

Legal Issues in Higher Education

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The
**LEGAL
MIND**



*How
the
Law
Thinks*

DANIEL W. PARK

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



Allan Bakke



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 end social
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
remediating societal
discrimination

JULY 10, 1978

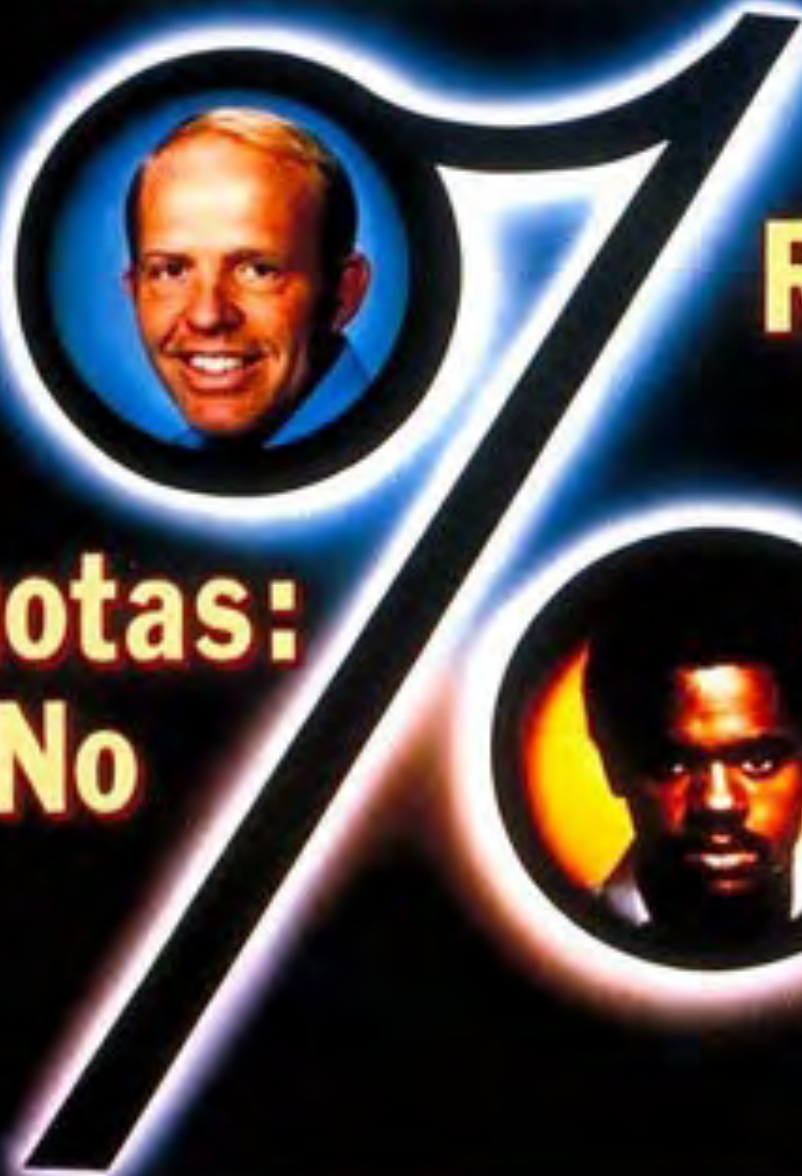
\$1.00

TIME

EXCLUSIVE
An Interview
With The
President



What Bakke Means



**Race:
Yes**

**Quotas:
No**



25 Years Later....

Grutter v. Bollinger
Gratz v. Bollinger

2003



Barbara Grutter



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



Abigail Fisher

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

2

- 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

Summary

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 must do 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?

The Upshot

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



MONSANTO
Food · Health · Hope™



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
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*How
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Law
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Your Questions!

The Legal Mind

<http://amzn.to/1eNWQWQ>

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