

THE BURDEN OF PERSUASION: AFFIRMATIVE
ACTION, LEGACIES, AND RECONSTRUCTING
HISTORY:

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

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Russell K. Nieli's *Wounds that Will Not Heal: Affirmative Action and our Continuing Racial Divide* is published by Encounter Books and is described on the copyright page as "an activity of Encounter for Culture and Education, Inc."¹ The publishing company has recently released a series of conservative and libertarian books, including the following: *The Great Global Warming Blunder* (Roy W. Spencer); *Never Enough: America's Limitless Welfare State* (William Voegeli); *President Obama's Tax Piracy* (Peter Ferrara); and my personal favorite, *The Grand Jihad: How Islam and the Left Sabotage America* (Andrew C. McCarthy), which is advertised as "a harrowing account of how the global Islamist movement's jihad involves far more than terrorist attacks, and how it has found the ideal partner in President Barack Obama, whose Islamist sympathies run deep."² I situate Nieli's 2012

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

2. See *The Grand Jihad: How Islam and the Left Sabotage America*, ENCOUNTER BOOKS, <http://www.encounterbooks.com/books/the-grand-jihad-paperback> (last visited May 25, 2014).

work alongside the company it keeps: abject failures of the secular state, general accusations of the country's godlessness, and other evidence of false liberal pieties. Any anti-affirmative action book that begins by invoking Gandhi and Dr. Martin Luther King Jr. in its epigraph attempts to alert its readers that it is being fair and balanced. However, the first page pierces that veil. Consider the following:

Racial preferences in the U.S. first arose in response to the widespread rioting in the urban black ghettos of America during the late 1960s. As a result of these urban upheavals, concerned elites in the federal bureaucracy and federal courts, as well as the top universities and law schools, concluded that much more had to be done to deal with the pressing problem of black poverty and alienation in America than could be achieved through the prevailing ideal of color-blind justice, which had done so much to inspire the 1950s and 1960s era civil rights movement.³

Such a breathtaking *tour de force* of the inspirational color-blind 1950s and 1960s civil rights era would, were it not so risible, be suspect if only to see whether anyone was reading the Introduction.

But, in the kind of inaccurate rendering of events that characterizes this work, Nieli's very first footnote states that President Johnson was "probably thinking of a huge expansion of Great Society training and other programs rather than racial preferences" when he "issued Executive Order 11375 reaffirming in unmistakably clear and forceful terms the requirement for color-blind, nondiscriminatory, merit-focused hiring for all federal contractors."⁴ Well, President Johnson was "probably" doing nothing of the sort when he signed into law this Executive Order banning *sex-based* discrimination. In his final chapter, over two-hundred pages later, Nieli mentions—without citation—President Richard Nixon's 1969 revised "Philadelphia Plan" as the "first of the national 'affirmative-action' initiatives."⁵ This bookend of incomplete historical citation—almost passing over President Kennedy's Executive Order 10925, which employed the term "affirmative action," and confusing the purposes of the different Executive Orders and Plans and Revised Plans—is, as so much of this book is, off by a tick and wrong. I confess that it takes a certain moxie to start with Gandhi and King and, within one page, switch to inaccurate and extraordinary renditions of color-blindness. In fairness, I read a lot of this history and, as others in my boomer generation, lived through much of it, but I cannot recall

3. NIELI, *supra* note 1, at 9.

4. *Id.*

5. *Id.* at 338.

having encountered so little nuance in a work dedicated to these major legal issues in the last seventy-five years of higher education.

Nieli asks for this harsh reading in light of his smarmy style throughout, as when he shows false modesty in laying out his thesis and choices of argumentation:

Some will feel that in the following materials I have been much too harsh on preference policies and their supporters, that I look only at the downside of the policies, and that I ignore all the good that they have done. In response to such criticisms, I will just say that on balance not only have 40+ years of racial preferences policies had overwhelmingly negative consequences, but that if one looks closely enough at the various “goods” they are supposed to have achieved, the “goods” almost always turn out to be so intimately tied to countervailing “bads” that their supposedly positive value cannot be unambiguously placed in any plus column.⁶

Just for the record, I had been lured into carefully reading Nieli’s book precisely because I had hoped to find a thoughtful, accurate, and cumulative reading of this vexing literature on the continuation of affirmative action—whether or not, at the end of the day, I would be convinced by it. After all, Nieli examines important higher education policies: college admissions, alumni privilege, stereotype threat, the use of socioeconomic status as a proper criterion for college admissions, fundamental fairness, minority colleges, the reach of equal protection, the mismatch theory controversy, and other difficult and complex issues about which reasonable people can write extensively, cross swords, and live to disagree. That project is not accomplished by this book. While each of the policies deserves review, in this Book Review I look at alumni privilege carefully and then suggest why I think Nieli’s effort falls so short, especially in contrast to the more satisfying, though no less ambitious, project by law professor Randall Kennedy, in his *For Discrimination Race, Affirmative Action, and the Law*.

To the extent that snarkiness, performed properly, can be a form of nuance, Nieli’s putdown of William Bowen and his Mellon Foundation-funded colleagues as “River Pilots” was clever and original, as their series of books likened admissions policies to “the River.”⁷ Because I had

6. *Id.* at 14.

7. He flags “the three pro-affirmative action River Books sponsored by the Andrew W. Mellon Foundation.” *Id.* at 21. He then spends Chapter V (Selling Merit Down the River) railing against their findings. *Id.* at 275–381. The trilogy includes WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); DOUGLAS S. MASSEY ET AL., *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES* (2003); and CAMILLE Z. CHARLES ET AL., *TAMING THE RIVER:*

my own objections to that body of work, I found Nieli's analysis to be perhaps his lone contribution, although our takes were not in the least overlapping or symmetrical. I felt that Bowen and his colleagues did not take into account the relevant literature, that they mischaracterized the issues of Latino college students, and that the analysis of private college data was unlikely to shed light on litigation involving public college admissions.⁸ Nieli largely objects to their support for affirmative action. Thus, my critique was about efficacy, whereas his critique was primarily about fairness to white students and the unfair advantage he feels that the books convey to the mismatched minority students.

Nieli did not object to the use of admissions preferences for athletes, an oddly-tolerant concession, but one that I found telling. He states,

Though corrupting to intellectual standards, athletic preferences can at least be defended on the grounds that there are other forms of merit a college might acknowledge besides the strictly academic kind and that these might include, in addition to special musical or dance talent, the ability of an accomplished athlete. Whether or not one accepts this rationale, it is hard to see mere membership in an 'underrepresented minority group' as a form of nonacademic talent comparable to that of being an accomplished athlete or musician—although some have tried valiantly to defend this claim.⁹

Examine this legerdemain carefully: in other words, such nonacademic criteria can be advanced and defended because, well, they can be advanced and defended and at least they are not race. This feckless circularity resembles Fifth Circuit's language in *Hopwood v. Texas*, language that Nieli may have taken to heart and made his own: "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."¹⁰

NEGOTIATING THE ACADEMIC, FINANCIAL, AND SOCIAL CURRENTS IN SELECTIVE COLLEGES AND UNIVERSITIES (2009).

8. See Michael A. Olivas, *Shape of the Class*, 24 REV. HIGHER EDUC. 193 (2001).

9. NIELI, *supra* note 1, at 359–60.

10. *Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir. 1996). In turn, Judge Jerry Smith, the Fifth Circuit's author of the *Hopwood* decision, was likely inspired by Justice Powell's turn of phrase in *Bakke*, in which the Justice wrote, "[Diversity includes] city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 322 (1978).

Reading this section carefully, I was momentarily joyed when Nieli appeared to believe that legacy or alumni privileges are the same shibboleths that he found race and ethnicity to be. Did he and I have an overlap, a momentary eclipse where two moons hurtling in different directions aligned? I need not have worried, but the elision he performs merits special scrutiny: “Legacy admissions are more problematic. Like race, being a legacy or a child of a wealthy donor can’t be justified as a special form of either academic or nonacademic merit, which is why so many people see something untoward about preferences based on these factors.”¹¹ But then remember that magic is largely a nuanced form of misdirection: “But legacy and wealthy-donor preferences are rarely opposed with the vehemence of racial preferences, in part because most people realize that private colleges and universities are dependent on private funding to survive and that loyal alumni donors (and generous nonalumni [sic] donors) are often important sources of such funding.”¹² In other words, legacy admissions are an unprincipled necessity because they bring money with them. Never mind that Nieli spent more than three-hundred previous pages saying that *wealthy* minorities are the predominant beneficiaries of affirmative action—I mean, racial preferences. But, not to put too fine a point on it, anyone who defends non-alumni donor privilege, as he does, has surrendered the right to any high resentment he might feel from those unfair admissions to the unwashed. To add insult to injury, Nieli also cavalierly cites the music from *Cabaret* for the proposition that “money makes the world go around.”¹³ Well, money and outrage over ascribed minority privileges make his world go around. One can only wonder if all the white beneficiaries of unearned privilege suffer from the same withered self-concepts over ill-gotten and unearned gain that he clumsily insists minorities either suffer from, or should suffer from. Nieli’s book inconsistently and unpersuasively treats this issue, and it is a dictionary example of one man protesting too much.

Also, is it impolite to note that in the University of Michigan admissions cases, U.S. Federal District Court Judge Patrick Duggan stated that “there [was] no overall discriminatory impact”¹⁴ regarding university

11. NIELI, *supra* note 1, at 360.

12. *Id.*

13. *Id.* at 361.

14. *Gratz v. Bollinger*, 135 F. Supp. 2d 790, 801 (E.D. Mich. 2003)

[D]ue to the University’s past history of discrimination, it is less likely that a minority student will receive any *alumnus* “A” (alumni) points. Furthermore, minority students are less likely to reside in the forty-five northern Michigan counties that the University identifies as underrepresented under its “G” (geography) factor. In this Court’s opinion, Defendant-Intervenors’ reliance upon the discriminatory impact of the other SCUGA factors is misplaced as the SCUGA factors are but one compo-

alumni privileges? Judge Duggan failed to analyze admissions through a racial lens, even though, in most years, the legacy points were a greater factor in more admissions decisions at the University of Michigan than its affirmative-action practice. The same was true at Texas A&M ("TAMU") when, after *Grutter's* repudiation of *Hopwood*, TAMU announced it would not use affirmative action, so as to emphasize merit, but without announcement, it kept its Aggie-legacy points in place.¹⁵ The four points (on a scale of 200) that TAMU awarded to legacies resulted in more white admits in any year of the practice than the number of minorities admitted in those years as freshmen. TAMU was publicly embarrassed into conceding the inconsistency and dropped its alumni preferences. But shouldn't the presumption be that public institutions do not need to resort to this practice? Although the number of legacy points seems small, the costs of the practice are significant. Minority admissions officers, and even minority legislators, have told me that, in time, legacy admissions will work so black and Latino parents can eventually pass the privilege to their children. I believe this eventuality is chimerical and will simply never come true, given the large number of white alumni whose children apply to college and the few minorities who are similarly situated. Graduation data suggest that the arc of such admissions, at selective public institutions in Texas, will never improve to the point where alumni privilege produces a substantial number of minority students. Even Justice Sonia Sotomayor was recently taken in by this false new math, when she appeared to be convinced that discontinuing legacy admissions was simply moving the goalposts on minorities.¹⁶

I will grant Nieli this: he does raise legitimate arguments about un-

ment of the overall race-conscious admissions programs that Plaintiffs seek to invalidate. Because both the allegedly discriminatory SCUGA factors and the racial preferences are part of the same program, there is no overall discriminatory impact.

Id. (internal citations omitted).

15. After the *Grutter* decision, TAMU decided it would not employ racial affirmative action and announced plans accordingly. However, it maintained its alumnus privilege points, which helped admit more white students each year than the number of minority freshmen under any circumstances. When the incongruity came to light after a critical op-ed, TAMU retreated. See Todd Ackerman, *Texas A&M Abolishes Legacy Program*, HOUS. CHRON., Jan. 10, 2004, at A1.

16. Justice Sotomayor, in *Fisher* oral arguments, noted with regard to alumni privilege, "[i]t's always wonderful for minorities that they finally get in, they finally have children and now you're going to do away for that preference for them. It seems that the game posts keeps changing every few years for minorities." See Scott Jaschik, *Surprise on Legacy Admissions*, INSIDE HIGHER ED (Oct. 16, 2013), <http://www.insidehighered.com/news/2013/10/16/unexpected-exchange-supreme-court-alumni-child-preferences#sthash.gdXicr90.dpbs>.

fairness, although he does a poor job differentiating between reparations theories and the mistaken logic of *Bakke*, in which the idea of diversity first reared its head. It could have been useful for him to show how diversity logic privileges race and why that is worse than privileging class or any other non-meritorious criterion. For example, I would have listened carefully and likely agreed with a thoughtful discussion of why Cheryl J. Hopwood's life history and backstory should or should not give way to that of, say, a Chicana similarly situated. After all, Hopwood had a daughter with a disability, had working class roots, and possessed other attractive traits. I would have voted for her, and over the years, I have gladly voted for admissions of many of her kith and kin. I certainly would not have voted against her due to her having attended CSU-Sacramento, as apparently happened.¹⁷

The entire purpose of Nieli's book is to show the harmful and unprincipled effects of affirmative action. Carl Cohen, a reviewer who appreciated this book much more than I did, wrote the following about the Nieli work:

Preference by race is wrong. We all know that. Even those who advocate it often do so abashedly, hiding or obfuscating what they do, and not seldom lying about it. They believe sincerely that the products of such preference are so very good that we must accept the need to put aside for a while the

17. See *Hopwood v. Texas*, 861 F. Supp. 551, 564–65 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

Cheryl Hopwood had a [Texas Index] of 199, which placed her in the resident presumptive admit range. Hopwood's TI reflects a 3.8 grade point average and an LSAT score of 39. Hopwood's application indicates she received an associate's degree in accounting from Montgomery County Community College in May 1984 and a bachelor's degree in accounting from California State University in Sacramento in 1988. The application further indicates she is a certified public accountant in California, she worked twenty to thirty hours a week while obtaining her undergraduate degree, and she was active in Big Brothers and Big Sisters in California. Hopwood submitted an additional letter to the law school dated January 22, 1992, requesting permission to attend law school on a limited basis the first year, if accepted, because of the needs of her child, who had been born with cerebral palsy. Hopwood's application file contains no letters of recommendation. Additionally, her responses to the questions are brief and do not elaborate on her background and skill. She provided no personal statement with the application.

After his initial review of Hopwood's file, [Admissions Committee Chair Professor Stanley] Johanson dropped her from the presumptive admission zone to the discretionary zone because, in his evaluation, she had not attended schools that were academically competitive with those of the majority of the applicants, had a large number of hours at junior colleges, and was able to maintain a high GPA although working a substantial number of hours.

Id. at 564 (notes omitted).

principle that the races are equal and ought always to be treated equally.

Russell Nieli, very much to the contrary, contends that the products of race preference, or affirmative action, are bad—very, very bad. Their consequences, for all concerned, are dreadful. He is correct. The object of *Wounds That Will Not Heal* is to prove this badness: to illustrate it, to explain it, and to drive it home as forcefully as it is possible to do.¹⁸

As Cohen notes, Nieli usefully catalogues all the available arguments against affirmative action, citing chapter and verse from the various research studies over the years that have formed the internal logic of conservative responses to the policy. As the aforementioned Cohen summarizes, “the products of race preference, or affirmative action, are bad—very, very bad.”¹⁹

One final pivot on which Nieli rests his logic is that he cites Randall Kennedy’s suggestion from an earlier writing that merit “is a malleable concept, determined not by immanent [sic], preexisting standards.”²⁰ As his convoluted attempt to justify the unfortunately-necessary and instrumentally-justified white privilege reveals, Nieli is of the same mind. In Kennedy’s new book, *For Discrimination: Race, Affirmative Action, and the Law*, Kennedy argues that given the country’s long history of racial discrimination—more pervasive than Nieli’s inchoate and imperfectly-documented “prevailing ideal of color-blind justice, which had done so much to inspire the 1950s and 1960s era civil rights movement”²¹—some amount of discrimination against whites can be justified:

The pertinent principle should be racial justice. How one effectuates that principle that involves all manner of complex sociological and political judgments. Under certain circumstances, nondiscrimination is probably the best vehicle available for attaining racial justice (or its closest practicable approximation). Under other conditions, however, racially selective affirmative action is a better vehicle. . . . That is not to say that affirmative action is without risk and expense. As I have noted at some length, affirmative action does generate

18. Carl Cohen, *Both Wrong and Bad*, 26 ACAD. QUESTIONS 1 (2013), available at <http://carl-cohen.org/docs/Spring%202013%20Academic%20Questions.pdf> as.org/articles/both_wrong_and_bad.

19. *Id.*

20. NIELI, *supra* note 1, at 246. Trying to pin down his references is hard, in part because the Index is not always accurate, and in part because he does not always provide pin cites for quoted materials, leaving readers to read an entire book for a small point to which he has cited.

21. NIELI, *supra* note 1, at 9.

toxic side effects—like many useful medicines. If the side effects outpace the therapeutic benefit, the medicine should be discontinued (though, it is hoped, replaced by something more suitable).²²

This book, his fifth with Pantheon, is vintage Randall Kennedy, and while I have not always agreed with Kennedy's often-provocative take on issues, I remain quite fascinated at his courageous exploration of difficult subjects. I confess that Randy is a friend, and we had breakfast together last time I was at Harvard Law, about a year ago. I found his books, *Nigger: The Strange Career of a Troublesome Word*²³ and *Interracial Intimacies: Sex, Marriage, Identity and Adoption*,²⁴ quite moving and persuasive. I even admired and learned from his careful engagement with early, critical legal scholars of color, such as law professors Derrick Bell, Mari Matsuda, and Richard Delgado, in which he was both supportive of their projects while also deeply critical of what he considered to be the flaws in their work:

I provide a historical context for the versions of the racial exclusion and racial distinctiveness theses that Bell, Delgado, and Matsuda articulate. I argue that their writings warrant close attention. They raise questions that are, or should be, central to any academic community. They share an intellectual kinship with several well-known and influential intellectual traditions. They express beliefs that are prevalent, deeply rooted, and consequential.

....

At the same time, the writings of Bell, Delgado, and Matsuda reveal significant deficiencies—the most general of which is a tendency to evade or suppress complications that render their conclusions problematic. Stated bluntly, they fail to support persuasively their claims of racial exclusion or their claims that legal academic scholars of color produce a racially distinctive brand of valuable scholarship. My criticism of the Bell/Delgado/Matsuda line of racial critiques extends farther, however, than their descriptions of the current state of legal academia. I also take issue with their politics of argumentation and with some of the normative premises underlying their writings. More specifically . . . I challenge: (1) the argu-

22. RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 243–244 (2013). After reading this book, I suspect that Professor Nieli will not be citing Kennedy as a racial moderate.

23. RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (2002).

24. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003).

ment that, on intellectual grounds, white academics are entitled to less “standing” to participate in race-relations law discourse than academics of color; (2) the argument that, on intellectual grounds, the minority status of academics of color should serve as a positive credential for purposes of evaluating their work; (3) explanations that assign responsibility for the current position of scholars of color overwhelmingly to the influence of prejudiced decisions by white academics.²⁵

That Nieli misappropriates Kennedy’s carefully nuanced and balanced work is all the more frustrating, as when he notes Kennedy’s demurrers about the racial thermodynamics of affirmative action and diversity rationales and then transmogrifies them into lack of support for the concept. Nieli states that Kennedy,

[H]as made similar comments casting doubt on the sincerity, if not the goodwill, of academic administrators who invoke “diversity” as their main reason for increasing the black presence in colleges and professional schools. . . . While Kennedy is generally supportive of racial-preference policies, he agrees with critics that the diversity rationale is a weak foundation on which to base one’s defense of such policies, and is at best a secondary concern of many who support and maintain affirmative action policies for other reasons.²⁶

In *For Discrimination: Race, Affirmative Action, and the Law*, Kennedy authoritatively examines the history of affirmative action, offers a frank appraisal of what he terms “the color-blind challenge to affirmative action,” analyzes the role of affirmative action in U.S. Supreme Court decisions,²⁷ and concludes with a thoughtful defense of the concept, properly applied. In each of these sections, he draws from a wide range of scholarship, adds personal vignettes, and shows the math homework supporting his judgments. By this, I mean that he lays out the predicates, assesses the good and bad of each dimension, and honestly explains how he got to that point. My favorite vignette is one that I am hereby appropriating, even if I might skip the attribution:

In assessing my own record, I try to maintain equanimity, knowing that on account of race I have sometimes been penalized and sometimes been preferred. I do my best and hope

25. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1747–49 (1989).

26. NIELI, *supra* note 1, at 246.

27. Despite writing the book before 2013, he includes in his consideration of U.S. Supreme Court decisions the Court’s most recent case, *Fisher v. University of Texas at Austin*, in which the Court remanded the matter to the federal appellate court for consideration of the policy’s “narrow tailoring.” *Id.* at 27. See generally *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

that my work meets high standards. I realize, though, that judgment is social, contingent, and subject to forces beyond my control. Does my status as a beneficiary of affirmative action oblige me to support it? Absolutely not. Mere benefit from a policy imposes no obligation to favor or defend it.²⁸

This is as good a defense and justification of the policy as I have ever read. As was shown in terms of alumni privilege, societal advantage, and wealth, more whites should adopt it as their mantra.

My only quibble with Kennedy's book derives from one of the case studies he uses to discuss admissions percentage plans. He begins his treatment of *Fisher* quite straightforwardly, noting:

Most Americans want to escape the gravitational pull of the country's ugly racial past. If affirmative action is required to effectuate that ambition, they will accept it, albeit in disguise. Affirmative action disguised in plain sight includes "race-neutral" policies established for the purpose of elevating blacks and other marginalized groups but making no reference to race in their packaging. Texas's Top Ten Percent Plan is such a policy.²⁹

He goes on to describe the policy, although he does not drill down very deeply into the details. Given the mistaken racial-paternity assumed even by Justice Ruth Ginsburg in her dissent in the *Fisher* remand,³⁰ I take this opportunity to elaborate on and correct the per-

28. KENNEDY, *supra* note 22, at 11.

29. *Id.* at 240–41.

30. Justice Ginsburg's dissent spares no snark in describing the Plan, which *Fisher* did not challenge:

Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. As Justice Souter observed, the vaunted alternatives suffer from "the disadvantage of deliberate obfuscation." Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage.

Fisher, 133 S. Ct. at 2433 (2013) (Ginsburg, J., dissenting) (internal citations omitted). She also drops a devastating footnote:

The notion that Texas' Top Ten Percent Law is race neutral calls to mind Professor Thomas Reed Powell's famous statement: "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind." T. Arnold, *The Symbols of Government* 101 (1935) (internal quotation marks omitted). Only that kind of legal mind could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious.

Id. at 2433 n.2.

centage plan record.

After *Hopwood* began to frag its way through Texas, State Representative Irma Rangel (D-Kingsville), the chair of the Texas House Committee on Higher Education, convened a small working group composed of Latino professors and attorneys from the Mexican American Legal Defense and Educational Fund (MALDEF) to advise her on a legislative response. Inasmuch as the decision had the effect of banning the use of race in admissions to the state's public colleges, the group—which varied between six and ten members and to which I belonged—met monthly in Austin to plot a completely race-neutral response. We began an intensive scholarly reading program, took note of legal and legislative developments in other states (particularly California) and undertook computer simulations to counter the immediate and detrimental effects of *Hopwood*. After more than nine months of meetings, we settled on a refined version of the California Master Plan (“Master Plan”). It had a longstanding tiered-model with open admission community colleges for freshman and sophomore classes, moderately selective junior-senior upper division institutions in the California State University System, and the more elite and selective University of California (“UC”) System, which drew from the top 12.5 percent of the state's high schools under a complex UC-eligible formula that weighted grades and mandatory test scores.³¹ While the Master Plan was decades old and had been revised to accommodate the state's growth and resources, UC campuses were still extremely competitive and bursting at the seams.³²

In contrast, Texas had a more decentralized plan, with over a dozen individual college systems, most with multiple campuses and no centralized admissions model. As noted, TAMU used alumni privilege. The University of Texas at Austin (UT-Austin), as the most selective and popular campus in that multiple-institution statewide system, faced a number of constraints; on the other hand, there were other campuses and systems that were under-capacity or could grow (unlike the more space-limited UC campuses, such as those in Berkeley and Los Angeles). There were symmetries, such as the very competitive nature of the flagship programs, particularly at the UT-Austin campus, with one of the nation's largest enrollments, and limits on the number of full-time, first-time freshmen they could plausibly accept, competitive undergraduate majors such as Business and Engineering, as well as selec-

31. See generally *Admission Requirements*, UNIV. OF CAL., <http://admission.universityofcalifornia.edu/freshman/requirements/index.html> (last visited May 25, 2014).

32. Goldie Blumenstyk, *As Yudof Steps Down, Major Challenges Lie Ahead for the U. of California System*, CHRON. HIGHER EDUC. (Jan. 20, 2013), <http://chronicle.com/article/Challenges-Ahead-for-the-U-of/136765/>.

tive graduate and professional schools.

In our search to find a race-neutral alternative to *Hopwood's* restrictions, we took note that the UT-Austin campus had a very small range of high schools that served as “feeder schools” to the campus, sometimes sending almost twenty percent of a selected high school’s graduating class to the campus, and a number of counties and high schools in the sprawling state that were less-inclined to send their students to the campus. We found more than two-dozen counties that had not sent a successful applicant to UT-Austin in over a decade, particularly from the more-remote eastern and western rural counties and schools. We did not take into account the racial character of those schools, although we certainly realized that the growing percentage of African-American and Mexican-American students were concentrated in the larger cities and, in the case of the Latino students, in the Rio Grande Valley, roughly along the state’s border with Mexico, in a swath from Laredo/Nuevo Leon East to Brownsville/Matamoros.

The state had recently upgraded the border colleges and re-aligned them with either the UT or TAMU systems, as a result of a MALDEF case,³³ but the Texas Supreme Court had subsequently overturned a lower court decision that had held the State had intentionally favored the more northern areas, harming Mexican-Americans who were concentrated along the border and in San Antonio.³⁴ One authoritative case study of the *LULAC v. Richards* litigation characterized the unanimous Texas Supreme Court decision as “unsound” inasmuch as it ignored the “centrality of race and racism and the intersectionality of racism with other forms of oppression.”³⁵ I found the combination of the successful upgrading of border colleges and the *Richards* defeat to be “the antonym of a pyrrhic victory—perhaps a victory notwithstanding the verdict.”³⁶

The computer runs were most promising for adding Mexican-Americans and, to a lesser extent, African-Americans (who had access to several private historically black institutions and two public ones) under one scenario: an automatic admissions policy that replaced the SAT or ACT requirement with the condition of graduating from a state

33. See generally *Clements v. League of United Latin Am. Citizens (LULAC)*, 800 S.W.2d 948 (Tex. App. 1990), *abrogated by M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704 (Tex. 2001).

34. *Richards v. League of United Latin Am. Citizens (LULAC)*, 868 S.W.2d 306 (Tex. 1993).

35. RICHARD R. VALENCIA, *CHICANO STUDENTS AND THE COURTS: THE MEXICAN AMERICAN STRUGGLE FOR EDUCATIONAL EQUALITY* 267 (2008).

36. MICHAEL A. OLIVAS, *SUING ALMA MATER: HIGHER EDUCATION AND THE COURTS* 119 (2013).

high school in the top twenty percent. We feared that such a program, even if only a small number of the eligible students enrolled, would swamp three or four of the flagship schools—perhaps UT-Austin, TAMU-College Station, University of Houston, and UT-Dallas—and that a larger percentage of graduates attending a given campus would prove problematic in its own way.

Ultimately, we settled on the Top Ten Percent Plan (“Plan”), which guaranteed admission to high school graduates who were in the highest decile of their graduating classes. We discussed, but discounted, any perfidy by parents to manipulate the high schools that their children would attend, assuming that parents’ quest to improve their students’ chances would not entice them to manipulate residency or to move. We also assumed that schools would continue to rank their graduates rather than hide the ball by flattening the class rank and not recording it for college purposes. We sold the plan on broad participatory grounds and stressed the widespread notion that doing well in school was a good indicator of quality, one often incorporated into choices of valedictorian, and that high rank-in-class was often used as a proxy for college readiness. We successfully sold it to legislators by stressing the simplified process, one to be fairly applied across all schools, and one likely to result in a signal to high school students, school counselors and advisors, and parents. I recall one white, rural legislator’s surprise when he was informed that no one from his district’s largest high school had been admitted into UT-Austin for over a quarter century, and I recall a pleasant discussion with a lawyer, who had litigated *Hopwood* and gone on to become an education attorney-advisor to then-Governor George W. Bush. As it turned out, he was from a small rural district, and he immediately offered to pitch the plan to the governor.

In a state where whites are a declining proportion and total number of the public school population, the Plan was sure to spread out the applicants and enrollees. But it was not at all clear it would do so disproportionately for students of color, and it did not ultimately do so. The after-the-fact quarterbacking that now seems afoot is simply wrong. This plan was not race-specific; rather, it was crafted to survive the hostile post-*Hopwood* politics and potential legal challenges, and it was intended to reduce the effect of the standardized tests on the system. To describe it as race-neutral is particularly appropriate in its as-applied optics, as over half of all students admitted under the Plan (now reduced to less than ten percent for UT-Austin, after the campus received an exemption on the grounds that the enrollment under the original Plan had swamped them and left them with no room for dis-

cretionary admits) have been white,³⁷ in a state where whites constitute only slightly more than thirty percent of the total public school enrollment (if Latinos did not drop out of school at such an alarming rate, the percentage of white students would be even lower).³⁸

That residential segregation in Texas is so pervasive that there are single-race high schools is no counter to the race-neutrality of the Top Ten Percent Plan. To assert otherwise requires a hermetically sealed perfect world where every school would be composed of the ideal percentage of students by group in the state. In my most nationalistic or nihilist moment, I would never claim that every unfair result is traceable to nativism or racial discrimination, but to the Abigail Fishers and Russell Nielis of the world, alumni privilege is an unfortunate necessity, and every minority student—a term to be used advisedly in Texas—is sitting in their seat or keeping them out. Indeed, *Fisher* is a special racial pleading, even as Abigail Fisher did not directly challenge the Plan. The mere existence of the Plan, which did not admit her, is evidence that the University of Texas must be using racial means to keep her out, even as *Grutter* allows the institution to employ racial admissions considerations in a modest way.³⁹ I am confident that minority-related cases will be brought with regularity when whites are more readily recognized as not constituting the majority. But I cannot expect Kennedy to know this insider baseball, and at least he took a swing at *Fisher* and at the percentage plan issue.

One last signpost: Kennedy is a scholar with broad and wide-ranging interests, and one of his most admirable works is his loving article on his mentor, Supreme Court Justice Thurgood Marshall.⁴⁰ He has also written a comprehensive and authoritative analysis of the centrality of the Montgomery Bus Boycott, in which he situates the moral and political force of Dr. King.⁴¹ Although I am certain that he did not have Nieli

37. The Top Ten Percent Plan was altered in 2009 for the UT-Austin campus, after years of special pleading. See generally Scott Jaschik, *10 Percent Plan Survives in Texas*, INSIDE HIGHER ED (May 29, 2007), <http://www.insidehighered.com/news/2007/05/29/percent#ixzz2jms2Abd8>; Scott Jaschik, *Texas Limits '10%' Admissions*, INSIDER HIGHER ED (June 1, 2009), <http://www.insidehighered.com/news/2009/06/01/texas#ixzz2jmt30i54>.

38. See Table 4, *Enrollment by Race/Ethnicity, Texas Public Schools, 2001-02 Through 2011-12*, TEXAS EDUCATION AGENCY, ENROLLMENT IN TEXAS PUBLIC SCHOOLS 2011-12 8 (2012), available at http://www.tea.state.tx.us/acctres/enroll_index.html.

39. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

40. Randall Kennedy, *Doing What You Can with What You Have: The Greatness of Justice Marshall*, 80 GEO. L.J. 2081 (1992). Particularly noteworthy in his narrative is the discussion of how Justice Marshall used dissents to cert denials to keep death penalty abolition discourse flowing. *Id.* at 2082–2091.

41. Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

specifically in mind, he impatiently writes, “[p]reviously I noted how opponents of racial affirmative action frequently, albeit inaccurately, invoke [Rev.] King for moral authority. That misappropriation should cease.”⁴² I could not help but wonder if that curt admonition extended to citing both King and Gandhi. Kennedy’s book is only half the length of Nieli’s, but it has twice as much analytic power and actually grapples with the complexities of the relevant issues. Nieli deals in elliptical reasoning and ditties, as in one inexplicable and anonymous piece of “feisty doggerel” that he drops in an unattributed footnote: “Merit Can, Merit Must, Be the Basis of Our Trust! So Hey, Hey, Ho, Ho, Racial Preference Gotta Go!”⁴³ If you want very old doggerel frozen in amber, try Nieli’s book. If you want a book warm to the touch, with heft and seriousness, then take the time to read Kennedy’s work. It will be time well spent.

42. KENNEDY, *supra* note 22, at 243.

43. NIELI, *supra* note 1, at 274.