Legal Issues in Higher Education

Daniel W. Park
Daniel W. Park
Chief Campus Counsel for UC San Diego
New Author!
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Topics

- Race-conscious admissions
- Recent developments in patent law
- Handling student misconduct cases
- Working with University Counsel
- Your questions!
Race-Conscious Admissions
Regents of the University of California v. Bakke

1978
UC Davis School of Medicine
Was Bakke a Victim of Race Discrimination?
A Fractured Court

Nine Justices — Six Opinions
Justice Louis Powell
• No quotas

• Race could be a factor in admissions
But Why?
To redress societal discrimination
Diversity
To improve educational learning
Important Observation
The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.

—Justice Powell
Individual Review

No Racial Set-Asides
Implication

Affirmative Action is disconnected from remedying societal discrimination
25 Years Later....
Grutter v. Bollinger
Gratz v. Bollinger
2003
Lee Bollinger
Admissions Policy

the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.
Key Features

- Emphasized classroom learning
- No numerical goal
- All applicants received same individual review
Affirmative Action Wins
5 to 4
Race could be a “plus factor”

Consideration of overall individual contribution
But one caveat
Gratz v. Bollinger
No Automatic Extra Points
Nothing in Justice Powell’s opinion in Bakke signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.
Implication

- The Goal of Diversity is Constitutional
- The Means for Achieving Diversity Are Subject to Judicial Review
One Footnote...
"The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."
Fisher
v.
University of Texas
2013
The Blockbuster that Didn’t Happen
But...
Affirmative action did get more vulnerable
Remember Grutter?

• Diversity is a compelling interest justifying considering race in admissions

• The means of considering race is subject to judicial review
What is the standard judges should use when reviewing affirmative action programs?
The means chosen must be narrowly tailored
• ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application
• Use of race in admissions must be “necessary” achieve the educational benefits of diversity
What does that mean?
No workable race-neutral alternatives would produce the educational benefits of diversity
If a nonracial approach could promote the substantial interest about as well and at tolerable administrative expense...
use of race is forbidden
Who has the burden?
The University
How?
Must have tried some other method that does not involve race
Can institutions of higher education continue to take steps to achieve a diverse student body?
Yes
Can universities use race as a factor in admissions?
Yes
What must universities do to narrowly tailor their admissions programs to meet the compelling interest in diversity?
Determine that available, race-neutral alternatives do not suffice to achieve the benefits of diversity.
Schuette v. Coalition to Defend Affirmative Action

Argued 2013
Is Affirmative Action Permitted?
Can Affirmative Action Be Banned?
Michigan Civil Rights Initiative (aka Proposal 2)
The University of Michigan, Michigan State University, Grand Valley State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
6th Circuit says Proposal 2 is illegal
Does a ban on preferential treatment violate the Equal Protection Clause?
Stay tuned
Patent Law Developments
String of Recent Cases

- Stanford v. Roche
- Bowman v. Monsanto
- Myriad Laboratories
- Prometheus Laboratories
Stanford v. Roche

2011
U.S. Constitution

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries
Basic Principles

• Inventions belong to the inventors

• Inventors can assign their rights to third parties

• Without some agreement with the inventor, employers don’t own inventions of inventors
The Bayh-Dole Act

Federal contractors (like universities) can retain title to inventions
Purpose

• promote the utilization of inventions arising from federally supported research

• promote collaboration between commercial concerns and nonprofit organizations

• Ensure that the Government obtains sufficient rights in federally supported inventions.
Duties

• Disclose to federal government
• Written election within two years
• File patent application before any statutory bar date
Government Rights

• Fully paid-up license to practice invention

• March-in rights when the contractor fails to take "effective steps to achieve practical application" of the invention

• If contractor does not retain title government may consider requests for inventor to retain title
What Happened

• Signed a Copyright and Patent Agreement (CPA) stating that he "agree[d] to assign" to Stanford his "right, title and interest in" inventions resulting from his employment at the University.

• Also signed agreement stated that researcher "will assign and do[es] hereby assign" to business his "right, title and interest in each of the ideas, inventions and improvements" made "as a consequence of [his] access" to business.
Who Wins?

Agreed to Assign vs. Does Hereby Assign
Mayo Collaborative Services v. Prometheus Laboratories, Inc.

2012
What is patentable?
Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U.S.C. § 101
Exceptions
Laws of Nature
Natural Phenomena
Abstract Ideas
“Such discoveries are manifestations of . . . nature, free to all men and reserved exclusively to none.”
But...
An application of a law of nature might be patentable.
Patents on Medical Diagnostic Techniques
“Pro-Predict”

- a diagnostic test kit
- help doctors determine proper dosage of thiopurines
How Does It Work?
The Dispute

• Mayo Clinic developed its own test

• Prometheus sued for patent infringement
The Patent

- certain concentrations of metabolites indicated that the dosage is too high or too low
Question: Is this a Law of Nature?
Yes
Association for Molecular Pathology v. Myriad Genetics, Inc.

2013
Myriad’s Invention

• precise location and sequence of two human genes which can substantially increase the risk of breast and ovarian cancer
The Patent’s Claim

- the act of locating these genes in blood, and then extracting them for study
- Before they had isolated them, these genes did not exist before.
Did the Genes Exist Before?
Discoveries of useful properties will likely not get patent protection
Bowman v. Monsanto Corp.

2013
What is a Patent?

• The exclusive right to make, use, or sell the patented invention
Patent Exhaustion

• Purchaser has the right to use or resell

• BUT no right to make copies
What about an invention that reproduces itself?
Genetically modified soybeans

Round-up Ready
Monsanto’s Terms

- Plant purchased seeds in one season
- Consume or sell resulting crop
- May not save any seed for later planting
- May not give or sell seed for later planting
Vernon Bowman
Indiana Farmer
Bowman’s Plan

- Went to grain elevator to buy soybeans
- Planted beans
- Applied Roundup
- Harvested what survived
- Took seed from survivors
- Presto - Roundup Ready seeds - FREE!
Can Monsanto stop Bowman?
Does planting round-up ready seeds violate Monsanto’s exclusive patent right to “make” the seeds?
YES
Bowman is “making” new seeds
Not the last word on self-replicating technology
In another case, the article’s self-replication might occur outside the purchaser’s control. Or it might be a necessary but incidental step in using the item for another purpose.
Student Misconduct
Due Process in a Nutshell
Due Process Clause

Neither the United States nor state governments shall deprive any person “of life, liberty, or property without due process of law.”
Two aspects
Procedural
Substantive
Core Elements of Procedural Due Process

• Notice of the charges or issue
• The opportunity for a meaningful hearing
• An impartial decision maker
Goss v. Lopez

1975
Suspension is a deprivation of liberty that requires due process
“At the very minimum,… students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.”
How much process?
Not much
Notice of the Charges & Opportunity to Explain
Board of Curators v. Horowitz

1978
No hearing required
University of Michigan v. Ewing
1985
Ewing’s Argument

- 32 students had failed the test - all 32 allowed to retake
- 10 allowed to retake three times
- 1 allowed to retake four times
- Ewing was the only student ever not allowed to retake the test
The Process

- Promotion and Review Board reviewed Ewing’s case
- At Ewing’s request, Board met a second time
- Ewing personally explained why he should stay in the program
- Appealed to Executive Committee
Example of a substantive due process claim
Defer to academic judgment
The record unmistakably demonstrates ... that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.
Lessons
Process is good
Academic judgments will receive deference
Non-academic decisions will receive more scrutiny
Follow your policies
Listen to everything
Try to be fair
Working with University Counsel
Realistic Deadlines
Don’t lie
Don’t hold back bad facts
Bring documents
Be careful what you put in writing
Have reasons

Preferably good ones
Be careful who you trust
The Legal Mind
How the Law Thinks
Daniel W. Park
Your Questions!
The Legal Mind

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