Affirmative Action Ruled Unconstitutional
Options for Building a Diverse Health Care Workforce

On June 29, 2023, the Supreme Court of the United States decided Students for Fair Admissions, Inc v President and Fellows of Harvard College. In so doing, the Court held that “Harvard’s and UNC’s [University of North Carolina’s] admissions programs violate the Equal Protection Clause of the Fourteenth Amendment.” This decision refutes the recent trend of regard for race in admissions. It is a setback for diversity efforts in higher education and underlines the many challenges medical schools face in building a racially and ethnically diverse health care workforce.

The Supreme Court’s recent decision now renders unconstitutional the surest lever for overcoming the mismatch between the racial makeup of the patient population and physician workforce. It is the redress of these realities that is impacted by the recent Court decision. This decision calls into question the legality of “holistic review” admission policies, which comprise “scholastically blind” interviews, as well as efforts to address unconscious racial bias. In this Viewpoint we review how the recent Court decision affects extant medical school admission policies that seek to actively enhance the diversity of the national medical student body and its derivative national health care workforce.

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The Liaison Committee on Medical Education (LCME), the accrediting body for schools of medicine in the US and Canada, has long required medical schools to develop and evaluate programs or partnerships aimed at achieving diversity among medical school applicants. The most recent iteration of the relevant LCME standard states that “a medical school has effective policies and practices in place, and engages in ongoing, systematic, and focused recruitment and retention activities, to achieve mission-appropriate diversity outcomes among its students, faculty, senior administrative staff, and other relevant members of its academic community.” In text accompanying the standard, the LCME describes the benefits of diversity, noting that having medical students and faculty members from a variety of racial and ethnic groups enhances the development of a physician workforce that is culturally aware and competent to improve access to health care and address current health care disparities. The LCME further asserts that diversity and inclusion on the part of medical schools will promote the development of core professional attributes among physicians, including altruism and social accountability. Four Republican members of the Committee on Education and the Workforce of the House of Representatives recently submitted a letter to the LCME that queried the LCME’s view on diversity. The LCME’s response indicated that the organization will be supportive of medical schools’ efforts to promote diversity without specifying the methods by which they do so.

Despite decades during which affirmative action was routinely deployed during the admissions process to US medical schools, little progress has been made in correcting the racial and ethnic inequities of the national health care workforce. Demographic data from 2022 indicate that the percentage of White physicians approximates the proportion of individuals who self-identify as White in the population at large. In contrast, physicians who self-identify as Black or African American or as Hispanic (regardless of race) are underrepresented by a factor of 2 to 3. Individuals who identify as American Indian or Alaska Native or as Native Hawaiian or Pacific Islander are similarly underrepresented.

The Supreme Court’s recent decision now renders unconstitutional the surest lever for overcoming the mismatch between the racial makeup of the patient population and physician workforce: affirmative action in university admissions. Chief Justice Roberts’ opinion made clear that “the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause,” noting that both “programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.” Other parts of his opinion are particularly relevant to medical school admission programs. First, the reading of the Court’s case law as requiring that “an individual’s race may never be used against him in the admissions process” and determining...
that “[c]ollege admissions are a zero-sum” such that “[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”1 Second, he concluded that the Harvard and UNC programs ran afoul of the Court’s “long held” principle that “universities may not operate their admissions programs on the ‘belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue,’” pointing to what he termed Harvard’s admissions process resting “on the pernicious stereotype that ‘a black student can usually bring something that a white person cannot offer.’”1 Third is his faulting of the universities’ admissions programs for lacking a “logical end point,” and in particular his rejection of UNC’s “metric that turns solely on whether a group’s percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina.”4 Collectively, these 3 pillars of his reasoning will make it exceedingly difficult for medical schools to prepare their students to be sensitive to the needs of the diverse patient populations they will serve. Roberts’ opinion contains clear signals to litigants in challenging any such programs, as well as to lower courts on how to review them, and as such serves as a caution for medical schools seeking to push forward.

Simultaneously, the Court’s opinion potentially leaves room to maneuver. Chief Justice Roberts’ opinion for the Court explicitly states that “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”4 The question for medical education is whether Justice Sotomayor is correct when she asks in her dissent whether this merely “announces a false promise to save face and appear attuned to reality.”4 What Roberts’ opinion gives with one hand it partially removes with the other; he notes that “despite the dissent’s assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today.”4 He cautions that a “benefit to a student who overcame racial discrimination, for example, must be tied to that student’s ‘courage and determination’ and ‘a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student’s unique ability to contribute to the university.” That is, “the student must be treated based on his or her experiences as an individual—not on the basis of race.”1

Nevertheless, as Justice Sotomayor contends in her dissent, even on its own terms the majority opinion enables colleges and universities to “continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example.”5 In the wake of the decision, there has been increased interest in the way UC Davis School of Medicine used the “socioeconomic disadvantage scale,” which is race and ethnicity neutral, to achieve higher enrollments of Black and Hispanic student populations.7 The scale gives a higher boost to students the more their family background is disadvantaged. As recent reporting on the UC scale notes, the children of physicians receive a zero on this score. It remains to be seen whether this is a circumstance that institutional leaders in medicine are willing to accept. Medical schools that adopt these kinds of programs are likely to face litigation. The Thomas Jefferson High School for Science and Technology has been sued over its formally race-neutral program that allocates a percentage of seats on the basis of geography and consideration of a student’s “experience factors,” including prior disadvantage. The challengers to the program, after losing at a federal court of appeals,8 on August 21, 2023, asked the US Supreme Court to review the decision. The cases raise, among other things, the question of whether the fact that a program is motivated by a goal of achieving racial diversity taints its race-neutral design. Far from coming to an end for legal questions about race and ethnicity and university admissions, intense litigation will likely continue for many years.

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REFERENCES

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