

# Virtual Mentor

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## HEALTH LAW

### Affirmative Action and Medical School Admissions

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Are medical schools allowed to consider race and ethnicity in their admissions process? Since 1978 and the landmark case of *Regents of University of California v. Bakke*, the answer has generally been a nuanced yes, but the issue has been hotly debated again; the Supreme Court heard the latest challenge to affirmative action in higher education—*Fisher v. University of Texas at Austin*—on October 10, 2012. As *Grutter v. Bollinger*, the last high court review of this topic, was only a decade ago, speculation abounds about whether the court intends to overturn the status quo by banning race as a legitimate admissions factor [1]. This article will highlight the decisions of all three relevant Supreme Court cases and situate the debate about affirmative action within the context of medicine and medical education in the U.S.

Caucasian doctors continue to be overrepresented and Hispanic and African American doctors underrepresented in American medicine, but the issue of affirmative action in medical education continues to be litigated. Table 1 shows rounded percentiles of racial groups' representation in the general population, in medicine, and in 2011 medical school enrollment. While members of underrepresented groups are enrolling in medicine in higher numbers than occurred in the past (suggesting prospects for greater diversity in the future), the question of what constitutes adequate representation is an important one that the courts continue to struggle with: must the physician population be a perfect mirror of the general population, or should its inclusiveness be measured some other way? (More on this in the final section.)

Table 1. Representation of racial groups in the general and medical populations

	General population (2011) [2]	Physician workforce (2011) [3]	Medical student enrollment (2011) [4]
% Caucasian	63	70	60
% African American	13	4.7	7
% Latino/Hispanic	17	6.3	8
% Asian	5	16	22

Though some critique it for stigmatizing the disadvantaged and failing to adequately weight the unique experiences of individuals, affirmative action in higher education is lauded for generating a diverse educational environment, compensating members of underrepresented groups for past wrongs, and promoting equality of opportunity (“leveling the playing field”) [5]. In medical school, particularly, affirmative action

is credited with producing a diverse physician workforce in the U.S. and helping to foster cultural sensitivity in all physicians with an inclusive educational environment. Some also believe it reduces racial, ethnic, and geographic health care disparities, which they see as associated with an overly homogenous clinical workforce [5, 6].

Three major Supreme Court cases highlight what is at stake in the battle over affirmative action in medical school admissions.

### ***Regents of University of California v. Bakke (1978)***

In 1950, when the University of California's medical school first opened, all but three of its students were Caucasian (and the three were all of Asian descent) [7]. To help diversify its student body, the school developed two admissions pools—one exclusively for students from designated “minority” groups [7]. In the standard admission stream for 84 slots, all candidates with a GPA below 2.5 were excluded and those remaining were ranked based on interview, GPA, MCAT scores, extracurricular activities, and letters of recommendation [7]. The remaining 16 places were reserved for students who were disadvantaged or members of minority groups, who did not need to meet the 2.5 GPA cutoff and were not ranked against the candidates in the standard review [7].

A Caucasian student sued the medical school for discrimination when he was twice denied admission despite entrance scores significantly higher than those of other applicants accepted into the second pool [7]. Most significantly, the court upheld generally the right of schools to consider race as one factor in their admission process. They did, however, strike down UC's specific admission policy, which excluded white students from those 16 places, as unconstitutional and require it to admit the previously rejected student [7]. Some justices thought the policy violated Fourteenth Amendment equal protection rights which guarantee all persons “the equal protection of the laws” and others argued it was a violation of Title VI of the Civil Rights Act (1964), which bans racial discrimination by all entities receiving federal financial assistance [8, 9]. The basic principle of the *Bakke* decision was that, while schools cannot outright exclude anyone on the basis of race, they can use race as a “plus” factor that can be weighed in an individual's admission along with other salient factors like academics.

### ***Grutter v. Bollinger (2003)***

Twenty-five years later, the Supreme Court again upheld the general right of schools to consider race in their admissions policies. In *Grutter*, the University of Michigan Law School used race as a “plus” factor in its admission process, to ensure the enrollment of a “critical mass” of students from minority groups to achieve the educational benefits of a diverse student body [10]. The law school took a flexible approach to reviewing its candidates based on academics, talent, experience, motivation, and ability to contribute to a diverse student body [10]. In the latter, faculty considered broadly how a student might contribute to diversity, including factors beyond race or ethnicity alone [10].

A Caucasian student sued the school, arguing racial discrimination played a role in her being denied admission, but the Supreme Court upheld Michigan's admissions policy [10]. The law school was found to use race as a "plus" factor only, as one of a variety of positive admissions qualities [10]. Such efforts did not violate the Equal Protection clause because they narrowly considered race based on a compelling need to obtain educational benefit from diversity and, unlike in *Bakke*, the policy did not outright exclude any group or "preserve" a certain number of positions—the defamed "quota" system—on the basis of race alone [10]. *Grutter* is a model for how medical schools can constitutionally consider race in their admission policies, but the outcome of *Fisher* could change these standards [11].

### ***Fisher v. University of Texas at Austin (2012-2013)***

The latest case to shape the fate of affirmative action in school admissions concerns a policy in undergraduate admissions at the University of Texas at Austin [12]. UT Austin's intended goal in drafting the policy, as in *Grutter* and *Bakke*, was to improve the educational environment for students by increasing diversity [12]. Students can be accepted through two processes: (1) any Texas student in the top 10 percent of his or her high school's graduating class is automatically admitted, which accounts for approximately 85 percent of all admissions in a given year, and (2) for the remaining 15 percent of slots, race is a "plus" factor to be considered along with a variety of personal and academic achievements, as in *Grutter* [12, 13]. The policy has been successful at diversifying the student population—UT now ranks sixth in the nation for graduating nonwhite students, enrollment of African American students has doubled and Hispanic enrollment is 1.5 times greater than it was before the policy's implementation [13].

The current legal challenge to UT's policy began when two Caucasian students, denied admission under both pathways, filed suit alleging discrimination on the basis of race in violation of their Fourteenth Amendment right to equal protection [12]. Their claim has lost in both the federal district and appellate courts [12]. The Fifth Circuit Court of Appeals, the highest court to review it before the Supreme Court, reasoned that, like Michigan, UT considers race along with many other factors, evaluates students individually, and evaluates all students equally regardless of race [12]. Moreover, UT has carefully tied its affirmative action policies to its goal of diversifying the educational experience [12]. The Fifth Circuit Court cautioned, however, that it was not approving UT's policy for perpetuity—noting the dramatic increases in nonwhite students the "top ten percent" program was creating, the court noted that that policy may soon eliminate a need for the contested one [12].

The Supreme Court heard arguments on October 10, 2012, and will issue its verdict in this landmark case in the coming months. One question raised in oral arguments was whether those who brought suit have a right to do so and whether they have in fact been injured, given that they have since been accepted at and graduated from other schools [14]. It is unlikely, but conceivable, that the court could decline to give a verdict for these reasons.

Another question is whether the court might overturn all race-conscious admissions as unconstitutional or deal exclusively with UT's policy, which would have little effect on any other school [15]. This is related to the question of what constitutes "critical mass," or when a university should stop affirmative action admissions. One of the justices pointed out in arguments that the UT policy raised African American enrollment from 4 to 6 percent, but the state's population is 12 percent African American [14]. UT argued that comparison to the population should not be the measurement, because *Grutter* does not allow quotas [14]. One possible test for critical mass was whether the underrepresented group would feel isolated amongst the student body [14]. Additionally, the question of whether critical mass can be achieved through race-neutral policies was raised [14]. Justices also questioned whether focusing on race was more important than focusing on socioeconomic status for enhancing classroom diversity [14].

The decision in this landmark case will have significant implications for the composition of the medical profession and for higher education generally. More broadly, the Fifth Circuit Court's question is one that will undoubtedly receive more consideration in the coming decades: will there be a point when affirmative action is no longer needed or appropriate?

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