

## EDITORIALS



## Affirmative Action in the Balance

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To provide good care, physicians must understand the communities and cultures in which they work. An important way to ensure that physicians understand the lives of their patients and to reduce health disparities is to promote racial and ethnic diversity in the physician workforce. However, a crucial tool that has made such diversity possible is currently in danger. Within the next few months, the U.S. Supreme Court will announce its decision in a case destined to chart the future of affirmative action in American higher education. The outcome in *Fisher v. University of Texas at Austin*<sup>1</sup> will determine whether race may continue to be taken into account as a factor in university admissions, including admission of students to our nation's medical schools.

The plaintiff in the case, Abigail Fisher, applied for undergraduate admission to the University of Texas at Austin but was denied admission. The admission policy of the University of Texas consists of two parts. First, all applicants in the state of Texas who graduate in the top 10% of their high-school class are automatically offered admission; this policy is race-neutral and fills about four fifths of the available spaces. Second, the remaining spaces are filled according to a holistic evaluation process in which six factors are considered, one of which is race. Since the student bodies of some Texas high schools are dominated by underrepresented minority students, the top-10% policy in itself results in a substantial admission of students who are members of minority groups. Additional minority students are admitted through the holistic evaluation process.

Abigail Fisher, who is not a member of an underrepresented minority group, did not graduate in the top 10% of her high-school class, and after the holistic review she was denied admis-

sion to the University of Texas at Austin. She claims that the explicit use of race as a factor in admission to the university violates the Equal Protection Clause of the 14th Amendment of the Constitution. In cases involving racial classifications, the Supreme Court invokes the standard of strict scrutiny, which requires in this case that the admission plan at the University of Texas be based on a compelling government interest and be narrowly tailored. The plaintiff claims that the plan fails on both counts.

Two landmark Supreme Court cases, *Regents of the University of California v. Bakke*<sup>2</sup> (1978) and *Grutter v. Bollinger*<sup>3</sup> (2003), provide the legal foundation for *Fisher*. Allan Bakke applied for admission to the medical school of the University of California at Davis, but he was denied admission. The admission policy of the medical school included an affirmative-action plan in which 16 spots were reserved in each class for underrepresented minority students, and Bakke, who was not a minority student, challenged the constitutionality of the quota system.

That challenge was upheld by the Court. In his opinion, Justice Lewis Powell wrote that the rigid quota system at the University of California violated the Equal Protection Clause of the 14th Amendment. He further contended, but was not joined by any other justice on this point, that unlike a quota, the use of race as one of several factors considered in admission would be constitutionally permissible. In his opinion, he wrote, "Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background — whether it be ethnic, geographic, culturally advantaged or disadvantaged — may bring to a professional school of medicine experiences, outlooks, and ideas that

enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”

In *Grutter v. Bollinger*, Justice Powell’s opinion in *Bakke* was reaffirmed. Barbara Grutter was a white student who applied for admission to the University of Michigan Law School but was not accepted. The law school had a race-conscious admission plan in which each applicant was evaluated on the basis of multiple factors, among which only minority race or ethnic group was considered a plus factor, with the goal of achieving a “critical mass” of minority students as the core measure of diversity. In a 5-to-4 decision in which Justice Sandra Day O’Connor wrote the majority opinion, the Court ruled that the holistic plan of the law school did not violate the Equal Protection Clause. Justice O’Connor went on to suggest a possible time limit on the use of racial preferences in admissions: “The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

Now, just 10 years after *Grutter*, in *Fisher v. University of Texas at Austin*, the Supreme Court will revisit the use of racial preferences in admissions. The oral arguments<sup>4</sup> were heard on October 10, 2012, and Justice Elena Kagan recused herself, probably because of her previous involvement in the case as solicitor general in the Obama administration. Given the remaining justices’ previous views of affirmative action, Court observers predict that Justice Anthony Kennedy’s vote will most likely determine the outcome.

Although he has argued for diversity, Justice Kennedy has not supported affirmative action. It is noteworthy that in *Grutter* he was in the minority. Not only did he join the dissent written by Chief Justice William Rehnquist, but he also wrote a separate dissent of his own, in which he stated that “. . . the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.”

It may prove telling that during oral arguments in *Fisher*, both Chief Justice Roberts and Justice

Kennedy asked pointed questions about the notion of a “critical mass” of underrepresented minority students as part of an admission process. It was evident from their questions that both of them have doubts about the constitutionality of such an approach.

A judgment by the Court in *Fisher* to overrule *Grutter*, or in Justice Sotomayor’s words, to gut it, would effectively spell the end of affirmative action in higher education, including medical education. Such a judgment from the current Court is certainly possible. We believe, though, that it would be a grave mistake with serious negative consequences for the physician workforce and for American society. Medical students learn in great part from one another, and a multicultural classroom is key to effective learning. We agree with Justice Powell’s opinion in *Bakke* that race should be permitted in medical-school admissions as one factor among others, because it is essential that “physicians serve a heterogeneous population.” And we support the amicus curiae brief submitted by the Association of American Medical Colleges in *Fisher*, which states, “Medical schools strongly believe that diversity in the educational environment is integral to instilling in new physicians the cultural competence necessary to more effectively serve a diverse society.”<sup>5</sup>

Future generations of physicians need to mirror the society they serve, and this will not happen unless medical schools are permitted to pursue holistic admission policies that consider race and ethnic group along with factors that characterize students who become outstanding physicians. In reaching their judgment in *Fisher*, we hope the justices will agree.

Disclosure forms provided by the authors are available with the full text of this article at NEJM.org.

1. Abigail Fisher et al. v. State of Texas et al., United States Court of Appeals, Fifth Circuit, January 18, 2011.
2. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
3. Grutter v. Bollinger, 539 U.S. 306 (2003).
4. Abigail Noel Fisher, Petitioner, v. University of Texas at Austin et al. No. 11-345. Transcript of oral arguments. Washington, DC. October 10, 2012.
5. Trinity FR et al. Brief for amici curiae Association of American Medical Colleges et al. in support of respondents. 2012.

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