Bakke Redux — Affirmative Action and Physician Diversity in Peril

Health Policy Portal

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Abstract: This article examines the legal arguments that may lead the Supreme Court to overrule precedent and strike down affirmative action in university admissions. Given the critical importance of a diverse physician workforce for our Nation's health care system, the potential reversal of affirmative action admission programs in medical schools may have severe negative consequences. This article discusses the implications for health care should the Court issue an opinion restricting or eliminating affirmative action in higher education.

The Supreme Court's opinion in *Regents of the University of California v. Bakke* was fractured and complex,[1] but it has nonetheless stood as precedent for affirmative action admissions policies in higher education for 45 years. When the opinion was issued in 1978, some respected legal scholars praised it,[2] while other equally respected scholars condemned it.[3]

As the Court prepares to review two new affirmative action cases in its OT 2022 term (*Students for Fair Admissions Inc. v. President & Fellows of Harvard College*[4] and *Students for Fair Admissions Inc. v. University of North Carolina*[5]), we can expect to see renewed analysis of the *Bakke* opinion and its implications for today's affirmative action admissions policies. *Bakke's* importance as precedent was reinforced by the Court's affirming opinions in *Grutter v. Bollinger*[6] and *Fisher v. University of Texas at* Austin.[7] Will the 1978 opinion in *Bakke* and the subsequent affirming opinions in *Grutter* and *Fisher* remain precedential, or will the Court decide to change course, in keeping with Justice O'Connor's prediction in *Grutter v. Bollinger* that, "...25 years from now, racial preferences will no longer be necessary..."?[8] For those who support affirmative action in higher education (as I do), it is important to understand the legal arguments on both sides of these cases — not only the arguments favoring affirmative action, but also those opposing it.

There are special policy implications of these cases for the racial and ethnic diversity of medical schools and the physician workforce. Diversity among physicians is particularly important to meet the health care needs of an increasingly diverse US society. Patients may prefer to be cared for by a physician of their own race or ethnicity, and racial and ethnic correspondence between patient and physician may result in superior overall quality of care. As will be discussed in this article, the diversity of the physician workforce is already quite fragile, and the potential termination of affirmative action in university (and medical school) admissions is certain to lead in time to an even less diverse complement of physicians. While the loss of affirmative action programs in university admissions would have serious implications across our society, the consequences for the health care system — as will

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About This Column

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be discussed herein — may be especially profound.

The *Bakke* Opinions

The Court's deliberations in *Bakke* generated three principal opinions. Four justices (Stevens, Chief Justice Burger, Stewart, and Rehnquist) voted to strike down the UC Davis School of Medicine's special admissions policy.[9] The medical school reserved 16 seats in each class of 100 students solely for underrepresented minority applicants. Although non-minority students could apply through the special program, none were ever admitted through that pathway. The medical school, through this special admissions policy, excluded Allan Bakke from participation in its medical education program because of his race. Because the medical school acknowledged that it received federal funds, the four justices concluded that the school was in violation of the clear text of Title VI of the Civil Rights Act of 1964:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[10]

The four justices determined that they did not need to address a constitutional question in this case, as they deemed the statutory language in Title VI to be unambiguous. Thus, in their opinion, the justices avoided the Constitution altogether and did not consider it necessary to conduct an analysis of the Equal Protection Clause of the Fourteenth Amendment. Justice Stevens concluded:

> In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 (of the Civil Rights Act) should not be given its natural meaning… In unmistakable terms, the Act prohibits the exclusion of individuals from federally funded programs because of their race.[11]

In contrast, four other justices (Brennan, White, Marshall, and Blackmun) fundamentally disagreed with the analysis of Justice Stevens, Chief Justice Burger, and Justices Stewart and Rehnquist.[12] On the basis of their assessment of the foundational legislative history of Title VI of the Civil Rights Act of 1964, Justice Brennan and colleagues concluded that Title VI must be regarded as coextensive with the Equal Protection Clause of the Fourteenth Amendment. Consequently, they believed that Title VI may not function independently of the Constitution but must follow from it:

> In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment.[12]

In their opinion, therefore, the UC Davis School of Medicine's special admissions program was permissible based on Title VI when considered as being coextensive with the Equal Protection Clause the Fourteenth Amendment.

With these conflicting views of the two groups of four justices, the controlling opinion was written by Justice Lewis Powell.[13] Although Justice Powell wrote for himself, he was joined in parts of his opinion by the other justices. Justice Powell's opinion was in agreement with Justice Stevens and his three colleagues that the UC Davis School of Medicine's special admissions program was unlawful, a judgment stemming from both Title VI and the Equal Protection Clause of the Fourteenth Amendment. In Justice Powell's application of strict scrutiny, the program constituted a racial quota and could not stand. Although he was sympathetic to UC Davis' argument that the Nation needs a racially and ethnically diverse physician workforce, he staunchly opposed affirmative action in higher education as a means of reparation for prior discrimination by society at large. He considered such an argument to be too "amorphous."[14]

However, Justice Powell's opinion also was in agreement with Justice Brennan and his colleagues that Title VI was coextensive with the Equal Protection Clause:

> In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause.[15]

The determination that Title VI is coextensive (or coterminous) with the Equal Protection Clause left room for judgment about whether an alternative affirmative action admissions program to UC Davis' could be permissible based on Title VI and the Constitution. Justice Powell suggested that the holistic admissions plan employed by Harvard College would be a model for an affirmative action admissions plan that would meet the requirements of both Title VI and the Constitution (and he attached a description of Harvard's plan to his opinion).

The Diversity Rationale

The Harvard holistic admissions program calls for each applicant to be evaluated as an individual. While minority race and ethnicity may be considered as plus factors, race and ethnicity apply only as additional tipping points among other academic and personal factors used to evaluate each applicant. In this manner, race would not be a determining factor for any candidate but instead would be considered among an array of characteristics in a holistic manner. In Justice Powell's view, student diversity,

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including racial and ethnic diversity, may bestow meaningful educational benefits on all students at a college or university. This "diversity rationale" was a cardinal element in Justice Powell's opinion in *Bakke*. Because Justice Brennan and his three colleagues concurred with this aspect of Justice Powell's opinion, following *Bakke* the holistic admissions concept (based on Harvard College's admission plan) became the universal, constitutionally acceptable template for affirmative action admissions plans in colleges and universities across the Nation. Although Justice Brennan and colleagues endorsed Harvard's holistic admission plan, they did not specifically endorse Justice Powell's diversity rationale. Instead, they believed that Harvard's admission plan was justified as a remedy for society's past racial discrimination, which had severely limited the educational opportunities for underrepresented minorities.

Although the diversity rationale for affirmative action was endorsed in subsequent opinions by the Court in *Grutter v. Bollinger* and *Fisher v. University of Texas at Austin* — and has stood the test of time — the concept has not been without controversy.[16] Among the leading critics of the validity of the diversity rationale is Anthony Kronman, dean emeritus of Yale Law School. In his book, *The Assault on American Excellence*,[17] Kronman asks probing questions about whether racial or ethnic diversity in the university classroom brings the type of educational value that Justice Powell envisaged. He further argues that creating diversity in the university according to racial and ethnic groups may inadvertently interfere with students' intellectual growth and individuality. Kronman does not consider the potential value of racial and ethnic diversity in medical school classrooms. In Kronman's opinion,

> Powell's' view of diversity has controlled the discussion of race and ethnicity in higher education for four decades, with consequences of a far-reaching and destructive kind.[18]

His argument continues:

> Those who today insist that our colleges and universities need to be more diverse sometimes give lip service to the diversity of individual talents, values, and judgments. But they mainly think of diversity in group terms and measure its presence or absence accordingly.[19]

Other scholars too have voiced concern about Justice Powell's concept of the diversity rationale. Guido Calabresi described the *Bakke* opinion as amounting to "tricks and subterfuges."[20] Calabresi suggested that by delegating admission decisions to university administrators, who work behind closed doors to create student diversity in their institutions, Justice Powell had sanctioned an affirmative action admissions plan that was, in effect, tantamount to a quota system similar to that of the UC Davis School of Medicine but referred to instead as "holistic admissions." Calabresi would have preferred a more candid solution based on reparations for subordinated groups, and he disparagingly referred to Justice Powell's opinion in *Bakke*, which pointedly cast aspersions on reparations, as a "pseudo-tragedy."[21] Recall that Justice Powell was firmly opposed to the reparations argument as being amorphous: how can an affirmative action program at a single university provide restitution for all of society's past discrimination?

Scholars both critical of and supportive of affirmative action who have also expressed doubt about Justice Powell's diversity rationale include Peter Schuck,[22] Abigail Thernstrom,[23] Thomas Sowell,[24] Brian Fitzpatrick,[25] Charles Lawrence,[26] and Kent Greenawalt.[27] For example, Greenawalt writes:

> I have yet to find a professional academic who believes the primary motivation for preferential admissions has been to promote diversity in the student body for the better education of all the students while they are in professional school.[28]

Randall Kennedy, a staunch supporter of affirmative action, has expressed serious doubt about the diversity rationale, and instead believes that affirmative action is better regarded as a reparation for past discrimination.[29]

Chilton et al.[30] recently conducted an empirical study of the association of diversity policies for selecting panels of editors of law reviews with the subsequent number of citations to articles published in the law review. While the median number of citations was modestly higher in law reviews with editor diversity policies, the difference was not statistically significant. The data therefore do not support a benefit of diversity among law review editors and the quality of the law review as assessed by article citations.

Strict Scrutiny

In his constitutional analysis in *Bakke*, Justice Powell applied strict scrutiny to the UC Davis affirmative action admissions plan, in which 16 seats out of 100 were reserved for underrepresented minority applicants. Justice Powell determined that this plan did not pass a strict scrutiny analysis. He also applied a strict scrutiny analysis to his diversity rationale modeled after Harvard College's holistic affirmative action plan. He concluded that this plan did survive strict scrutiny. Given that both approaches to affirmative action reach similar ends with respect to admission of underrepresented minority applicants, it is challenging to reconcile these disparate constitutional judgments, which raises the provocative question, just how "strict" was Justice Powell's strict scrutiny analysis of the diversity rationale? It seems possible, if not likely, that the Supreme Court will address a comparable question in *Students for Fair Admissions v. President & Fellows of Harvard College* and *Students for Fair Admissions*

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v. University of North Carolina. How strict must a strict scrutiny analysis of an affirmative action program be?

Academic Freedom and the First Amendment

The foundation of Justice Powell's diversity rationale for affirmative action in higher education was predicated on the idea that academic freedom is fundamental to the vitality of the university. Justice Powell pointed to "that robust exchange of ideas that lies at the heart of the notion of academic freedom."[31] Academic freedom finds much of its grounding in the First Amendment, and an important element of academic freedom that was highlighted in *Sweezy v. New Hampshire*[32] is the freedom to select who will be educated at a university. Justice Powell regarded the First Amendment concern as a countervailing constitutional interest that must be balanced against the concerns of the Equal Protection Clause. Constitutional support for the diversity rationale, from Justice Powell's perspective, is provided more by the First Amendment than by the Fourteenth. One critic of the diversity rationale who nonetheless supports affirmative action, Charles Lawrence, explicitly argued against the use of the First Amendment in this context.[33]

Other critics of Justice Powell's diversity rationale have found an element of irony in the First Amendment argument, considering the concern that on university campuses today, expression is regularly silenced based on the content of speech that students and faculty find unworthy or reprehensible. In this regard, Kronman observed:

> Powell's insistence that diversity is the engine of academic freedom, and not its enemy, will seem ironic to those who view its mature expression in today's colleges and universities as an instrument of orthodoxy instead.[34]

Kronman's view is that the growth of racial and ethnic diversity on university campuses may have inadvertently contributed to the suppression of speech on subject matter deemed too sensitive for open discussion — resulting in less academic freedom on campuses, not more. If Kronman's contention is correct, then Justice Powell's reliance on the First Amendment to support the diversity rationale appears unpersuasive.

Amicus Brief of America First Legal Foundation

Among the amicus curiae briefs that have been submitted for *Students for Fair Admissions v. President & Fellows of Harvard College*, a brief from the America First Legal Foundation was written on behalf of neither party.[35] The brief is of interest here because its central argument closely parallels the argument presented in the opinion by Justice Stevens and his three colleagues in *Bakke*.[36] Although the amici do not refer directly to the Stevens opinion in their brief, the close alignment of the arguments is unmistakable. Should the Justices find the brief of the America First Legal Foundation persuasive, it may have significant impact on the Court's opinion.

As noted previously, in reaching the conclusion that the UC Davis School of Medicine's admission program was discriminatory and could not be sustained, Justice Stevens and colleagues relied exclusively on the language of Title VI of the Civil Rights Act of 1964 (previously quoted),[37] not on the Constitution. Because the language in the statute is clear, Justice Stevens adhered to the doctrine of constitutional avoidance and did not consider it necessary to include an analysis of the Equal Protection Clause in his judgment. As UC Davis' admission program was clearly discriminatory and UC Davis accepted federal funds, a violation of Title VI was undeniable.

Justice Stevens and colleagues did not agree with the opinion of Justice Brennan and his three colleagues that,

> In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment.[38]

While Justice Brennan and colleagues believed that Title VI was coextensive with the Fourteenth Amendment and should be interpreted in the light of the Equal Protection Clause, Justice Stevens and colleagues did not. For the purposes of the present article, this distinction is a critical one.

The amicus brief from the America First Legal Foundation for *Students for Fair Admissions v. President & Fellows of Harvard College*[39] is predicated on an argument very similar to that of Justice Stevens and colleagues in *Bakke*. The amici believe that *Students for Fair Admissions v. President & Fellows of Harvard College* can be decided by the Court solely on the basis of Title VI — and that the Equal Protection Clause need not be considered:

> It is not necessary for this Court to resolve the more difficult questions surrounding the constitutionality of affirmative action under the Equal Protection Clause… The Court needs only to enforce the commands of an unambiguous federal statute to resolve this case, and there is no affirmative-action exception to the requirements of Title VI.[40]

The amici's brief mirrors the substance of Justice Stevens' *Bakke* opinion that Title VI is not coextensive with the Fourteenth Amendment and that constitutional avoidance should be invoked. In contrast, Supreme Court precedent aligns with the opposing argument (as presented by Justice Brennan and his three colleagues in *Baake*) that Title VI must be interpreted in the light of the Equal Protection Clause (referred

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to as the "doctrine of coextensiveness"[41]). Whether and how the Court decides this important issue in *Students for Fair Admissions v. President & Fellows of Harvard College* may be crucial to the outcome of the case.

Asian American Applicants

While much of the focus in *Students for Fair Admissions v. President & Fellows of Harvard College* is on Harvard College's affirmative action program, a second key question in the case is whether Harvard discriminates against Asian American applicants by purposefully restricting their admission.[42] Similar to Harvard's limit placed on the admission of Jewish applicants in the early 20th century,[43] the College is now alleged to place limits on admission of Asian American students. The implication is that, while awarding plus points to Black, Hispanic, and Native American applicants, Harvard effectively assigns minus points to students of Asian ancestry. The minus points may be related to the relatively low "personal rating" scores assigned to Asian American applicants by Harvard admissions officers.[44] If the Court is persuaded by this allegation, which Harvard denies, a finding that Harvard discriminates against Asian American students would be a clear violation of Title VI.

Another concern regarding Asian American students is whether — if the Court judges that Harvard discriminates against them — a strict scrutiny analysis of Harvard's affirmative action program would fail. To survive strict scrutiny, Harvard must show that its holistic admissions program, with plus points assigned to underrepresented minority applicants, does not disadvantage applicants of other races and ethnicities.[45] If, however, the Court rules that Asian American applicants are handicapped by the preference provided to Blacks, Hispanics, and Native Americans, this criterion for surviving a strict scrutiny analysis may not be met.[46]

The Physician Workforce

In the cases before the Supreme Court, the stakes are high for the Nation's medical schools, the physician workforce, and the health care needs of patients across our increasingly diverse society. Patients select their physicians according to a spectrum of criteria, and these criteria may sometimes include the race, ethnicity, or national origin of the physician. Patients may prefer to be cared for by a physician based on these characteristics, and racial or ethnic alignment between patient and physician may promote trust and better quality of care. It is particularly important for the Nation to have a diverse physician workforce to provide the best health care choices for our diverse society.

According to 2021 data from the Association of American Medical Colleges,[47] the racial and ethnic representation among U.S. medical school enrollees may be summarized as follows:

American Indian/Alaska Native	1.1%
Asian	26.8%
Black or African American	9.7%
Hispanic, Latino, or Spanish	11.8%
White	55.4%

For underrepresented minority students (defined as American Indian/Alaska Native, Black/African American, and Hispanic/Latino/Spanish), the total percentage enrollment among U.S. medical schools of 22.6% and only 9.7% for Black/African American enrollees are not optimal for the creation of a truly diverse physician workforce. If the Court were to curtail or eliminate affirmative action altogether in higher education, the percentages would surely decline even further. For example, in one empirical study,[48] medical school matriculation rates were examined before and after six state-level affirmative action bans were instituted (California, Washington, Florida, Texas, Michigan, Nebraska). Following the implementation of the bans, matriculation rates for underrepresented minority students declined by 17.2%. Similar findings were reported in another recent study.[49]

The respondent's brief from Harvard College in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* paints an even more alarming picture: without its holistic admissions plan, the College contends that the percentage of African American and Hispanic students would be reduced by nearly half.[50]

An affirmative action ban may affect medical school matriculation in two ways: by reducing the underrepresented minority applicant pipeline among undergraduate students, and by reducing minority applicant admissions to medical schools based on the loss of holistic admissions practices by the medical schools themselves. With medical school matriculation rates that are already marginal for underrepresented minority students, the Nation's health care workforce can little afford to cut them even further.

Conclusion

If the Supreme Court were to overrule *Grutter* based on Title VI and effectively eliminate affirmative action in higher education, as a counter measure, individual universities might argue that a rationale for retaining affirmative action programs is based on restitution for their own histories of discrimination and racism (in contrast to restitution for our entire society's history of discrimination and racism).[51] Also, Congress could theoretically amend Title VI to permit such affirmative action plans; but with our current legislature it seems improbable that such an action would be possible. It is equally improbable that the Court would create an exception (or carve-out) for medical schools and permit them to pursue holistic admissions. Thus, the Court's decision in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* is likely to be determinative of the future of affirmative action in higher education. The implications for medical education, the physician workforce, and patient care will be consequential, if not monumental.

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Note

The author has no conflicts of interest to disclose.

References

1. *Regents of the University of California v. Allan Bakke*. 438 U.S. 265 (1978), Legal Information Institute, *available at* <https://www.law.cornell.edu/supremecourt/text/438/265> (last visited August 24, 2022).
2. J.C. Jeffries, "Bakke Revisited," *Supreme Court Review* 2003 (2003): 1-25 (2003), *available at* <https://www.jstor.org/stable/3536948> (last visited June 8, 2022).
3. G. Calabresi, "*Bakke* as Pseudo-Tragedy," *Catholic University Law Review* 28 (1979): 427-444, *available at* <https://scholarship.law.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2367&context=lawreview> (last visited June 8, 2022).
4. *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*. S Ct Docket No. 20-1199. OT 2022, Briefs *available at* <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/> (last visited June 8, 2022).
5. *Students for Fair Admissions Inc. v. University of North Carolina*. S Ct Docket No. 21-707. OT 2022, Briefs *available at* <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-university-of-north-carolina/> (last visited June 8, 2022).
6. *Grutter v. Bollinger* 539 U.S. 306 (2003), *available at* <https://supreme.justia.com/cases/federal/us/539/306/#tab-opinion-1961291> (last visited June 8, 2022).
7. *Fisher v. University of Texas at Austin* 579 U.S. ___ (2016), *available at* <https://www.supremecourt.gov/opinions/15pdf/14-981_4g15.PDF> (last visited July 11, 2022).
8. *Grutter v. Bollinger*, *supra* note 6.
9. Legal Information Institute, *supra* note 1.
10. 78 Stat. 252, 42 U.S.C. § 2000d
11. Legal Information Institute, *supra* note 1.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. A. Chilton, J. Driver, J.S. Masur, et al., "Assessing Affirmative Action's Diversity Rationale," *Columbia Law Review* 122, no. 2 (2022): 331-406.
17. A. Kronman, *The* Assault *on American Excellence* (Free Press, 2019).
18. *Id.*
19. *Id.*
20. *Bakke* as Pseudo-Tragedy, *supra* note 3.
21. *Id.*
22. P.H. Schuck, "Assessing Affirmative Action. National Affairs," Summer 2014, *available at* <https://www.nationalaffairs.com/publications/detail/assessing-affirmative-action> (last visited June 8, 2022).
23. A. Thernstrom, "Questioning the Rationale for Affirmative Action," *Virtual Mentor* 16, no. 6 (2014): 495-497.
24. T. Sowell, "The 'Diversity' Fraud. Creators," Dec. 20, 2016, *available at* <https://www.creators.com/read/thomas-sowell/12/16/the-diversity-fraud> (last visited June 8, 2022).
25. B. Fitzpatrick, "The Diversity Lie," *Harvard Journal of Law & Public Policy* 27, no. 1 (2003): 385-398.
26. C.R. Lawrence, "Each Other's Harvest: Diversity's Deeper Meaning," *University San Francisco Law Review* 31, no. 4 (1996-1997): 757-778, *available at* <https://heinonline.org/HOL/LandingPage?handle=hein.journals/usflr31&div=31&id=&page=> (last visited July 11, 2022).
27. K. Greenawalt, "The Unresolved Problems of Reverse Discrimination," *California Law Review* 67 (1979): 87-130.
28. *Id.*
29. R. Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* (Vintage Press, 2013).
30. Assessing Affirmative Action's Diversity Rationale, *supra* note 16.
31. Legal Information Institute, *supra* note 1.
32. *Sweezy v. New Hampshire*. 354 U.S. 234 (1957), *available at* <https://www.oyez.org/cases/1956/175> (last visited June 8, 2022).
33. Each Other's Harvest, *supra* note 26.
34. *The Assault on American Excellence*, *supra* note 17.
35. *Students for Fair Admissions*, *supra* note 4.
36. Legal Information Institute, *supra* note 1.
37. *Supra*, note 9.
38. Legal Information Institute, *supra* note 1.
39. *Students for Fair Admissions*, *supra* note 4.
40. *Id.*
41. R.C. Salomone, "Title VI and the Intent/Impact Debate: A Critical Look at Coextensiveness," *Hastings Constitutional Law Quarterly* 10, no. 1 (1982): 16-78, *available at* <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1256&context=hastings_constitutional_law_quaterly> (last visited June 8, 2022).
42. *Students for Fair Admissions*, *supra* note 4.
43. J. Moscona-Skolnick, "Cloak of Meritocracy, Harvard's 'New Plan' of Admissions and the 'Jewish Problem,'" *Exposé* (2013), *available at* <https://projects.iq.harvard.edu/expose/book/cloak-meritocracy-harvard%E2%80%99s-%E2%80%9Cnew-plan%E2%80%9D-admissions-and-%E2%80%9Cjewish-problem> (last visited July 11, 2022).
44. P. Arcidiacono, J. Kinsler, and T. Ransom, "Asian American Discrimination in Harvard Admissions" February 2, 2022, *available at* <http://public.econ.duke.edu/~psarcidi/realpenalty.pdf> (last visited July 11, 2022).
45. *Grutter v. Bollinger*, *supra* note 6.
46. "Constitutional Law: *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard College*," *Harvard Law Review* 134, no. 7 (2021): 2630-2637, *available at* <https://harvardlawreview.org/2021/05/students-for-fair-admissions-inc-v-president-and-fellows-of-harvard-college/> (last visited July 11, 2022).
47. Association of American Medical Colleges, *2021 Fall Applicant, Matriculant, and Enrollment Data Tables*, *available at* <https://www.aamc.org/media/57761/download?attachment> (last visited June 8, 2022).
48. L.M. Garces and D. Mickey-Pabello, "Racial Diversity in the Medical Profession: The Impact of Affirmative Action Bans on Underrepresented Student of Color Matriculation in Medical Schools," *Journal of Higher Education* 86 no. 2 (2015): 264-294, *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4454423/> (last visited June 8, 2022).
49. D. P. Ly, U. R. Essien, and A. R. Olenski, et al., "Affirmative Action Bans and Enrollment of Students from Underrepresented Racial and Ethnic Groups in U.S. Public Medical Schools," A*nnals of Internal Medicine* 175, no. 6 (2022): 873-878, doi.org/10.7326/M21-4312.
50. *Students for Fair Admissions*, *supra* note 4.
51. L. Gibson, "Harvard's Ties to Slavery," *Harvard Magazine* (July-August 2022), *available at* <https://www.harvardmagazine.com/2022/07/jhj-harvard-slavery-ties> (last visited July 12, 2022).

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