Book Reviews

Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It

By Richard Sander and Stuart Taylor

Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide

By Russell K. Nieli

*Both reviewed by Roger Clegg**

Note from the Editor:

This feature reviews two new books on affirmative action in anticipation of the Supreme Court's upcoming decision in *Fisher v. University of Texas*. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the constitutional and public policy issues involved with affirmative action. To this end, we offer links below to other reviews of the same research and different perspectives on the *Fisher* case. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

• Review of Mismatch, The New Republic: http://www.newrepublic.com/book/review/mismatch-affirmative-action-fisher-university-texas

• Review of Mismatch, Law & Politics Book Review: http://www.lpbr.net/2013/02/mismatch-how-affirmative-action-hurts.html

• Review of Mismatch, The New York Journal of Books: http://www.nyjournalofbooks.com/review/mismatch-how-affirmative-action-hurts-students-it%E2%80%99s-intended-help-and-why-universities-won%E2%80%99t-

• David Gans and Adam Winkler, *Text and Principle Support Use of Race to Foster Equality—A Reply to Roger Clegg and other Critics*, Online *Fisher* Symposium, SCOTUSblog, Sept. 17, 2012: http://www.scotusblog.com/2012/09/online-fisher-symposium-text-and-principle-support-use-of-race-to-foster-equality-a-reply-to-roger-clegg-and-other-critics/

• Brief for Brennan Center for Justice at NYU School of Law, et al. as Amici Curiae Supporting Respondents, Fisher v. University of Texas, No. 11-345 (2012): http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/11-345-REVISED-bsac-Brennan-Center-for-Justice.pdf

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Timing is important, and it is hard to imagine when two books have been better timed than the two that are being reviewed here.[1]

Here's why: On October 10, the Supreme Court heard oral arguments in *Fisher v. University of Texas*, in which that school's use of racial and ethnic preferences in undergraduate admissions has been challenged as unconstitutional. In *Grutter v. Bollinger*, the Court had ruled in 2003 that the use of such preferences can sometimes be justified, but the 5-4 ruling was a narrow one, and for a variety of reasons it is not at all clear that the University of Texas's discrimination falls within the bounds set by *Grutter*.

But this term's case also provides the Court with the opportunity to reconsider *Grutter* itself, and in particular its holding that the "educational benefits" of student body "diversity" are so "compelling" that they justify racial and ethnic discrimination. In reaching this conclusion, the Court relied on social science evidence, but now the empirical data are mounting against the persuasiveness of that evidence, casting doubt on the continued veracity of the Court's previous conclusion.

Here's the basic question: Just what is it that we expect African-American and Latino students to say to white and Asian-American students that will provide the latter with such compelling educational benefits it justifies racial discrimination by the government to make it more likely that these conversations take place?

The purported existence of such conversations—which is what the "diversity" justification boils down to—is the only justification for admission preferences that the University of Texas is using or can use. The Court has rejected the remedial justification in this context (and rightly so); it has rejected the role model justification (and rightly so); therefore there is nothing else left (and rightly so).

If one thinks about it carefully, it is hard to imagine what such conversations would be.[2] And, as an empirical matter, it has become clear that the social-science evidence that there are compelling educational benefits is underwhelming—while the evidence of the costs is overwhelming. A number of amicus briefs discuss the lack of benefits and the seriousness of the costs, including one filed by Richard Sander and Stuart Taylor, and one by Abigail and Stephan Thernstrom, Althea Nagai, and Russell Nieli.

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Which brings us back to the two books. There Sander and Taylor have marshaled even more of the evidence included in their brief, as has Nieli.

The formers' book is titled *Mismatch: How Affirmative Action Hurts Students It's Intended To Help, and Why Universities Won't Admit It* and, as the title suggests, it focuses on the empirical evidence that has accumulated showing that African American and Latino students have been set up for failure in a variety of ways by matriculating at schools where their academic qualifications are substantially lower than the rest of the student body's.

To elaborate: If a student is admitted to a school and has academic qualifications lower than most of the other students', then he or she will not do as well as if he had attended a school where his qualifications were on par with the other students'. His grades will be lower, and he is more likely to become discouraged and drop out or even flunk out, and more likely to switch

majors to something easier. Additionally, he will learn less since the classes are being taught at a different level than the one he is at, so that even if he does graduate, he is less likely to pass, say, a bar exam afterwards. That's the "mismatch."

Nieli's book is *Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide*, and likewise marshals a great deal of social-science evidence that the results of racial preferences have been bad—divisive and counterproductive—not good.

Here's an example of just one of the studies discussed in Nieli's book: As noted, it is clear that the educational benefits of diversity are nonexistent for the mismatched African Americans and Latinos, but how about for the white and Asian students (the more plausible candidates anyhow, since there are more of them at the selective schools and presumably there is little need for, say, African Americans to get wider exposure to white perspectives)? Duke University economists Peter Arcidiacono and Jacob Vigdor found in a 2008 study:

> Our empirical results cover a broad range of outcomes, including earnings, educational attainment, and satisfaction with both one's life and one's job. Across these varying specifications, we fail to find any significant evidence that white or Asian students who attend more diverse colleges do better in life. … In general, we find that the type of diversity increase brought about by affirmative action policies—which brings lower-scoring minority students into potential contact with higher-scoring majority-race students—is if anything detrimental to majority-race students.

So, the constitutional and statutory principle of racial nondiscrimination is to be set aside because there are "educational benefits" from interracial conversations that are so "compelling" that they outweigh all of these costs of racial discrimination, including: 1) It is personally unfair, passes over better qualified students, and sets a troubling legal, political, and moral precedent in allowing racial discrimination; 2) it creates resentment; 3) it stigmatizes the so-called beneficiaries in the eyes of their classmates, teachers, and themselves, as well as future employers, clients, and patients; 4) it mismatches African Americans and Latinos with institutions, setting them up for failure; 5) it fosters a victim mindset, removes the incentive for academic excellence, and encourages separatism; 6) it compromises the academic mission of the university and lowers the overall academic quality of the student body; 7) it creates pressure to discriminate in grading and graduation; 8) it breeds hypocrisy within the school and encourages a scofflaw attitude among college officials; 9) it papers over the real social problem of why so many African Americans and Latinos are academically uncompetitive; and 10) it involves states and schools in unsavory activities like deciding which racial and ethnic minorities will be favored and which ones not, and how much blood is needed to establish group membership—an untenable legal regime as America becomes an increasingly multiracial, multiethnic society and as individual Americans are themselves more and more likely to be multiracial and multiethnic.

Yes, the Justices might want to rethink this matter, and here's hoping that when they do they have these two books handy.

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The organization of each book is straightforward. *Mismatch*, after its introduction, looks at the early work done flagging the problem, especially by Rogers Elliott and A.C. Strenta at Dartmouth; Frederick Smyth and John McCardles at the University of Virginia; the book *Increasing Faculty Diversity* by Elinor Barber and Stephen Cole (which Neil Rudenstein of Harvard helped put in motion); and then Richard Sander's own work with regard to law schools. The book notes, by the way, that the term "mismatch" in this context appears to have been coined by the invaluable Thomas Sowell in the 1970s.

Mismatch then devotes several chapters to a section on "The California Experiment: What Happens after a Legal Ban on Racial Preferences?"—adverting to the decision by the University of California Board of Regents and then the people of California (via ballot initiative Proposition 209) to end affirmative discrimination in the mid-1990s. It turns out the sky has not fallen—in fact, things are rosier all around, and educational benefits have accrued to all racial and ethnic groups. A section on "Law and Ideology" then criticizes the respective roles in this area of mendacious academics, the politically correct media, the ineffectual Supreme Court, the bullying American Bar Association, and the ideologically-driven California Bar—each in its own way and as discussed in its own chapter.

A final section provides the authors' proposals for "The Way Forward." In these chapters the authors note that closing the test-score gap will require better parenting and educational reforms at the K-12 level, which is certainly true. But the authors' reforms, disappointingly, do not include an outright end to racial preferences, but instead call for expanding the use of socio-economic preferences and capping the preference given race so that it is no greater than the former, as well as greater transparency and an end to race-based aid awards. There is nothing wrong with any of these ideas, so far as they go, but, as discussed at the end of this review, the time is long overdue for drawing a bright, clear line against racial discrimination in university admissions.

Wounds That Will Not Heal begins with two chapters that provide some historical context—one on the political and legal development of racial preferences, and the other a letter from the author to another academic sent some years ago in which he discusses why racial preferences are not a good antidote to racism. The final chapter, on America's "continuing dilemma" of its racial relations, returns to the broader historical and political context, focusing on the work of Charles Murray and William Julius Wilson, with a sobering look at the continuing problems of the largely black urban underclass—a group that gets little attention from affirmative action, particularly university admission preferences, which are generally limited to middle- and upper-class blacks and Latinos.

But the middle three chapters are of the most interest to those following the *Fisher* case. The third and fifth chapters skillfully summarize "Some Recent Social Science Research" on the racial preferences that are "Selling Merit Down the River," discussing, in particular, the mismatch problem, aggravation of "stereotype vulnerability," and other unintended consequences and perverse disincentives. Chapter 4 addresses the "contact hypothesis," according to which racial prejudice and negative stereotyping will be diminished if there is more contact among the races; the chapter notes that, as nice as it might be to think so, this is not always true—and especially not when the contact is brought about by the use of racial preferences, thereby ensuring that the members of some racial groups will in general have significantly different academic abilities than the members of others.

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The reasons *Mismatch* gives for stopping short of advocating a ban on racial preferences are (a) universities would try to skirt the ban, and (b) it might lead to too steep a drop in black, Native American and, to some extent, Latino admissions to the very top schools. But the first objection is true of any ban on any illegal activity, and does not change the fact that bans do diminish bad behavior even as they cannot make it impossible; moreover, there can be cheating under weaker reforms, too (the evidence is that universities are cheating now, for that matter, given the huge weight they are giving race and ethnicity—as analyses by my organization, among others, have shown[3]); and to the extent that there is cheating it undercuts the second objection. As to the second objection, it is just a version of racial balancing and "discrimination for its own sake" that the Court has rejected; it is not only speculative but ignores changes that might occur when the removal of preferences creates more incentive for academic excellence among previously-preferred groups; and it also ignores the harms suffered by the preferred groups at these schools now. Sander (Harvard, 1978) and Taylor (Princeton, 1970) might find racial imbalances at their respective alma maters to be an unthinkable national catastrophe that justifies those harms at their schools and of course at all the other schools and for all the other students around the country—but others might not.

In any event, neither of those reasons speaks to any "compelling" interest that the Supreme Court has recognized, and the book has demolished the argument for "educational benefits" from racial preferences, which is the only relevant justification offered.

A concluding thought, and one that perhaps the *Mismatch* authors—as well as Professor Nieli—would agree with. It is odd that the permissibility of racial discrimination ought to hinge on social science evidence at all. It is simply too malleable, to put it too charitably. Social scientists testified on both sides of the *Brown v. Board of Education* litigation, to give just one notorious example.

It is certainly true that one's race is an element of one's character and personality. Therefore, the pro-preference argument continues: One should consider race in evaluating that person "holistically" and the yearly creation of a campus's student body may well be a delicate combination of art and science. The claim is that there is a time for considering the totality of circumstances, for subtle shading and balanced nuance.

But there is also a time for bright lines and clear rules. In 2013, discriminating against someone or in that person's favor because of skin color ought to be out of bounds.

Take a look at our most recent census. It shows that America is increasingly a multiracial and multiethnic country.[4] Over one in four Americans now say they are something other than simply "white." Blacks are no longer the largest minority group: Latinos are. Since the last census, the Latino population has grown by 43.0 percent, and the Asian population by 43.3 percent. Blacks and whites, conversely, are the slowest growing populations. The black population has grown by only 12.3 percent, and the white population by only 5.7 percent. And it is interesting that the number of Americans who identify themselves as belonging to "two or more races" has grown by 32.0 percent. That doesn't even count those Americans, like our president, who are multiracial but declined to identify themselves in that way on the census form.

Much was made in the aftermath of the recent election of the nation's changing demographics. But in this regard note that our fastest growing racial group—Asians (of which there are many subgroups)—is frequently discriminated against in public university admissions by "affirmative action," and that our largest ethnic minority group—Latinos (of which there are also many subgroups)—has recently been discriminated against in government contracting by such programs. The racial disparities that exist in our society are now principally the result of cultural factors—in particular, out-of-wedlock birthrates—that will not be solved by racial preferences in university admissions.[5]

The point is that, in such a country, it is simply untenable—too unwieldy and too divisive—for our institutions to classify and sort people on the basis of skin color and national origin, and to treat citizens differently—some better, some worse—depending on which silly little box is checked. Here's hoping that these two books help lead the Supreme Court to that same conclusion.

Endnotes

1 Both books were discussed by their respective authors at Cato Institute events, which can be viewed on the internet at http://www.cato.org/event.php?eventid=9192] and at http://www.cato.org/event.php?eventid=9213. In addition, one of the authors of *Mismatch* discussed his book on a Federalist Society panel at its recent annual convention, and can be viewed at http://www.fed-soc.org/publications/detail/who-benefits-from-affirmative-action-and-race-and-gender-consciousness-event-audiovideo.

2 Roger Clegg, *No Compelling Interest, No Reason To Say So*, Online *Fisher* Symposium, SCOTUSblog, Sept. 6, 2012, http://www.scotusblog.com/2012/09/online-fisher-symposium-no-compelling-interest-no-reason-not-to-say-so/; *see also* Roger Clegg, *Interview with Crumbia University's President*, National Review Online, May 23, 2012, http://www.nationalreview.com/phi-beta-cons/300841/interview-crumbia-university-s-president-roger-clegg.

3 See generally, Center for Equal Opportunity, Affirmative Action News: Education, http://www.ceousa.org/affirmative-action/affirmative-action-news/education.

4 U.S. Dep't of Commerce, 2010 Census Data, http://2010.census.gov/2010census/data/.

5 Roger Clegg, *Latest Statistics on Illegitimate Births*, National Review Online, Oct. 4, 2012, http://www.nationalreview.com/corner/329432/latest-statistics-illegitimate-births-roger-clegg.