Suing Alma Mater

HIGHER EDUCATION and the COURTS

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Originally, this book was a project titled "Untroubled Immunity," based on a paper that had had a profound influence upon me at the start of my career as a professor. It was published in 1974 by Stephen K. Bailey, and I began teaching at the University of Houston in 1982, the year he died—far too early at age sixty-five. In Washington, D.C., I heard him give several lectures and workshops on legal issues and their important role in higher education policy. I was a law student at Georgetown University Law Center for much of that time, and he was unfailingly helpful and encouraging to me. (He once kidded me about the topic of my Ph.D. dissertation, on the establishment of the Ohio Board of Regents, saying, "Well, everyone needs a dissertation topic." He was correct.) I have worked on portions of this virtual project since then, not always consciously and certainly not consistently. I had become afraid that it might become my *Key to All Mythologies* or my *Smile,* the great unfinished work ridiculed by George Eliot in *Middlemarch* and the 1966 rock-and-roll album project left unfinished by Brian Wilson until 2004, when he recovered from the mental illness that had interfered with the execution of that towering work.

In the serendipity that has largely defined my professional life plans, Ashleigh Elliott McKown, an assistant editor at the Johns Hopkins University Press, then approached me with encouragement to move this project from its vague "forthcoming" vapors to the real thing. For this, I will always be grateful. She also pried loose two supportive and useful reviews, both anonymous, that provided both support and guidance. Although this is my fifteenth book, I still am paralyzed at the outset of each one, daunted by the time and effort each takes, even when I have thought about them for many years, as was the case here. The experience over several decades on my higher education law casebook, *The Law and*

Higher Education: Cases and Materials on Colleges in Court, in its third edition (2006), with supplements, a teacher's manual, and now a coauthor (Amy Gajda), helped more than was obvious, as I am forced to think about not only the cases and the need for legal reasoning but also the pedagogical value for instructional purposes. I have taught each of the cases highlighted here many times and still learn anew each time, in part because I am simply better at my craft of teaching but also because seeing them fresh with a new cohort of students who help dissect them helps me to look deeply each time. For those who think of teaching and producing scholarship as antithetical to each other, I am Exhibit A for the opposite proposition.

I was not new to the Johns Hopkins University Press, as I withdrew from a contract with them more than a decade ago, for a book on student financial aid policy issues, in part because I grew frustrated with the pace of congressional action on Title IV and related legislation, and because other events overtook my research agenda. I felt remorse for having withdrawn and felt special regret that I had let down Jacqueline Wehmueller, who had shown great faith and encouragement in the project. Jacqueline is now an executive editor at the Press, so I am glad to be back in her good graces. (The truth is, she was always very gracious and did not show me any disfavor or exasperation.)

I feel more than the usual debt of gratitude to the many people who helped on this project, especially since many of my collaborators had personal roles and stakes in the cases. In fact, several said that they had waited for someone to ask them about the case and were glad I had contacted them. Some were not as glad and succumbed to my charms (more likely, were worn down by my persistence) quite reluctantly. But I appreciated them all, and the book is much better for their elaborations or corrections of the record: Todd Ackerman, Judith Areen, Benjamin Baez, Vanessa Baird, Aaron Bruhl, Alvin O. Chambliss Jr., Matthew Finkin, Matthew L. M. Fletcher, Steven Friedman, Amy Gajda, Leslie C. Griffin, William A. Kaplin, Albert Kauffman, Barbara A. Lee, David T. Lopez, Marcee Lundeen, Stuart Nelkin, Michael S. Paulsen, Ellen Rabiner, Richard Spuler, Peggy Stone, Octavio Villalpando, and Leland Ware. Of course, all are absolved of any guilt by association.

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Gregory Britton, Martin Schneider, and Mary Lou Kenney. Lavina Fielding Anderson, copyeditor extraordinaire, saved me from my sorry self in so many instances that I will never undertake another book without her assistance.

The Cases Reviewed in This Book

This project was originally about a number of U.S. Supreme Court higher education cases and their backstories. The 120 cases in the fifty-year period that I counted for the study provided many well-known possible examples, but during the years that this project sat in my in-box, Foundation Press started its Law Stories series, and I wrote about immigration cases and civil rights cases in the Supreme Court for several of the readers, and with Ronna Greff Schneider, I coedited a series volume of our own, focusing on a dozen K–12 and higher education law cases (2008). This project confirmed that examining the backstory or litigation history was a genre that I enjoyed and even had a knack for. Having this background information invariably improves my understanding and my teaching of the cases in my higher education law seminar. It also scratched my Supreme Court itch, so when this project came along, I was ready to focus on important cases that had never made it to "SCOTUS," as insiders are wont to call the Supreme Court.

The truth is that this is a very big pond, and there are so many fascinating cases that never made it to the Court that I started out with dozens of favorite cases that I had tracked, been involved with, or studied, so that I had to winnow out dozens of potential candidates. I ended up choosing cases where not much had been written by other scholars. *Hopwood* is the exception, but I chose it because it might as well have been a Supreme Court holding in the Fifth Circuit, where I live and work. I also saw up close and personal how a case can transform practice, for good or ill, as my own law school struggled to implement *Hopwood*'s perverse holdings, even as we knew it was on the wrong side of history. My own professional involvement in ameliorating the effects of that case resulted both in my choosing to include it and in my being in a photo, now occupying my office shelf, in which Governor George W. Bush is signing the Texas Top Ten Percent Plan into law, surrounded by several of us who had assisted Rep. Irma Rangel in moving the bill through the Texas Legislature to his desk.

In addition, each case was about a different subject, with discrimination claims being a thread through all of them, in both state courts and federal courts. Even the civil procedure of the cases was mixed: two judgments notwithstanding the verdicts, a retrial after too many sick jurors ruined the first trial, a

settlement after the appellate remand, complex class certification issues, a case where bad lawyering left subsequent appeals lawyers with bad facts wrongly stipulated to, and a frontal challenge to the Court which SCOTUS chose not to correct or rebuke. Here are the cases I chose, with their subject matter and the procedural notes on their disposition. While none made it all the way through the chute to the highest court in the land, they all could have, with either deeper pockets or slightly different facts or decisions or a different trajectory. They all stand on their own, representing difficult and deep issues.

Chapter 1 is "A Primer on Higher Education Law in the United States." Higher education law has developed over time from sometimes puzzling beginnings, but in essence, courts have been asked to resolve disputes over such basic questions as, What is a college? and Who is responsible for the governance of this entity? The simultaneous existence of both private and public institutions of higher education imposes different expectations and responsibilities for each. Another major wellspring of litigation is faculty, who justifiably feel that they have legal rights in their positions and control over how they teach. Both of these components are shifting and contested. The nature of collective bargaining has streamlined but also intensified such redefinitions. Students have an increased sense of ownership and legal entitlement. The most recent actors to undertake substantial litigation are nontraditional stakeholders in the many purposive organizations and external communities that assert standing and deeply held convictions.

Chapter 2 is another orientation essay. In it I describe how I constructed the database for this study, beginning with more than 300,000 items of potential interest and, through successive winnowings, reducing the figure to the 120 cases involving higher education that made their way to the U.S. Supreme Court in the last fifty years. I also produce a brisk statistical overview that profiles these cases by issue, plaintiff, defendant, and outcome. Perhaps the most interesting finding of the statistical exercise is that the odds are heavily weighted in favor of institutions. As an exemplar, I note the strikingly negative results of Native American litigation in the Court, supplying a stark example of such lopsided odds.

Chapter 3 provides the final orientation for nonspecialist readers: how cases make it to the U.S. Supreme Court. The simple appeals process, known even to elementary schoolchildren, provides a mighty river of potential cases that slows to a trickle that can be heard and ruled on—in some fashion—in a single term. I explain the role of certiorari in designating the winners and losers and describe the complex role that the Court itself plays in communicating what kinds of cases

it would receive hospitably as well as the specialized role of policy entrepreneurs, also known as purposive organizations. In addition to the time-honored and effective ACLU, MALDEF, and the NAACP Legal Defense Fund are their newer conservative counterparts, many of them religiously affiliated, who have adopted similar techniques and parallel goals. One of them, the Alliance Defense Fund, renamed itself the Alliance Defending Freedom in July 2012, after this book went to press.

In Chapter 4, I illustrate some of these principles with a discussion of *U.S. v. Fordice,* a long and drawn-out case that was an alternative model for higher education litigation, one not brought by directed organizational interests. I conclude that such a case will not likely be seen again, revealing the changed landscape of how these cases arise.

Chapter 5 is about *Hopwood v. Texas,* which produced the interesting judgment, "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." This complex federal case was tried at the district court, with a 1994 decision. It was affirmed by the circuit, with later proceedings the same year. After it was re-considered at the district court, it was reversed and remanded by the circuit in 1996, at which time the appeal was dismissed. A request for a rehearing by the entire circuit was denied in 1996. Certain motions to add another party were granted by the U.S. Supreme Court in 1996, and this writ of certiorari was then denied. Additionally, the Court denied cert to hear the case. There was a final remand to the original district court in 1998, the judgment for which was affirmed in part and reversed in part by the circuit in 2000. The key decision that led to dismantling affirmative action in the circuit was *Hopwood v. State of Texas.* In 2003, another admissions case, *Grutter v. Bollinger,* overturned *Hopwood,* and in 2012, the issue is in play with *Fisher v. UT.*

Chapter 6 addresses *Lawrence M. Abrams v. Baylor College of Medicine,* a bench trial before a federal judge, with a verdict for the faculty member. The verdict was upheld by the court of appeals, and no cert appeal to the U.S. Supreme Court was sought by the medical school defendant.

Chapter 7 covers *Christina Axson-Flynn v. Johnson,* a federal case where the defendant university won at the trial level but which, on appeal, was overturned and remanded by the circuit back to the trial court. The parties then settled the matter.

In Chapter 8, I use *Richards v. League of United Latin American Citizens* to discuss the state district court's certification of the classes and the court of appeals' affirmation of this certification. At the end of the trial in October 1991, the

district court entered its judgment for the plaintiffs three months later in January 1992 on undisputed facts (a directed verdict) and jury findings and then overruled adverse jury findings (JNOV). The judgment was directly appealed by the state to the Texas Supreme Court. Pending a ruling on the merits of the case, in June 1993the court issued a stay of all injunctive relief granted by the trial court. The court overturned the lower court on the merits, after the state legislature enacted substantial resources in the interim.

Chapter 9 examines *Reginald Clark v. Claremont University Center,* a suspenseful case where justice ground exceedingly slow and fine. The original jury trial was postponed almost a year due to jury illnesses, but the faculty plaintiff won his jury trial. The decision was upheld by the state appeals court, and the state supreme court then upheld the verdict on appeal. While I do not treat it as a full-blown case study, in Chapter 10 I treat the *Garcetti v. Ceballos* case for what it is, an important SCOTUS decision that further weakened *Pickering* and further solidified *Connick,* one that undermines faculty autonomy and public-employee speech jurisprudence—and ultimately academic freedom. Any new book on this topic in the future will have to reckon with the growing and insidious application of this case in higher education decisionmaking, at the individual faculty level, and in terms of the overarching governance system.

Together with the analysis of Supreme Court cases, I have followed the leads set out by George R. LaNoue and Barbara A. Lee in their pioneering book, *Academics in Court* (1987, p. 146). In this careful and interesting study, they used a dual method approach to study hundreds of federal cases involving college faculty and employee discrimination claims and then to fashion five chapter-length ethnographic litigation history case studies. I have adopted this approach; by broadening the large-scale database to fifty years of all the Supreme Court cases involving colleges, I shamelessly bogarted their approach to the case studies. I have even attempted to emulate the smart-assed humor they employed, although I know I fell short in this dimension. For one tongue-in-cheek chapter title, they label *Lieberman v. Gant,* a case about how to determine what a plaintiff's comparator is or should be, as being about "A Faculty Wife Who Was not a Gentleman." In another reference, this one in the chapter about an equal pay case, *Mecklenberg v. Montana State University,* they refer to the site of the case as "Marlboro country" (p. 146) and to the happenstance of the actual publication of the judge's opinion: "Indeed, if Greg Morgan had not responded to the invitation of the Commerce Clearing House to have the decision published in the *Employment Practices Decisions,* the *Mecklenberg* opinion might have been the legal equivalent to the Zen riddle of whether a tree makes a noise when it falls deep

in the forest where no one can hear it" (p. v). For LaNoue and Lee, there were many trees crashing, and not in silence.

Most importantly, I have adopted their overarching purpose in my study that follows theirs by twenty-five years: "We are concerned with what happens to the particular people and institutions that get caught up in the litigation process. In 1983 there were about 13 million civil lawsuits in the United States. For the participants, these cases involved an enormous amount of time, money, expense, and often anxiety. Litigation in our society has assumed an unusual role in conflict resolution, and it is important to describe and, eventually, to measure the consequences of this process. This requires a new social science lens, which this book develops and applies" (p. 173). As they did, I inhabited Marlboro country with the various actors in these dramas, and I have sought to add details and nuance that round out the cases. All cases resemble life less the farther they move through various appeals processes toward whatever "resolution" there is in the arc of that case's life. I would be satisfied to be viewed as someone as successful as they were in their book.

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PART I

A Primer on Higher Education Law in the United States

The year 1970 was in the middle of the civil rights era, the height of the anti–Vietnam War period, the tail end of the best rock-and-roll years (in this year Van Morrison wrote *Moondance,* Jimi Hendrix and Janis Joplin died, and the Beatles disbanded),[1] and the time of the Kent State and Jackson State University shootings. During this momentous year, John S. Brubacher wrote in *The Courts and Higher Education*:

> The occasion for judicial prying into discretionary matters has grown out of an accentuated public interest in civil liberties. As never before, courts are applying the principles of the First, Fifth, and Fourteenth Amendments to the transaction of academic affairs. Take the due process clause of the First and Fourteenth Amendments as an illustration. Dismissing a student used to be a simple matter within the autonomous discretion of the dean or faculty disciplinary committee. But now the courts may review this discretion both procedurally and substantively. Procedurally they inquire whether the student had a fair hearing, and substantively they examine whether college rules on discipline are reasonable. This review amounts to an important reduction in the traditional autonomy of the college or university. How much further is this encroachment likely to go?[2]

The "encroachment" he lamented has gone much further than he even had dared fear. However, not all observers of this period were as mortified as he was. Political scientist Stephen K. Bailey, looking out at the same landscape, saw a more balanced review of the relationship between the state and higher education that had given rise to Brubacher's concerns over the legalization of the academy:

> Today, as we perceive this elemental paradox in the tensions between the academy and the state, it is useful to keep in mind its generic quality. For at heart we are dealing, I submit, with a dilemma we cannot rationally wish to resolve. The public interest would not . . . be served if the academy were to enjoy an untroubled immunity. Nor could the public interest be served by the academy's being subjected to an intimate surveillance. . . . Whatever our current discomforts, because of a sense that the state is crowding us a bit, the underlying tension is benign. . . . The academy is for the state a benign antibody and the state is the academy's legitimator, benefactor, and protector. Both perspectives are valid. May they remain in tension.[3]

I graduated from college seminary in 1972. When I first began doctoral work and legal studies hoping to carve out a niche in the growing field of higher education law, I leaned toward the Stephen Bailey view; after nearly forty years of observation, I have come to appreciate how prescient he was, writing in 1974. But even the most observant and astute scholar of higher education politics would be surprised at today's developments. In modern higher education, few major decisions are made without considering the legal consequences; although the core functions of higher education—instruction and scholarship—are remarkably and relatively free from external legal influences, no one would plausibly deny the increase of legalization on campus. We know surprisingly little about the law's effect upon higher education, but virtually no one in the enterprise is untouched by statutes, regulations, case law, or institutional rules promulgated to implement legal regimes. It is rather like the persistent heat and humidity in Houston: You need not measure them, but you know they are there, even if you do not consult a meteorologist.

Lewis Thomas, among our most thoughtful commentators on medicine and science in society, ascribed organic qualities to the university, and his view of a college as a "community of scholars" is grounded in an appreciation of the history of education. Paul Goodman's *The Community of Scholars* and John Millett's *The Academic Community,* both published in 1962, also exemplify this perspective.[4] Like a prism refracting light differently depending upon how you hold it up for viewing, higher education can appear differently. For Herbert Stroup and many other sociologists, colleges are essentially bureaucracies, a view from which no student confronting course registration today is likely to be dissuaded.[5] To Victor Baldridge, universities are indisputably political organizations, as they have also appeared to Clark Kerr, Burton Clark, and Cary Nelson.[6] To thirty years' worth of critics, higher education is stratified by class, resistant to legal

change, too easily given to political correctness, too easily given to conservative politics, and in need of fundamental restructuring.[7] As many observers would insist, all are equally close to the truth or truths, depending upon which truth is being refracted. The cases to be examined in this book reveal many truths and, often frustratingly, few answers. To paraphrase the astute Stephen Bailey: All these perspectives are valid. May they remain in tension.

Legal Governance

As many cases reveal, legal considerations can pare governance issues down to essentials, chief among them the question: What is a college? Despite the seeming obviousness of this question, a variety of cases probe this fundamental definitional issue. In *Coffee v. Rice University*, the issues were whether the 1891 trust charter founding Rice University (then Rice Institute), which restricted admissions to "white inhabitants" of Houston and required that no tuition be charged, could be maintained in 1966.[8] The court held that an "institute" was a postsecondary institution by any other name, and its postcompulsory collegiate nature rendered it a "college." On the issue of whether the trust could be maintained with its racial restrictions and tuition prohibition, the court applied the doctrine of *cy pres*, which theory allowed the trustees to reformulate the provisions and admit minorities and charge tuition, for to continue the practices would have been impracticable; if the trust provisions can no longer be realistically carried out, a court can reconstitute the trust to make it conform to the changed circumstances.

A court is not always so disposed as the *Coffee* court. In *Shapiro v. Columbia University National Bank and Trust Co.*, a 1979 case, the court allowed a trust reserved only for male students to remain male-only, refusing to apply *cy pres*.[9] My personal favorite is *U.S. on Behalf of U.S. Coast Guard v. Cerio*, a 1993 case in which a judge allowed the Coast Guard Academy to reformulate a major student prize when the endowment's annual interest had grown to over $100,000.[10] The judge begins, "This is essentially a case of looking a gift horse in the mouth and finding it too good to accept as is." He then allowed the academy to reconstitute the gift and to use some of the prize interest for other support services.

Sometimes it is a zoning ordinance that raises the issue of what constitutes a college. In 1983's *Fountain Gate Ministries v. City of Plano*, a city wished to restrict colleges from being located in residentially zoned housing areas.[11] The Fountain Gate Ministries argued that its activities were those of a church, rather than those of a college. However, the court took notice of the educational

instruction, faculty, degree activities, and other college-like activities and determined that these constituted a college, protestations to the contrary notwithstanding. In the opposite direction, a court held that a consultant firm's use of the term "Quality College" to describe its activities did not make it a "college" or subject it to state regulation.[12] In wry fashion, the court noted that to make use of "college" in an organization's title would make a college bookstore or the Catholic College of Cardinals into postsecondary institutions.

Sometimes the definition drives a divorce decree. In *Hacker v. Hacker,*[13] a father who had agreed to pay for his daughter's college tuition did so while she was a theater major at the University of California, Los Angeles, but refused to do so when she moved to Manhattan and enrolled in the Neighborhood Playhouse, a renowned acting school; that it was not degree-granting persuaded the judge that the Neighborhood Playhouse failed to meet the definition of a college. Occasionally the definition turns on accreditation language (*Beth Rochel Seminary v. Bennett*),[14] while other times it turns on taxation issues (*City of Morgantown v. West Virginia Board of Regents*).[15]

The Establishment of Public and Private Colleges

Due to the different constitutional considerations, such as free speech and due process not applying to private colleges, issues that vexed Brubacher when he wrote in 1970, it is important to distinguish between the two forms in order to understand the full panoply of rights and duties owed to institutional community members. Consider the public/private distinction as a continuum, with the 1819 case of *Trustees of Dartmouth College v. Woodward*[16] at the purely private end and, 165 years later, the purely public colleges, such as the University of Texas, Ohio State University, and other flagship institutions at the other. In *Dartmouth,* the first higher education case ever considered by the U.S. Supreme Court, the State of New Hampshire had attempted to rescind the private charter of Dartmouth College, which had been incorporated in the state nearly fifty years earlier, and to make it a public college with legislatively appointed trustees to replace the college's private trustees. The Court held that the college, once chartered, was private and not subject to the legislature's actions, unless the trustees wished to reconstitute it as a public institution.

Of course, if there are pure archetypes such as Dartmouth and the University of Pittsburgh, there must be intermediate life forms, such as Alfred University, where, in the 1968 case, *Powe v. Miles,*[17] several students were arrested; the court held that the regular students were entitled to no elaborate due process, as the