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ARTICLES

The Inevitable Irrelevance of Affirmative Action Jurisprudence

Leslie Yalof Garfield

_Fisher v. University of Texas_ presents an Equal Protection challenge to the University of Texas' race-preference admissions policy. Assuming that the Court will not abolish affirmative action programs wholesale, how will colleges and universities structure their admissions programs in light of the likely teachings of the _Fisher_ case? Garfield argues that they are likely to ignore any broad message, instead treating Abigail Fisher’s case as just another example of an impermissible program.

Misshaping the River: Proposition 209 and Lessons for the _Fisher_ Case

William C. Kidder

California’s experiences with and responses to Proposition 209 bear on the Fisher v. University of Texas case with respect to both questions of “compelling interest” and “narrow tailoring.” Two related developments led to the end of race-conscious admissions at the University of California. This article advances the five central findings and conclusions. First, it compares minority students’ perceptions of campus racial climate at research universities with or without affirmative action and “critical mass.” Second, it examines affirmative action bans and “chilling effects.” Third, it examines two myths about credentials and performance upon which critics of affirmative action rely. Fourth, it claims that UC has a “natural experiment” verifying that class-based policies are not effective substitutes for race-conscious policies. Last, the article discusses UC business schools and UC Law schools as case studies demonstrating the need for race-conscious affirmative action.
ARTICLES

Percent Plans: A “Workable, Race-Neutral Alternative” to Affirmative Action?

Marvin Lim 127

This Article considers whether percent plans are a “workable, race-neutral alternative” to affirmative action in admissions. Connecting Grutter with doctrine on employment law, it clarifies that “critical mass” must be evaluated quantitatively, particularly in race-neutral regimes. It then finds that percent plan policies have not engendered critical mass because they rely on flawed assumptions about majority-minority schools. In contrast, individualized assessments can realize significant diversity gains in the same settings within the constitutional limits to college and universities’ latitude to weigh race. These findings support the notions that percent plans are not “workable” policies and that affirmative action should remain constitutionally permissible.

NOTE

Blue Field of Dreams: A BCS Antitrust Analysis

Trevor Jack 165

This note examines antitrust issues with regard to the Bowl Championship Series [“BCS”]. Amateur sports have an enduring place within the hearts and minds of Americans. College football is considered a chief example of an amateur sport despite the fact that outside organizations and advertisers funnel millions of dollars into it each year. The persistent myth of amateurism in college football enabled it to run relatively unregulated and immune to antitrust scrutiny up until a few decades ago. The note begins by examining the current state of antitrust law. It then examines the origins of the National Collegiate Athletic Association [“NCAA”] and the BCS and discusses how antitrust law applies to these institutions. The article concludes with alternative remedies to the BCS system, with particular attention given to the recently adopted four-team playoff format. These alternatives are not intended to destroy the BCS, but to remove barriers to competition inherent in its current design.
BOOK REVIEWS

Textualism’s Last Stand: A Review of Scalia and Garner’s
Reading Law
Gregory Bassham 211

In Reading Law: The Interpretation of Legal Texts, Supreme Court Justice Antonin Scalia, the architect of modern textualism, has teamed up with the distinguished lexicographer and usage expert, Bryan A. Garner, to write a thick, hard-punching, and highly readable book. It is an odd-couple partnership in some ways—Scalia, the witty, pugnacious, conservative icon; Garner, the tweedy, scholarly, pro-choice, pro-gay-marriage wordsmith. Yet the authors’ strengths (and weaknesses) complement each other in a kind of literary and dialectical feng shui. While the book may not be the “great event in American legal culture” that Judge Frank Easterbrook touts it to be in his glowing Foreword, it is fair to say that it may become a minor classic. This review examines some of the strengths and weaknesses of the book.

Duke Lacrosse, Universities, the News Media, and the Legal System: A Review of Howard M. Wasserman’s Institutional Failures
Meredith Bollheimer 229

This review examines a few passages and concepts from Howard M. Wasserman’s Institutional Failures: Duke Lacrosse, Universities, the News Media, and the Legal System. This collection of essays is a must read for any college or university administrator who finds themselves embroiled in a high profile controversy. It allows the reader to consider the totality of the events that transpired at Duke with the benefit of hindsight and expert analysis. There are important lessons in this book not only for senior college and university administrators, but also for faculty members, college and university public relations/communications personnel, government prosecutors, the media, and perhaps most importantly, consumers of media. In total, this book is presented in a highly digestible way; its legal analysis is precise and thorough, but accessible to non-lawyers as well.
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On the Cover

Our cover this month, “Jeanne Hébuterne (Au chapeau)” (36⅞ in. by 21⅛ in.) by Amedeo Modigliani, sold for $42,104,835 at Christie’s recent Impressionist and Modern Art Sale in London on Feb. 6, 2013. Though he was born into a reputable family and educated in the academic style at the finest art schools, Modigliani famously reinvented himself upon moving to Paris in 1906, casting off his “bourgeois” trappings and cultivating a reputation as a talented, but troubled, artist and a serial abuser of drugs and alcohol. He went so far as to destroy all of his previous work and adopted an entirely new visual style, notable for its elongated forms and mask-like faces. Theories abound as to what spurred this transformation, but it’s generally believed that the substance abuse was likely a means to disguise the symptoms of his tuberculosis, a highly communicable, and at the time, incurable, disease that would have made him a social outcast.

Like many of the avant-garde artists of this time, Modigliani sold very few paintings during his life, and what little he made was fruited away by his addictions. Since his death, however, the value of his work skyrocketed, driven by his unique style, vagabond life and early death. He died at age 35 from tubercular meningitis, complicated by his alcohol abuse and narcotics addiction, leaving behind a reputation as the quintessential “tortured artist” and inspiring generations of misguided emulators.

—David H. Lenok, Associate Legal Editor

Some of our other favorites from this auction include:
• p. 28, “Jeune fille à la Mauresque, Robe Verte” by Henri Matisse, which sold for $4,794,051.
• p. 43, “Samois, La Berge, Matin” by Paul Signac,
which sold for $3,042,371.
  * p. 51, “Après Le Déjeuner” by Berthe Morisot, which sold for $10,924,931.

BRIEFING

10/ Tax Law Update

David A. Handler, partner in the Chicago office of Kirkland & Ellis LLP; and Alison E. Lothes, associate in the Boston office of Sullivan & Worcester LLP, report on:

- **Estate of Giovacchini**—Court makes its own valuation determination of unique Lake Tahoe, Calif. property and denies accuracy-related penalties;

- **Estate of Sommers v. Commissioner**—State court determination that gifts were irrevocable is upheld;

- **Chief Counsel Advice 201304006**—Estate can’t expand Internal Revenue Code Section 6166 election; and

- **Patel v. Comm’r**—Income tax charitable deduction for allowing local fire department to use home for training services is denied.

13/ Philanthropy

Robert F. Sharpe, Jr., president of the Sharpe Group in Memphis, Tenn., reports on the impact of the American Taxpayer Relief Act of 2012 on charitable giving.

FEATURES

Estate Planning & Taxation

17/ The Best Defense is a Good Offense

By Elaine M. Bucher, Michael D. Simon & Alyse M. Reiser

What should an estate-planning attorney do when a client wants to create a trust or will or change an existing provision, and the attorney thinks that the new document or provision may be contested? Here are some action items that can increase the probability that the client’s testamentary wishes will be honored.

Elaine M. Bucher is a shareholder at Gunster, Yoakley & Stewart, P.A. in West Palm Beach, Fla.

Michael D. Simon is a shareholder at Gunster, Yoakley & Stewart, P.A. in West Palm Beach, Fla.

Alyse M. Reiser is an associate at Gunster, Yoakley & Stewart, P.A. in West Palm Beach, Fla.

23/ Including Capital Gains in Trust or Estate Distributions After ATRA

By Frederick M. Sembler

Trustees of nongrantor trusts and executors of estates often want to treat distributions to beneficiaries as including realized capital gains, so that these gains are passed, along with any associated tax liability, to the beneficiaries. But fiduciaries must contend with the Internal Revenue Code and regulations that may limit this ability. Take note: There’s a Treasury regulation that may give fiduciaries more flexibility in determining when capital gains will be included in distributable net income.

Frederick M. Sembler is the founding member of The Law Office Of Frederick M. Sembler, PLLC, with offices in New York and Stamford, Conn.

Fiduciary Professions

30/ Divided Duties

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778 A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons From the Lawrence King Case
David Alan Perkiss
In his remarks at the School of International Relations in Tehran, Iran, on 30 August 2012, Secretary-General Ban Ki-moon said: “At the entrance of the United Nations there is a magnificent carpet—I think the largest carpet that the United Nations has—that adorns the wall of the United Nations, a gift from the people of Iran. Alongside it are the wonderful words of that great Persian poet, Sa'adi. I quote:

> All human beings are members of one frame,  
> Since all, at first, from the same essence came,  
> When time afflicts a limb with pain  
> The other limbs at rest cannot remain.  
> If thou feel not for other’s misery  
> A human being is no name for thee.

This wise counsel is as relevant today as when it was written nearly 800 years ago.” The Secretary-General added that: “Our collective responsibility is to build bridges of mutual understanding. This is the very heart of the Alliance of Civilizations, which is an initiative by the United Nations, an initiative inspired by Iran itself through dialogue among civilizations. This is what your country has proposed. All nations should be true to that higher calling.”

The 2001 United Nations Year of Dialogue among Civilizations was established to redefine diversity and to improve dialogue between civilizations and cultures. Dialogue among civilizations laid the foundations for what, in 2005, became the Alliance of Civilizations. As the Secretary-General said in a 2007 speech, “the Alliance of Civilizations [is] the successor to our earlier Dialogue among Civilization process.” The UN Chronicle takes a closer look at that process and at the progress made and lessons learned during the past ten years in achieving dialogue among civilizations, for that goal remains as valid and as necessary today as it was back in 2001.
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