

# Why Racial Preference Is Illegal and Immoral

Carl Cohen

THE role of race in assuring social justice is again squarely before the Supreme Court in a case whose full and revealing name is: *Kaiser Aluminum & Chemical Corporation and United Steelworkers of America, AFL-CIO, v. Brian F. Weber, individually and on behalf of all other persons similarly situated.*

Weber, a white unskilled steelworker, is Bakke's analogue. The Steelworkers Union and Kaiser Aluminum are not the only forces against him. The United Auto Workers and the United Mine Workers, the National Education Association, the Coalition of Black Trade Unionists, and assorted other unions are against him. The American Civil Liberties Union is against him. Even the United States government is formally aligned against him. On Weber's side is the Anti-Defamation League of B'nai B'rith (with some associated non-Jewish ethnic groups) and, according to repeated surveys, an overwhelming majority of the American population, including a majority of the black population.

But the issues at stake here, touching the most fundamental rights of individual persons, are not to be decided by counting noses. The chief things going for Weber are the Fourteenth Amendment of the U.S. Constitution, the Civil Rights Act of 1964 as amended, and sound moral principles. Thrice is he armed who hath his quarrel just.

Weber has thus far been victorious, both in the Federal District Court, and in the Federal Court of Appeals (5th Circuit, New Orleans). His formidable opponents find it difficult to overcome the plain words of the law applied straightforwardly to the established facts of his case. The law (Title VII of the Civil Rights Act, Sec. 703) forbids flatly all discrimination in employment because of race.\* Beyond any possible doubt (as we shall see) Weber was discriminated against by his employer, and classified by his employer, and had his status as an employee adversely affected because of his race. That the employment practice through

which this was done is a violation of this federal law is an ineluctable conclusion of any rational mind.

Is it not remarkable, then, that unions, industry, and government should now join in the effort to persuade the Supreme Court to evade this conclusion? Weber's opponents are neither foolish nor evil. They seek, somehow, to surmount the barriers to racially discriminatory treatment in order to achieve objectives they think good. Reflection upon this case will oblige the Supreme Court—and all citizens who would reach thoughtful judgment on these issues—to reconsider those objectives, and to appraise the means by which they have been pursued.

The *Bakke* case, and the *DeFunis* case before it, dealt with racially discriminatory practices in professional-school admissions—a matter for which the middle classes have, rightly, a tender concern. *Weber* deals with racial discrimination in blue-collar employment. The injury done Brian Weber was at least as great as that done Allan Bakke, and the class Weber formally represents is very much larger, if less articulate, than that directly affected by racially preferential school admissions. It is disturbing, therefore, that the voices raised in behalf of Weber's rights, and the rights of literally millions of individual citizens in like circumstances, are so painfully few. Silence now from quarters that were outspoken in opposition to racial preference in higher education may lead some to infer that self-interest, more than justice, was what motivated that earlier concern.

In both spheres—school admissions and industrial employment—the same issues arise: in the

\* Subsection (a) of Sec. 703 reads:

"It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin" 42 U.S. Codes 2000e—2 (a) (1970).

CARL COHEN, a new contributor, is professor of philosophy at the Residential College of the University of Michigan in Ann Arbor, and the author of *Democracy* and of *Civil Disobedience*. He was formerly a member of the Board of Directors of the American Civil Liberties Union.

allocation of scarce goods, may one's race count in one's favor? If ever, when? In *Bakke* a racially preferential admission system at the University of California Medical School at Davis was struck down, but attention to race in the admissions process was there held permissible within certain very narrow limits: to advance the diversity of an entering class, or to remedy the condition of specific persons who had been discriminated against by the school using the racial instrument. *Weber* is in many important respects different. Here the factor of diversity does not enter; here matters pertaining to intellectual qualifications are replaced by matters pertaining to seniority. Here the stakes are greater and the underlying moral issues are presented more cleanly.

## I

THIS is what happened. Kaiser (Kaiser Aluminum & Chemical Corporation) and the union (United Steelworkers of America, AFL-CIO) sought to increase the number of minority workers in the skilled crafts at Kaiser's Grammercy, Louisiana, plant. To this end, in a 1974 collective-bargaining agreement, they changed the system whereby employees would enter on-the-job training for craft positions. Prior craft experience was eliminated as a requirement, and entrance ratios, by race, were established for acceptance in the job-training program. For each white worker admitted one minority worker would be admitted, until the percentage of minority craft workers in the Grammercy plant roughly approximated the percentage of the minority population in the surrounding area, then about 40 per cent. Dual seniority lists were established, one black and one white, and each two vacancies filled with the persons at the top of the two racially distinct lists.

It was an inevitable result of this system that some employees would be favored because of their race, and some would be injured because of theirs. Brian Weber was refused admission to the job-training program although his seniority was higher than some employees from the other racial list who were admitted. Weber sued on his own behalf and on behalf of all non-minority employees who applied for on-the-job training at the Grammercy plant after that labor agreement was signed. A racially preferential scheme for allocating on-the-job training opportunities, he argues, is a clear violation of the Federal Civil Rights Act.

One portion of Title VII of that Act deals explicitly with on-the-job training programs. That portion (subsection (d) of Sec. 703) reads as follows:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprentice-

ship or other training or retraining, *including on-the-job training programs*, to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training [42 U.S. Codes 2000e-2 (d) (1970); emphasis added].

Was it prescience that caused the Congress to formulate this ban with language so precisely and indubitably covering the case at hand? Not at all. Title VII had as its purpose the elimination of all ethnic favoritism in employment; there had been, at the time of its adoption, plenty of experience of the ways in which racial prejudice can be given effect—one of the commonest being in job-training programs. In that form as in all forms, said the Congress in effect, racial discrimination in employment is no longer permissible.

How can Kaiser and the union (and the U.S. Department of Justice) reasonably argue that such a scheme is indeed lawful or fair? They contend that the law, properly interpreted, does not forbid this variety of racial preference, which they think justified by our history of discrimination. They contend that if the pursuit of pressing social objectives now imposes incidental costs on individuals, Weber and his like are the right persons to bear those costs. They contend that they were ordered, by the U.S. government, to introduce racial preference of precisely this kind. And they contend that Weber wasn't really injured by this program at all. I examine these arguments in turn.

## II

“KAISER and the union [the first argument begins] reached an agreement that was fully in accord with the spirit of Title VII. There was a voluntary effort to bring a greater number of minority workers into the skilled crafts. Congress never intended to forbid such voluntary efforts. If now the product of such agreements, reached through collective bargaining, is struck down, the cause of racial justice will have been dealt a devastating blow.

“We must [this argument continues] permit management and labor to join, as in this case, to correct a racially unbalanced situation flowing from the historical and social realities of American life. Blacks have been discriminated against, cruelly and consistently, by industry and by unions. Now an effort is being made to give redress. It is an ironic inversion of the Civil Rights Act to use that Act to forbid the only instruments that may effectively achieve its own intended result.

“It is true [the argument proceeds] that Title VII specifies that preferential treatment of racial minorities is not required [Section 703 (j)]. But that is not to say it is forbidden. When its aim is precisely that of the Act itself, it must not be forbidden. Weber relies upon the narrowest con-

struction of the words and misses—inadvertently or deliberately—the remedial spirit of the law and of the Kaiser program here in question.”

The main pillar of Weber's opposition comes to this: “If the Court agrees that racial quotas such as this one are discriminatory, we will be kept from doing what many of us think it is necessary to do, and do quickly, in the interest of long-term justice. Let it be understood, therefore [the argument concludes], that this quota, although it does of course distinguish by race, and does, admittedly, give favor by race, does not ‘discriminate’ by race in the bad sense that the law condemns. When we come to realize that some plans for racial balance, while they may have adverse effects upon some white workers, are nevertheless justified by pressing societal needs, we will also see what interpretation of the law is required by justice.”

To put the argument plainly is to see both its earnestness and its frailty. The requirements of the Civil Rights Act, which in turn were intended to give concrete meaning to the constitutional demand that no citizen be denied the equal protection of the laws, were aimed at bringing to a final halt all formal discrimination on the basis of race—and color, religion, sex, and national origin. It certainly was not intended, and it obviously was not formulated, to forbid only such racial discrimination as employers and unions thought objectionable, while permitting any racially discriminatory schemes that employers and unions might by agreement find worthy or convenient. What the employer and the union happen to prefer, whether their motives be honorable or crass, has absolutely no weight, says the law in effect, against the *right* of each individual citizen to be dealt with, in matters pertaining to employment, without regard to race, religion, or national origin.

### III

“**B**UT that cannot be the correct interpretation of the law,” answer Kaiser and the union in chorus, “because the Supreme Court has several times, in the years since, recognized the lawfulness and wisdom of racially preferential employment schemes. Indeed, our federal courts have *ordered* the imposition of such racial preference in some cases! So it is clearly false that *all* racial preference has been forbidden. If that is so, then it is not obviously true that *this* scheme for racial preference has been forbidden.”

This rejoinder brings us to the core, legal and moral, of the controversy in *Weber*. What kind of attention to race does the Civil Rights Act (and, indirectly, the Constitution) permit? And what should it permit? In the *Bakke* case, this question was complicated by the entry of First Amendment considerations pertaining to the robust exchange of ideas in the classroom; the holding in *Bakke*

was tangled by the fact that Justice Powell's pivotal opinion, although condemning racial favoritism, permits attention to race to advance diversity among an entering school class. Here, in *Weber*, such First Amendment considerations are totally absent. What, if anything, remains to justify race-conscious employment practices?

There is a clear and honorable answer to this question, given forcefully by federal courts at every level. Title VII of the Civil Rights Act forbids all deliberate discrimination by race, save only in cases where racial classification is absolutely essential to give redress to *identifiable persons* injured by racial discrimination *and where the injury done them was done by the same party upon whom the numerical program is imposed*. One purpose only may justify numerical schemes using racial categories: the *making whole* of those to whom redress for racial injury is specifically owed, by those who owe it.

For example: the known victims of racial discrimination by a trucking company have been held entitled, as a remedy, to a place in the seniority lists of that company that would have been theirs if they had not been so victimized. To put them now in as good a place as they would have been in but for the discriminatory employment practice from which they can be shown to have suffered, it may be necessary to attend to race. Only in that way can the victims be made whole; they would otherwise remain subordinate to persons who, had it not been for racial discrimination in that company, would now be their subordinates. (See *Franks v. Bowman Transportation Co.* 424 U.S. 747 [1976].) In such cases, the racially oriented remedy cannot be refused on the ground that the effect on other employees is adverse because, although the employees who suffer from the imposition of the plan are very possibly innocent themselves, they have clearly benefited, in seniority, from the specific discriminatory practice for which remedy is being given. Race-conscious remedies for the victims of illegal discrimination are lawful, consistent with Title VII, only in such circumstances.

Weber and Kaiser Aluminum are in no such circumstances. Upon examining the facts, the Federal District Court found that Kaiser had not been guilty of any discriminatory hiring or promotion at its Grammercy plant. Kaiser's industrial-relations superintendent at that plant testified that, prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community. Advertising in periodicals and newspapers that were published primarily for black subscribers, Kaiser found it very difficult to attract black craftsmen. The evidence established two key facts:

1. Kaiser had a serious, operational, no-discrimination hiring policy at its Grammercy plant from the day of that plant's opening in 1958.

2. Not one of the black employees who were offered on-the-job training opportunities over more senior white employees (pursuant to the 1974 Labor Agreement) had been subject to any prior employment discrimination by Kaiser.

From these facts it is an inescapable conclusion that the quota system at Kaiser's Grammercy plant was not an instrument for the specific redress of persons injured by racial discrimination there; it was unabashed racial preference aimed at numerical proportions having nothing to do with past conduct in that plant. Such preference Title VII outlaws. The distinction, between impermissible racial preference and permissible remedy for past discrimination, is put eloquently by the Circuit Court of Appeals in affirming Weber's rights:

If employees who have been arbitrarily favored are deprived of benefits capriciously conferred on them in order that those who were arbitrarily deprived may receive what they should, in fairness, have had to begin with, no law is violated. This is so even if both the class whose rights are restored and the class required to "move over" are defined by race—if the original arbitrariness was defined in that manner. And the reason is that no one is being favored or disfavored, advantaged or injured, under these circumstances *because* of race; rather, those who have been unjustly deprived receive their due and those who have been arbitrarily favored surrender some of the largesse capriciously conferred on them. That these consequences end by race is a mere incident of the fact that they began that way.\*

But those who were favored by race at Weber's expense were admittedly not the victims of such original arbitrariness. The Circuit Court's support of Weber is therefore categorical: "[U]nless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII" (p. 225).

#### IV

SINCE it is clear that the beneficiaries of this racial program were not victims of Kaiser's previous discrimination, and equally clear that the use of dual seniority lists is an explicit effort to favor blacks over whites, the defenders of this program are compelled to resort to a different justification—past "societal discrimination."

"We cannot deny [say the defenders in effect] that the two-list system deliberately favors one race over another. But we do deny that favoring this race at this time in this country is unfair. We contend that, in view of the historical discrimination against blacks (and other minorities), the racially preferential device now before us is entirely justifiable. It is justifiable not only because

blacks have been so long oppressed, but because, as a corollary, whites have been unfairly *advantaged* by race prejudice. The white employees of Kaiser who are passed over by this plan may indeed be innocent of any racial discrimination themselves, but they have been and are the beneficiaries of racial discrimination by others. This is the heart of our justification. Favor to blacks now is just because of the favor whites have enjoyed until now."

This is the principled argument by which many without selfish interests in these programs are persuaded that they are fair. One might have expected the American Civil Liberties Union, for example, to spring to the defense of the rights of an almost defenseless individual. Instead it joins the forces against Weber because the ACLU has convinced itself that his rights have not really been infringed on, even though he suffers from deliberate disadvantage because of race. How can that be?

"Racial preference in employment is justified [the argument proceeds] when it is a response to the morally legitimate demand that the *lingering effects* of past racial discrimination be remedied. The lingering effects of historical oppression include the continuing losses of decent employment, together with the money and status that it brings. But the same historical race prejudice that has systematically blocked minorities from access to decent jobs has conferred an involuntary benefit upon whites because, while the number of desirable jobs remains roughly constant, the elimination of competition by minority workers results in the availability of desirable jobs for whites in generous disproportion to their numbers. This benefit is conferred even upon those whites who may, in fact, deplore the prejudice from which they gain. Yet they did gain. Now, with racial quotas favoring blacks, they lose. Their present loss is morally justified by their earlier gain. The primary target of racially preferential programs should be those guilty of past unlawful discrimination, of course. But where those guilty parties simply cannot be identified or are no longer available to make restitution, a secondary but legitimate target is the unjust enrichment attributable to that racial discrimination. Quota plans, like the one devised by Kaiser and the union, seek to redistribute that unjust enrichment. Seen in this light, their fairness—the moral rightness of racial preference for societal rebalancing—cannot be de-

\* 653 F. 2d 216, 225 (1977); page references below refer to this decision. The Supreme Court has agreed. In a case arising from a plan devised to give remedy to school employees within a previously discriminatory system, the Supreme Court declined review of a decision that, in view of the source and nature of that earlier injury, a minority worker may there be entitled to preferential treatment "not because he is black, but because, and only to the extent that, he has been discriminated against" *Chance v. Board of Examiners*, 534 F. 2d 993, 999 (1976); cert. denied 431 U.S. 965 (1977).

nied." So reasons the ACLU explicitly, and many other honest citizens implicitly, in giving pained approval to race quotas.

The argument fails utterly upon inspection. It relies upon a premise that is clearly and admittedly false in the *Weber* case and like cases. And were all its premises true, they could still not justify the racial preference here in question.

Consider the premises first. The adverse impact on Weber is held justifiable by his unjust enrichment resulting from the bad conduct of others. But if Weber were in any way the beneficiary of past discrimination, he certainly was not unjustly enriched by employment discrimination in the Grammercy plant. In that plant, it is agreed by advocates of the quota and by the courts, there had been no refusal to hire or promote blacks or other minorities, no racial discrimination from which Weber benefited. But the injustice done to Weber is manifested in the loss of entitlements he earned by ten years of work *in that plant*—not in the Kaiser Corporation or in the workforce at large. His entitlements in this matter cannot have been acquired as the result of the historical misconduct of others. Long before Weber came to work at that plant, blacks and whites received equal employment treatment there—so the claim that simply by virtue of his having the seniority that he did in the Grammercy plant Weber was enjoying an unjust enrichment is simply false. That false premise cannot justify "redistribution." The Circuit Court put the matter crisply: "Whatever other effects societal discrimination may have, it has had—by the specific finding of the court below—no effect on the seniority of any party here. It is therefore inappropriate to meddle with any party's seniority or with any perquisites attendant upon it, since none has obtained any unfair seniority advantage at the expense of any other" (p. 226).

But suppose *arguendo* (what is not true) that Weber had been unfairly enriched by past racial discrimination. What would follow? The enrichment thus identified might then be a target for redistribution. Among whom? To take from Weber and give to another because Weber got his seniority "unjustly" could conceivably be justified (if ever) *only* if those to whom the redistribution were made were the same persons from whom the spoils had been taken in the first instance. The appealing argument by which so many are persuaded makes the faulty supposition that, if X has gained fortuitously but undeservedly from some unidentifiable Y, we are morally justified in taking from him and giving to a wholly different Z who suffered no loss to X's benefit, but who happens to be of the same *race* as that injured but unidentifiable Y. Buried in this reasoning process is the mistaken premise that the distribution of goods or opportunities is rightly made by racial categories. Z, the person now given preference over X because of race, has a right to get from him (this

premise supposes) because Z is black, and blacks have been so long oppressed. But rights do not and cannot inhere in skin-color groups. Individuals have rights, not races. It is true, of course, that many persons have been cruelly deprived of rights simply because of their blackness. Whatever the remedy all such persons deserve, it is deserved by those injured and because of their injury; nothing is deserved because of the color of one's skin. This is the philosophical nub of the *Weber* case.

## V

So long-lasting and self-perpetuating have been the damages done to many blacks and others by discrimination that some corrective steps must be undertaken. The moral anxiety created by this need for affirmative action accounts, in part, for the willingness of some to tolerate outright racial quotas. In the passion to make social restitution, sensitive and otherwise fair-minded people have gotten the moral claims of living persons badly confused. The head of the Office of Federal Contract Compliance (by whom, as we shall see, Kaiser was threatened) epitomizes this confusion: "Society is trying to correct an age-old problem, and Weber is a victim of that process. There is nothing I can say to him. This is something that has to happen. The question is whether you give priority to a group that's been systematically deprived of opportunity while Brian Weber's parents and grandparents were not discriminated against. If someone has to bear the sins of the fathers, surely it has to be their children" (New York *Times Magazine*, February 25, 1979).

But deliberately visiting the sins of the fathers upon their innocent sons and grandsons, to the special advantage of persons not connected with the original sinning, is conduct neither lawful nor morally right. To suppose that both the beneficiaries of redress and those who are made to carry its burden are properly identified by race is, to be plain, racism. It is ethical racism because supposed with good will. It is simplistic because, on this view, race by itself—without consideration of the nature or degrees of past injuries, present advantages, or future pains—is sufficient to trigger the preferential device. The mistaken view in question is therefore properly entitled *simplistic ethical racism*.

Injuries are suffered in fact, claims made and burdens carried, by individual persons. Civil society is constituted to protect the rights of individuals; the sacrifice of fundamental individual rights cannot be justified by the desire to advance the well-being of any ethnic group. Precisely such justification is precluded by the Fourteenth Amendment of our Constitution, whose words—no state "shall deny to any person within its jurisdiction the equal protection of the laws"—express no mere

legalism but a philosophical principle of the deepest importance. Explicating that clause, in a now famous passage, the Supreme Court wrote: "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. . . . Equal protection of the laws is not advanced through indiscriminate imposition of inequalities (*Shelley v. Kraemer* 334 U.S. 1, 22 [1948]).

The nature and degree of the injury done to many Americans because they were black or brown or yellow varies greatly from case to case. Some such injuries may justify compensatory advantage now to those injured. But the calculation of who is due what from whom is a very sticky business; compensatory instruments are likely to compound injustice unless the individual circumstances of all involved—those who were originally hurt, those who benefit now, and those who will bear the cost—are carefully considered. Whatever compensatory advantage may be given—in employment or elsewhere—it must be given to all and only those who have suffered like injury, without regard to their race. What we may not do, constitutionally or morally, is announce in effect: "No matter that you, X, were innocent and gained no advantage; you are white and therefore lose points. No matter whether you, Z, were damaged or not; you are black and therefore gain points." If the moral ground for compensatory affirmative action is the redress of injury, the uninjured have no claim to it, and all those individuals of whatever ethnic group who have suffered the injury in question have an equal claim to it.

Racially based numerical instruments have this grave and unavoidable defect: they cannot make the morally crucial distinctions between the blameworthy and the blameless, between the deserving and the undeserving. As compensatory devices they are under-inclusive in failing to remedy the same damage when it has been done to persons of the non-favored races; they are over-inclusive in benefiting some in the favored categories who are without claims, often at substantial cost to innocent persons. Except in those cases where the discriminatory policy of the employer is established, and the identity of injured applicants or employees determinable, racial preference in employment is intolerably blunt, incapable of respecting the rights of individuals.

## VI

THIS unsuitability of the racial means to the compensatory end partly explains the queasiness of language with which the advocates of "numerical instruments" defend their schemes. Although they believe their aims are good, there is yet widespread shame among them that they resort to racial preference to advance them. Hence the use of euphemisms like "dis-

vantaged" in identifying the beneficiaries of racial programs, when what is really meant is "black" or "minority." Not all minorities are disadvantaged, and not all those disadvantaged are minorities, obviously. But it is tempting to hide the racial character of a program which, if exposed, would be legally and morally intolerable.\*

"Affirmative action"—a phrase that now pervades our language—has commonly been used in the same duplicitous way. Affirmative steps to eliminate racially discriminatory practices rightly win the assent of all. Affirmative efforts to recruit fairly (whether for on-the-job training programs or for professional schools), affirmative inquiry to determine whether testing is job-related and to insure that evaluation of performance is not racially infected—in such forms affirmative action is of unquestionable merit. But when, in the name of affirmative action for racial equality, the deliberately unequal treatment of the races is introduced, we suffer a national epidemic of double-speak. Employment advertisements everywhere exhibit this duplicity with an almost ritualized motto: "An equal opportunity/affirmative action employer." The very term "affirmative action" has lost its honor and has become, for most, a euphemism for racial preference.

The unsavory character of their means is recognized by the advocates of racial instruments; that recognition is revealed by an inclination to be covert in conduct and to equivocate in language. Unsavoriness is tolerated here, however, even by organizations whose normal pride it is to expose immoral expedience in the body politic. Nothing is more indicative of the true spirit of a community than the character of the instruments it permits, and of those it precludes, in advancing public policy. Police surveillance to root out spies, the suppression of speech (radical or conservative) to protect the peace—all such instruments are rejected in a decent society. Civil libertarians wisely insist that we forswear instruments that invade the rights of individuals, even when forswearing proves inconvenient. The use of such instruments is precluded, forbidden not just to evil people but to all people. Preference by race is one of these forbidden instruments. The very high priority given to this exclusionary principle, and its applicability to all including the state itself, marks it as *constitutional* in the most profound sense.

Efforts to cut constitutional corners—however well-intentioned—corrupt a civil society. The means we use penetrate the ends we achieve; when the instrument is unjust, the outcome will be in-

\* In the original trial of the *Bakke* case, the University of California defended the racial quotas at the Davis medical school as being for all "disadvantaged" students. When the court noted that not a single disadvantaged person who was not of an ethnic minority had been admitted in all the years of that program's operation, the university in effect conceded the misdescription. Not a pretty business.

fects by that injustice. This lesson even civil libertarians have always to be relearning.

## VII

THE inconsistency between racially preferential means and the end of honestly equal treatment is exquisitely exhibited in one aspect of the *Weber* case upon which Kaiser and the union place much emphasis. "We are caught [say they] in a monstrous double bind. What will you have us do? Desegregate, you say. Integrate your workforce; show us that you mean to undo, affirmatively, the wrongs earlier done. We do it, making serious efforts to increase the number of minorities in craft jobs through advertisement, recruitment, encouragement. We get some results, but they are not dramatic. Then you—the nation speaking through your regulatory agencies—tell us that what we have done is not enough. You threaten us! Of course we take action in response to your threat—and having done so, we are threatened at law on the other side! Such inconsistency is unbearable. You, the body politic, must speak with one tongue!"

What is that first threat of which Kaiser complains? It came from the Office of Federal Contract Compliance whose regulations mandate "affirmative action" by all government contractors. The withdrawal of all federal contracts was the price Kaiser might have had to pay if, to avoid being found in "non-compliance," racial preference for minorities had not been introduced. Whence does the OFCC get the authority to make such threats? From an order of the President of the United States, say they, Executive Order 11246. This order requires federal contractors to take affirmative action to prevent low employment of women and minorities in their workforces, on the assumption that most disproportionately low employment is the result of discrimination. Since the racial instrument agreed upon was a direct response to federal authority exercised under that valid order, it is outrageous now, say Kaiser and the union, to attack us for violation of the Civil Rights Act.

This response to official inconsistency cannot help but evoke some sympathy. But as a defense of racial quotas it is worthless. The argument fails on two levels. First, Executive Order 11246 does not require and cannot justify racial quotas in cases like this one, in which the conduct of the employer has not been unlawfully discriminatory. The Order says nothing about numerical ratios. Indeed, its plain words *forbid* all racial preference. The relevant passage of that Order reads: "The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin" (30 Fed. Reg. 12319 [1965]).

Some numerical plans to protect employment for

minorities have been upheld by the courts as valid executive actions—but they have been so upheld as responses to specifically identified violations by those upon whom the remedy was imposed. The so-called Philadelphia Plan was held permissible under Title VII, but that holding was explicitly tied to prior exclusionary practices by the six trade unions controlling the workforce in the construction industry in Philadelphia. Whatever tools the Office of Federal Contract Compliance may think itself entitled to employ, it has no authority in law, and certainly none in morals, to press for a racial quota in cases where, as here, those getting preference under the scheme had not been injured by that employer, and those injured by the scheme had not benefited from any misconduct of that employer.

The argument fails at a second level as well. If Executive Order 11246 be interpreted so as to authorize the OFCC to require racial quotas in cases like this one, the Executive Order itself is plainly unlawful, an illegitimate exercise of administrative authority in conflict with federal statute. The Civil Rights Act specifically prohibits racial classification in admission to on-the-job training programs (Sect. 703(d); cited above, p. 41). The quota plan devised by Kaiser and the union is, as we have seen, patently in violation of this section. When the law and an executive order clash, there can be no doubt of the outcome. Writes the Circuit Court: "If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition" (p. 227).

Only by resolutely enforcing the rights of citizens can the insolence of office be restrained. Individual workers, without power or money, need to be protected against civil servants who take it upon themselves to threaten in order to be able to report numerical ratios they think desirable, claiming only to be following the orders of their superiors.

## VIII

DEFENSES of racial preference—by efforts to reinterpret the law, by confused arguments based on "societal discrimination," by claim of executive order—all collapse. It is important to see why they *should* collapse. The defenders, conscious of their own righteous pursuit of racial justice, little doubt that the tools they wish to employ would have the good consequences they hope for. To question the merit of those tools is for them almost a betrayal of the oppressed in whose behalf they claim to battle. In their eyes the conflict is only over whether they are to be permitted to do a good deed—i.e., give preference to racial minorities—not whether it is a good deed, or whether its consequences will be good.

Decency of motivation, however, does not insure the goodness of the immediate object, or the goodness of its consequences. Racial justice is an aim that all share; it is distorted when transformed into formulas for ethnic proportionality in workforces and professions based (as in this case) upon ethnic populations in the surrounding area. What accounts for this transformation? Motives honorable in their general statement are blended with a vision of cultural homogeneity that is profoundly unhealthy. The objectives then sought in making that blend operational often prove inconsistent with the original aim. It is this inchoate vision of homogeneity—made concrete in numerical proportions—that lies behind racial instruments like the one at issue in *Weber*. Federal Appellate Courts have not been oblivious to the evils that ensue:

There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. . . . Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality. It may also have unexpected results, such as the development of indicia for placing individuals into different racial categories. Once racial classifications are imbedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into malignant preference at other times. Moreover, a racial preference for members of one minority might result in discrimination against another minority, a higher proportion of whose members had previously enjoyed access to a certain opportunity [*Associated General Contractors of Massachusetts Inc. v. Alshuler* 490 F. 2d 9,17-18 (1973)].

In this spirit three Federal Circuit Courts have repeatedly refused to approve racial quotas in the absence of proved past discriminatory practice dictating that specific remedy.

Racial classifications have insidious long-term results: anger and envy flowing from rewards or penalties based on race; solidification of racial barriers and the encouragement of racial separatism; inappropriate entry of race into unrelated intellectual or economic matters; the indirect support of condescension and invidious judgments among ethnic groups—in sum, the promotion of all the conditions that produce racial disharmony and racial disintegration. What Kaiser and the union defend is very far from an innocuous good deed. It is a plan having very damaging consequences to very many people.

Some of the damage, direct and substantial, is done to those, like *Weber* and *Bakke*, who bear the immediately resulting burden. "Society" does not pay; the "white majority" does not pay; individual citizens pay. The penalty to them is great

and undeserved. One notable feature of the *Bakke* decision, almost entirely overlooked by commentators and the press, is the fact that all nine Supreme Court Justices there agreed that, as a result of the quota system used by the medical school at Davis, Allan Bakke was done a constitutional injury—that is, an injury he should not have to suffer unless it can be well justified. Even the four Justices who thought the injury could be justified took the hurt done to him very seriously. One of those four (that is, one of the group who did *not* side with Bakke), Justice Blackmun, refers to the injury done to Bakke as an "ugly" one. The other five Justices struck down that racially preferential program; Powell among them condemns the damage such programs do. The Washington Supreme Court, too, in deciding against Marco DeFunis in an analogous case, did not deny that he had been seriously hurt, and candidly rejected the claim that such quotas are "benign." A program giving special favor to racial minorities, say they, "is certainly not benign with respect to non-minority students replaced by it" (*DeFunis v. Odegaard* 507 P 2d 1182). *Reverse discrimination* is not an invention or a hypothesis yet to be confirmed; it is a sociological and legal fact.

## IX

THE reality of the evils flowing from racial instruments introduces one of the most intriguing aspects of the *Weber* case. A dispute arises between the District and the Circuit Court beneath which lies a momentous philosophical issue. Numerical remedies based on race do damage, the two courts agree; they further agree that this is a case in which the imposition of such a numerical remedy cannot be justified because there has been, in fact, no previous unlawful discrimination by the employer here. However, in those cases in which such remedy might prove justifiable (previous discriminatory practice in that setting being alleged), the following question arises: may that numerical instrument of redress be devised and executed on the authority of the employer and union acting jointly? Or is a racial quota permissible as remedy only on the express authority of the judiciary? The District Court not only found the remedy unjustifiable, but held in addition that such painful remedies would in no case be in the province of unions and management to impose. The Circuit Court, agreeing on the first point, did not agree on the second. Voluntary remedial action (said they) is preferable to court action; therefore, to insist upon judicial imposition of remedies would interfere unduly with reasonable private amelioration. The underlying issue here is the locus of authority in resolving questions of justice. Which court is the wiser?

In permitting numerical remedies to be imposed (if at all) only by the judiciary, the District Court,

I submit, is deeply right. The reasons for this are several and complicated.

First, the question of whether the circumstances are such as to justify the imposition of a numerical remedy (a question that must be answered affirmatively if any such remedy is to be lawful) is precisely the kind of question that cannot be answered fairly by employers and unions acting in their joint interests. Individuals will bear the burden; if the case were of a kind to justify the imposition of that burden on Weber and his like, past discrimination by that employer in that context must be proved or admitted. No employer is likely to make that admission. To do so would invite a host of very expensive lawsuits in behalf of those injured. Employers will therefore enter such agreements only with the understanding that no past discrimination has been proved or admitted. That very understanding (however arguable it may be) on which an employer might be willing to enter an agreement with a union to give racial preference to minorities is precisely the understanding which, if reflecting the facts truly, shows that racial preference unjustly injurious and unlawful.

This peculiar feature of "voluntary" racial instruments is admitted—even emphasized, ironically—by the UAW, the NEA, and other assorted unions. If (they argue) voluntary racial preference is permissible only when the employer's past conduct would be found in violation of Title VII, there will be no voluntary race-conscious action. For, as they agree: "[I]t is usually difficult to predict whether or not [previous] discrimination would be found" (associated unions, brief *amici*, p. 13). Indeed! For this reason precisely it is a question of such a kind that no answer to it reached as part of a labor-management agreement could be trusted.

The aggregated unions continue: "Moreover, the employer would, by taking voluntary action, put itself in a no-win situation in a suit such as this. Either its past conduct will be determined to be unlawful, thereby inviting litigation by discriminatees, or the remedial action will be found unlawful, and liability to white employees will exist" (*ibid.*). Just so! But the authors of this candid statement apparently do not see where their argument leads. They would like the courts to conclude that, since the present standard (that "voluntary" racial quotas suppose the same finding of unlawful discrimination which alone might justify court-imposed remedies) effectively precludes "voluntary" quotas altogether, we should permit the introduction of a new standard, one that would allow "voluntary" quotas under some factual circumstances that—as they admit—would not justify a court in imposing them! What could serve as such a standard? The lone dissenting judge of the Circuit Court, pursuing the same line, is driven to propose an astounding answer: A "voluntary" quota plan should be upheld, he suggests, if it is "a reasonable remedy for an arguable violation of Title VII" (p. 230, emphasis added).

This standard is neither feasible in practice, nor morally acceptable if it were. As a practical matter, such notions as "reasonable remedy" and "arguable violation" have virtually no objective content. Only the courts could resolve, on a case-by-case basis, disputed claims about "arguable violations" and about the reasonableness of remedy. Endless litigation could not be avoided—but it is the elimination of time-consuming litigation that is alleged to be the great merit of "voluntary" racial instruments. The increase in court involvement that would result undercuts any proposed justification of "voluntary" quotas on grounds of efficiency.

More important than its inefficiency, however, is the fact that the proposed standard (that a voluntary quota plan should be upheld if it is "a reasonable remedy for an arguable violation of Title VII") is morally unacceptable. Just remedies presuppose some determinable wrongs for which they give redress and by which they are justified. It is confusion of mind to propose a *remedy* for an *arguable* violation; one cannot put right what might prove on more judicious examination to have been no wrong at all.

ALL "voluntary" quotas (i.e., those introduced without court imposition) presuppose reliance upon some standard that must encounter essentially the same problem. The philosophical dimensions of the dispute between the two courts here emerge. The Circuit Court's position exhibits irremediable moral defect: by permitting racially preferential programs without the backing of judicial authority, it permits the delegation of questions of justice to private hands that are neither equipped, nor disposed, nor authorized to resolve them fairly.

To resolve a matter of individual right the bargaining process between labor and management is almost the worst imaginable tool. The impartial determination of facts without regard to interest, and the honest application of principles without regard to advantage, are essential in adjudicating questions of right—but the elimination of regard for self-interest and advantage is precisely what is impossible at the bargaining table.

Even if the needed impartiality were possible there, it would be inappropriate, uncommon, and surely could not be relied upon. Union and management bargainers are duty-bound to press for the advantage of the units they represent. The process is designed to deal with issues of pay and working conditions, not with the protection of individual rights. Justice entails giving to each his due—whether or not he or others can negotiate for it successfully.

Most important, the authority to resolve questions of justice cannot lie in a labor-management bargain. Individual rights *may not*—as a matter of law or morals—be bargained away. As a matter of constitutional principle, the Supreme Court has spoken definitively on this issue. A union, they

agree, may waive some of its rights to *collective* activity, such as the right to strike, in a bargaining agreement made with the aim of economic advantage for its members. The Court continues:

Title VII, on the other hand, stands on plainly different ground; *it concerns not majoritarian processes, but an individual's right to equal employment opportunities.* Title VII's strictures are absolute and represent a congressional command that *each* employee be free from discriminatory practices. Of necessity, *the rights conferred can form no part of the collective bargaining process* since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver [*Alexander v. Gardner-Denver Co.* 415 U.S. 36, 51-52 (1974), emphasis added].

Contracts reached through collective bargaining may, of course, introduce different terms of employment for different groups of employees in the light of the relevant conditions of those groups. Race, however, is never relevant in that sense. Because racial discrimination invariably touches the non-bargainable rights of all individuals adversely affected, race itself has been identified as an inappropriate criterion for the classification of employees.\*

In sum: the courts have repeatedly held that, in compromising with an employer, a union may not take race into account. Programs like the one at issue in *Weber* explicitly take race into account. The conclusion of this syllogism is inescapable.

THE unions take another tack. "You fail to note [they rejoin in effect] that this is a *voluntary* program. Weber and his fellows may be said to have relinquished their rights in this matter because, when the plan was devised, they were adequately represented by their union. The union has a duty to represent all of its members; its bargainers are selected democratically; and since white workers constitute a majority of the bargaining unit, the union process may be relied upon to reach no agreement that will violate the rights of individual white members."

It is hard to take this argument seriously. Union process is often genuinely democratic; negotiators for unions generally do seek to represent the interests of all the members of the bargaining unit. But the most sympathetic review of union process could not rationally conclude that the fairness of unions to their members over the long term has been such as to justify the delegation, to bargainers, of matters of fundamental individual right. The current flow of complaints about reverse discrimination in employment contracts in itself provides substantial evidence that the bargaining process, notwithstanding its general fairness, cannot be depended upon in this sphere. "Voluntary" is an appealing word. But its use here

suggests what is not true—that those who were injured by the racial instruments devised in the contract did themselves volunteer to carry the burden. To call Weber's sacrifice "voluntary" is most inappropriate.

This defense of "voluntary" racial instruments (even if unions were invariably sensitive to matters of individual right) avoids the key question of legitimate authority. At stake here are the rights of individuals to the most fundamental of democratic conditions—equal treatment under the law—and, moreover, their rights to that equal treatment as it bears upon the most suspect of all categorical distinctions, race. Even legislators, it may be argued, however powerful their assembly, honorable their election, and dutiful their conduct, may not take from individual citizens certain fundamental rights. With the noblest of intentions, it is not within their authority to pursue public policy at the cost of compromising the individual citizen's right not to be discriminated against because of his race or religion. Philosophers will differ about the grounds of legislative authority, but few will seriously deny that upon such authority there must be some hard limits. Unequal treatment because of race is as clear an example as there is of the violation of those limits.

If the principle here expressed were somehow mistaken, if it were sometimes just, in the cause of racial redress, to sacrifice the rights of some blameless non-beneficiaries to advantage others who had not been injured, even so it would at least be certain that no such decision could be properly made by any save the legislature of highest authority, subject to the review of the court of highest jurisdiction. The notion that, to encourage "voluntary affirmative-action plans," we may bypass the body politic, investing unions and management with the authority to bargain with fundamental human rights, makes the prospect of a reversal in the *Weber* case very distressing. Not substantive entitlements alone are at issue here, but also the procedural rights of working people to have questions of justice decided by legislatures and courts.

## X

**W**eber and *Bakke* are closely analogous in this procedural regard. Weber's right to equal treatment was infringed on by a union-management agreement, *Bakke's* by a

\* The Supreme Court has written: "[T]he statutory power to represent a craft and to make contracts as to wages, hours, and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations" *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203 (1944).

medical-school admissions committee. Legitimate authority was exceeded in both cases. When it was asked, in *Bakke*, for what purposes a university might consider race in admissions, Justice Powell replied, in his decisive opinion, that it may be considered for the sake of student diversity (to support the exchange of ideas in accord with First Amendment concerns), or, conceivably, as redress for the specific victims of specific injustices. "Societal discrimination" as a ground for racial preference he explicitly considered and rejected. Powell wrote:

We [i.e., the Supreme Court] have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals, in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations [references omitted]. After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus the government has no compelling justification for inflicting such harm [*University of California Regents v. Bakke* 57 L. Ed 2d 750, 782-83 (1978)].

But findings of constitutional or statutory violations it is not the business of private bodies—unions, or managements, or medical-school committees—to make. Powell continued:

Petitioner [the Regents of the University] does not purport to have made, and is in no position to make, such findings. . . . [Even] isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria [references omitted]. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination (p. 783; emphasis added).

Powell's point is that a medical-school admissions committee (even though indirectly an agent of the state) is entirely without the requisite authority. Kaiser and the union have a far weaker claim to the needed authority than did they. An admissions committee is not competent to make the findings that might justify racial preference, granted. But if the admissions committee had

sought to present such findings of identified discrimination at the Davis medical school (discrimination that, in fact, the university specifically denies), they might conceivably contend that as one agent of one arm of one element of the state, it was within their province to do so—and thus might conceivably seek to justify their racial program as remedy. That claim must fail, the mission of the medical school and all its subsidiary elements being educative, not judicial. Any analogous claim made by Kaiser and the union—that they are authorized to make findings of "societal discrimination" that will justify inflicting harm on Weber and other blameless parties—is totally without warrant.

## XI

IN THE absence of any showing or admission of previous illegal discrimination at the Grammercy plant, every defense of racially preferential remedy must prove unsatisfactory. Sensitive to this point, the American Civil Liberties Union argues at length that the factual circumstances of this case have been misunderstood, that Kaiser Aluminum *did* discriminate against minorities. The pattern of employment by Kaiser at other plants in earlier years is reviewed, and much is made of the racially disproportionate impact, at the Grammercy plant, of a "purportedly neutral criterion." Using the percentage of the minority population in the surrounding parishes of Louisiana as benchmark,\* the argument concludes that Kaiser's workforce at the Grammercy plant in skilled-craft positions was "severely under-representative." Putting aside the question of how "representativeness" might rationally be established, or, if it had been established, what bearing that would have upon the lawfulness of Kaiser's previous conduct, it is important to note that the entire thrust of this argument is misdirected. The *Weber* case presents an appeal to our highest court on a matter of fundamental principle. That principle must be argued on the basis of a factual record properly established at trial in a responsible Federal District Court, Appellate Courts, and the Supreme Court, face the question of principle *given that record*. Even the District Court could analyze only the facts brought before it by the parties. Kaiser testified to its non-discriminatory practices at the Grammercy plant from its opening, and of its efforts to recruit black craftsmen from the general community. They would not and could not report otherwise. If (as some now claim) the record should

\* ACLU and Society of American Law Teachers, brief amici, p. 11. The inappropriateness of such figures in estimating fairness with respect to employment in the skilled crafts is so obvious, and has been so often remarked, that one is embarrassed for the ACLU to find such an argument here pursued. See Thomas Sowell, "Are Quotas Good for Blacks?," COMMENTARY, June 1978.

have shown hidden unlawful conduct by Kaiser, such findings could only have entered the record at the trial level. At this point the issue is, supposing the record complete and accurate, whether, *without* such previous violations established, this racial quota is permissible.

To contend that the facts of the matter *could* be viewed differently is to blind oneself to the essence of the controversy. Had the courts found, after examining all testimony, that Kaiser had previously discriminated against minorities in its Grammercy plant, the issue now to be decided here would not even have arisen.\*

## XII

ALL arguments thus far explored incorporate the realization that individuals are indeed injured when disadvantaged solely because of their race. Brian Weber did not get the job-training opportunity he was entitled to. Most ordinary people, and most judges, have no difficulty in seeing that. So zealous are some of the advocates of racial preference, however, that they claim not to see it. Weber was never really hurt, say they. He has a legitimate complaint only if he was discriminated against unfairly. But he wasn't discriminated against at all! Hence he has no case.

Puzzling though this claim appears on its face, it is honestly defended, in two ways. First, it is argued, Weber has lost nothing more than seniority entitlements. But seniority systems may be altered by labor-management agreement, and in any event, seniority rights are not vested in the individual employee but in the collective-bargaining unit. Therefore, when a voluntary quota plan results in Weber's getting less than he expected in view of his greater seniority, he loses nothing that belonged to him in the first place. The injury done to him (it is contended) is apparent, not real.

This argument is twice faulty. It underplays the importance of individual seniority entitlements in the industrial context; and it does not face up to the discriminatory nature of the seniority deprivation in this case.

In allocating scarce opportunities and goods in the industrial world, seniority is critically important. For very many workers a host of matters—job security, opportunities for advanced training, vacation and retirement benefits—depend chiefly upon the number of years of service they have given. Nothing remains to them after years of service but their seniority claims. To deny that harm is done to an unskilled worker on an hourly wage when he is deprived of entitlements flowing normally from ten years' seniority shows gross moral insensitivity. Seniority does not insure qualification for positions demanding special talents, of course; but where qualifications are roughly equal, or not distinguishable, seniority above all other

considerations will be relied upon in the interests of fairness.

Seniority entitlements are tied to individuals, not just to the bargaining unit. In matters of job assignment, transfer, layoff and recall, and job training, opportunities must be distributed among competing employees. Competitive-status seniority is therefore of great moral as well as practical importance, and directly affects individuals more importantly than it does the bargaining collective. Non-competitive benefits also—pensions, sick leave, paid vacations—are commonly determined in part by length of service and therefore must be tied to individuals. Seniority, the Supreme Court writes, "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job" (*Humphrey v. Moore* 375 U.S. 335, 346-47 [1964]). The "who" in this passage refers to individual persons, not to groups.

Seniority systems are bargainable, true. It does not follow, however, that all seniority rights are bargainable. It is essential not to confuse the *system* of seniority with individual *entitlements* under a given system in force. Once a seniority system has become a reality in rule and practice, a worker's rights and expectations under that system are his and very precious to him. It is callous to minimize the injury done when such rights are not respected.

When the ground of that disrespect is race, the injury is particularly offensive. Entitlements in themselves minor (which an opportunity for on-the-job training is not) become matters of grave concern when manipulated for racial reasons. Where one must sit on a bus or go to the toilet understandably becomes a source of rage and an issue of constitutional proportions when the determination is made by race. Protests over segregated lunch counters had as their target not the culinary opportunities denied, but the immoral character of the ground of their denial. Even if Weber's seniority expectations be thought trivial, the racial ground of the unequal treatment he received is very far from trivial.

Some who understand very clearly why Allan Bakke was injured when excluded from medical school in a racially discriminatory way fail to see that the injury done to Brian Weber is equally unjust. Applicants to a competitive program, they appreciate, have a right to evaluation on some set of relevant criteria—past performance, intellectual promise, character, or whatever—and if deserving on the basis of those criteria, ought not be deprived of place because of race. But if the performance qualifications of all applicants are

\* Might an appellate court not reverse an inferior court because of its mistaken interpretation of the facts as appearing in the record? Only in those rare circumstances in which the treatment of the facts by the inferior court was "clearly erroneous." That claim would be untenable in this case.

roughly equal (as were those of Weber and the minority workers chosen in his place), where, they ask, is the injustice?

The injustice lies in the deprivation, on improper grounds, of what one is otherwise entitled to. The basis for the entitlement will be different in different contexts. Scarce places in medical or law schools are rightly allocated to persons best exhibiting the characteristics that have been determined relevant to the studies or profession to be pursued. Scarce on-the-job training opportunities are rightly allocated to those having certain seniority entitlements. The bases of Weber's and Bakke's claims to that of which they were deprived are very different; but both were wrongly denied what they would have received if the scarce available goods had been distributed in accord with established criteria in a morally just way. Both were the plain victims of racial discrimination, losing out because of the color of their skin.

Persons concerned about such injustice when done in the academic world ought seriously to consider the wisdom of remaining silent when essentially the same injustice (although with respect to different entitlements) is done in the industrial world. If preference by race should be found, in the *Weber* case, to justify the deprivation of what is fairly earned by a laborer, the security of what is fairly earned by anyone in any sphere is similarly threatened.

### XIII

IF THE damage to Weber cannot reasonably be minimized, can it be wholly denied? This is the second line of defense to which Kaiser and the union fall back in the effort to show that Weber was not discriminated against at all. Weber's rights were not infringed on, they say, because he never had any seniority rights to job training here. The argument goes like this: "Where admission to a training program is properly a function of seniority, and seniority, like Weber's, is untainted by the employer's previous discrimination, he would be damaged if race were allowed to supervene. But Weber errs in thinking that seniority gives him any claim under *this* quota program, which was initiated in 1974, by Kaiser and the union, specifically to increase minority representation in the craft employments. New rights were then created, Kaiser and the union agreeing to use seniority only for the distribution of available slots *within* the two racial lists, black and white. If, in the new plan, they had agreed to use the lottery method—two separate lotteries, one for whites and one for blacks—it would be obvious that seniority was not the real issue here. They could have done just that. Weber's claim that he was deprived of seniority rights is a red herring, because the mode of selecting from each racial pool is irrelevant. So the Kaiser plan, as the dissenting judge wrote,

'stands or falls on its separation of workers into two racial pools for assignment to job training' (p. 235)."

This argument is a compound of perceptivity and blindness. Seniority was the system deliberately adopted by Kaiser and the union—but they did not make that choice at random. Years of past work in the very plant where those training opportunities were to arise was thought the fairest consideration in allocating scarce places to otherwise equally qualified workers. Seniority was adopted as a relevant and rational principle. To create two seniority lists, black and white, and then choose the top person from each list, even if he has less seniority than the fourth or twentieth person on the other list, is to override the seniority principle with race. If the basis chosen for the fair distribution of scarce opportunities had not been seniority, but (say) a lottery, then the just application of the lottery principle would require that *it* not be overridden by race. It is therefore perceptive to note that the real issue here goes beyond seniority—that the plan fails simply because it separates the workers into two *racial* pools—every such separation being necessarily invidious. Any system used to distribute opportunities among the members of each racial pool, even if of itself fair, must be distorted by that antecedent racial classification. Whatever besides seniority might prove just as a ground for the distribution of goods, skin color isn't it.

Is it correct to say, then, that Weber had no seniority rights here at all? No. When it is agreed by union and employer that, for allocating these job-training opportunities, length of service is the appropriate basis, employees acquire entitlements on that basis. The injustice of racial favoritism manifests itself, in this case, in the deprivation of those entitlements. Were a worker's entitlements based on some other feature of his circumstances—his experience or his performance on a competitive examination—then the injustice of racial favoritism might be manifested in the deprivation of entitlements flowing from those. Weber has a right to non-discriminatory treatment. To contend that he never had any rights in this matter because the respect in which he was discriminated against isn't the only respect in which he might have been discriminated against is a last-ditch effort to obscure the wrong that was done him.

### XIV

THE villain of the piece—here, in *Bakke*, wherever it raises its head—is preference by race. The *Weber* case provides an opportunity to reaffirm the moral and constitutional commitment to govern ourselves without preference to any by reason of color, or religion, or national origin. If we undermine that commitment—even though it be in an honest effort to do good—we will reap the whirlwind.