Raising the Bar on Achieving Racial Diversity in Higher Education: The United States Supreme Court's Decision in *Fisher v University of Texas*

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Abstract

In *Fisher v University of Texas,* the U.S. Supreme Court revisited the constitutionality of race-conscious admissions practices aimed at fostering student diversity in university programs. Although it concluded that student diversity remains the type of compelling state interest that justifies consideration of race in admissions, the court nonetheless raised the bar on the use of such practices by requiring universities to prove that no workable race-neutral methods can produce the same result. Whether this standard of proof is one that can be met—and whether challenges will mount against universities that continue to use the holistic methods sanctioned 10 years ago in *Grutter v Bollinger*—remains to be seen. In this commentary, the authors review the background and history of the Supreme Court's decisions on race as a factor in university admissions decisions and examine the potential effects of *Fisher* on medical education specifically.

Ten years after upholding the constitutionality of race-conscious university admissions practices to achieve greater racial and ethnic diversity, the U.S. Supreme Court revisited the question in *Fisher v University of Texas.*[1] In a 7-to-1 ruling, with Justice Ginsburg the lone dissenter and Justice Kagan having recused herself because of her prior involvement as the U.S. solicitor general, the court held that the goal of greater racial diversity in higher education is a sufficiently "compelling interest" that can justify consideration of applicants' race by public universities. But the majority also held that the University of Texas had not sufficiently demonstrated that its specific approach—identical to that sanctioned by the court in *Grutter v Bollinger*[2]—was necessary to achieve the goal of student diversity and that only the courts can determine, using the strictest possible scrutiny, when universities have "use[d] race to achieve the educational benefits of diversity."

The decision creates new challenges for universities whose admissions practices include the use of race as a plus factor. On one hand, the ruling reaffirms the principle of racial diversity as a compelling interest in public higher education. On the other, however, it lays the groundwork for future legal challenges to admissions practices that seek to achieve this goal in other than race-neutral ways, shifting the burden of proof to universities to show the lack of an alternative approach. Thus, the ultimate question is whether *Fisher* will further hasten movement away from the very admissions practices sanctioned only a decade earlier and, if so, what the implications for medical school admissions will be.

Background and Decision

Health care has been an enduring issue in civil rights, and the vast literature on the subject would fill a library. In their epic history, *An American Health Care Dilemma: Race, Medicine, and Health Care in the United States 1900–2000,*[3] W. Michael Byrd and Linda A. Clayton document the pervasive impact on both medical care and medical training of the organized racism that for so long permeated society and culture in the United States. Discrimination in the context of medical care involved not only the use of extensive techniques aimed at denying treatment to minority patients but also the systematic exclusion of qualified minority candidates from medical schools and training programs. African American students attended segregated medical schools and were permitted to train only in segregated clinics and hospitals. Even the most outstanding African American graduates were denied admission; stories such as that of Louis T. Wright—mistakenly accepted into Harvard Medical School based on his academic brilliance and then nearly excluded from obstetrical training because of his race—underscore the stunning thoroughness of the barriers that were erected.

With the demise of racial discrimination as a formal, defining construct of society came a deliberate effort to unwind the damage to health and health care caused by these utterly pervasive and long-standing practices. These efforts included the enactment of Medicare, Medicaid, and community health centers, whose roots lie not only in health security but in civil rights.[4] Furthermore, it is important to understand the reformation of medical education as part of this enormous effort to rectify the past, and as part of an overall national commitment to improving health and health care for populations that have experienced historic exclusion and underservice. As the Association of American Medical Colleges' (AAMC's) amicus brief in *Fisher* eloquently argues, a central goal

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of medical education is to immerse students in "environments that reflect the ever-increasing diversity of the society they serve,"[5] a step that is fundamental to living in a diverse society in which all patients must be treated equally.

With the court's 1978 decision in *Regents of the University of California v Bakke*,[6] the nation commenced what has become a 35-year odyssey, whose pathway will determine the permissible means by which public educational institutions can contribute to shaping the health care system of a highly diverse nation. *Bakke* established, and 25 years later, *Grutter* reaffirmed, the principle that diversity within a student body is a matter of such enormous urgency as to justify the extremely high "compelling interest" standard that must be present before government can consider the question of race. As Justice Ginsburg observed in her dissent, *Grutter* identified the means by which this principle could be lawfully advanced, through the use of holistic methods for evaluating applicants that treat race as one of many factors to be weighed in combination with others. As the AAMC noted in its amicus brief, there simply is no proven substitute for this approach. This is particularly the case in medical school admissions, where tools such as geographically targeted admissions cannot work, and where individual consideration of applicants is absolutely essential.

Ironically, it was this very Supreme Court–sanctioned approach to incorporating consideration of race into the admissions process that the University of Texas adopted in *Grutter*'s wake. Furthermore, the University moved to implement the *Grutter*-sanctioned approach precisely because it determined that the race-neutral strategies it had introduced after a previous legal challenge to its admissions efforts[7] were achieving results that fell well short of its goal of program-wide diversity, not just the greater numerical presence of minority students. This decision on the part of the university to enhance its admissions practices in accordance with *Grutter* in turn triggered Abigail Fisher's lawsuit when she was denied admission to its flagship Austin campus.

Writing for the majority in *Fisher*, Justice Anthony Kennedy stressed that student diversity in education remains a compelling governmental interest, one that can justify the use of racial classifications by government. With an eye toward the court's decision in *Bakke,* Justice Kennedy reiterated that "[student diversity] serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."[1(p 2418)] He concluded that these benefits, in turn, enhance the academic mission of universities, a particular concern under the First Amendment separate and apart from the value of diversity in the context of race. As a result, student diversity within universities has a value separate and apart from overcoming the past effects of discrimination and justifies conduct that would be prohibited in other settings.

According to the majority, however, the value of student diversity depends on whether the particular admissions process chosen "can withstand strict scrutiny."[1(p 2418)] In this regard, Justice Kennedy wrote, "educational judgment that … diversity is essential to … educational mission"[1(p 2419)] is insufficient and that universities are entitled to no deference in this judgment. Rather, they "must prove that the means chosen … to attain diversity" are narrowly tailored, and "*the reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity*"[1(p 2420)] [emphasis ours].

In his concurrence, Justice Thomas made clear that he would have gone further and invalidated the basic, underlying assumption that achieving racial diversity among students constitutes the type of compelling governmental interest that justifies the use of race as a factor. But as Justice Scalia noted in his brief, separate concurrence, the plaintiff did not challenge this underlying proposition, only the use of the holistic methods sanctioned in *Grutter.* This, however, did not stop Justice Thomas in his extraordinary concurrence from comparing the University of Texas' justifications offered for considering race to achieve student diversity against the justifications offered by segregationists for using racial classifications to maintain separation of the races. From his perspective, claiming that diversity promotes a healthier society and a far-higher-quality educational experience was no different from arguing that society would be far healthier, and educational opportunities for minority students far richer, were separation of the races in education to be maintained. According to Justice Thomas,[1(p 2429)] the damage was equal:

> I suspect that the University's program is … based on the benighted notion that it is possible to tell when discrimination helps, rather than hurts, racial minorities…. But … the worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helps minorities.

As he has written and spoken previously in other settings, Justice Thomas stressed the long-term damage that in his view flows to minority students whose admission, in his opinion, is tainted by the very fact of an admissions policy that uses race as a plus factor.

Justice Ginsburg's dissent, in addition to criticizing the majority for rejecting the very approach to admissions practices the court had sanctioned only a decade earlier in *Grutter*, observed that the supposedly "race-neutral" policies that the majority found acceptable (e.g., awarding plus factors for family or community poverty) simply are a "deliberate obfuscation" (quoting Justice David Souter's opinion in *Graetz v Bollinger*,[8] decided on the same day as *Grutter*) of the reality of race consciousness: "[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious."[1(p 2433)] In her view, nothing in the Constitution requires government actors to be "blind to the lingering effects of 'an overtly discriminatory past.'"[1(p 2433)]

The Future of Racial Diversity in Medical Education

In the aftermath of *Fisher*, the goal of racial diversity in higher education remains intact. What is now at sea, however, is the permissible approach in achieving this goal. Simply following *Grutter* no longer insulates an educational program from litigation. Furthermore, it is unclear what level of proof is necessary beyond that offered by the University of Texas in this case—that student rankings, coupled with consideration of proxy characteristics, such as poverty and place of residence, could not achieve the program-wide results that exemplify a robust level of diversity. And as Justice

Ginsburg notes, simply switching to a race-neutral test may not be so simple if the measures used in race neutrality are commonly understood to be substitutes for race. Will these proxy measures also be attacked as veiled efforts to identify measures that are no more than stand-ins for race?

For medical education, as the AAMC amicus brief described, the complexities associated with finding substitutes for race are even greater. The case for medical school diversity goes beyond the value added to the educational experience itself; there is at least some evidence that the quality of medical care itself is influenced by a health care system in which medical professionals share the basic characteristics of their patients.[9] Although this evidence is inconclusive, there is reason to believe that diversity within the health professions carries with it benefits that are external to the education process itself and that affect the most basic experiences of patients within the health care system. It also must be acknowledged that the medical school admissions process is unique. It is not merely a placement process that determines which students will study at which schools, like much of the rest of higher education. There is only one path to becoming a physician, and the extraordinarily limited nature of medical education training programs means that the process is one that heavily favors the educationally privileged.

It is very possible that this ruling will have little overall effect on the diversity of the student populations in medical schools and, consequently, on the diversity of the health care workforce. Even under *Grutter*, medical schools have struggled to identify enough qualified minority applicants to significantly enhance diversity in medical education. What is indisputable is that the goal of diversity is one that survives as a key tenet of the medical education system. Now the challenge becomes how to advance that goal using methods and approaches that further it in a manner that achieves constitutional acceptability.

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