THE FUTURE OF RACIAL PREFERENCES:

A REVIEW OF RUSSELL K. NIELI'S *WOUNDS THAT WILL NOT HEAL: AFFIRMATIVE ACTION AND OUR CONTINUING RACIAL DIVIDE* & RANDALL KENNEDY'S *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW*

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INTRODUCTION

"*The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.*" —Chief Justice Roberts[1]

Randall Kennedy disagrees with the Chief Justice; he wants to continue racial discrimination. In a provocative new book, *For Discrimination: Race, Affirmative Action, & The Law,*[2] Kennedy, a professor at Harvard Law School, advocates a continuation and even expansion of racial preferences in college and university admissions. Kennedy readily acknowledges that racial preferences "distinguish between people on a racial basis . . . discriminate . . . redistribute resources . . . favor preferred racial categories of candidates, promoting some racial minorities over whites with superior records . . . [and] generate stigma and resentment."[3] Nevertheless, Kennedy claims that racial preferences are morally required to compensate for past racial discrimination by all aspects of society.[4]

Russell K. Nieli agrees with the Chief Justice; he wants to end racial discrimination. In a 2012 book, *Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide*,[5] Nieli, a lecturer in politics at Princeton University, advocates an immediate end to racial preferences. "Reworking a series of essays compiled over a period of more than three decades, [the book presents] a no-holds-barred critique of race-based employment and university admissions policies, whose consequences for the social harmony and well-being of America, are almost wholly negative."[6] Essentially, Nieli offers a social science argument for the end of racial preferences.

The two books are complementary—both are skeptical of the Supreme Court's diversity rationale for racial preferences.[7] At the same

1. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ., announcing the judgment of the Court). For a discussion of the higher education implications of the case, see generally Charles J. Russo & William E. Thro, *Higher Education Implications of Parents Involved for Community Schools*, 35 J.C. & U.L. 239 (2009).

2. RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, & THE LAW (2013).

3. *Id*. at 18–19.

4. *Id*. at 11.

5. RUSSELL K. NIELI, WOUNDS THAT WILL NOT HEAL: AFFIRMATIVE ACTION AND OUR CONTINUING RACIAL DIVIDE (2012).

6. *Id.* at 10.

7. *See* KENNEDY, *supra* note 2, at 13, 97–103, 202–03; NIELI, *supra* note 5, at 241–75.

time, the books are contradictory—one advocates for the continuation of racial preferences on moral grounds while the other calls for an immediate end to racial preferences on social science grounds. Taken together, the two authors collectively provide a foundation for an intelligent discussion of the wisdom of racial preferences in college and university admissions.

Of course, any discussion of racial preferences in higher education must confront the elephant in the room—the Constitution.[8] While the Court has imposed significant restrictions on the use of race in college and university admissions,[9] *Fisher v. University of Texas* will force many institutions to reconsider their use of racial preferences.[10] After *Fisher*, any use of race is conditioned on the college or university proving that there is no workable race-neutral alternative.[11] Many colleges and universities will not be able to meet that burden. Unless the Court over

8. Although private institutions are not subject to the restrictions of the Constitution, private institutions that receive federal funds must adhere to constitutional standards. In re Civil Rights Cases, 109 U.S. 3 (1883). To explain, all private institutions that receive federal funds are subject to Title VI, which prohibits racial discrimination. 42 U.S.C. § 2000d (2012). The Supreme Court explicitly held "that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by [a private] institution that accepts federal funds also constitutes a violation of Title VI." Gratz v. Bollinger, 539 U.S. 244, 275 n.23 (2003). *See also* Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (holding that because there is no equal protection violation, there is no Title VI violation). Moreover, the nondiscrimination obligation of Title VI applies to "all of the operations" of "a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which receives federal financial assistance." 20 U.S.C. § 2000d-4a (2012). An institution subject to Title VI may not discriminate because of race or gender in financial aid programs "directly or through contractual or other arrangements." 34 C.F.R. § 100.3(b).

9. *See Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 244; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

10. 133 S. Ct. 2411 (2013). As one scholar observed:

> I very much doubt that the way colleges and universities have justified their individual policies in the recent past will continue to work. Many schools have operated under the assumption that they can justify their policy in isolation—that all they need to do is show their application and yield rates and thus prove that without preferences they would have fewer under-represented minorities than they regard as minimally necessary. But it is not just the fact of a race-preferential admissions policy that must be defended now, but also the details of the particular policy and its effects on educational outcomes. Just as different forms of diversity must be balanced against each other, different pedagogical problems must be considered against each other. More specifically, the pedagogical advantages of racial diversity must be balanced against the pedagogical disadvantages of gaps in academic credentials.

Gail Heriot, Fisher v. University of Texas*: The Court (Belatedly) Attempts To Invoke Reason and Principle*, 2012 CATO SUP. CT. REV. 63, 89 (2013).

11. *Fisher*, 133 S. Ct. at 2419–20.

rules or limits *Fisher*, the future of racial preferences is more litigation and more restrictions, if not outright prohibition.

This constitutional reality after *Fisher* provides a lens through which to review both Kennedy's and Nieli's books. A policy and legal argument that ignores constitutional reality has little practical value, even if some find the arguments persuasive. This review of *For Discrimination* and *Wounds That Will Not Heal* has three parts. Part I examines Kennedy's moral argument for continuing racial preferences. Part II explores Nieli's social science argument for ending racial preferences. Part III details the post-*Fisher* constitutional reality—wherein racial preferences still exist, but are limited. This review concludes that unless the Court overrules or limits *Fisher*, neither Kennedy nor Nieli can prevail in total; nevertheless, Nieli's vision will prevail for those institutions that cannot meet the *Fisher* requirements.

I. KENNEDY'S MORAL ARGUMENT FOR RACIAL PREFERENCES

Kennedy's justification for racial preferences is simple:

> I support it because, on balance, it is conducive to the public good. It is a continuation and intensification of an egalitarian and democratic impulse in American race relations that has been gathering momentum, albeit fitfully and with dramatic reversals, since at least the Civil War. Racial affirmative action partially redresses debilitating social wrongs. Racial minorities, and blacks in particular, have long suffered from racist mistreatment at the hands of the federal government, state governments, local governments, and private parties. This oppression has produced a cycle of self-perpetuating problems that will not resolve themselves without interventions that go beyond prospective prohibitions on intentional racial mistreatment. Past wrongs have diminished the educational, financial, and other resources that marginalized groups can call upon, and have thus disadvantaged them in competition with whites. Hence, it is not enough simply to end racist mistreatment. Reasonable efforts to rectify the negative legacy of past wrongs are also morally required.[12]

As Nieli notes, "[w]hile Kennedy is generally supportive of racial-preference policies, he agrees with critics that the diversity rationale is a weak foundation on which to base one's defense of such policies, and is at best a secondary concern of many who support and maintain affirmative action policies for other reasons."[13] Indeed, Kennedy "used to

12. KENNEDY, *supra* note 2, at 11.
13. NIELI, *supra* note 5, at 246.

disdain the diversity rationale, and . . . continue[s] to think that some of the claims made on its behalf are excessive."[14]

Kennedy sets out his moral argument for racial preferences in five chapters. Chapter One explores the history of affirmative action.[15] First, Kennedy examines the National Government's effort to assist the newly freed slaves following the Reconstruction Era.[16] Second, he discusses the early efforts of the national government and some states to outlaw racial discrimination in employment during the 1940s.[17] Third, he explores the developments of anti-discrimination law during the Civil Rights Era.[18] Fourth, Kennedy discusses the late 1960s and early 1970s adoption of the "New Affirmative Action," programs designed to "channel benefits on an expressly racial basis to groups that are deemed in need of special assistance."[19] Fifth, he details the history of the "affirmative action stalemate" since the 1970s, including a comprehensive discussion of Supreme Court decisions.[20] Finally, he examines the efforts to restrict racial preferences through state ballot initiatives.[21]

Chapter Two sets out the pro and con arguments for racial preferences.[22] Kennedy focuses on four possible justifications for racial preferences: (1) reparations;[23] (2) diversity;[24] (3) integration;[25] and (4) supplementing existing anti-discrimination laws.[26] Kennedy makes the arguments for all justifications, details the counterarguments, and responds to the counterarguments. He also addresses the argument that racial preferences actually hurt their intended beneficiaries.[27] Kennedy concludes that "racial affirmative action as typically designed and administered does indeed help racial minorities—those assisted directly and those benefited indirectly—and that it helps America as a whole with its ongoing struggle to redress long-standing injustices and to knit together a deeply divided society."[28]

Chapter Three confronts the "Color Blind Challenge" to racial pref-

14. KENNEDY, *supra* note 2, at 13.
15. *Id.* at 22–77.
16. *Id*. at 22–26.
17. *Id*. at 26–30.
18. *Id*. at 31–38.
19. *Id.* at 39–54.
20. *Id.* at 54–69.
21. *Id*. at 69–77.
22. *Id.* at 78–146.
23. *Id*. at 78–94.
24. *Id*. at 94–106.
25. *Id.* at 106–07.
26. *Id.* at 107–15.
27. *Id.* at 115–34.
28. *Id*. at 78.

erences.[29] First, Kennedy details the history of the notion of a colorblind constitution beginning with Justice Harlan's 1896 dissent in *Plessy v. Ferguson,*[30] and he continues the history through the present day.[31] Second, he details what he regards as the attractions of the colorblind position.[32] Third, he offers a comprehensive analysis of the problems arising out of the colorblind position.[33]

Chapter Four offers a comprehensive history of the Supreme Court's struggles with racial preferences in college and university admissions.[34] Kennedy discusses all three acts: *Bakke*;[35] the University of Michigan cases;[36] and *Fisher*.[37] The *Fisher* discussion was written before the Court rendered its decision and, thus, it does not address the actual opinion.

Chapter Five concludes the book "by offering three observations regarding the future of racial affirmative action in the United States."[38] First, "[r]ace neutral policies that are actually race conscious are simply the latest in a long line of legal fictions in American race relations law."[39] Second, "[t]he United States will have company as it continues fitfully to reform itself racially."[40] Other nations and international treaties appear to both implicitly and explicitly demand racial preferences.[41] Third, because racism is persistent, society should be reluctant to impose an endpoint.[42]

Ultimately, Kennedy's moral argument is unpersuasive. To be sure, African-Americans have been the victims of immoral, unconstitutional, and illegal behavior for centuries. At the same time, however, Kennedy's moral position is undermined by his failure to acknowledge white poverty. Income inequality is growing;[43] the white lower class is in-

29. *Id.* at 147–81.
30. 163 U.S. 537, 554–59 (1896) (Harlan, J., dissenting).
31. KENNEDY, *supra* note 2, at 148–54.
32. *Id*. at 154–61.
33. *Id*. at 161–81.
34. *Id*. at 182–239.
35. *Id*. at 182–205
36. *Id*. at 205–21.
37. *Id*. at 221–40.
38. *Id*. at 240.
39. *Id.* at 242.
40. *Id*. at 245.
41. *Id*. at 245–53.
42. *Id*. at 253–54.
43. As Sander and Taylor note:

> Since 1979 the share of consumer income in the United States going to the top five percent of the income distribution has doubled, and the share going to the top 0.1 percent has more than tripled. Measures of social mobility show that persons who start life in the bottom fifth of the in

creasingly dysfunctional and self-destructive.[44] For example, Eastern Kentucky, a region that is almost entirely white, is impoverished.[45] Nevertheless, the primary beneficiaries of admissions preferences are middle class minorities.[46] "Rather than being 'visibly open to talented and qualified individuals of every race and ethnicity,' selective colleges can much more accurately be described as bastions of privilege, with no more than a tenth of their enrollments coming from the less fortunate half of American society."[47] If justice requires an admissions preference for the son of African-American lawyers, justice also requires an admissions preference for the coal miner's daughter.

II. NIELI'S SOCIAL SCIENCE ARGUMENT FOR AN END TO RACIAL PREFERENCES

Nieli's justification for ending racial preferences immediately is simple:

> From the very beginning, however, racial preference policy was anathema to large segments of the American public, including many of those who had fought the good fight to end segregation and racial oppression in the Jim Crow South. For them, racial preferences were a shameful betrayal of the highest ideals of the civil rights movement, and of Justice Harlan's magisterial pronouncement in the *Plessy* case that 'our Constitution is color-blind and neither knows nor tolerates

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> come distribution are less likely now than they were a generation ago to move to the top half.

RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 248 (2012).

44. *See* CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA 1960-2010 (2012).

45. Kevin D. Williamson, *Left Behind: An Elegy for Appalachia*, NAT'L REV., Dec. 16, 2013, at 28. Unfortunately, the total poverty of Appalachia is not new. *See* HENRY M. CAUDILL, NIGHT COMES TO THE CUMBERLANDS: A BIOGRAPHY OF A DEPRESSED AREA (1963).

46. While racial preferences increase the number of minorities on campus, they do little to increase the number of poor minorities on campus. As Sander and Taylor explain:

> In an authoritative series of national surveys of high school students, more than half of blacks entering elite colleges in 1972 came from families that were in the bottom half of the socioeconomic distribution. By 1982 less than a quarter of blacks entering elite colleges came from the bottom half, and by 1992 the proportion was down to eight percent. Two-thirds of the 1992 cohort of blacks at elite colleges came from the top quartile of the American socioeconomic distribution—that is, the upper-middle class and the upper class. There is little reason to think that things have gotten better since then.

SANDER & TAYLOR, *supra* note 43, at 248.

47. PETER G. SCHMIDT, COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION 3 (2007).

classes among citizens.'[48]

Nieli concluded that, "[u]ntil they are removed, racial preferences . . . will continue to gnaw at the interethnic norm of reciprocity and fairness, which is the very linchpin holding together racially and ethnically diverse societies like the United States."[49]

Nieli's book is an exhaustive and comprehensive review of the social science data surrounding racial preferences, but he intends it "more as an exercise in social policy criticism than a new addition to social research more narrowly conceived."[50] The book has three main goals. First:

> [I]t seeks to explain the continuing sense of outrage and betrayal that is felt by so many Americans—especially Asians, poor whites, and those 'white ethnics' whose forebears often immigrated to the U.S. from many of the poorest regions of Southern and Eastern Europe—over policies of ethno-racial preferences from which their own kind have been systematically excluded.[51]

Second, the book aims:

> [T]o direct attention to some of the most revealing social science research over the past 15 years that critically evaluates the claims of racial preference supporters. Much of this research is addressed to refuting the contentions of the three pro-affirmative action River Books sponsored by the Andrew W. Mellon Foundation.[52]

In particular, Nieli seeks to use "contemporary evolutionary biology and evolutionary psychology to explain why policies of racial preferences have so often reduced social harmony, intensified ethno-racial tensions, and ended in violence and murderous rage in the many countries where they have been introduced."[53] Finally, Nieli attempts "to draw attention to what [he has] called . . . the 'second wound that will not heal'—the problem of the inner-city black underclass."[54]

Nieli accomplishes these three goals in six chapters. Chapter One focuses on "the dramatic shift that took place in the early 1970s away from the civil rights era vision of a color-blind society to color-conscious 'quota' thinking and other group-based understandings of

48. NIELI, *supra* note 5, at 10.
49. *Id*.
50. *Id*. at 18.
51. *Id*. at 20.
52. *Id*. at 21.
53. *Id*.
54. *Id*. at 24.

human rights and government entitlements."[55] In particular, Nieli discusses the distinction between tribalism and personalism. Tribalism regards individuals as part of a larger group; what matters is whether the individual possesses the characteristics of the group.[56] In contrast, personalism focuses on the talents and character of the individual.[57] As Nieli demonstrates, the effect of America's embrace of racial preferences is the adoption of the "tribalistic consciousness" and an abandonment of the personalism philosophy that underlies traditional anti-discrimination legislation.[58]

Chapter Two addresses "the claim that racial preference policies serve to combat the racist understanding that certain types of jobs are mainly for whites and not suitable for black capacities or interests."[59] Nieli demonstrates that "racial-preference policies serve to heighten rather than reduce racist ideas and racist understandings."[60] Drawing on the work of labor economists, Nieli shows that racial preferences have not had a significant impact in reducing income disparities between races.[61] Emphasizing the work of Michael Walzer,[62] Nieli concludes that efforts to remedy past discrimination must build upon, rather than undermine, "the understandings of social justice that are widely shared by members of all races in America."[63]

Chapter Three shifts from employment to college and university admissions.[64] In *The Shape of River*, Derek Bok and William Bowen argue that racial preferences have substantial benefits to colleges and universities and very few downsides.[65] Nieli disputes their conclusion and contends that there is "a huge downside to preference policies both at the undergraduate and professional-school levels."[66] Specifically, Nieli shows downsides such as the following: deep resentment of

55. *Id*. at 31. As Nieli explains, this chapter is a revised version of the fourth chapter in his anthology, RACIAL PREFERENCE AND RACIAL JUSTICE—THE NEW AFFIRMATIVE ACTION CONTROVERSY (1991).

56. *Id*. at 37–38.

57. *Id*. at 39–43.

58. *Id*. at 37–39.

59. *Id.* at 97. Chapter 2 is adapted from Nieli's comments to Andrew Koppelman on the first draft of Koppelman's ANTI-DISCRIMINATION LAW & SOCIAL EQUALITY (2001).

60. *Id.* at 98; 99–127.

61. *Id*. at 127–31.

62. *Id*. at 131. Nieli explicitly references Michael Walzer's, SPHERES OF JUSTICE (1984).

63. *Id*. at 98–99.

64. This Chapter originally appeared in the Fall 2004 issue of *Academic Questions.*

65. DEREK BOK & WILLIAM BOWEN, THE SHAPE OF THE RIVER (1998).

66. NIELI, *supra* note 5, at 134.

preferences among whites and Asians;[67] lower academic performance among minorities who are admitted under racial preferences;[68] little impact on future earnings of minorities who benefit from preferences;[69] increased self-segregation by race on campuses;[70] no real economic benefits to whites and Asians that attend racially diverse institutions;[71] and, in the context of law schools, higher dropout and bar failure rates.[72] Although these negative consequences would normally cause rational policy makers to abandon such policies, Nieli, building upon the work of Shelby Steele,[73] offers "white guilt" as an explanation for the continuation of racial preferences.[74]

In Chapter Four,[75] Nieli shows that racial ethnic diversity leads to uncertain outcomes. In short, it all depends upon the circumstances.[76] As Nieli explains, advocates of the "contact hypothesis" believe increased interaction between people of different racial and ethnic groups leads to less prejudice, greater understanding and empathy, and more societal harmony.[77] However, recent research suggests that increased contact among different racial groups actually promotes discord and conflict.[78] Utilizing the work of Robert Putnam,[79] Nieli sets out a "revised contact hypothesis" where benefits result only under unique and limited circumstances.[80] Concluding the chapter, Nieli explains how mismatching—the process where minority students attend more selective institutions than they would attend without racial preferences—actually undermines the value of diversity.[81]

In Chapter Five,[82] Nieli turns to a critique of the sequels to *The Shape of the River*.[83] Nieli argues that these subsequent books fail to compre-

67. *Id*. at 172–79.
68. *Id.* at 163–72.
69. *Id*. at 143–48.
70. *Id*. at 186–87.
71. *Id*. at 215–22.
72. *Id.* at 222–32.
73. *See* SHELBY STEELE, A DREAM DEFERRED (1998); SHELBY STEELE, SECOND THOUGHTS ABOUT RACE IN AMERICA (2001).
74. NIELI, *supra* note 5, at 235–40.
75. Chapter IV originally appeared as *Diversity's Discontents: The Contact Hypothesis Exploded,* 21 ACAD. QUESTIONS 409 (2008).
76. NIELI, *supra* note 5, at 241.
77. *Id*. at 247–50.
78. *Id*. at 250–53.
79. ROBERT PUTNAM, BOWLING ALONE (2001).
80. Nieli, *supra* note 5, at 253–71.
81. *Id*. at 271–74.
82. This chapter is drawn from a 2004 report for the the National Association of Scholars. *See* RUSSELL K. NIELI, NAS REPORT, THE CHANGING SHAPE OF THE RIVER: AFFIRMATIVE ACTION AND RECENT SOCIAL SCIENCE RESEARCH (2004).
83. *See* DOUGLAS MASSEY, CAMILLE CHARLES, GARVEY LUNDY, & MARY FISCHER, THE

hend the intensity of opposition to racial preferences,[84] misunderstand the disincentives that racial preferences give to minorities,[85] ignore the dysfunctional characteristics of certain subcultures,[86] and do not grasp the impact of racial preferences on middle class minorities.[87] Drawing upon evolutionary psychology and evolutionary sociology, Nieli asserts that racial differences are more volatile than other differences among humans.[88]

In Chapter Six,[89] Nieli departs from the racial preferences theme and focuses exclusively on the problems of the African-American urban poor—the group whose plight first prompted the use of racial preferences in college and university admissions.[90] Drawing heavily on the works of Daniel Patrick Monihyan,[91] William Julius Wilson,[92] Christopher Jencks,[93] and Charles Murray,[94] Nieli traces the problems of the African-American urban poor to the post-World War II migrations from the rural South to the urban areas of the North and Midwest.[95] Yet, asserting that the descendants of slaves who sought to escape the oppression of Jim Crow were ill-equipped to deal with the realities of urban life does not fully explain the continued problem of urban poverty. Recognizing this inadequacy, Nieli takes up "the problem of second-generation maladaptation and delinquency."[96] In doing so, Nieli demonstrates that the problems of the African-American urban poor cannot be solved through admissions or hiring preferences that primarily benefit the middle class; rather there must be a reconstruction of the two-parent family and related community structures.[97]

Ultimately, Nieli makes a persuasive social science argument about

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SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES (2003); CAMILLE CHARLES, MARY FISCHER, MARGARITA MOONEY, & DOUGLAS MASSEY, TAMING THE RIVER: NEGOTIATING THE ACADEMIC, FINANCIAL, AND SOCIAL CURRENTS IN SELECTIVE COLLEGES AND UNIVERSITIES (2009).

84. NIELI, *supra* note 5, at 284–96.

85. *Id*. at 296–329.

86. *Id.* at 329–46.

87. *Id*. at 346–56.

88. *Id*. at 356–81.

89. This chapter is derived from Russell K. Nieli, *The Disintegration of the Black Lower Class Family*, 22 POL. SCI. REV. 44 (1991).

90. *See* NIELI, *supra* note 5, at 9–10.

91. DANIEL PATRICK MOYNIHAN, FAMILY AND NATION (1986); DANIEL PATRICK MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

92. WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED (1987).

93. Christopher Jencks, *Review of the Truly Disadvantaged*, NEW REPUBLIC, Jan. 13, 1988 at 28–30.

94. CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950–80 (1984)

95. NIELI, *supra* note 5, at 386–445.

96. *Id.* at 445–80.

97. *Id*. at 480.

racial preferences in college and university admissions—at least as institutions currently use racial preferences. His critique of *The Shape of The River* and its sequels is simply devastating.[98] Those who rely on social science to justify colleges' and universities' current use of racial preferences must confront and refute Nieli's argument to the contrary. His discussion of the pathological dysfunction of urban African-Americans is a provocative addition to the literature.[99]

III. THE CONSTITUTIONAL REALITY—LIMITING, BUT NOT ENDING, RACIAL PREFERENCES

A. Racial Preferences After *Fisher*

The constitutional analysis begins with the propositions that the Equal Protection Clause is "essentially a direction that all persons similarly situated . . . be treated alike,"[100] and that the Constitution protects "*persons*, not *groups*."[101] Indeed, 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."[102] "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[103]

Because such distinctions "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,"[104] and those distinctions "are contrary to our traditions and hence constitutionally suspect,"[105] "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[106] Recognizing that "racial characteristics so seldom pro-

98. *Id*. at 133–240, 275–382.

99. *Id.* at 383–480.

100. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); *see also* U.S. CONST. amend. XIV, § 1.

101. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (emphasis in original). *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–80 (1986).

102. Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

103. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289–290 (1978).

104. Shaw v. Reno, 509 U.S. 630, 643 (1993) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). *Cf*. United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring) ("[A]n explicit policy of assignment by race may serve to stimulate our society's latent race-consciousness."); Wright v. Rockefeller, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) ("Here the individual is important, not his race, his creed, or his color.").

105. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

106. *Bakke*, 438 U.S. at 265. *See also Adarand*, 505 U.S. at 227 (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"); *J.A. Croson*

vide a relevant basis for disparate treatment,"[107] racial classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests."[108] "Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what 'classifications' are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[109]

Moreover, the fact that the government might use racial classifications to *help* racial minorities does not change the analysis.[110] Indeed, the Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation."[111] "The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts."[112]

A college or university that wishes to use racial preferences faces a difficult constitutional reality. This reality demands that: (1) the insti

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Co., 488 U.S. at 500–01; Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[T]he Equal Protection Clause demands that racial classifications... be subjected to the 'most rigid scrutiny.'").

107. *J.A. Croson Co.,* 488 U.S. at 505 (quoting Fullilove v. Klutznick, 448 U.S. 448, 533–534 (1980) (Stevens, J., dissenting)).

108. Grutter v. Bollinger, 539 U.S. 306, 326 (2003). *See also J.A. Croson Co.*, 488 U.S. at 493.

109. *Grutter*, 539 U.S. at 326.

110. "[T]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable.... While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982).

111. Johnson v. California, 543 U.S. 499, 505 (2005). *See also Adarand*, 515 U.S. at 226 (stating "despite the surface appeal of holding 'benign' racial classifications to a lower standard, because 'it may not always be clear that a so-called preference is in fact benign . . . .'"); *J.A. Croson Co.*, 488 U.S. at 500 ("But the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."). As Justice Thomas observed:

> That these programs may be motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

Adarand, 505 U.S. at 240 (Thomas, J., concurring).

112. Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2421 (2013).

tution prove that its use of race complies with the Constitution; (2) race be used only in extraordinary circumstances; and (3) race be used only as a last resort. Each of these aspects of the constitutional reality warrants additional discussion.

1. The Institution Must Prove Its Use of Race Is Constitutional

Normally, the courts presume that governmental action is constitutional.[113] The private party, as one challenging the constitutionality of the government's action, has the burden of proof "to negate every conceivable basis which might support it."[114]

When government uses racial classification, those presumptions are flipped. "[T]he government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'"[115] In the context of racial preferences in higher education, "[s]trict scrutiny requires the university to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'"[116] Moreover,

> [T]he mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Strict scrutiny does not permit a court to accept a college or university's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.[117]

2. Race Is Limited to Extraordinary Circumstances

The government's use of race is limited to extraordinary circumstances. The Supreme Court has recognized only two objectives as constitutionally sufficient justifications for race-conscious decision-making: (1) remedying the present effects of identified past intentional discrimination by a particular governmental unit; and (2) obtaining the educational benefits of a diverse student body in higher education.[118] Just as

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113. Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988).

114. F.C.C. v. Beach Comm'ns, Inc., 508 U.S. 307, 314–15 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

115. *Johnson*, 543 U.S. at 505 (quoting *Adarand,* 515 U.S. at 227).

116. *Fisher,* 133 S. Ct. at 2418 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)).

117. *Fisher*, 133 S. Ct. at 2421 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

118. *See, e.g.,* Grutter v. Bollinger, 539 U.S. 306, 328–30 (2003).; *J.A. Croson Co.*, 488 U.S. at 504–05.

significantly, the Court has rejected, as a matter of constitutional law, a number of other justifications offered by state and local governments for race-conscious measures: remedying societal discrimination; maintaining racial balance; and providing faculty role models for students.[119]

Because most colleges and universities never engaged in past intentional discrimination or, if there was discrimination, have eliminated any present day effects, institutions that wish to use race must rely on the compelling interest of diversity. Despite what many administrators may think, the Court's embrace of "diversity" is:

> [N]ot an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.[120]

A college or university "is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'"[121] "That would amount to outright racial balancing, which is patently unconstitutional."[122] "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[123]

Even when a college or university utilizes this broad definition of diversity, it still "must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."[124] "It remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'"[125]

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119. *See Grutter,* 539 U.S. at 323–24; Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality); *Bakke*, 438 U.S. at 307–10. The Court also disapproved the rationale of increasing the number of physicians practicing in under-served areas where the institution did not prove that race-conscious admissions would "promote better health-care delivery to deprived citizens." *Bakke*, 438 U.S. at 310–11.

120. *Bakke,* 438 U.S. at 315.

121. *Fisher*, 131 S. Ct. at 2419 (quoting *Bakke,* 438 U.S. at 307).

122. *Grutter,* 539 U.S. at 330.

123. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732 (2007).

124. *Fisher*, 133 S. Ct. at 2419–20.

125. *Id*. at 2420 (quoting *Grutter*, 539 U.S. at 337).

3. Race Must Be A Last Resort

Consideration of race must be a last resort. Courts must inquire "into whether a university could achieve sufficient diversity without using racial classifications."[126] Put another way, the college or university must prove there are "no workable race-neutral alternatives that would produce the educational benefits of diversity."[127] If there is a workable race-neutral alternative, "then the University may not consider race."[128]

The requirement to prove a negative—that no race-neutral alternative would produce the desired level of minority representation—raises significant problems for colleges and universities. Quite simply, one cannot determine the viability of a race-neutral alternative without first making assumptions about what level of minority representation is sufficient. It is not enough to ascertain that a race-neutral alternative will yield a minority representation of X percent; one must know whether X percent is a "critical mass." If so, then the race-neutral alternative is viable and the college or university may not use race; if not, then the race-neutral alternative is not workable and the institution may use race.

Consequently, the college or university's definition of critical mass effectively is determinative. While the institution is entitled to deference on whether it needs to pursue diversity, it is not entitled to deference on what constitutes a critical mass. Otherwise, a college or university could simply define critical mass in such a way as to always justify the use of race. For example, if a college or university said that it wanted minority representation of ninety percent, it would render all possible race-neutral alternatives unworkable.

Although the Court has not provided guidance on what constitutes a critical mass, and while that definition may well depend upon context, certain parameters seem inherent in any definition of critical mass. Just as it is "completely unrealistic" to assume "that minorities will choose a particular trade in lockstep proportion to their representation in the local population,"[129] it is completely unrealistic to assume that minority representation on a particular campus will exceed their representation in the area served by the college or university. Thus, if a public college or university serves a state or a particular region of a state, the level of minority representation in that state or region provides some rough guidance as to the definition of critical mass. For those public institutions that serve states or regions with low minority

126. *Fisher*, 133 S. Ct. at 2420.
127. *Id*.
128. *Id.*
129. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989).

populations, it will be difficult to define critical mass as a high number of minorities.

Once critical mass is defined in a constitutional manner, then the institution must demonstrate that there is no realistic race-neutral alternative that can achieve the critical mass. Such a showing will often be difficult.[130] It involves an analysis of the impact of automatically admitting the top students at every high school in a state or region. In areas where many high schools are not integrated, such a plan can yield a significant amount of minority representation.[131] Colleges and universities must also examine socioeconomic preferences. [132] If minorities

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130. As Heriot explained:

> The bottom line, however, is that if capturing the educational benefits of diversity is the goal, the academic judgments that must be made in fashioning an actual policy are numerous and never-ending. Those judgments cannot be simple-minded sentimental ones and they definitely cannot be political in nature. Reason and principle must prevail.
>
> If *Fisher* does nothing else, it should force colleges and universities to confront the research on mismatch in a detached and scientific manner. That means using ideologically diverse teams of qualified, independent investigators—persons whose job and prestige are not dependent on maintaining the status quo. It means adequately funding and supporting the investigation with access to data. It means following standard scientific procedures by making the data available to qualified researchers who wish to critique the work.

Heriot, *supra* note 10, at 90 (footnotes omitted).

131. In detailing the effects of such a plan at the University of Texas, the Supreme Court observed:

> The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-*Hopwood* AI/PAI system that did not consider race, the entering class was 4.5% African–American and 16.9% Hispanic. This is in contrast with the 1996 pre-*Hopwood* and Top Ten Percent regime, when race was explicitly considered, and the University's entering freshman class was 4.1% African–American and 14.5% Hispanic.

Fisher, 133 S. Ct. at 2416.

132. To explain further:

> Class-based affirmative action comes under a variety of names. It is alternately referred to as "economic" or "socioeconomic" affirmative action, and in some cases loosely characterized as admissions preferences for the poor. Class-based policies are designed to place a "thumb on the scale" for applicants who have faced obstacles to upward mobility. Because demographic factors can present substantial obstacles to upward mobility, supporters of class-conscious affirmative action support this boost as a means to level the playing field. Socioeconomic status exerts a powerful influence on one's likelihood of attending a four-year college. This is especially true when students live in neighborhoods and attend schools where disadvantage is concentrated. Moreover, socioeconomic status significantly impacts the academic measures (e.g., high school

are a disproportionate share of the poor in the area served by the college or university, then a socioeconomic preference has the potential to increase minority representation.[133] A similar logic applies to first generation students—applicants who will be the first in their families to attend college. Additionally, colleges and universities must explore other creative race-neutral measures—such as quotas by region of the State—that might lead to increased minority representation.

For many colleges and universities, there will be workable race-neutral alternatives. If so, then the institution must cease using race and start using the race-neutral alternatives.[134] In other words, racial preferences will end at those schools. Conversely, there will be some institutions where there are no workable race-neutral preferences. This likely will be the case if the minority population is relatively low, if the high schools where minorities attend are generally integrated, and if whites make up a significant portion of the poor and/or the first generation applicants. Those colleges and universities will be allowed to pursue racial preferences, albeit subject to the significant limitations imposed by the court.

B. The Constitutional Reality Prohibits Kennedy's Moral Vision

Randall Kennedy wants to have racial preference as means of righting historical, societal wrongs.[135] Although Kennedy's argument is provocative and interesting, it is incompatible with our constitutional reality for two reasons.

First, he grounds his justification for racial preferences not in obtaining the educational benefits of diversity, but in compensating racial minorities for past societal wrongs. Yet, as Kennedy explicitly acknowledges,[136] remedying societal discrimination is not and never

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GPAs and standardized test scores) admissions officers use to gauge applicants' college readiness.

Matthew Gaetner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367 (2013).

133. Indeed, high achieving low-income students of all races are unlikely to apply to selective institutions. *See* Caroline M. Hoxby & Christopher Avery, *The Missing One-Offs: The Hidden Supply of High Achieving Low-Income Students* (Nat'l Bureau of Econ. Res., Working Paper No. 18586, 2012), *available at* http://www.nber.org /papers/w18586.pdf?new_window=1.

134. Although university administrators may well be alarmed at the end of racial preferences, such a development need not lead to a dramatic decline in minority representation. Indeed, after California banned racial preferences through a state constitutional amendment, the University of California had an increase in both the number of minority applicants and number of minorities actually attending. SANDER & TAYLOR, *supra* note 43, at 138–139.

135. KENNEDY, *supra* note 2, at 11.

136. *Id.* at 194, 199.

has been a compelling governmental interest.[137] As the Court explained:

> '[S]ocietal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.[138]

Similarly, the Court has rejected the notion—implicit in Kennedy's thesis—that increasing the representation of minorities is a compelling governmental interest.[139] "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[140]

Second, even if Kennedy tied his argument to obtaining the educational benefits of diversity, it is likely that his chosen means is unconstitutional. Kennedy claims to "champion sensibly designed racial affirmative action," but he never defines what he means.[141] Since he states that he benefited from "sensibly designed affirmative action,"[142] one assumes that he regards the preferences that he received as constitutionally appropriate. Thus, one can infer that, in Kennedy's definition of "sensibly designed affirmative action," colleges and universities will favor an African-American from a prestigious prep school over a coal miner's daughter from an abysmal school district in Appalachia.[143] The African-American son of college-educated parents will be preferred over the first generation white student.[144] Law schools will prefer an African-American applicant with an extraordinarily low LSAT score to a white applicant with a high LSAT score.[145] The African-American Ivy League graduate will be preferred over the white graduate of a regional state college or university.[146] Kennedy likely regards these examples as appropriate; the courts likely would find them un-

137. Grutter v. Bollinger, 539 U.S. 306, 323–24 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306–310 (1978).
138. *Bakke*, 438 U.S. at 310.
139. *Grutter*, 539 U.S. at 323–24; *Bakke*, 438 U.S. at 306–10.
140. *Bakke*, 438 U.S. at 307.
141. KENNEDY, *supra* note 2, at 11.
142. *Id*.
143. *Id.* at 5.
144. *Id.* at 3–4.
145. *Id.* at 5–6.
146. *Id.* at 5.

constitutional.[147]

To be sure, there is always a possibility that the Supreme Court will overrule *Bakke* and *Grutter* and declare that societal discrimination and/or obtaining a particular level of minority representation is a compelling interest. There is also a possibility that the strict scrutiny standard will be lessened for classifications designed to help minorities. Justice Ginsburg has suggested that the government "may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."[148] Yet, in the absence of such a broad change, Kennedy's moral vision is doomed.

C. *Fisher* Will Lead to a Partial Fulfillment of Nieli's Colorblind Admissions Vision

Russell K. Nieli wants to end racial preferences immediately; he wants a colorblind admissions system. As a constitutional matter, his vision is incompatible with current doctrine—the Court is not going to abandon the educational benefits of diversity as a compelling governmental interest. As a practical matter, it seems likely that *Fisher* will force many schools to adopt his vision.

From a constitutional perspective, Nieli's argument depends upon the Court reversing *Grutter* and holding that obtaining the educational benefits of diversity is not a compelling governmental interest. Such a result would remove the only justification for most colleges and universities to use race. Although four Justices—Roberts, Scalia, Thomas, and Alito—have expressed, at least implicitly, their disapproval of diversity as a compelling governmental interest,[149] Justice Kennedy has embraced the diversity rationale.[150] Absent a change in the Court, it seems highly unlikely that the Court will overrule *Grutter*'s diversity rationale.

On a practical level, however, the prospects for Nieli's vision are much better. As noted above, colleges and universities that wish to use

147. *See* Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (finding that "the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program").

148. *Gratz*, 539 U.S. at 301 (Ginsburg, J., joined by Souter, J., dissenting).

149. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725–33 (2007); Grutter v. Bollinger, 539 U.S. 306, 346–48 (2003) (Scalia, J., dissenting); *Grutter*, 539 U.S. at 352–54 (Thomas, J., joined by Scalia, J., dissenting).

150. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

race must prove a negative, that there is no racial alternative that will result in the necessary critical mass of diversity. Regardless of how a college or university defines critical mass, institutions will find the task of proving that there is no workable race-neutral alternative to be challenging. In those states where the state constitution bans consideration of race, public institutions have found race-neutral ways to promote minority representation.[151] Similarly, studies both at the University of Colorado and the University of North Carolina found that race-neutral mechanisms could produce similar levels of minority students.[152] Given these experiences and social science studies, it seems likely that many other colleges and universities will be unable to prove the negative—that there is no workable race-neutral alternative. Since the existence of a workable race-neutral alternative precludes the use of race, *Fisher* will force many institutions to abandon racial preferences. For those universities, Nieli's vision of a colorblind admissions system will become reality.

CONCLUSION

In the second decade of the twenty-first century, the future of racial preferences is uncertain. Kennedy and Nieli have given us two fascinating and provocative views of why racial preferences should be continued or abolished, respectively. However, it is the Constitution—or more precisely the Supreme Court's interpretation of the Constitution—that will determine the future of racial preferences. Unless the Court overrules or limits *Fisher,* neither Kennedy's moral argument nor Nieli's social science argument will become the constitutional reality; the practical result is that *Fisher* will force many colleges and universities to adopt Nieli's view.

151. *See* SANDER & TAYLOR, *supra* note 43.

152. *See* Brief of the Univ. of N.C. as Amicus Curiae Supporting Respondents, at 33–34, Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013) (No. 11-345) (explaining that if the University of North Carolina adopted a top ten percent plan, minority representation would actually increase; test scores would decline). *See generally* Gaetner & Hart, *supra* note 132 (concerning the University of Colorado).