Diversity as a Compelling Interest in Higher Education

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Affirmative Action in the courts

Constitutional Law:

- Court must apply strict scrutiny under equal protection clause
- To withstand strict scrutiny, a compelling interest such as diversity must be proven
- Policy must also be narrowly tailored to achieve the compelling interest

Historical cases

1896: Plessy v. Ferguson Upholds *de jure* (state-sponsored) school segregation; "separate but equal" becomes law of the land.

1950: Sweatt v. Painter (UT Austin) Determined that a separate law school for African Americans was not constitutional due to racial isolation and other intangibles, paving the way for *Brown v. Board.* Heman Marion Sweatt is the first African American admitted to UT Law School.

1900 **1935** **1970**

1954: *Brown v. Board (Kansas)* Declared "separate but equal" institutions unconstitutional, striking down *de jure* (state-sponsored) school segregation.

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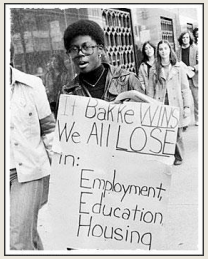
Recent Cases and Policies

1978: *U of California v. Bakke* Quotas are unconstitutional, but diversity in the classroom is a "compelling interest."

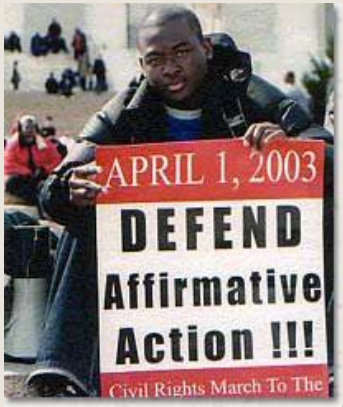


1997: Top 10% Rule (H.B. 588) instituted at all Texas universities; holistic admissions policies emerge for remainder of incoming class.

1970 1980 1990 2000

1996: *Hopwood v. U of Texas* Fifth Circuit Court struck down use of race in law school admissions to achieve diversity or to counter discrimination.

2003: *Grutter v. Bollinger (U of Michigan)* Confirms diversity in the classroom is a compelling interest; admissions policies that take race plus other factors on an individual basis does not constitute a quota system. *Kennedy's dissent:* court did not apply "strict scrutiny."



Recent Cases and Policies

2007: *PICS v. Seattle School Board* Diversity remains a compelling interest, but the deciding factor cannot be race alone.

2013: *Fisher v. U of Texas* UT argued on the basis of diversity as a compelling interest to justify holistic review; case was remanded to Fifth Circuit because it had not applied "strict scrutiny." UT Austin favored.

2014: *Schuette v. Coalition (U of Michigan)* Upheld Proposal 2, a state ballot measure abolishing affirmative action at public institutions.

2005

2010

2015

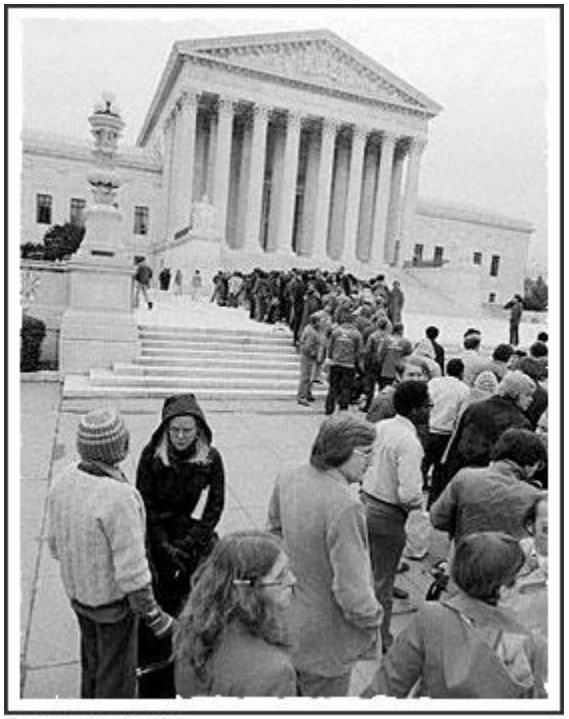
2009: Top 10% Rule capped at 75% of incoming class at UT Austin only (S.B. 175).

2016: Fisher v. U of Texas II: SCOTUS affirmed deference to academic freedom and the university's constitutional right to consider race amid a holistic admissions review.

Univ. of California v. Bakke (1978)

- Allan Bakke denied admission to UC medical school
- SCOTUS deemed diversity a "compelling interest" in the classroom, generally upholding affirmative action
- However, SCOTUS struck down UC's race-based quota system because it went too far; ordered that Bakke be admitted

Effects of Bakke



- Laid the more recent foundation for affirmative action in higher education
- Established diversity as a "compelling interest," which becomes the legal standard for today's affirmative action cases
- Also determined that racial quota systems unconstitutional
- Challenge to educators and administrators is to find alternative ways to promote diversity

Precedent of Grutter v. Bollinger

Educational Benefits of Diversity

"In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"

Precedent of Grutter v. Bollinger

Business Imperative

"These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."

Precedent of Grutter v. Bollinger

National Security

"What is more, high-ranking retired officers and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experiences,' a 'highly qualified, racially diverse officer corps … is essential to the military's ability to fulfill its principle mission to provide national security.' The primary sources for the Nation's office corps are the service academies and the Reserve Officer Training Corps (ROTC) the latter comprising students already admitted to participating colleges and universities…(contd')"

Precedent of Grutter v. Bollinger

National Security

"…At present, 'the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academics and the ROTC used limited race-conscious recruiting and admissions policies.' To fulfill its mission, the military 'must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.' "

Fisher v. University of Texas (2013)

- Abigail Fisher was denied admission to The University of Texas at Austin in 2008
- She sued the university because her application was reviewed under the holistic admissions process, during which race is one factor out of many to be considered in admission

Fisher v. University of Texas (2013)

- Supreme court affirmed educational benefits of diversity remain a compelling interest, but argued for the narrow tailoring of race
- Remanded back to Fifth Circuit Court for "strict scrutiny"
- The Fifth Circuit found in favor of UT Austin: "It is equally settled that universities may use race as part of a holistic admissions program where it cannot otherwise achieve diversity."
- 47 students with lower test scores and grades were admitted – five were African American or Latino/a and 42 were white. 168 African American and Latino/a with grades as good or better than Fisher were denied admission.

Fisher v. University of Texas (2016)

- Affirmed deference to academic freedom and the university's constitutional right to consider race amid a holistic admissions review
- Opinion notes that holistic policy requires continual refinement to "assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary"

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UT Austin Holistic Admissions

Under holistic review, UT takes a broad look at individual characteristics, including an applicant's:

- Culture, language, and family
- Educational, geographic, and socioeconomic background
- Work, volunteer, or internship experiences
- Leadership experiences
- Special artistic or other talents
- Race or ethnicity

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Precedent of Fisher v. Texas II

Met "reasoned, principled explanation"

"The University articulated concrete and precise goals – e.g., ending stereotypes, promoting 'cross-racial understanding,' preparing students for 'an increasingly diverse workforce and society,' and cultivating leaders with 'legitimacy in the eyes of the citizenry' – that mirror the compelling interest this Court has approved in prior cases.'"

Precedent of Fisher v. Texas II

Top Ten Percent Plan Not Sufficient

"The record, however, reveals that the University studied and deliberated for months, concluding that race-neutral programs had not achieved the University's diversity goals, a conclusion supported by significant statistical and anecdotal evidence."

Precedent of Fisher v. Texas II

Holistic Admissions Narrowly Tailored

"The record shows that the consideration of race has had a meaningful, if still limited, effect on freshman class diversity. That race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence on unconstitutionality."