



# *Diversity as a Compelling Interest in Higher Education*

DR. GREGORY J. VINCENT

Vice President for Diversity and  
Community Engagement

Professor of Law

W. K. Kellogg Professor of Community  
College Leadership



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DIVISION OF DIVERSITY AND  
COMMUNITY ENGAGEMENT

# 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

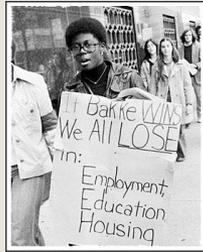
**1954: Brown v. Board (Kansas)** Declared “separate but equal” institutions unconstitutional, striking down *de jure* (state-sponsored) school segregation.



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# Recent Cases and Policies

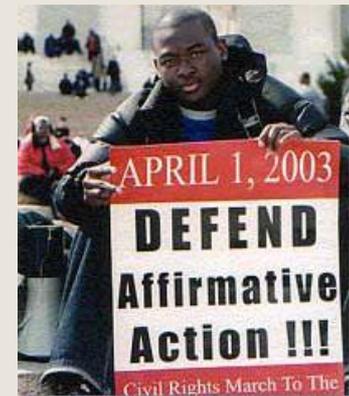
**1978: *U of California v. Bakke*** Quotas are unconstitutional, but diversity in the classroom is a “compelling interest.”



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

**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.”



1970

1980

1990

2000

# 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.

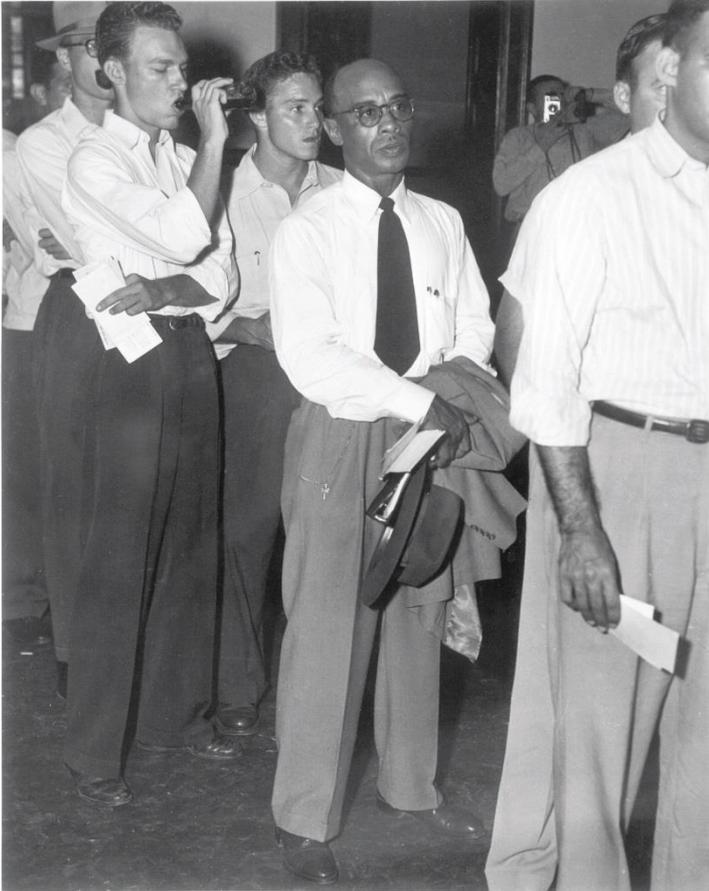
# *Sweatt v. Painter (1950)*

Thurgood  
Marshall and  
W.J. Durham  
argue *Sweatt v.  
Painter*



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# Heman Sweatt: First African American Admitted to UT Law School



“The hostility was terrifying. I think I was in the law school five minutes before I was pulled out of a registration line and cussed out. While in the law school, I had threats against my life. The first Friday in school, there was a Ku Klux Klan demonstration on campus.”

—Heman Sweatt, 1972



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# Importance of *Sweatt v. Painter*

- ❖ The University of Texas at Austin became the first school ordered by law to admit African American graduate students
- ❖ Opened the door for undergraduates to be admitted—but that didn't happen until 1956
- ❖ *Sweatt v. Painter* paved the way for *Brown v. The Board of Education*



# *Brown v. Board of Education (1954)*

“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

—Chief Justice Earl Warren,  
1954

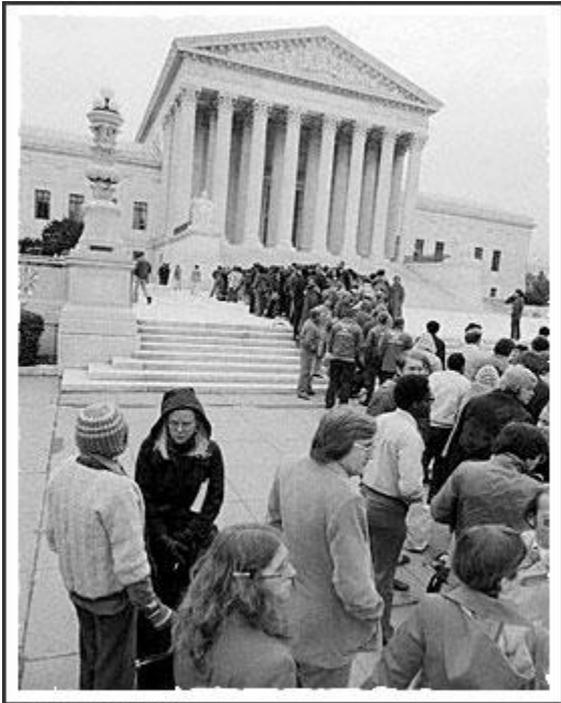


# Univ. of California v. Bakke (1978)

- 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



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- 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



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# *Hopwood v. University of Texas (1996)*

- Supreme Court declined to hear the case; thus the Hopwood decision became the law with regard to the use of race in admissions in Louisiana, Mississippi and Texas (those were the states over which the Fifth Circuit had jurisdiction).



# Effects of *Hopwood*

- Minority enrollment declined at universities in Texas
- In 1995, African Americans made up 7.4% of law school admissions; Hispanics 12.5%
- In 1997, without affirmative action, African Americans made up 0.9% of law school admissions; Hispanics 5.6%



# Top Ten Percent Rule (1997)

- Law guarantees Texas students who graduated in the top ten percent of their high school class automatic admission to all state-funded universities



# Grutter v. Bollinger (2003)

- Upheld affirmative action admissions policy of Univ. of Michigan Law School
- Diversity as compelling interest



# *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 officer corps are the service academies and the Reserve Officer Training Corps (ROTC) the latter comprising students already admitted to participating colleges and universities...”



# 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.’ ”



# *Parents Involved in Community Schools v. Seattle School District No. 1 (2007)*

- School districts in Seattle, WA and Louisville, KY used racial classifications to assign students to schools in order to achieve diversity and/or avoid racial isolation
- SCOTUS affirmed diversity was a “compelling interest,” but ruled that race could not be the predominant factor used to achieve diversity (“narrow tailoring”)



# 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.”
- UT Austin’s mix of legislated Top Ten Percent admissions (75% of class or more) and holistic admissions (25% of class or less) continues with degrees of success in diversifying the University



# 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



# Schuetz v. Coalition to Defend Affirmative Action (2014)

- Questioned whether a state violates the 14<sup>th</sup> Amendment by banning race- and sex-based discrimination in public university admissions

In 2012, the Sixth Circuit ruled that the state ban was unconstitutional

In 2014, the Sixth Circuit was reversed and the state ban upheld



# *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”