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**Governing Badly:
Theory and Practice of Bad Ideas in
College Decisionmaking**

IHELG Monograph

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University of Houston Law Center/Institute for Higher Education Law and Governance (IHELG)

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Governing Badly:

Theory and Practice of Bad Ideas in College Decisionmaking

[Jerome Hall Lecture, 2011]

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There is remarkably little literature, of either a theoretical or qualitative bent, on institutional failures, or the policy failures that lead to bad decisionmaking. There is, of course, much literature on maximizing decisionmaking, where *not* understanding college metaphors results in bad choices. Thus, the *inverse* of James March's garbage-can model, Victor Baldrige's political power model, James Millett's scholarly community model, and the many other such theoretical bases would lead to bad decisionmaking.¹ Ignoring Sabatier and Mazmanian's Implementation Theory, Canon and Johnson's Compliance Theory, Cobb and Elder's Agenda-Building Theory,² and other political science theories will likely lead to ineffective structural inculcation of policy decisions in any meaningful fashion. That poor policymaking is not the subject of more scholarly theoretical work is likely due to scholars' trying to make sense of what actually works and what theories advance our understanding of higher education organizations, rather than examining the criteria associated with failure. It is unsurprising, therefore, that so little theory focuses upon bad theory and ineffective implementation per se, even if the absence of X might have considerable explanatory power.

Indiana Chief Justice Randall Shepard, only partially tongue in cheek, has recently written about “Big, Dumb Trends” affecting state courts, provocative developments, such as inexorable demographic trends, not “Bad Ideas” per se.³ And David H. Freedman, in his popular text, *WRONG, Why Experts Keep Failing Us—And How to Know When Not to Trust Them*,⁴ examines much stupidity, and even makes provocative lists, Letterman-like. (As just one example, done right, whistleblowers are a useful irritant and corrective to the system.)

There is a small applied literature on bad college decisionmaking, one that largely consists of case studies of failure. The best example of this genre is the qualitative study by Jerrold Footlick, a reporter who wrote *Truth and Consequences: How Colleges and Universities Meet Public Crises*,⁵ a book that included nine chapters devoted to higher education institutional failures to communicate with the media about scandals or major disasters. These case studies run from the University of Utah’s embarrassing treatment of “cold fusion” and Ohio State’s firing of truculent football coach Woody Hayes to a court case at the University of Georgia (Jan Kemp’s firing over her whistle-blowing on academic practices in an athletics support program) and the campus judicial system on trial at the University of Pennsylvania (hate speech and the “water buffalo” matter). Of course, not all of the case studies -- all of them interesting topics in their own right -- were about failures of governance, although some clearly were such failures, such as the case of President James Holderman of the University of South Carolina, who actually served jail time for fraud. Footlick notes allegations that Holderman, with considerable information on his inappropriate spending and sexual habits, was not reined in by his trustees, despite all the evidence. A former governor accused the board of being “blinded through political

drunkenness.”⁶ In Footlick’s eyes, all the cases were examples of how badly higher education interacts with the press and other media.

Mining another vein of bad decisionmaking, law researchers Richard Delgado and Jean Stefancic examined a series of legal decisions that they consider to be “serious moral errors,” “embarrassingly inhumane decisions,” and “moral abominations.”⁷ Such cases include now-discredited decisions in racial matters, Indian law, Chinese immigration, Japanese internment, woman’s suffrage, forced sterilization, and gay rights. Most are older cases, now eclipsed by different community norms, different cultural times, different societal assumptions (although the gay rights case is 1986, only four years before they wrote their law review article). Here is how they define their cases:

The concept of “serious moral error” is, of course, impossible to define and perhaps ultimately incoherent. We use the term in three limited senses. A decision will be said to embrace serious moral error if (1) it lacks nuance to an embarrassing degree; (2) it is broadly or universally condemned by subsequent generations, somewhat akin to being overruled; (3) its assumptions, e.g., about women, are roundly refuted by later experiences. Judges will always hand down decisions that will seem offensive to some. We reserve the term “serious moral error” for those shocking cases that virtually everyone later condemns.⁸

Delgado and Stefancic’s intriguing take on bad judicial decisionmaking is instructive, for their criteria are straightforward, and they examine the cases by parsing them and showing alternative results. Several of their picks were 19th Century racial blunders, such as those

affecting blacks (*Dred Scott* and *Plessy v. Ferguson*), Native Americans (*Johnson v. M'Intosh*, where Chief Justice John Marshall characterized Indians as “fierce savages, whose [chief] occupation was war”), and Chinese (immigration restrictions), and a 20th Century case involving Japanese (internment cases, such as *Korematsu v. U.S.*).⁹ Another 19th Century case, *Bradwell v. Illinois*,¹⁰ allowed Illinois to bar law graduate Myra Bradwell from practicing law because she was a woman, and because the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of Civil life.” Their 20th Century choices included the 1927 forced sterilization case (“The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes”)¹¹ and the more recent 1986 case that upheld Georgia’s sodomy statute,¹² already notorious by the time they wrote their 1990 article. By then, retired Justice Lewis Powell had already shown remorse and recanted his decision to uphold the decision.¹³

Let me take stock. Clearly, we can learn from bad decisionmaking, and indeed, do so on a regular basis when we evaluate actions and policies. There is a weak theoretical basis for understanding such errors: it is a soft science at best, one that is largely anecdotal. It may also be true that the actual implementation of policy clears up or rounds the corners off excesses. I regret my stab at this issue may not advance the theory ball very far up the hill, as it is a first attempt, but I do propose some theoretical considerations at the end of this project.

My own candidates for bad college policymaking include cases where I believe decisionmakers disregarded good sense, did not consider the full range of alternatives, and made bad choices that were avoidable. In a footnote, Delgado and Stefancic characterize these mistakes as technical (“failing to reflect carefully on precedent”) or as ones of prudence (e.g., “exercising bad business judgment in a contract matter.”)¹⁴ The many regental or administrative

or agency decisions made on a daily basis in higher education are not written down or published in a search engine for their precedential value, like court decisions, so relatively little “academic common law” accretes over time, correcting errors or overturning bad decisions. As in the case of the zen riddle about trees falling silently in the forest, only the incidents that become public through the news media or through litigation exist, as part of a communications feedback loop.

In the next section, I propose four examples of bad policy making, and speculate on why each is bad. Of course, none is the policy equivalent of *Dred Scott* or *Korematsu v. U.S.*, but I hope readers agree that each is a bad idea by the criteria I pose. In my final section, I ruminate on the criteria, anticipate objections, and suggest areas for future scrutiny.

a. Legacy or Alumni Preference Admissions

Despite substantially changed demographics and rapidly changing conditions, many public colleges continue to employ a criterion that is unearned by the applicant, is unrelated to the applicant’s merits, is highly correlated with wealth, and is almost a perfect proxy for race—legacy credit. Legacy credit, also called “alumni privilege,” is a seemingly innocuous entry in the admissions laundry list employed by many colleges, but I believe that it has no proper place in public college admissions criteria.¹⁵ My reasoning includes four interrelated points: 1) the practice is fundamentally unfair, as it does not incorporate merit or achievement, but rather, advantage; 2) the practice is particularly unfair in those jurisdictions not legally allowed to practice affirmative action in the admissions practice; 3) legacy admissions might arguably be acceptable and appropriate for private independent institutions, but even in this non-public sector, colleges should use them cautiously; 4) legacy practices, where they might arguably be

appropriate, should reward parental attendance, but should not be extended further, either horizontally (siblings) or vertically (grandparents).

First, the practice itself is unfair. If your parents attended college, you already have been conveyed several clear advantages. It means the applicant comes from a well-educated family, and therefore already has inherited many economic, educational, and other psycho-social benefits. Alumni parents - - even in schools without formal legacy practices - - often are also able to convey a benefit by personally contacting admissions officials to inform them of their child's interest in attending alma mater. Thus, the benefit is conveyed even in a non-preferential world. And make no mistake, it is preferential. A February 5, 1999 *Chronicle of Higher Education* story revealed that Texas A&M University admitted 2,000 - 3,000 legacy students in 1996-97, and quoted TAMU officials as indicating that for 200 students, alumni preference was the "deciding factor."¹⁶ That number was more than the number of African Americans who enrolled as freshmen at TAMU that year. Data from TAMU show that in the year 2000, 201 such students were admitted, primarily on plus points.

I am certainly not saying that all other criteria are meritorious or show the true abilities of applicants. After all, family income also clearly correlates with standardized exams; and access to Advanced Placement, honors, calculus, Latin, and other advantageous curricular opportunities also track wealth through high school location. But legacy credit simply piles on, without any achievement by the applicant. Moreover, unlike racial affirmative action, which is predominantly a proxy for redressing disadvantage, alumni or legacy admissions are an attribute of privilege and advantage.

Second, this practice is particularly unfair in a state such as California or Washington, where the use of race is proscribed, or a Fifth Circuit state where a misguided court opinion

restricted colleges' ability to use race as a factor in admissions, notwithstanding *Bakke*.¹⁷ Many opponents to affirmative action have persuaded the courts and public opinion that any use of race is unfair. Where are they now, with this proxy for white advantage? That Texas A & M University would use it is particularly pernicious, given the institution's longstanding practices of excluding women and people of color. TAMU has not provided recent racial data, but my discussions with TAMU admissions officials suggest that virtually all such admits were Anglo, as would be expected. The University of Michigan admissions cases revealed UM's use of this device as well.¹⁸ After *Grutter*, TAMU refused to implement its holdings or to use race in admission, but left their legacy program in place, until they were embarrassed into abandoning the practice.¹⁹ To make matters worse, some schools such as TAMU extended this privilege to Aggie brothers and sisters, not just parents. Even if states choose to use alumni points, they should restrict legacy admissions points to children of graduates. If, as I have argued, parental preference is bad enough, brothers and sisters are even more attenuated and even poorer public policy.

Third, it is true, as some legacy supporters will say, that courts have upheld the practice. I acknowledge that courts have done so, and recently. The dreadful *Hopwood* opinion appeared to allow the practice, as did one of the University of Michigan admissions cases. In the former, the *Hopwood* panel decision reads, "A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni."²⁰ And in a related ruling, Michigan U.S. District Judge Patrick Duggan held that with regard to University of Michigan alumni privileges, "there is no overall discriminatory impact."

However, both courts got it wrong, in my judgment. *Hopwood* was wrong in several respects, and the U.S. Supreme Court ultimately repudiated its holdings with regard to race in *Grutter*, even if it did not affect legacy practices. Judge Duggan did not analyze the race of the UM legacies, and discounted them, even though the legacy points figured in more admissions to UM than did their affirmative action practice in most years. The best (and most cynical) insight into this phenomenon came, predictably, from the late Justice Blackmun, who said in *Bakke*, “[Colleges] have given conceded preference up to a point to those possessed of athletic skill, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.”²² But even if courts were correct, and this criterion were allowable, I raise the question of whether, as a matter of public college policy, it should be. I, of course, answer in the negative. Private schools, without any constitutional restrictions, may do so. Publics should not.

Fourth, I have heard minority admissions officials and even minority legislators, tell me that in time this will work out so that Black parents and Chicano parents (in Texas, in this instance) can eventually pass this privilege on to their children, now coming of age. I believe this eventuality is chimerical and will simply never come true. Juxtapose the numbers of white alumni parents whose children apply to college with those few minorities who are in a position to pass it on. Indeed, in Texas, the graduation data suggest that in selective public colleges, the arc of such admissions will never improve to the point where alumni privilege produces points for a substantial number of minority parents.

In *Hopwood*, the panel judges allowed alumni privilege, which they termed the applicant’s “relationship to school alumni”; they also concluded that a college could consider “whether an applicant’s parents attended college” (a first-generation preference).²³ In the

context of law schools, consider these two criteria: one rewards applicants fortunate enough to have parents who were allowed to attend the law school, and one rewards applicants whose parents did *not* attend college. When implemented at public schools, the former criterion excludes substantial numbers of African Americans, Mexican Americans, and Asians. At the University of Houston, which became a public institution in 1963-64, the first black law student did not graduate until 1970; fewer than one dozen Mexican Americans graduated before 1972. Even as recently as 1971, UTLS enrolled no black students in its first-year class. Children of early 1970s UTLS minority graduates, if born while their parents attended law school, would now be eligible for the alumni preference, but they would be in competition with the thousands of white applicants who could and would invoke the privilege. While it is true that the latter criterion (first-generation preferences) would more likely favor minority children whose parents were denied admission or were unable to attend college, many uneducated white parents would likewise transmit this “advantage.” A Texas Coordinating Board study group reviewing alternative admissions criteria determined that there were no good proxies for race.²⁴

Deracinating the racial criterion simply cannot work.

Of course, there is a trickle of minority alumni at states’ elite public colleges, but it is just that, a trickle, not the river we should have expected from most states’ public K-12 school figures. The 4-out-of-100 points TAMU awards may not seem like a big matter, but if it is not, shouldn’t the presumption be that they and other public colleges do not need it? When TAMU admits nearly 11,000 students each year, and between 2,000 and 3,000 have the extra 4 points out of the 100 total accorded alumni legacies, can it be a small matter? I urge faculty at institutions with these practices to rise up and insist they be stopped.

These cases, and many others I could have analyzed, show that the distribution of scarce benefits remains a contentious issue, one that divides American society along tectonic plates of race, class, ethnicity, gender, and other dimensions. Like immigration cases that define who we are as a polity or as a people, so do admissions cases define us as a nation.²⁵ Inasmuch as higher education is the great engine of upward mobility in our society, how we constitute our student bodies is an important consideration. Unfortunately, due to historical racism and unequal educational opportunity, race remains a fugue in postsecondary education to this day. Therefore, understanding the admissions process and the practices that form its common law is an important key to understanding our country's complex racial history.

b. Linking State College Appropriations to Test Scores

In an understandable attempt to improve the quality of public schools over the last twenty years, legislatures have enacted plans to tie tax revenues to school district performance, such as conditioning state aid upon student test scores, teacher certification, or other markers. For example, Texas enacted a “career ladder” program in the 1980’s, which promised pay raises for certain teacher behaviors; another statute created “master teacher” certification, which was never funded and was very unpopular with teachers, who both distrusted the program’s requirements and who did not believe the state would back the program with any money. There have even been privately-funded efforts, such as those instituted by the Milken Family Foundation, which award grants to teachers whose students score well on state-required exams. Of course, the charter school movement has also tied resources in some instances to student performance in the special programs.²⁶

States have also linked increased funding to the performance of their colleges. For instance, performance funding criteria reward additional resources to colleges in Colorado that graduate minority students, while public institutions in other states receive additional formula aid for students who take their degrees within five years.²⁷ At the margins, such formulae may stimulate colleges to improve their performance, although they can backfire if a college takes fewer at-risk students and reduces access overall by skimming off only less-needy prospects. Or institutions can “game” such statutes and regulations by exploiting loopholes, creating new casks for old behavior, or seeking exemptions. In a 1986 study, for instance, I found that colleges were largely ignoring changes in immigrant student policy, following a U.S. Supreme Court decision that rendered the practices illegal or obsolete.²⁸ Like my nephews who rake my yard badly so I’ll send them away, colleges can drag their feet rather than implement legal or policy mandates. Institutional foot-dragging likely sabotages many more top-down requirements than is generally acknowledged. Department chairs can outwait deans, who can outlast provosts, etc. And not many cases, statutes, or regulations come with effective enforcement mechanisms or implementation tools.

But sometimes mandates, especially those that control funds or have funding mechanisms, require institutional attention. In Ohio, there was an interesting, and dreadful funding proposal that originated in the state’s coordinating board, the Ohio Board of Regents, which assists the legislature in coordinating public college funding formulae.²⁹ The OBR proposed in 1996 a plan that was intended to tie a portion of annual state funding to the state’s five public law schools to the two quantifiable measures used by the schools to admit students: their grade point average (GPA) and the Law School Admission Test (LSAT) score.³⁰

The OBR plan, which was to take effect in 2000, would have provided state subsidies in a two-step fashion. In the first tier, schools would get funding for all Ohio students who fell above the setpoint of a median GPA (3.25) and median LSAT (65th percentile); for the second phase, the schools would receive additional funds for each Ohio resident student with a 3.5 GPA and 80th percentile LSAT (“second capped tier”). In addition, the schools would get a subsidy for ten percent of any state students, irrespective of their scores. This complex formula, with additional and reduced non-resident provisions, was predicted to equate to 124 fewer first tier subsidies (at \$4,625 per fulltime resident student) at Cleveland State, as one example. The Ohio State and University of Cincinnati law schools would likely have gained under the plan, while Akron, Toledo, and Cleveland State likely would have lost resources relative to the then-existing plans.

Deans of the three northern law schools, faced with the prospect of substantially-reduced funding, loudly protested, as did officials at the Law School Admissions Council (which devises and administers the LSAT). The LSAC executive director, for example, opined that the funding plan was “a terrible misuse” of the LSAT, which is intended only as an admissions tool, predicting likely success in the first year of law school. “My objection is really as strong as I can make it,” he said.³¹

Misuse of the LSAT in the admissions process is itself a major problem, as the test is a mild predictor of law school first year grades, even when combined with the GPA for undergraduates. It has been my own experience in serving on admissions committees for many years, and after reading thousands of law schools and graduate applications, that there is an institutional over-reliance upon standardized test scores. Particularly pernicious is the common law school practice of combining LSAT scores and GPA’s into a weighted index score, and then using the test score again as a criterion in making the decision, in effect counting a score twice.

Such practices simply give test scores a weight they cannot bear, especially in psychometric terms. I have written about this (too) extensively, so I spare readers here the details, but one important point is worth noting: in educational circles, we accord too much deference to standardized tests, imbuing them with near-cult reverence and significance.³²

In a subsequent ruling, the Fifth Circuit upheld the application of the *Grutter* principles, but was dismissive of the Texas Top Ten Percent Plan, which had no racial criteria, but also minimized the usual test scores for rank in high school class:

Mindful of the time frame of this case, we cannot say that under the circumstances before us UT breached its obligation to undertake a “serious, good faith consideration” before resorting to race-conscious measures; yet we speak with caution. In this dynamic environment, our conclusions should not be taken to mean that UT is immune from its obligation to recalibrate its dual systems of admissions as needed, and we cannot bless the university’s race-conscious admissions program in perpetuity. Rather, much like judicial approval of a state’s redistricting of voter districts, it is good only until the next census count—it is more a process than a fixed structure that we review. The University’s formal and informal review processes will confront the stark fact that the Top Ten Percent Law, although soon to be restricted to 75% of the incoming class, increasingly places at risk the use of race in admissions. In 1998, those admitted under the Top Ten Percent Law accounted for 41% of the Texas residents in the freshman class, while in 2008, top ten percent students comprised 81% of enrolled Texan freshmen. This trajectory evidences a risk of eroding the necessity of using race to achieve critical mass with accents that may, if persisted in, increasingly present as an effort to meet quantitative goals drawn from the demographics of race and a defiance of the now-demanded focus upon individuals when considering race. A university may decide to pursue the goal of a diverse student body, and it may do

so to the extent it ties that goal to the educational benefits that flow from diversity.³³

However, using test scores and grade point averages to determine state appropriations is just a poor idea. Not only would such legislative funds drive the admissions process, rather than the schools, but it would mean that the law schools would be seduced into weighting these two criteria even more than they currently do. Just as the inclusion of such numbers in ranking schemes (such as *U.S. News & World Reports*) leads the tail to wag the dog, so would Ohio public law schools choose their student bodies on numbers, instead of the many criteria available to them, such as essays, life experiences, work records, letters of reference, and the dozens of other markers included in the typical application package.³⁴

If legislators want to condition funds, I believe better public policy ends are advanced by employing exit criteria, such as graduation rates, rather than entrance indices, although such measures occasion other problems. If higher education's value is transformative, there need to be many avenues to admission, and fewer limitations upon the raw materials – students. If a legislature wishes to cap the total number of hours a student can take without graduating, or limit how long they can matriculate, or even use capitation funds to expand or restrict professional school spaces (such as precious spots in medical, dental, veterinary, or pharmacy schools), then thoughtful plans and financial formulae to do so are welcome. And using reasonable restrictions on non-residents, while usually a bad idea, is at least grounded in reasonable public policies to favor state residents or domiciliaries. But the colleges need exclusive jurisdiction and discretion over the admissions process, especially in post-baccalaureate programs such as professional schools and graduate schools.

Are there better ways for states to improve their professional school funding systems?

Yes, including several that are difficult to undertake. First, formulae should be reviewed for their efficiency and efficacy; this includes fully funding the fiscal programs in place. I have examined many states that have reasonable and detailed formulae for funding professional schools, even including such complex schemes as professional libraries, which are not fully funded, so that each year is catch-up. In addition, compacts, consortia, and “rental” space arrangements between certain high-prestige professional programs in one state and other states that arrange contracts or consortia should be regularly reviewed. For instance, some states lease spaces in high-demand/low supply programs, such as optometry and pharmacy schools in other states. The University of Houston, for example, holds open and available a number of places in its pharmacy and optometry schools for residents of other states that do not have such programs. Baylor College of Medicine in Houston, a private institution, is paid a subsidy for each Texas resident medical student it enrolls; in New York, Cornell’s veterinary school and School for Industrial and Labor Relations (ILR) have similar arrangements as “statutory colleges,” although the host institution is a private, Ivy League university. An interesting court case arose at Alfred University, when several students were dismissed for disciplinary infractions, yet students in the state-sponsored Ceramics engineering program were given more due process than were other students in the private college, due to New York State’s contracting of their places.³⁵

If it were done carefully and with input from the institutions, plans to expand or contract enrollments could be undertaken in reasonable fashion, especially if there were long term planning, not just year-to-year fluctuations. And while it is difficult to do well, programs could be closed or eliminated. There are cases that show how it can be done successfully (such as *Moore v. Board of Regents*, where the SUNY Regents closed doctoral programs in English and

History at SUNY-Albany),³⁶ and likewise, ones where the institution acted badly or ineptly, such as *Behrend v. State of Ohio*,³⁷ where Ohio University closed its School of Architecture, but did so in such a fitful and poor fashion that the OU students affected won a judgment that even reimbursed them for losses due to their wasted time. Of course, it is easier to move a graveyard than it is to close a program, but in many respects it is institutionally preferable than giving thin gruel to existing programs, causing them to grow gaunt.

As a postscript on the law school appropriations, the OBR conducted additional research, including testimony from the Ohio law deans, and withdrew the proposal before it was to be implemented in 2000. But a stake needs to be driven through the heart of extramural or legislative uses for standardized exams. In early 2007, the Commissioner of the Texas Coordinating Board, the statewide higher education agency, suggested in all seriousness that the LSAT or the GRE be used as required exit exams for graduating seniors, in fields where there are no existing ETS instruments.³⁸ This rush to enact measurable learning outcomes will inevitably lead to poor choices of measurement tools, and this increased reliance upon standardized testing regimes will hardly provide the assurances that its proponents seem to desire. It will likely lead to increased stratification, poor institutional behaviors, and other detrimental consequences such as has happened in the K-12 sector, where high-stakes testing has shown itself to be a chimerical search for quality and accountability.³⁹

C. Program Discontinuance

I have never heard a reasoned discussion of faculty tenure take place where the words “faculty deadwood” were not spoken. This term, like other code-words, disguises more than it reveals. After thirty years in the academy, I am not unmindful to the fact that some few colleagues do not carry their weight, or have lost their effectiveness in their duties, but I would

observe that these are a small and almost irreducible number, surely in contrast to those many who dedicate their lives to the professoriate and who spend (too) many hours in their classrooms, offices, labs, and libraries. Should faculty not perform their duties, there are several means of removing them, ranging from informal “pushouts” all the way to more formal tenure revocation firings or post-tenure provisions. In my own experience as a faculty member, program chair, and associate dean, I have participated in the whole range of such activities, trying to make even the most difficult cases as humane as was possible.⁴⁰

The American Association of University Professors (“AAUP”) has promulgated extensive guiding principles and detailed guidelines for dismissing faculty, from denying tenure to removing tenured faculty. To remove faculty with tenure, the AAUP allows removal for such extreme cause as certain medical reasons, faculty malfeasance, or moral turpitude, as well as removal not for cause but for such intervening acts as bona fide institutional financial exigencies and authentic program discontinuances. But in my view, program discontinuance (or in AAUP’s infelicitous but thorough terminology, “Discontinuance of Program or Department Not Mandated by Financial Exigency”)⁴¹ is a prime example of bad governance. In bona fide financial exigency proceedings, all the books are opened and a massive institutional bankruptcy procedure is undertaken with faculty involvement and shared governance. Everyone understands that there is a widespread problem akin to that of a bankruptcy and realizes that sacrifices will have to be made, even if it means eliminating programs and faculty. Poorly done, you have *American Association of University Professors v. Bloomfield College*,⁴² where the judge found there to be no true exigency, but only a crude plan to eliminate faculty to be a transparent and cynical ploy that did not even save money. Done right in a collaborative and professional way, however, as in *Krotkoff v. Goucher College*, courts will likely ratify such a practice. In *Krotkoff*, the Goucher College faculty and administrators made the difficult decision to terminate a tenured German literature faculty member (one of several) in favor of another tenured faculty member who could teach both German and French language courses, the service courses needed most. In this instance and in other non-*Bloomfield* types of cases, judges have upheld such decisions, especially when the decisions are made with faculty participation. In *Krotkoff*, the judge noted, “the necessity for revising Goucher’s curriculum was undisputed. A faculty committee accepted

elimination of the classics department and reduction of the German section of the modern language department as reasonable responses to this need.”⁴³

And the entire college need not be in financial trouble to trigger cutbacks, as the AAUP program discontinuance policies indicate. In *Scheuer v. Creighton University*, the Creighton School of Pharmacy experienced financial distress due to reductions in federal health funds, while the rest of the University remained relatively healthy.⁴⁴ The court thus held that tenured Pharmacy faculty member Scheuer could be dismissed under the theory that financial exigency need not be necessary in the entire institution for its principles to apply—as long as there was due process available and institutional bona fides. While I could quibble with elements of *Scheuer*, where the trial record raised serious questions about the cycle and ebb and flow of funds, I could more easily live with a result that in a comprehensive institution the entire enterprise need not be in a death rattle before exigency or program discontinuance procedures are employed, provided the faculty are involved in the decision-making, that it be *bona fide*, and the books have to be open to genuine and searching examination. I understand and appreciate that Professor Matthew Finkin⁴⁵ and the AAUP would require more, and that the judges were circular in their reasoning:

The Nebraska Supreme Court's reasoning is contrary to the purpose as well as the history of academic tenure. Inasmuch as every institution has centers of ‘loss’ as well as centers of ‘profit,’ the Nebraska court would give essentially unfettered discretion to university administrators to select tenured faculty from among loss centers and terminate them on grounds of a ‘financial exigency,’ while nevertheless continuing to operate the deficit-incurring program in a financially sound institution. Given the uncertainties of external financial support, enrollment, and programmatic popularity, relatively few faculty could rest secure in the knowledge that their currently self-sustaining schools or programs will always continue to be self-sustaining. Thus, the potential chilling effect on the exercise of academic freedom occasioned by the court's approach is significant.⁴⁶

I also confess that *Browzin v. Catholic University of America*⁴⁷ flabbergasts me each time I teach it in my Higher Education Law class, for *Browzin*, along with *Spuler v. Pickar*,⁴⁸ the University of Houston case I will consider next, are the nadir of program discontinuance and financial reasons for dismissing or not tenuring faculty. In my own value system, I consider these

two cases to be the *Dred Scotts* of faculty dismissals. At Catholic University of America's ("CUA") large School of Engineering and Architecture, Professor Browzin began to teach in the fields of Structures, Soil Mechanics, and Hydrology in 1962. I have been advised by engineering professor friends that these are traditional bread-and-butter courses in many civil or mechanical engineering departments. After the traditional probationary period, by the 1969-70 academic year, Browzin had received tenure, but was notified that his appointment would not be renewed after 1970 due to a financial retrenchment and reorganization in the School of Engineering and Architecture. He sued for reinstatement.

At the time of this case, the AAUP principles did not contain a separate provision for program discontinuance, such as became necessary after *Browzin*. Unfortunately for Professor Browzin, the AAUP program discontinuance provisions in force in 1970 were incorporated into the financial exigency regulation, which proved to have enough wiggle room in it that Judge Skelly Wright held for CUA. The Regulation then in force read:

Where termination of appointment is based upon financial exigency, or bona fide discontinuance of a program or department of instruction, Regulation 5 [dealing with dismissals for cause] will not apply * * *. In every case of financial exigency or discontinuance of a program or department of instruction, the faculty member concerned will be given notice as soon as possible, and never less than 12 months' notice, or in lieu thereof he will be given severance salary for 12 months. Before terminating an appointment because of the abandonment of a program or department of instruction, the institution will make every effort to place affected faculty members in other suitable positions. If an appointment is terminated before the end of the period of appointment, because of financial exigency, or because of the discontinuance of a program of instruction, the released faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it.⁴⁹

Given this conflation of "financial exigency" and "abandonment of a program of instruction" (program discontinuance), it was held that CUA's only obligation was to consider

Browzin, should a “suitable position” become available within two years. In part, this situation arose because Browzin’s lawyer had stipulated at an earlier point in trial that he was being terminated due to “program discontinuance,” even though there was no actual “program” from which he was being “discontinued.” There was no degree, no major, no minor in hydrology: his course load was a regular load of courses, none of which were revised or taken off the books.

Here is where the judge got snookered. Judge Wright took CUA at its word that it had undertaken a “detailed review” and that no suitable position was available. Yet within eighteen months after Browzin was forced to leave, the Department of Civil Engineering hired another faculty member who went on to teach two courses in Water Resources (Hydrology and Hydraulics) and a new course in Planning. Planning! Remember, Browzin had taught Structures, Soil Mechanics, and Hydrology. When he offered to take on another course in Structure Design, Browzin was told that other faculty members were teaching it, including one who had joined the engineering faculty in 1960, two years before Browzin had done so. Judge Wright notes that the emphasis on Planning would likely attract new students and additional external funds for research. He concluded, “clearly, [this Planning emphasis] was a program significantly different from what Browzin had been teaching” He also noted some vague admonitions from an accrediting report that referred to the need for Planning.⁵⁰ *Sic transit gloria* Browzin. Let’s review what happened in this sleight of hand: The new guy would teach Browzin’s courses, plus a course on Planning. A single course had become a “program,” one of a professor’s four-course teaching load. Browzin had been hired in 1962, taught basic courses as he was required, received tenure due to his overall teaching and scholarship record, and was dismissed seven years later as an anachronism.

The could-have/should-have list here is a book chapter by itself. How could a person teaching basic courses for which he had been recently hired become obsolete? How is the need for one new course the undertaking of an entire new program? How could the new person who was to teach three of Browzin’s four courses not be a replacement, triggering the “suitable position” requirement? How could Browzin become “obsolete” within seven years of being hired? Why didn’t CUA just make the next hire one that included Planning as a field, if it is one, or were one at that time? If it had been a discrete field of study, why not send Browzin to the University of Maryland, Howard, George Mason, George Washington, or Georgetown to sit in

and audit a Planning course so that he could teach it himself? How can one course or even a new emphasis trigger such a reaction? Where is the searching and detailed review that coughs up one quarter of a recently tenured professor's load? How could a trial judge and a distinguished appellate judge get this so wrong? How could the CUA faculty be so asleep at the switch?

Surely the institution begins with the presumption that it is acting in good faith and the opportunity to show that it was searching and thorough in its program review. Doing so virtually assures a college of meeting AAUP standards and passing judicial scrutiny, should there be a suit. But buried in this sad decision is the evidence that a person's career at CUA ended because of a one-course revision. After the decision, the AAUP, which entered an *amicus* brief in this case on behalf of Professor Browzin, rewrote its policy to give additional procedural safeguards to the program discontinuance process and to separate it from its parent, i.e., financial exigency. That AAUP brief, written by then-young AAUP counsel Matthew Finkin, who went on to a distinguished career as a labor lawyer and law professor, does not reveal that he ended up serving as counsel for Professor Browzin, by leave of the court, as his trial counsel no longer represented him at the appeal stages. By the time the case had ripened, there had been stipulations that a genuine exigency had occurred, and the trial court accepted these representations by the University, and the Circuit Court also accepted them. In fact, the AAUP brief made clear that these representations were not only unclear, but that even if they had been clear and openly-determined, Catholic University made no good faith effort to relocate Browzin elsewhere within the University, and improperly placed the burden of proof upon him to prove they had not done so.⁵¹ (AAUP brief, 1974, 23-29) Boxed in by this strategy, he was released by Catholic University and never taught again. Dr. Browzin joined the Site Safety Branch, U.S. Nuclear Regulatory Commission, Washington, D.C., as a researcher, and he served as a widely-published scientist with the US NRC in the Office of Nuclear Regulatory Research, Division of Engineering Technology. He died in September, 1989, in Montgomery, Maryland.⁵²

Another example of an institution behaving poorly in a similar fashion is my own University of Houston (“UH”), as exemplified by *Spuler v. Pickkar*, a 1992 case where UH denied tenure to German department faculty member, Richard Spuler, because of “financial circumstances” in the department. The UH German department, like many, was suffering stagnant enrollments, in contrast to the Spanish department, which was growing and replacing

vacancies in predominantly-Latino Houston, and this was given as the reason for not granting tenure to Spuler. But UH hired Spuler only five years earlier, and in any event, cutbacks in the department's funds were entirely administrative. That is, administrators in the College determined which program areas would receive more funds and which would receive fewer funds. My own discussions with UH senior and college officials at the time revealed that Professor Spuler earned approximately \$29,000 for nine months, in a College with a budget greater than \$60 million and at a university with a budget greater than \$200 million in 1992. In addition, a more senior, tenured faculty member left at the same time, but the department chair determined that the need was for a German literature professor:

[T]wo months after Spuler departed, the University advertised nationally for a German professor. The University explained that Spuler was a linguistics expert and taught elementary courses, while the professor who resigned was a professor of German literature. Although the basic languages acquisition courses could be taught by any German Department faculty member, specialized knowledge--which Spuler lacked--was needed to teach the literature classes.⁵³

The Fifth Circuit accepted this "tradeoff." Following a jury trial in federal court, the jury had found in favor of Spuler, concluding that he had been deprived of substantive due process and that the defendants in their individual capacities had breached his contractual rights:

Plaintiff responds that he was hired in a tenure tract [sic] position; his qualifications met and even exceeded the requirements for eligibility for tenure; and he was denied tenure eligibility despite his qualifications based on financial limitations of the institution at the time. Plaintiff urges that he had a reasonable expectation based on the representations in the faculty handbook that he would be genuinely considered for tenure. Instead, despite the positive recommendations of the faculty tenure committee, plaintiff was barred from tenure because of the negative recommendations of his department chairperson and the dean of the college due to financial considerations. Consequently, the tenure review was a sham, in violation of his reasonable expectation of tenured employment.⁵⁴

The magistrate judge found him to have been “eminently qualified to be a tenured faculty member at the University of Houston by virtue of his academic achievements, teaching ability, and service to the university community” but held that employment at the University of Houston was at-will and based solely on probationary year-to-year contract appointments.

Crucially, she held that the UH Handbook language “does not guarantee the promotion to tenured status following a probationary period; it merely describes the minimum conditions for consideration for that position. Moreover, there is no evidence that the University violated the time limitations for the probationary period and the mandatory review for tenure time set forth in the faculty handbook. (In other words, e.g., [sic] the probationary time limitations include ‘year six of the seven-year probationary period.’) Similarly, plaintiff received timely notice of nonrenewal of his contract as required by the faculty handbook. While this Court concludes that plaintiff met the requirements for promotion and tenure listed in the faculty handbook, as noted, tenure is not automatic. The employee remains an at[-]will employee and the University is entitled to exercise complete discretion to deny tenure despite plaintiff’s compliance with the requirements of the faculty handbook.”⁵⁵

Magistrate Brown directed a verdict overturning the jury verdict: “even assuming that these standards and criteria for promotion and tenure constituted a basis for a reasonable expectation for tenure for a qualifying employee, the denial of tenure based on financial limitations and declining enrollment in the Department of German was a reasonable decision. Plaintiff has failed to demonstrate that tenure was denied on any other basis apart from those reasons. The budget restrictions at the time demonstrated a genuine need to limit the budget of the German Department for both the short and long-term. The decision to terminate the only Assistant Professor in the department was a reasonable decision. The Chairperson and Dean made this hard decision with as much courtesy and consideration as possible under the circumstances.”⁵⁶ The Fifth Circuit agreed with the JNOV and denied Spuler’s appeal; after a request for an *en banc* hearing was denied in May, 1992, he ran out of steam and money and accepted his lawyer’s advice not to appeal further.⁵⁷ For several years, until 1999, he taught German and directed German cultural programs at the Houston Goethe Center, a German language and cultural center, which closed several years later; in 2011, he is a Senior Lecturer in German at Rice University.

Spuler embodies shades of Browzin, who “lacked” the expertise to teach Planning. Spuler had been hired five years earlier and taught the subject matter and course load UH needed him to teach, yet when UH made its financial decision, Spuler was not redeployed to teach literature simply because he had not taught it at UH; he had taught several literature courses earlier. UH did not even exhibit CUA's effort to gin up a program discontinuance. At Goucher College, Krotkoff wanted to be redeployed to a vacancy in economics, an area where she was certainly not qualified to teach, but the evidence showed that Spuler was clearly qualified and experienced to teach literature, and had taught the language classes that his department had assigned him to teach.

But UH committed an even graver sin by inviting Spuler to apply for tenure in his fifth year and thus enabling his portfolio to advance to the University-wide Promotion and Tenure Committee. While it is true that UH standards do not require untenured faculty to be given the reasons for the denial of tenure, there has to be a point at which the college is estopped from asserting financial reasons, especially when no institutional determinations of financial exigency or program discontinuance are in evidence. As bad as was CUA's revocation of Browzin's tenured status after a Potemkin program review, UH's dismissal of Spuler is in some respects morally worse, because UH led Spuler to believe that his tenure case would turn on his merits. One died by fire, another by ice, yet both suffered not for cause, but for enrollment fluctuations and poor administrative planning. In large and comprehensive multiversities, no single faculty member should be reconstituted as a program or a casualty of short term enrollment fluctuations. If there were such fluctuations, institutions should not hire faculty, only to dismiss them within the decade. Universities are built upon a series of cross-subsidizations and budgets should not be balanced upon the backs of such faculty. And, at the least, decisions to terminate persons should be made before they enter the tenure chute, rather than tantalizing them by placing the fruit so close to their fingers, only to remove it.

D. Playing Immigration Cop

Imagine that a United States embassy is overrun and its employees are taken hostage. Further, all this takes place on television and our government is unsuccessful in rescuing embassy employees. Things are bad, and at a diplomatic and military standoff. Feelings run

high against this country. As it turns out, many students from this country are international students at U.S. colleges and universities. At a public university in my home state, New Mexico, state college trustees passed the following resolution:

Any student whose home government holds or permits the holding of U.S. citizens hostage will be denied subsequent enrollment to New Mexico State University until the hostages are released unharmed. The effective date of this motion is July 15, 1980.⁵⁸

Of course, I couldn't make this kind of stuff up, for I cannot, even on a bad day, imagine how a group of smart people, savvy enough to be appointed to an important board, can act so deliciously badly. To be sure, when national security is threatened at home or abroad, as in this case thirty-plus years ago, even reasonable people have vengeful fantasies or think the worst of all people who originated from that country. If truth is war's first casualty, surely reasoned judgment deriving from national origin instincts is its second. Moreover, in the singular case of Iran, it was widely remembered that Iranian students in Iran and in the United States were openly opposed to the Shah's regime, and many paid with their lives for this opposition. When the Shah's regime was overthrown, and the embassy eventually occupied, it was students who led the action. Thus, anger at Iranian students was not surprising, even if misplaced.

The United States government responded by requiring all non-immigrant Iranian students (predominantly those on F-1, or student visas) to report to the Immigration and Naturalization Service (INS) or be deported. In *Narenji v. Civiletti*, this administrative roundup was upheld as lawful.⁵⁹ As it turned out, very few of the students were out of status. But immigration is an exclusive concern of the federal government, and states, including state colleges, may not enact their own immigration or diplomatic policies, due to the doctrine of

preemption. Thus, the court saw through the NMSU regent policy, which was guised in fiscal concerns (the Iranian students at the college would renege on their tuition and fee bills) and in safety concerns (they were worried that physical harm might befall these students on campus). The judge properly rejected these transparent claims, and invalidated the trustee policy.

Following the heinous September 11, 2001 attacks in the United States, there has been a rush to single out international students, as several of the terrorists had been students in U.S. flight schools or in the country on student visas.⁶⁰ For example, after several years of allowing undocumented college students to establish in-state residency in the City University of New York (CUNY), this policy was overturned following the attacks.⁶¹ Just the Summer before, Texas had enacted legislation that allowed the undocumented to attend college as residents, while California and other states did so as well, after 9/11.⁶² Although many colleges turned over international student files to the FBI and other federal agencies, a number of colleges refused to do so without warrants or subpoenas. The PATRIOT Act, the omnibus legislation governing immigration and terrorism, included a number of provisions that turned up the heat on colleges enrolling international students and on the students themselves. Many students withdrew and returned to their home countries until things were restored to some semblance of order.⁶³

Just as in earlier times, when the British Empire would not let the laws of Tobago rule their interests at sea, so the U.S. government could not allow New Mexico State University to have its own foreign policy. In a certain sense, given the strong feeling occasioned by Iran in 1980 and the Taliban and Al Qaeda following September 11, 2001, what is remarkable is not how many colleges behaved so badly, but how few did so.

Conclusion

Paraphrasing Delgado and Stefancic's principles – “serious moral error” includes cases that “lack[] nuance to an embarrassing degree,” are “broadly or universally condemned by subsequent generations”, and their “assumptions...are roundly refuted by later experiences.” They consider the matters they discussed as “monstrous, anomalous - - a moral abomination.”⁶⁴ The examples I discussed are not necessarily of this high order, and did not happen long ago, or long enough ago to have gained the kind of disapproval or infamy their cases had gained. Indeed, colleges won the financial exigency and program discontinuance cases. I chose these cases because in my view, the colleges or decisionmakers (including faculty who played a role in these matters) all acted badly, even if legally. By the criteria I am developing here, it does not have to be illegal to be bad decisionmaking or poor moral choices.

I would argue that each of the cases I examine is a confluence of bad judgments, poor research, and failure to discern the larger harm to the higher education polity. The Ohio Board of Regents funding formula was so badly developed that it was never actually put into place; relatively few public schools employ alumni/legacy admissions because they are so unfair and because admissions criteria are under more widespread scrutiny; most colleges weather cashflow or enrollment fluctuations better than did Catholic University or the University of Houston in the Browzin or Spuler instances; and most colleges do not want to play like they are the immigration police.

I believe that there are many such cases out there in the ether, and I urge scholars and whistleblowers to track, publicize, and study them. While there are promising theoretical approaches to understanding organizational failure, there is much more work to be done in this

regard. In this article, I tracked several possible models that could be used to implement policies, and suggested that variations on them might be useful to understand bad policymaking—the failure to implement, to communicate, etc, and I employed a quasi-legal standard of abject moral failure, as was suggested by legal scholars Delgado and Stefancic to explain legal decisions that had become widely known as embarrassing over time. This comparison, while instructive, is not fully theoretical and in some ways not a good parallel, given the basic differences between judicial decisionmaking and higher education policymaking.

Kathryn Schultz, in her book *Being Wrong: Adventures in the Margin of Error*, makes the best case for using errors as correctives to the system, although in her view, it is essential that actions be regularly examined and corrected, in a cybernetic fashion. She notes:

In our collective imagination, error is associated not just with shame and stupidity but also with ignorance, ignorance, psychopathology, and moral degeneracy. This set of associations was nicely summarized by the Italian cognitive scientist Massimo Piattelli-Palmarini, who noted that we err because of (among other things) “inattention, distraction, lack of interest, poor preparation, genuine stupidity, timidity, braggadoccio, emotional imbalance, . . . ideological, racial, social, or chauvinistic prejudices, as well as aggressive or prevaricatory instincts. In this rather despairing view—and it is the common one—our errors are evidence of our gravest social, intellectual, and moral failings.

Of all the things we are wrong about, this idea of error might top the list. It is our meta-mistake: we are wrong about what it means to be wrong. Far from being a sign of mental inferiority, the capacity to err is crucial to human cognition. Far from being a moral flaw, it is inextricable from some of our most humane and honorable qualities: empathy, imagination, conviction, and courage. And far from being a mark of indifference or intolerance, wrongness is a vital part of how we learn and amend our views about the world.

Given this centrality to our intellectual and emotional development, error shouldn't be an embarrassment, and cannot be an aberration. As Benjamin Franklin observed in the quote that heads this book, wrongness is a window into normal human nature—into our imaginative minds, our boundless faculties, our extravagant souls. This book is staked on the soundness of that observation: that however disorienting, difficult, or humbling our mistakes might be, it is ultimately wrongness, not rightness, that can teach us who we are.⁶⁵

In her vexing book *Stupidity*, Avital Ronell sets out a general theory of why people act stupidly. Because I am not fully fluent or conversant in the foreign language of postmodern, I have struggled more than should be necessary to understand this provocative and densely packed book. In trying to explain the work of the early 20th century German philosopher Robert Musil, Ronell explains:

What Musil has marked with great clarity and necessity is the general infiltration of stupidity, the need for a double valuation (there is, without fail, good and bad, slow-and fast-tracked stupidity), the way it mimes values such as talent, progress, hope — indeed, the way stupidity has pervaded our highest values — and his example for this actuality is a Nietzschean one. He shows how the incontestable virtue of loyalty easily succumbs to the stupidity of the we, gathering the They into an obedience school on collective parade. Finally the we cannot be relegated simply to the other shore but falls on me in my own singularity, at least occasionally, with determined regularity. I am hit by the They of which I am at times a part. I am not spared my own stupidity, that of the They, when I join the we. Stupidity in the end is linked to the finity of knowing. In order to name the limit of knowing, Musil resorts to the mark of the we:

“Occasionally we are all stupid”. Because our “knowledge and ability are incomplete, we are forced in every field to judge prematurely”. While this observation offers the mood and cadence of a “happy ending” for Musil’s troubling topic – we are all in this together, we are forced by the very nature of finitude: stupidity is what we share, the share of existence in which we take part – it is built on the abyss of judgment. Stupidity, which, Musil writes, falls due to each of us *occasionally*, rests on the wobbly scale of a premature judgment. But is it not possible that judgment is constitutively premature, always ahead of the justice it might have rendered?⁶⁶

Occasionally, we are all stupid. I certainly have felt this way, more often than I would like to admit. Once, when asked by a *Chronicle of Higher Education* writer what I thought of legacies, I said something smart-assed like demography would cure those as well. As if. Just as actors cannot tell in advance that the movie they are filming will turn out to be just dreadful, so we all make decisions we later come to regret, usually through employing better data, better strategic reasoning, better collegial means, and higher moral principles, grounded in better and more transparent governance. Legal scholar Jules Lobel asks even more fundamental questions, such as how one knows victory, especially in longstanding civil rights struggles. In *Success Without Victory*, he writes,

Those who view justice not as a mere norm but as a turbulent river, “a fighting challenge, a restless drive,” are continually operating on the fault line between current reality and human aspiration, between what is and what ought to be. Success in navigating the river requires maintaining the tension between

reality and aspiration, between what is and what ought to be, between our reach and our grasp. It requires not getting stuck on either bank of the river, neither the muddy bank of reality nor the high cliffs of our dreams.

I am still not sure whether our efforts were successes or failures. They were successful if they inspire others to struggle, to resist injustice together, and to eschew the easier, more “successful” path. They will be successful if they help others, as they helped me, to understand the meaning of our lives as more than winning or losing.⁶⁷

Even so, this preliminary inquiry revealed some reasons why good people do bad things as college trustees or policymakers. I hope that this early attempt will attract others to the field, and that we will better understand bad governance. Doing so will surely enhance our ability to understand good governance and higher education policymaking. Most of us learn from our mistakes, and decisionmakers are no different. I admire the ambition of Peter Hall, whose excellent work *Great Planning Disasters* helped me think through this project. In his 1979 work, he noted, “I do not want to seem to promise more than this book can deliver. There will be no grand overarching model which will explain all previous disasters and guarantee how to avoid new ones. The object is to begin an explanation, not to end one.”⁶⁸ I hereby adopt this modest viewpoint, and hope to begin an explanation.

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 23. Hopwood, 78 F.3d 932, 946 (5th Cir. 1996), *cert denied* 518 U.S. 1033 (1996)
 24. Texas Higher Education Coordinating Board, Report on the Effects of the Hopwood Decision on Minority Applications, Offers, and Enrollment at Public Institutions of Higher Education in Texas (1998), available at <http://www.thecb.state.tx.us/reports/PDF/0016.PDF> (last visited Feb. 9, 2011).
 25. Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997); Victor C. Romero, *Noncitizen Students and Immigration Policy Post-9/11*, 17 GEO. IMMIGR. L. J. 357 (2003); VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* (2005); MARIA PABON LOPEZ & GERARDO R. LOPEZ, *PERSISTENT INEQUALITY: CONTEMPORARY REALITIES IN THE EDUCATION OF UNDOCUMENTED LATINA/O STUDENTS* (2009).

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26. CHRISTOPHER A. LUBIENSKI & PETER C. WEITZEL, eds. *THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS* (2010); DARREL DRURY & JUSTIN BAER, eds. *THE AMERICAN PUBLIC SCHOOL TEACHER: PAST, PRESENT, AND FUTURE* (2011).
27. A Colorado statute enumerates the Statewide Expectations and Goals for Higher Education. Colo. Rev. Stat. Ann. § 23-1-104 (West 2003). Several of these were repealed soon after, but most of the provisions remain law in 2011. See, e.g., Laws 2004, Ch. 215, § 15, eff. July 1, 2005, repealing subsecs. (1.5) and (2).
28. Michael A. Olivas, *Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: Undocumented Adults and “Enduring Disability”*, 15 J.L. & EDUC. 19 (1986).
29. Laurel-Ann Dooley, *Making the Grade: Ohio Regents Tie State Law School Subsidies to Scholastic Achievements of Incoming Students*, ABA JOURNAL, Dec. 1996, at 36.
30. *Id.*
31. *Id.* (quoting Philip Shelton).
32. For other takes on the efficacy and psychometrics of the LSAT, see William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975 (2004); on its misuses, see William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1 (2000); Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997); Michael

A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U ARK. LITTLE ROCK L. REV. 993 (1999); Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391 (2005); Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, and the River*, 55 J. Legal Educ. 16 (2005). Readers are advised to provide their own pillows.

33. Fisher v Univ. of Texas at Austin, No. 09-50822, p. 55 (5th. Cir. 2011).
34. See, e.g., Anne M. Richard, *Law School Admissions*, in THE COLLEGE ADMISSIONS OFFICER'S GUIDE 454-472 (Barbara Lauren ed., 2008).
35. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).
36. Moore v. Board of Regents of Univ. of New York, 407 N.Y.S.2d 452 (1978).
37. Behrend v. State, 379 N.E.2d 617 (Ohio Ct. App. 1978).
38. "Dr. [Raymund] Paredes said that the problem with that is you can measure a threshold of competence, but you cannot measure what part of that the university is responsible for. He suggested that there be an effort to align the SAT and other exams, such as the GRE,

LSAT, and so forth. There are enough common data elements so that learning outcomes can be measured. Not all graduates would necessarily need to take the exams, but one could take a sample size to measure learning outcomes at a given institution. Some private companies are already beginning to do that.” Minutes, Texas Higher Education Coordinating Board Committee on Academic Excellence and Research, [21/188] (Mar. 6, 2008), available at: http://www.theccb.state.tx.us/events/committeemeetings/AER/2008_04/Agenda.pdf (last visited Feb. 11, 2011).

39. ROBERT MURRAY THOMAS, *HIGH STAKES TESTING: COPING WITH COLLATERAL DAMAGE* (2005).

40. I confess that I have even not always been entirely truthful or forthcoming when asked about some troubling colleagues who were under consideration elsewhere. I am particularly remorseful about one incident, where I glossed over one schnook’s difficulty as a colleague and his poor work habits, when I was called by a search committee at another school. In a technical sense, I did not lie, but I concede I offered no elaborations upon his poor record as a colleague; judging by how many times I have been burned by others’ lack of candor when the situation was reversed, I will have many colleagues in purgatory with me when we all die.

41. AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure*, available at:

<http://www.aaup.org/AAUP/pubsres/policydocs/contents/RIR.htm#b7> (last visited Feb.

11, 2011).

42. Amer. Ass'n Univ. Professors v. Bloomfield Coll., 322 A.2d 846 (N.J. Ch. 1974).

43. 585 F.2d 675, 682 (4th Cir. 1978).

44. 260 N.W.2d 595 (Neb. 1977).

45. Matthew W. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1139 (1980). I thank Professor Finkin for reviewing this section. We do not agree entirely, but it is a much better draft for his assistance.

46. *Id.* at 1141.

47. 527 F.2d 843 (D.C. Cir. 1975).

48. Spuler v. Pickar, No. H-88-1243, 1990 WL 357791 (S.D. Tex. Mar. 15, 1990); 958 F.2d 103 (5th Cir. 1992).

49. 54 AAUP Bulletin 448, 449 (1968), cited at *Browzin*, 527 F. 2d 843, 845 (1975).

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50. *Browzin*, 527 F.2d 843, 848-50 (1975).
51. “Before trial the parties stipulated that Dr. Browzin was a highly qualified professor in the field of civil engineering, that he was a tenured professor, and that Catholic University was faced with a bona fide financial exigency at the time the termination occurred. They also stipulated that the standards which were to govern the case were to be found in the 1968 Recommended Institutional Regulations on Academic Freedom and Tenure, propounded by the American Association of University Professors (AAUP). Tr. at 6. It was, in effect, a stipulation that the 1968 Regulations had been adopted as part of the contract between Browzin and the University, an adoption entirely consistent with the Statutes of the University and the University's previous responses to AAUP actions.”
Id. at 845.
52. His obituary appeared in the Baltimore Sun:
<http://www.legacy.com/baltimoresun/deathnotices.asp?Page=OBITFINDERSSIRERESULTS>
53. 958 F.2d 103, 105 (5th Cir. 1992).
54. *Spuler v. Pickar*, No. H-88-1243, 1990 WL 357791 at *1 (S.D. Tex.).
55. *Id.* at *2 [internal references omitted].

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56. *Id.*
57. Rehearing denied by *Spuler v. Pickar*, No. 90-2048, 1992 U.S. App. LEXIS 11286 (5th Cir. May 15, 1992). Discussions with David T. Lopez and Richard Spuler (April, 2010) (on file with author).
58. *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (N.M. Dist. 1980).
59. *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979)
60. For example, *see generally*, Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004); Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008).
61. S. B. 7784, 225th Leg., 2001 Reg. Sess. (N.Y. 2002).
62. Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009); Stella M. Flores, *The First State Dream Act: In-State Resident Tuition and Immigration in Texas*, 32 EDUC. EVALUATION & POL'Y ANALYSIS 435 (2010); Kevin J.

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- Dougherty, H. Kenny Nienhusser & Blanca Vega, *Undocumented Immigrants and State Higher Education Policy: The Politics of In-State Tuition Eligibility in Texas and Arizona*, 34 REV. HIGH. EDUC. 123 (2010).
63. Michael A. Olivas, *What the "War on Terror" Has Meant For U.S. Colleges and Universities*, in DOCTORAL EDUCATION AND THE FACULTY OF THE FUTURE 249 (Ronald G. Ehrenberg & Charlotte V. Kuh eds., 2009).
64. Delgado & Stefanic, *supra* note 4, at 1930 n.2.
65. KATHRYN SCHULTZ, BEING WRONG: ADVENTURES IN THE MARGIN OF ERROR 5-6 (2010).
66. AVITAL RONELL, STUPIDITY 93 (2002) (quoting Robert Musil, *On Stupidity*, in PRECISION AND SOUL: ESSAYS AND ADDRESSES (Burton Pike & David Luft eds. trans., 1978)).
67. JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 9 (2003).
68. PETER GEOFFREY HALL, GREAT PLANNING DISASTERS 12 (1980).

