

Back to *Bakke*: The Compelling Need for Diversity in Medical School Admissions

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Abstract:

In Supreme Court cases involving affirmative action in university admissions prior to 2023, most notably *Bakke* and *Grutter*, the Court upheld the constitutionality of race-based admissions on the basis of the diversity rationale. This rationale contends that racial and ethnic diversity in university classrooms benefits the education of all students, regardless of their race or ethnicity. Now, though, the Court has effectively overturned decades of precedent in deciding *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*.

This Article examines the diversity rationale going back to *Bakke* and proceeding all the way to the recent decision in *Students for Fair Admissions*. We concede the weaknesses of the diversity rationale, which, along with the purported lack of reliance interests since *Grutter*, contributed to the Court ending affirmative action nationwide. Yet we maintain that diversity in the context of medical school admissions should be viewed as a compelling interest for the purposes of equal protection analysis given the significant benefits of a diverse physician workforce to the health care system, particularly in the context of providing quality care to historically marginalized groups. We conclude by identifying a few possible paths forward now that the Court has deemed affirmative action unlawful nationwide.

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INTRODUCTION

At the end of June, the United States Supreme Court issued an opinion covering two cases implicating the use of affirmative action in undergraduate admissions policies: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*.¹ This opinion, authored by Chief Justice Roberts and joined by the five other members of the Court's conservative bloc, rejected the diversity rationale introduced in *Regents of the University of California v. Bakke*² and affirmed in *Grutter v. Bollinger*³ as insufficient justification for affirmative action programs in university admissions.⁴ Dismissing diversity-related interests as “inescapably imponderable,”⁵ the majority “ma[de] clear that *Grutter* is, for all intents and purposes, overruled,”⁶ though Chief Justice Roberts appeared to stop short of expressly overruling *Grutter*. Because the outcome of *Students for Fair Admissions* is likely the end of affirmative action in higher education generally⁷—for both undergraduate and graduate institutions—this Article will examine the consequences of the radically different legal landscape, focusing particularly on the effect on student admissions to medical schools in the United States and the downstream consequences for the physician workforce and the health care system more broadly.

This Article will proceed in five parts. Part I will return to *Bakke*,⁸ the landmark decision that had previously provided the foundation for affirmative action policies in universities across the country since it was decided over four decades ago.⁹ Part II will examine whether the controlling opinion in *Bakke*

1 *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. ____ (2023) (slip op.).

2 438 U.S. 265 (1978).

3 539 U.S. 306 (2003).

4 *Students for Fair Admissions*, 600 U.S. at ____ (slip op., at 23-24).

5 *Id.* at 24.

6 *Id.* at 58 (Thomas, J., concurring).

7 *But see infra* Part V. As will be discussed below, the majority notably included a footnote that excluded military academies from its ruling.

8 438 U.S. 265 (1978).

9 *See* Symposium, *Bakke at 40: Diversity, Difference, and Doctrine*, 52 U.C. DAVIS L. REV. (Oct. 26, 2018), <https://lawreview.law.ucdavis.edu/symposia/2018-fall/> (discussing the lasting impacts of *Bakke*); Charles Adside III, *Replay That Tune: Defending Bakke on Stare Decisis Grounds*, 64 CLEV. ST. L. REV. 519, 542 (2016) (describing how diversity became “the organizing principle at the nation’s colleges and universities” in the wake of *Bakke*); *see also* Adam Harris, *The Supreme Court Justice Who Forever Changed Affirmative Action*, ATLANTIC (Oct. 13, 2018), <https://www.theatlantic.com/education/archive/2018/10/how-lewis-powell-changed-affirmative-action/572938/> (arguing that *Bakke* “inadvertently changed how colleges go about recruiting and enrolling racial minorities”). *But see* Susan Welch & John Gruhl, *Does Bakke Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 OHIO ST. L.J. 697, 718 (1998).

written by Justice Powell was rightfully viewed as precedent in *Grutter*. Part III will assess the weaknesses of *Grutter* and discuss how it was treated by the majority in *Students for Fair Admissions*. Part IV will then review the impact of *Students for Fair Admissions* on medical school admissions and the resulting racial and ethnic composition of the physician workforce. Part V will briefly conclude, discussing the paths forward now that the Court has forbidden universities from engaging in race-based admissions practices.

I. DISTILLING *BAKKE*

A. *Bakke as a Case about Medical School Admissions*

Bakke notably dealt with an affirmative action admissions program to a medical school, the University of California Davis (UC Davis) School of Medicine.¹⁰ In certain respects, criteria and priorities for admissions to medical schools may differ from those for undergraduate and other graduate-level admissions.¹¹ The distinctive characteristics of medical school admissions are important to *Bakke* but have been infrequently discussed.¹²

(concluding that “the impact of *Bakke* on the number of minority applicants or enrollees was minimal”); cf. Rachel F. Moran, *Bakke’s Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 U.C. DAVIS L. REV. 2569, 2608 (2019) (describing *Bakke*’s “limited impact outside of higher education”). See generally WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (arguing that affirmative action has produced important benefits in the area of higher education).

¹⁰ *Bakke*, 438 U.S. at 269.

¹¹ See Barbara A. Noah, *A Prescription for Racial Equality in Medicine*, 40 CONN. L. REV. 675, 703-05 (2008). As Noah points out, “[t]he learning experience for undergraduates, law students, and medical students, for example, differs significantly because the purpose of these programs and the eventual occupations of their participants differ.” *Id.* at 703-04. Medical education within a diverse medical school class, for instance, “directly benefits the patients to whom these physicians provide care,” whereas in the law or business school contexts, “the stakes after graduation may be lower.” *Id.* at 704. “For better or worse, many attorneys or [business school graduates] will enter practices or businesses where they will encounter few minority clients,” whereas “most physicians will care for some, if not many, patients whose race, ethnicity, religion, and educational level differs from their own, and the quality of care these patients receive can have a significant impact on their health and quality of life.” *Id.* at 704-05. In short, “medical education requires student interaction that differs in kind from that experienced by undergraduates, law, or business students.” *Id.* at 705. Other commentators have also described the differences between medical school admissions and undergraduate and other graduate-level admissions. See, e.g., Rebecca C. Flanagan, *Do Med Schools Do It Better? Improving Law School Admissions by Adopting a Medical School Admissions Model*, 53 DUQ. L. REV. 75 (2015) (expounding upon the differences between medical school and law school admissions processes).

¹² See, for example, the following frequently cited articles that do not discuss medical school admissions: Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037 (1996); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of*

The faculty of the UC Davis School of Medicine formulated a special admissions approach, the Task Force program, in which sixteen of one hundred seats were allocated to students who were economically or educationally disadvantaged and students who wished to be considered as members of minority groups (defined as African American, Hispanic, or Native American).¹³ Admissions for the other eighty-four seats were administered by a separate committee.¹⁴ Although disadvantaged White students could also apply through the Task Force program, and many did, none were ever admitted through that mechanism.¹⁵ After Allan Bakke—who was also rejected from eleven other medical schools, including his alma mater, the University of Minnesota¹⁶—was twice rejected by the UC Davis School of Medicine, he subsequently brought a lawsuit alleging that the Task Force program, in which he was unable to participate, discriminated against him on the basis of race. The Superior Court of California found that the program violated the California Constitution, Title VI of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment, but refused to order that Bakke be admitted to the medical school, holding that he had not demonstrated that he would have been admitted in the absence of these constitutional and statutory violations.¹⁷ On appeal, the California Supreme Court affirmed the portions of the lower court’s opinion declaring the Task Force program unlawful,¹⁸ but directed that Bakke be admitted to the medical school.¹⁹

At the Supreme Court, where the case received immense public attention,²⁰ the petitioner, the Regents of the University of California, defended the Task Force program on the basis of society’s need for a racially and ethnically diverse workforce of physicians to care for an increasingly diverse population.²¹ As is

Affirmative Action, 101 COLUM. L. REV. 928 (2001); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013).

13 *Bakke*, 438 U.S. at 272–76, 272 n.1.

14 *Id.* at 274.

15 *Id.* at 276.

16 Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 985 (1999); *A Landmark Case Goes to Court*, HARV. CRIMSON (Oct. 12, 1977), <https://www.thecrimson.com/article/1977/10/12/a-landmark-case-goes-to-court/>.

17 *Bakke*, 438 U.S. at 270.

18 *Bakke v. Regents of Univ. of Cal.*, 553 P.2d 1152, 1155 (Cal. 1976) (en banc).

19 *Id.* at 1172.

20 See William Claiborne, *57 Law Briefs on Bakke*, WASH. POST (Sept. 17, 1977), <https://www.washingtonpost.com/archive/politics/1977/09/17/57-law-briefs-on-bakke/b3cb7c7c-b70e-4008-adc1-964886cbd552/> (reporting that *Bakke* generated more legal briefs than other Supreme Court case in at least twenty years); Elliot E. Slotnick, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21, 24–25 (1993) (analyzing data and concluding that “*Bakke* was considered an important story by television news”); Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427 (1979) (describing the national attention surrounding *Bakke*).

21 Brief for Petitioner, *Bakke*, 438 U.S. (No. 76-811), 1977 WL 189474, at *24–25

well known today, many patients prefer a physician of their own race or ethnicity,²² which can help minimize the effect of racial bias and thereby improve the quality of care.²³ The petitioner also argued that physicians from minority groups may be more likely to care for minority populations, who are significantly underserved with respect to health care.²⁴ Throughout the history of the United States, educating physicians from historically underrepresented groups has been severely impeded—in large part because of the long history of racial discrimination and inadequate educational opportunities for them.²⁵ Relatedly, the petitioner also referred to the importance of educating a diverse physician workforce. In short, then, the petitioner crisply laid out several important purposes of the affirmative action program in its brief:

Among the objectives of this program were enhanced diversity in the student body and the profession, improved medical care in underserved minority communities, elimination of historic barriers to medical careers for disadvantaged members of racial and ethnic minority groups, and increased aspiration for such careers on the part of minority students. It was the judgment of the Davis faculty that the Task Force program was the “only method” that would achieve significant enrollment of minority applicants.²⁶

These points were underscored in oral arguments delivered by Archibald Cox, a Harvard professor and the former Solicitor General under President John F. Kennedy. As will be discussed below, Justice Powell in his opinion ultimately dismissed all the petitioner’s arguments except the one pertaining to increasing diversity. In the end, the Court in *Bakke* proved to be markedly fractured, delivering six separate opinions, three of which will be discussed in the next

[hereinafter *Bakke* Brief for Petitioner].

22 See *infra* note 171.

23 See *infra* note 172.

24 *Bakke* Brief for Petitioner, *supra* note 21, at *3 (emphasis added) (citations omitted).

25 See Yasmeeen Daher et al., *The History of Medical Education: A Commentary on Race*, 121 J. OSTEOPATHIC MED. 163 (2021), <https://www.degruyter.com/document/doi/10.1515/jom-2020-0212/html?lang=en>; Vann R. Newkirk II, *America’s Health Segregation Problem*, ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/americas-health-segregation-problem/483219/>. It is also important to emphasize that racial discrimination against physicians of color remains prevalent today. See Amarette Filut, *Discrimination Toward Physicians of Color: A Systematic Review*, 112 J. NAT’L MED. ASS’N 117 (2020); Usha Lee McFarling, *‘It Was Stolen From Me’: Black Doctors Are Forced Out of Training Programs at Far Higher Rates Than White Residents*, STAT (June 20, 2022), <https://www.statnews.com/2022/06/20/black-doctors-forced-out-of-training-programs-at-far-higher-rates-than-white-residents/>.

26 *Bakke* Brief for Petitioner, *supra* note 21, at *3 (emphasis added) (citations omitted).

section.

B. A Sharply Divided Supreme Court

1. The Stevens Opinion: Title VI Unambiguously Forbids Race-Based Preferences

Four justices (Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist) decided the case solely on the basis of Title VI of the Civil Rights Act of 1964, which states: “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.”²⁷ These justices determined that the plain text of Title VI was unambiguous and prohibited discrimination on the basis of race by any program or activity receiving federal funding.²⁸ Because the UC Davis School of Medicine did receive such funding, the Stevens group judged that the special admissions program clearly violated Title VI.²⁹ Because they decided the case solely on statutory grounds, they did not address the constitutional issue.³⁰

2. The Brennan Opinion: Race-Based Preferences as a Remedy for Past Discrimination

A separate group of four justices (Justices Brennan, White, Marshall, and Blackmun) arrived at a completely different conclusion, namely that “[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.”³¹ Viewing Title VI as “merely extend[ing] the constraints of the Fourteenth Amendment to private parties who receive federal funds,” the Brennan group determined that nothing in the legislative history of Title VI compelled the conclusion that “Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities.”³² After next concluding that “racial classifications are not *per se* invalid under the Fourteenth Amendment,”³³ the Brennan group concluded that intermediate

²⁷ 42 U.S.C. § 2000d.

²⁸ *Bakke*, 438 U.S. at 412-13 (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁹ *Id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part).

³⁰ *Id.* at 411-12 (Stevens, J., concurring in the judgment in part and dissenting in part).

³¹ *Id.* at 325 (Brennan, J., concurring in part).

³² *Id.* at 327-28 (Brennan, J., concurring in part).

³³ *Id.* at 356 (Brennan, J., concurring in part).

scrutiny was the appropriate standard of review,³⁴ and that the UC Davis special admissions program met that standard.³⁵ In short, it endorsed affirmative action programs intended to “remove the disparate racial impact its actions might otherwise have” if there was reason to believe that the disparate impact is itself the product of past discrimination, *whether its own or that of society at large*.³⁶

3. *The Decisive Powell Opinion: Diversity as the Sole Compelling Justification*

With two groups of four justices delivering opposing opinions, this left a single justice—Justice Powell—to determine the outcome. Much has been written about Justice Powell’s opinion in *Bakke*,³⁷ but it is nevertheless worth clarifying certain aspects of the opinion. Justice Powell ultimately agreed with the Stevens group in their judgment that the UC Davis special admissions plan was not permissible,³⁸ but Justice Powell did not base this conclusion on Title VI, which he concluded, like the Brennan group, “proscribe[d] only those racial classifications that would violate the Equal Protection Clause.”³⁹ Instead, he relied on the Fourteenth Amendment and applied strict scrutiny,⁴⁰ rejecting what he characterized as the petitioner’s “more restrictive view” that “discrimination against members of the white ‘majority’ cannot be suspect if its purpose can be characterized as ‘benign.’”⁴¹ Justice Powell then evaluated each of the four purposes of the special admissions program as expressed in the petitioner’s brief:

- (i) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession”; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational

34 *Id.* at 358-59 (Brennan, J., concurring in part).

35 *Id.* at 369-74 (Brennan, J., concurring in part).

36 *Id.* at 369 (Brennan, J., concurring in part).

37 See, e.g., Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 332 (1st ed. 2001); Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21 (1979); Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race”*, 1979 WASH. U. L. Q. 147 (1979); J. HARVIE WILKINSON, III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 301 (1979).

38 *Bakke*, 438 U.S. at 319-20.

39 *Id.* at 267, 287.

40 *Id.* at 291.

41 *Id.* at 294.

benefits that flow from an ethnically diverse student body.⁴²

Justice Powell rejected each of the first three rationales as insufficiently compelling to justify affirmative action in university admissions policies. He was particularly critical of the first, insisting that “[i]f [the] petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid.”⁴³ In particular contrast to the Brennan group, he was also strongly opposed to the second, reparations for past societal racial discrimination, as an acceptable justification:

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. That goal was far more focused than the remedying of the effects of “societal discrimination,” *an amorphous concept of injury that may be ageless in its reach into the past*.⁴⁴

Finally, as to the third rationale, although he accepted that “a State’s interest in facilitating the health care of its citizens” could be sufficiently compelling to justify race-based preferences, he found little evidence in the record indicating that the UC Davis special admissions program was “either needed or geared” to do so.⁴⁵

Yet in contrast to the Stevens group, Justice Powell believed that even though the UC Davis special admissions program was unconstitutional, the use of race-based preferences in university admissions could be constitutional in some circumstances based on a “diversity rationale.”⁴⁶ Such rationale was premised on the idea that racial and ethnic diversity in university classrooms would benefit all students and provide educational value to the university community as a whole.⁴⁷ Justice Powell further proffered his view, ironic in the wake of *Students for Fair Admissions*, that Harvard College’s “holistic” admissions program, in which race could be considered as a “plus” factor among many characteristics of applicants, was a constitutionally acceptable model of an admissions program that took race

⁴² *Id.* at 305-06 (citations omitted).

⁴³ *Id.* at 307.

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.* at 310.

⁴⁶ *Id.* at 311-15.

⁴⁷ *Id.* at 314.

into account.⁴⁸ Notably, while the Brennan group agreed with Justice Powell that Harvard College's holistic admissions program was constitutionally acceptable,⁴⁹ these justices did not explicitly endorse Justice Powell's diversity rationale. Instead, they adhered to their belief that reparations for past societal discrimination served as the strongest rationale for race preferences in admissions based on the text and history of the Fourteenth Amendment.⁵⁰ Justice Powell was therefore left alone among the justices in advocating for the diversity rationale for affirmative action.

Because Justice Powell's opinion in *Bakke* was considered to be the "narrowest" opinion among those written by the markedly fractured Court (as defined in *Marks v. United States*),⁵¹ his opinion has been regarded as the controlling opinion in subsequent cases before the Court.⁵² As such, in the wake of *Bakke*, the diversity rationale became the sole constitutionally-acceptable justification for affirmative action, and the holistic admissions program of Harvard College became emblematic of a constitutionally-acceptable model for race-based preferences in university admissions. However, a closer examination of the diversity rationale will raise questions as to whether it ever met the generally accepted requirements to stand as a precedent⁵³ justifying race-based preferences in university admissions.

II. THE DIVERSITY RATIONALE AS PRECEDENT

Although the provenance of the diversity rationale for affirmative action in higher education is often attributed to Justice Powell and an amicus curiae brief filed in *Bakke* submitted by four universities (Columbia University, Harvard University, Stanford University, and the University of Pennsylvania),⁵⁴ the formulation of the diversity rationale did not originate with Justice Powell or this

48 *Id.* at 316-19.

49 *Id.* at 379 (Brennan, J., concurring in part).

50 *Id.* at 369-73 (Brennan, J., concurring in part).

51 *Marks v. United States*, 430 U.S. 188 (1977).

52 See *Grutter*, 539 U.S. at 307 ("Since *Bakke*, Justice Powell's opinion has been the touchstone for constitutional analysis of race-conscious admissions policies [T]he Court endorses Justice Powell's view"); *Gratz v. Bollinger*, 539 U.S. 244, 269-75 (2003) (assessing the undergraduate program at the University of Michigan based on the analysis in Justice Powell's opinion in *Bakke*); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 381 (2016) ("As this Court's cases have made clear, . . . a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'" (citations omitted)).

53 See *infra* Part III.

54 Brief for Columbia University, Harvard University, Stanford University & University of Pennsylvania as Amici Curiae Supporting Petitioner, *Bakke*, 438 U.S. (No. 76-811), 1977 WL 188007, at *11-13.

amicus brief.⁵⁵ This Part examines the origin of the diversity rationale and its standing as a precedent.

A. *Archibald Cox and the Diversity Rationale*

In 1974, four years before Justice Powell authored his opinion in *Bakke*, Archibald Cox, who argued on behalf of the petitioners in *Bakke*, filed an amicus curiae brief in *DeFunis v. Odegaard*, an affirmative action case under review by the Supreme Court that was declared moot before it was decided.⁵⁶ Marco DeFunis, Jr. had applied for admission to the University of Washington Law School,⁵⁷ but he was denied admission despite having higher grades and test scores than some minority students who were admitted.⁵⁸ He subsequently brought a lawsuit alleging racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.⁵⁹ After the University of Washington later decided to admit DeFunis,⁶⁰ the Supreme Court declined to decide the case on the merits.⁶¹ However, Cox's amicus brief on behalf of the defendant remains the first clear statement of the diversity rationale as part of a legal argument.⁶²

The objective of improving education for all students is permissible and non-discriminatory. The means is reasonably adapted to the objective. Should it be held that any notice of race requires a "compelling" justification, then we submit that seriously seeking to improve the non-discriminatory educational opportunities afforded all students is such a purpose.⁶³

Later in the brief, Cox focused on the specific benefits of diversity to a university community.

[D]iversity surely may—and most experienced educators believe that it does—improve the education of all students. A hard-and-fast rule forbidding an institution to give favorable consideration to membership in a minority race or other minority group in

55 See David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 VA. J. SOC. POL'Y & L. 158 (2018).

56 416 U.S. 312 (1974) (per curiam).

57 *Id.* at 314.

58 *Id.* at 324-25 (Douglas, J., dissenting).

59 *Id.*

60 *Id.* at 315.

61 *Id.* at 319-20.

62 Oppenheimer, *supra* note 55, at 162.

63 Archibald Cox, *Archibald Cox Amicus Brief*, 25 VA. J. SOC. POL'Y & L. 208, 220 (2018).

selecting an entering class from the qualified applicants would severely constrict the freedom of academic authorities to improve the non-discriminatory educational opportunities for the whole student body.⁶⁴

It is noteworthy that Justice Powell attached an excerpt from Cox's amicus brief as an appendix to his opinion in *Bakke*.⁶⁵

B. Critics of the Diversity Rationale

Although the diversity rationale for affirmative action in university admissions in Justice Powell's *Bakke* opinion was subsequently affirmed by the Supreme Court in both *Grutter* and *Fisher v. University of Texas at Austin (Fisher II)*,⁶⁶ this justification was and has continued to be the subject of intense controversy. Among the first legal scholars to question the diversity rationale was Richard Posner, who wrote in 1974 about Archibald Cox's amicus brief in the *DeFunis* case that the diversity rationale was "fundamentally inconsistent with that of a policy against hostile discrimination."⁶⁷

Guido Calabresi was similarly critical of the diversity rationale, describing it as "tricks and subterfuges" inevitably leading to the same result as a quota system for the admission of underrepresented minority students;⁶⁸ Justice Brennan had raised the same point in his opinion in *Bakke*.⁶⁹ Calabresi was among the first legal scholars to criticize the expansive deference provided to university admissions officers in making decisions about race-based preferences—behind closed doors and without public transparency. Calabresi was not alone in his critique and has been joined in a similar vein by other noted legal scholars including Thomas Sowell⁷⁰ and Brian Fitzpatrick.⁷¹ In an article

⁶⁴ *Id.* at 233.

⁶⁵ *Bakke*, 438 U.S. at app. 321-24.

⁶⁶ See *supra* note 52.

⁶⁷ Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 7-8, 15 (1974).

⁶⁸ Calabresi, *supra* note 20, at 444.

⁶⁹ *Bakke*, 438 U.S. at 379 (Brennan, J., concurring in part) ("[T]here is no basis for preferring [the Harvard] program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.").

⁷⁰ Thomas Sowell, *The 'Diversity' Fraud*, CREATORS (Dec. 20, 2016), <https://www.creators.com/read/thomas-sowell/12/16/the-diversity-fraud> ("Nothing so epitomizes the politically correct gullibility of our times as the magic word 'diversity.' The wonders of diversity are proclaimed from the media, extolled in the academy and confirmed in the august chambers of the Supreme Court But have you ever seen one speck of hard evidence to support the lofty claims?").

⁷¹ Brian T. Fitzpatrick, *The Diversity Lie*, 27 HARV. J. L. & PUB. POL'Y 385, 386 (2003) ("It is

from just last year, Adam Chilton and colleagues added to this list of critics:

It is extremely difficult to think of a contentious legal question on which legal thinkers as varied as Guido Calabresi, Richard Delgado, Lino Graglia, Sanford Levinson, Melissa Murray, Antonin Scalia, and Clarence Thomas would locate common ground. Yet all of those legal minds agree that the diversity rationale's justification for affirmative action suffers from profound flaws. On the legitimacy of the diversity rationale, then, it would seem that there is precious little diversity of thought.⁷²

In his recent book, *The Assault on American Excellence*, Anthony Kronman, a former dean of Yale Law School, raised provocative questions as to whether racial and ethnic diversity in university classrooms actually brings the type of educational value to all students that Justice Powell envisioned.⁷³ Kronman even argued that attempting to create diversity in university classrooms may inadvertently interfere with students' intellectual growth, individuality, and independence: "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."⁷⁴

More recently, in a pointedly provocative article, "Derailed by Diversity," Richard Thompson Ford wrote:

While the ideal of diversity has encouraged modest efforts to promote racial integration, the term "diversity" has also become a lazy stand-in for any discussion of the generations of race-based exclusion and exploitation that make race-conscious hiring and college admissions necessary. In this way, "diversity" has encouraged us to ignore and minimize past injustices and distorted our understanding of what justice requires today.⁷⁵

quite clear that the University of Michigan lied to the Supreme Court when it claimed it discriminates to obtain the educational benefits of diversity, and well near every other elite university lies when they say the same thing. Accordingly, the diversity fight is not over—it has only just begun.”).

⁷² Adam Chilton et al., *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 355 (2022).

⁷³ ANTHONY KRONMAN, *THE ASSAULT ON AMERICAN EXCELLENCE* (2019).

⁷⁴ *Id.* at 19.

⁷⁵ Richard Thompson Ford, *Derailed by Diversity*, CHRON. HIGHER. ED. (Sept. 2, 2022), <https://www.chronicle.com/article/derailed-by-diversity>.

Ford emphasized his view that in rejecting the reparations rationale for affirmative action and instead proffering the diversity rationale, Justice Powell was misguided and inadvertently set the stage for invalidating affirmative action in *Students for Fair Admissions*.⁷⁶ The reason for Justice Powell's adamant opposition to the reparations rationale for affirmative action remains uncertain,⁷⁷ but it is clear that he was responsible for eliminating this rationale from the Court's jurisprudence on affirmative action in higher education, a fact that various members of the majority in *Students for Fair Admissions* noted.⁷⁸

C. *The Diversity Rationale, Precedent, and a Fractured Opinion*

The *Bakke* opinions were severely fractured, but a careful reading generates the inevitable conclusion that only Justice Powell endorsed the diversity rationale, as no other justice clearly stated his support for it.

Is it credible for precedent to be established by the opinion of a single justice? According to the *Marks* rule, precedent can be set by a single justice if that justice's opinion rests on the "narrowest grounds."⁷⁹ The *Marks* rule, formulated in 1977 (a year before *Bakke* was decided), was articulated by Justice Powell himself, who wrote the majority opinion in the case, though he did not provide a clear definition of "narrowest grounds."⁸⁰ However, it was the *Marks* rule that supported Justice Powell's opinion in *Bakke* becoming precedential and

⁷⁶ *Id.*

⁷⁷ "The prevailing explanation characterizes [Justice] Powell [in *Bakke*] as a centrist who was sympathetic to the plight of racial minorities but who also worried about legitimating an interpretation of the Constitution that, from his perspective, would endow certain groups of Americans with more rights than others." Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1426 (2020). This theory suggests that "by basing his support of affirmative action on the importance of having various viewpoints represented on campuses, [Justice] Powell was able to allow for racially integrated universities without explicitly endorsing 'preferences' for racial minorities." *Id.* In a sense, then, conservative critics of Justice Powell accused him of pretending to be concerned about diversity writ large while actually being concerned solely about racial diversity. See, e.g., John H. McWhorter, *The Campus Diversity Fraud*, CITY J. (2002), <https://www.city-journal.org/html/campus-diversity-fraud-12218.html>; Scalia, *supra* note 37, at 148. Meanwhile, critical scholars on the left believe Justice Powell was primarily motivated by a belief that exposure to racial diversity would benefit White students. See, e.g., Leong, *supra* note 37, at 2155, 2161-66. Anders Walker argued that Justice Powell's embrace of diversity was a result of his embrace of a brand of pluralism popular in the American South. See generally ANDERS WALKER, *THE BURNING HOUSE: JIM CROW AND THE MAKING OF MODERN AMERICA* (2018). Asad Rahim proposes that Justice Powell saw the diversity rationale as a means of "curb[ing] left-oriented radicalism" by "increas[ing] the representation of moderate and conservative viewpoints on campuses." Rahim, *supra*, at 1427-28.

⁷⁸ *Students for Fair Admissions*, 600 U.S. at ____ (slip op., at 17-18, 35); *id.* at ____ (slip op., at 29-30) (Thomas, J., concurring).

⁷⁹ See *supra* note 51 and accompanying text.

⁸⁰ *Marks*, 430 U.S. at 193-94.

providing the legal foundation for affirmative action in higher education until *Students for Fair Admissions*.

It is counterintuitive, and perhaps inconceivable, that the opinion of a single justice, joined by no others, could be regarded as binding precedent. Richard Re, a law professor at the University of Virginia, has argued that the *Marks* rule should be overturned on the basis that it “shifts costly interpretive burdens to later courts, privileges outlier views among the [j]ustices[,] and discourages desirable compromises.”⁸¹ Re argues instead that “Court precedent should form only when a single rule of decision has the express support of at least five [j]ustices.”⁸²

Justice Gorsuch, in *Ramos v. Louisiana*, stated his view that minority opinions should not be regarded as being precedential, and certainly not opinions of a single justice joined by no others (which he regarded as new and dubious).⁸³ On the other hand, Nina Varsava has correctly noted that opinions of single justices have previously stood as precedent.⁸⁴ Given the controversy surrounding the idea that opinions from single justices may be precedential, this matter should raise serious concerns about the precedential value of Justice Powell’s opinion in *Bakke*. This also invites questions as to whether subsequent Court majorities, including in *Students for Fair Admissions*, should have focused on diversity as the only acceptable compelling interest for university affirmative action programs.

D. *Bakke and the First Amendment*

In defending the diversity rationale as a compelling state interest that survived strict scrutiny, Justice Powell primarily relied on the First Amendment: “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”⁸⁵ In short, Justice Powell believed academic freedom justified deferring to university admissions officers in their decisions to provide a “plus” factor based on an applicant’s race.⁸⁶ As a basis for his view, Justice Powell cited Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire*:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment[,] and creation. It is an atmosphere in which there prevail “the four

⁸¹ Richard Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1943 (2019).

⁸² *Id.*

⁸³ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403-04 (2020).

⁸⁴ Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 121 (2020).

⁸⁵ *Bakke*, 438 U.S. at 312.

⁸⁶ *Id.* at 312-13.

essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.⁸⁷

In assessing the strength of the diversity rationale as precedent, it is important to consider whether the First Amendment actually provides direct support. As Justice Powell himself noted, academic freedom is not an enumerated constitutional right.⁸⁸ *Sweezy* was a case involving a professor suspected of subversive activities who refused to give testimony about a lecture he delivered at the university.⁸⁹ In this sense, it was clearly a First Amendment issue involving speech, but the case had nothing at all to do with university admissions; its connection to the *Bakke* case is therefore, at best, distant. Yet Justice Powell extended Justice Frankfurter’s formulation of academic freedom in *Sweezy* to encompass the choice by some universities to give admissions preferences to underrepresented minority students. As Justice Thomas wrote in his dissent in *Grutter*, “I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of the Constitution’s ban on racial discrimination.”⁹⁰

E. Holding versus Dicta

While holdings in decided cases may serve to establish legal precedent, there has been ongoing debate about whether dicta—under certain circumstances—may also serve to set precedent. Randy Kozel has noted:

A court’s *holdings* receive deference in future cases. By contrast, the court’s unnecessary *dicta* are relevant to the extent that their reasoning is persuasive [D]efining the scope of precedent can be a complex enterprise, with the traditional distinction between holdings and dicta reflecting only one consideration among many.⁹¹

How does this description of holdings and dicta apply to *Bakke*, specifically in regard to Justice Powell’s diversity rationale and his reliance on Harvard’s “plus factor” admissions program? Michael Abramowicz and Maxwell Stearns,

87 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result). It is worth noting that Justice Frankfurter, in alluding to “the four essential freedoms” of a university, was referring to a statement from senior scholars in South Africa.

88 *Bakke*, 438 U.S. at 312.

89 *Sweezy*, 354 U.S. at 236-44.

90 *Grutter*, 539 U.S. at 364 (Thomas, J., concurring in part and dissenting in part).

91 RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 22 (2017).

in their detailed assessment of the strength of the precedent in Justice Powell's opinion in *Bakke*, argued that "[Justice] Powell's conclusion that diversity is a compelling interest counts as dicta" but his sanctioning of Harvard's "plus factor" admissions plan should be considered as a holding.⁹² In contrast, Alan Meese concluded that both the diversity rationale and Justice Powell's endorsement of the Harvard "plus" plan should be considered as dicta and not appropriate for the establishment of precedent.⁹³ It is noteworthy that both legal scholars agreed that the diversity rationale was dicta but disagreed about whether the Harvard "plus" system was a holding or dicta, suggesting that this determination may be a closer call. Still, in regard to the precedential value of decisional rationales, Kozel took an intermediate position:

We are thus left in a zone of uncertainty. Sometimes the Supreme Court insists on a firm line between rules and rationales in determining the forward-looking effect of precedent. In other cases, the lesson seems to be that decisional rationales are entitled to deference even if future courts disagree with them.⁹⁴

The diversity rationale stands at the center of Justice Powell's opinion in *Bakke*. Yet with the Court's decision in *Students for Fair Admissions*, it, too, has been resigned to the veritable dustbin of history. In the next part, we will acknowledge some of the weaknesses of *Grutter* while also critiquing how the *Students for Fair Admissions* majority handled it.

III. THE WEAKNESSES AND DEMISE OF *GRUTTER*

In *Grutter*, the University of Michigan Law School utilized a holistic admissions program similar to the Harvard program praised by Justice Powell in *Bakke*, aiming to admit a "critical mass" of underrepresented minority (Black, Hispanic, and Native American) students.⁹⁵ Justice O'Connor's opinion, joined by four other justices, resulted in a 5-4 ruling affirming Justice Powell's opinion in *Bakke*. Unmistakably constructed around Justice Powell's opinion in *Bakke*,⁹⁶ Adam Chilton and his coauthors observed: "The core of Justice O'Connor's opinion for the Court in *Grutter* was a reaffirmation, and extension, of the diversity rationale pioneered by Justice Powell."⁹⁷ This Part will examine the

⁹² Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1077-78 (2005).

⁹³ Alan J. Meese, *Reinventing Bakke*, FACULTY PUBL'NS (1998), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2469&context=facpubs>.

⁹⁴ KOZEL, *supra* note 91, at 81.

⁹⁵ *Grutter*, 539 U.S. at 316.

⁹⁶ *E.g., id.* at 323-25.

⁹⁷ Chilton et al., *supra* note 72, at 344.

weaknesses of this approach as well as her invocation of a twenty-five-year “deadline” for race-conscious admissions programs. It will subsequently critique how the opinions in *Students for Fair Admissions* treated *Grutter*, especially its “deadline,” focusing on how the principal dissent responds to the majority’s focus on this aspect of *Grutter*.

A. *The Exclusive Focus on the Diversity Rationale in Grutter*

It is readily apparent that Justice O’Connor’s *Grutter* opinion was strongly adherent to Justice Powell’s diversity rationale in *Bakke*. Justice O’Connor discusses and accepts the First Amendment justification for the diversity rationale: race-based admissions are a product of academic freedom, and university officials should receive deference to determine whom they wish to admit and teach.⁹⁸ Yet, it is striking that she declines to apply the *Marks* rule to Justice Powell’s opinion, determining that it was “unnecessary to decide” whether the diversity rationale was binding precedent.⁹⁹ In his dissent in *Grutter*, Justice Thomas observed that the Court decided not to rely on *stare decisis* in regard to Justice Powell’s opinion in *Bakke* (declining to apply the *Marks* rule) while simultaneously fully embracing Justice Powell’s diversity rationale.¹⁰⁰ Although this Article, in conjunction with many legal scholars, has expressed doubt as to the strength of the diversity rationale as compared to the others raised in *Bakke*, it is apparent that Justice O’Connor did supplement the reasoning laid out by Justice Powell in his *Bakke* opinion, expanding at least somewhat beyond the latter’s focus on intellectual diversity. Citing the district court opinion, Justice O’Connor argued that the University of Michigan Law School’s admission policy “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”¹⁰¹ She also pointed out that “numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”¹⁰²

Two additional points about the focus on diversity by Justice O’Connor are notable in light of what essentially amounted to a dismissal of diversity-related benefits by the majority in *Students for Fair Admissions*. First, she plainly stated that the “benefits [were] not theoretical but real,” citing American businesses as “hav[ing] made clear that the skills needed in [the] increasingly global marketplace can only be developed through exposure to widely diverse people,

⁹⁸ *Grutter*, 539 U.S. at 324, 328-29.

⁹⁹ *Id.* at 307.

¹⁰⁰ *Id.* at 356-57 (Thomas, J., concurring in part and dissenting in part).

¹⁰¹ *Id.* at 330 (citations omitted).

¹⁰² *Id.*

cultures, ideas, and viewpoints.”¹⁰³ Second, she relied heavily on an amicus brief filed on behalf of retired military officers.

What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle [sic] mission to provide national security.” The primary sources for the Nation’s officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, “the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.” We agree that “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.”¹⁰⁴

The persuasiveness of this reasoning is apparent from the fact that the *Students for Fair Admissions* majority, as this Article discusses in greater detail below, omits military academies from its ruling.

Yet in ending affirmative action, the majority in *Students for Fair Admissions* ultimately looked to reliance, a factor traditionally considered when assessing whether a precedent should be overturned. The importance of reliance in this context is justified on the basis of two principles: (i) people form expectations about their legal rights and duties based on judicial decisions; and (ii) overturning precedent may upset these expectations and instigate societal disruption.¹⁰⁵ In *Students for Fair Admissions*, however, as we will discuss further below, the majority argued that it was unreasonable for universities to continue to rely on *Grutter* on the basis that “*Grutter* itself limited the reliance that could be placed upon it by insisting, over and over again, that race-based admissions programs be limited in time.”¹⁰⁶ It is true that Justice O’Connor’s

103 *Id.*

104 *Id.* at 331 (citations omitted).

105 Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1846 (2023).

106 *Students for Fair Admissions*, 600 U.S. at ____ (slip op., at 38 n.9).

Grutter opinion is uncertain, even skeptical, of affirmative action policies relied upon by universities. Stating that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,”¹⁰⁷ Justice O’Connor suggested that “race-conscious admissions policies must be limited in time” and identified a few means by which this could be ensured.¹⁰⁸

Enshrining a permanent justification for racial preferences would offend . . . fundamental equal protection principle[s]. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point *In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.*¹⁰⁹

After referring favorably to so-called “race-neutral alternatives,”¹¹⁰ Justice O’Connor devoted the penultimate paragraph of the opinion to explaining when she expected affirmative action to no longer be necessary. In an often-quoted—and criticized¹¹¹—statement, she wrote: “[The Court] expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”¹¹² Far more than Justice O’Connor’s elaboration of the diversity rationale, this “deadline” and her surrounding discussion animated the majority’s stated reasoning in *Students for Fair Admissions*.

B. Students for Fair Admissions and the Focus on the Twenty-Five Year
“Deadline” in *Grutter*

In their briefs, both Harvard and the University of North Carolina leaned heavily on the Court’s precedents in *Bakke*, *Grutter*, and *Fisher II*.¹¹³ Harvard

¹⁰⁷ *Grutter*, 539 U.S. at 341.

¹⁰⁸ *Id.* at 342.

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *Id.*

¹¹¹ See, e.g., JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 263 (2007) (“The imposition of the time limit was O’Connor at her worst—and her best. To be sure, O’Connor was ‘legislating from the bench,’ in the accusatory term that conservatives like Bush used to describe activist judges. From the vague commands of the Constitution, she was extrapolating not just a legal rule but a deadline as well.”).

¹¹² *Grutter*, 539 U.S. at 343.

¹¹³ Brief for Petitioner, President & Fellows of Harv. Coll., *Students for Fair Admissions*, 600 U.S. at ____ (slip op.), at 21-41, available at <https://www.scotusblog.com/case-files/cases/students->

extracted from *Bakke* and *Grutter* three reasons for recognizing diversity in higher education as a compelling interest. First, the country benefits from having leaders “trained through wide exposure” to diverse ideas, meaning that the “‘path to leadership’ must . . . ‘be visibly open to talented and qualified individuals of every race and ethnicity,’ to ‘cultivate a set of leaders with legitimacy in the eyes of the citizenry.’”¹¹⁴ Second, racial diversity can promote better learning outcomes by advancing “cross-racial understanding” and “break[ing] down racial stereotypes.”¹¹⁵ Third, racial diversity “is indispensable to some universities’ educational missions.”¹¹⁶ Harvard also emphasized the lower courts’ findings that “a heterogenous study body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community.”¹¹⁷ The University of North Carolina reiterated most of these same reasons to support the conclusion that diversity in higher education is a compelling interest.¹¹⁸

However, this time, the Court did not adhere to its past precedents. The *Students for Fair Admissions* majority rejected the diversity rationale that had been affirmed repeatedly since *Bakke*. It found that the Court’s precedents had identified just two compelling interests permitting a resort to race-based government action: “remediating specific, identified instances of past discrimination that violated the Constitution or a statute” and “avoiding imminent and serious risks to human safety in prisons.”¹¹⁹ Chief Justice Roberts described the interests put forth by the universities as “not sufficiently coherent for the purposes of strict scrutiny.”¹²⁰

At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately “train[ed]”; whether the exchange of ideas is “robust”; or whether “new knowledge” is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no

for-fair-admissions-inc-v-president-fellows-of-harvard-college/ [hereinafter Harvard Brief]; Brief for Petitioner, Univ. of N.C., *Students for Fair Admissions*, 600 U.S. at ____ (slip op.), at 26-47, <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-university-of-north-carolina/> [hereinafter University of North Carolina Brief].

114 Harvard Brief, *supra* note 113, at 29 (citing *Bakke*, 438 U.S. at 312-13; *Grutter*, 539 U.S. at 332).

115 *Id.* at 29-30 (citing *Grutter*, 539 U.S. at 330).

116 *Id.* at 30.

117 *Id.* at 31 (citation omitted).

118 University of North Carolina Brief, *supra* note 113, at 37-38.

119 *Students for Fair Admissions*, 600 U.S. at ____ (slip op., at 15).

120 *Id.* at 23.

particular point at which there exists sufficient “innovation and problem-solving,” or students who are appropriately “engaged and productive.”¹²¹

Notwithstanding the fact that these same interests had been recognized as compelling in *Grutter* just twenty years prior, Chief Justice Roberts rejected them in *Students for Fair Admissions* for the purposes of strict scrutiny on the basis of measurement difficulties. He further insisted, with little attempt to distinguish from *Grutter*, that the “admissions programs fail[ed] to articulate a meaningful connection between the means they employ and the goals they pursue,” expressing particular concern about the imprecision of the racial categories.¹²² Part of what appears to drive his reasoning here was a strong distrust of race operating as a stereotype. Reading *Grutter* to forbid admissions programs premised on the “belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue,”¹²³ the chief justice described race-conscious admissions policies as being centered around the idea of there being “an inherent benefit in race *qua* race—in race for race’s sake.”¹²⁴

Yet what seemed to motivate Chief Justice Roberts’ conclusion most strongly was the *Grutter* “requirement” that “race-based admissions programs . . . must end.”¹²⁵ Indeed, in a rhetorical flourish similar to his famous admonition in *Parents Involved in Community Schools v. Seattle School District No. 1* (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”),¹²⁶ he argued: “Eliminating racial discrimination means eliminating all of it.”¹²⁷ Chief Justice Roberts asserted that “[t]he importance of an end point was not just a matter of repetition” but “the reason the Court was willing to dispense temporarily with the Constitution’s unambiguous guarantee of equal protection.”¹²⁸

Justice Kavanaugh, concurring separately, even claimed that the very *holding* of *Grutter* included the deadline of twenty-five years on the basis that various members of the Court had referenced the twenty-five-year limit in their separate opinions in *Grutter*.¹²⁹ Although he acknowledged that “the effects of past racial discrimination still persist,” Justice Kavanaugh argued that race-

121 *Id.* (citations omitted).

122 *Id.* at 24-25.

123 *Id.* at 28.

124 *Id.* at 29.

125 *Id.* at 21.

126 551 U.S. 701, 748 (2007).

127 *Students for Fair Admissions*, 600 U.S. at ____ (slip op., at 15).

128 *Id.* at 21.

129 *Id.* at 3 (Kavanaugh, J., concurring).

neutral admissions programs would constitute a sufficient means of ameliorating such harms.¹³⁰ Justice Kavanaugh, even more explicitly than Chief Justice Roberts in his majority opinion, insisted that *Students for Fair Admissions* was consistent with the Court's affirmative action precedents.¹³¹ This perhaps explains Chief Justice Roberts' decision not to include language overruling *Grutter* outright.

The principal dissent, authored by Justice Sotomayor, aptly dismantles the premise that *Students for Fair Admissions* was a natural outgrowth of *Bakke* and *Grutter*. As she notes first, "[t]here is no better evidence that the Court is overruling the Court's precedents than those precedents themselves[;] '[e]very one of the arguments made by the majority can be found in the dissenting opinions filed in' *Grutter* and *Fisher II* by Chief Justice Roberts, Justice Alito, and Justice Thomas."¹³² Viewing the diversity rationale as central to *Bakke* and its successor cases, Justice Sotomayor accused the majority of "singl[ing] out the limited use of race in holistic college admissions."¹³³

[This case] strikes at the heart of *Bakke*, *Grutter*, and *Fisher* by holding that racial diversity is an "inescapably imponderable" objective that cannot justify race-conscious affirmative action, even though respondents' objectives simply "mirror the 'compelling interest' this Court has approved" many times in the past. At bottom, without any new factual or legal justification, the Court overrides its longstanding holding that diversity in higher education is of compelling value.¹³⁴

Emphasizing that the Court has recognized numerous equally or more amorphous interests as compelling for the purposes of strict scrutiny, Justice Sotomayor accused the majority of "pay[ing] lip service" to racial diversity.¹³⁵

Justice Sotomayor also lambasted the majority for "[c]herry-picking language from *Grutter*" regarding the need for an expiration date to race-conscious admissions programs.¹³⁶ Interpreting the twenty-five years not as a firm deadline, but rather an "arbitrary number," Justice Sotomayor argued that *Grutter* merely required universities to periodically assess whether race-conscious programs were necessary to achieve the compelling diversity

130 *Id.* at 8 (Kavanaugh, J., concurring).

131 *Id.* (Kavanaugh, J., concurring).

132 *Id.* at 36 (Sotomayor, J., dissenting).

133 *Id.* at 41 (Sotomayor, J., dissenting).

134 *Id.* at 41-42 (Sotomayor, J., dissenting).

135 *Id.* at 42-43 (Sotomayor, J., dissenting).

136 *Id.* at 53 (Sotomayor, J., dissenting).

interests.¹³⁷ Reading *Grutter* the way that the majority did, Justice Sotomayor emphasized, was “based on the fiction that racial inequality has a predictable cutoff date.”¹³⁸

Equality is an ongoing project in a society where racial inequality persists. A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable. There is a sound reason why this Court’s precedents have never imposed the majority’s strict deadline: Institutions cannot predict the future. Speculating about a day when consideration of race will become unnecessary is arbitrary at best and frivolous at worst. There is no constitutional duty to engage in that type of shallow guesswork.¹³⁹

In light of ongoing racial disparities across a wide range of areas,¹⁴⁰ this understanding of *Grutter* seems more appropriately flexible to a country still desperately trying to overcome a long history of systemic race-based violence and discrimination. But relying on both the conceded weakness of the diversity rationale instituted in *Bakke* and the lack of reliance interests stemming from the time limitation discussion in *Grutter*,¹⁴¹ the majority in *Students for Fair Admissions* ended affirmative action programs in university admissions. Perhaps this decision was inevitable regardless of what exactly the Court in *Bakke* recognized as the compelling state interest, but one cannot help but wonder whether a holding more closely steeped in affirmative action as a mechanism to remediate the ongoing harms of racial discrimination would have been more compelling for the majority in *Students for Fair Admissions*. Indeed, particularly in the context of medical school admissions, there is an inextricable link between a lack of racial diversity and systemic racism in health care, a crucial issue that may be ignored through the lens of the narrowly focused diversity rationale. Indeed, because medical school admissions were not directly examined in *Students for Fair Admissions*, the majority overlooks the serious implications of its decision for the composition of the physician workforce. This highly important issue takes us back to *Bakke*.

137 *Id.* at 54 (Sotomayor, J., dissenting).

138 *Id.* (Sotomayor, J., dissenting).

139 *Id.* at 54-55 (Sotomayor, J., dissenting).

140 *See generally id.* at 1-29 (Jackson, J., dissenting).

141 *Id.* at 38 n.9.

IV. AFFIRMATIVE ACTION AND THE PHYSICIAN WORKFORCE

It is sometimes forgotten that *Bakke* was a case about a medical school.¹⁴² As one example, in his important article published for a general audience in the *New York Review of Books* soon after the *Bakke* decision was announced, Ronald Dworkin mentioned the UC Davis Medical School in the second paragraph but never returned to it.¹⁴³ Yet in light of the increasingly diverse population of the United States, racial and ethnic diversity in medical schools and among the physician workforce has a profound effect on health care in the United States.¹⁴⁴ This Part will elaborate on some of the specific ways in which diversity in the medical context improves health care and argue that affirmative action has been an important, though imperfect, means of increasing diversity in medical schools (and thus the medical profession).

A. *How Racial Biases and Misrepresentations Contribute to Racial Health Disparities in Medical Care*

Back in 1966, Martin Luther King, Jr. emphasized: “Of all the forms of inequality, injustice in health is the most shocking and the most inhumane.”¹⁴⁵ Stark racial and ethnic disparities in health care continue to persist in the United States to this day “virtually anywhere one might choose to look . . . [w]hether it is premature birth, infant mortality, homicide, childhood obesity, or HIV infection, . . . [or] heart disease, diabetes, stroke, kidney failure, and cancer.”¹⁴⁶

Importantly, this phenomenon is caused not only because of unequal access to care,¹⁴⁷ but because of the “concrete” care itself.¹⁴⁸ According to a 2003 report

¹⁴² See *supra* note 12 and accompanying text.

¹⁴³ Ronald Dworkin, *The Bakke Decision: Did It Decide Anything?*, N.Y. REV. (Aug. 17, 1978), <https://www.nybooks.com/articles/1978/08/17/the-bakke-decision-did-it-decide-anything/>.

¹⁴⁴ See *infra* Section IV.A.

¹⁴⁵ DAMON TWEEDY, *BLACK MAN IN A WHITE COAT: A DOCTOR’S REFLECTIONS ON RACE AND MEDICINE* 3-4 (2015).

¹⁴⁶ *Id.* at 4. That there are significant racial disparities with respect to health care should be considered common knowledge, but the sources included here constitute particularly well-documented research in this respect. See, e.g., JAMES N. WEINSTEIN ET AL., *COMMUNITIES IN ACTION: PATHWAYS TO HEALTH EQUITY* 57-99 (2017); SOFIA CARRATALA & CONNOR MAXWELL, *HEALTH DISPARITIES BY RACE AND ETHNICITY* (May 7, 2020), available at <https://www.americanprogress.org/article/health-disparities-race-ethnicity/>; DAYNA BOWEN MATTHEW, *JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTHCARE* (2015); Risa Lavizzo-Mourey & David Williams, *Being Black Is Bad for Your Health*, U.S. NEWS & WORLD REP. (Apr. 14, 2016), <https://www.usnews.com/opinion/blogs/policy-dose/articles/2016-04-14/theres-a-huge-health-equity-gap-between-whites-and-minorities>.

¹⁴⁷ See Christen Linke Young, *There Are Clear, Race-Based Inequalities in Health Insurance and Health Outcomes*, BROOKINGS INST. (Feb. 19, 2020), <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2020/02/19/there-are-clear-race-based-inequalities-in-health-insurance-and-health-outcomes/>; see also *Disparities in Health and Health Care Among Black*

by the Institute of Medicine (now called the National Academy of Medicine), “[r]acial and ethnic minorities tend to receive a lower quality of health [] care than non-minorities, even when access-related factors, such as patients’ insurance status and income are controlled.”¹⁴⁹ “Stereotyping, biases, and uncertainty on the part of health [] care providers can all contribute to unequal treatment.”¹⁵⁰

Various studies have affirmed the importance of implicit bias in medical care.¹⁵¹ For example, Daylen Bowen Matthew has argued that unconscious biases held by health care providers contribute to racial disparities in health, as doctors, no different from others, have been consistently flooded with negative images, messages, and sentiments about people of color.¹⁵² These messages then “automatically dominate and form into implicit biases concerning . . . individual patient[s].”¹⁵³

[W]ithout consciously thinking about it, the physician is likely to have made some implicit assumptions about his [Black] patient even before meeting her [T]he doctor may assume this patient has limited means, less education than himself, and has had few opportunities to take care to eat well, exercise, or rest over the course of her lifetime. Most likely, the physician will not even be aware that his judgments about the patient have been reached subconsciously . . . [b]ut the fact that this physician’s assumptions and stereotypes—his implicit biases—are neither irrational nor consciously chosen, does not mean that the

People, KAISER FAM. FOUND. (Feb. 24, 2022), <https://www.kff.org/infographic/disparities-in-health-and-health-care-among-black-people/> (noting that the Affordable Care Act narrowed, but failed to eliminate, racial disparities in health coverage).

148 KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 335 (2019).

149 INST. OF MED., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 1* (Brian D. Smedley et al. eds., 2002).

150 *Id.*

151 See BRIDGES, *supra* note 148, at 135; see, e.g., Michael Sun et al., *Negative Patient Descriptors: Documenting Racial Bias in the Electronic Health Record*, 41 HEALTH AFFS. 203 (2022); Gracie Himmelstein et al., *Examination of Stigmatizing Language in the Electronic Health Record*, 5 JAMA NETWORK OPEN (Jan. 27, 2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2788454>; Chloë FitzGerald & Samia Hurst, *Implicit Bias in Healthcare Professionals: A Systematic Review*, 18 BMC MED. ETHICS (2017); William J. Hall et al., *Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review*, 105 AM. J. PUB. HEALTH e60 (2015); Elizabeth N. Chapman et al., *Physicians and Implicit Bias: How Doctors May Unwittingly Perpetuate Health Care Disparities*, 28 J. GEN. INTERNAL MED. 1504 (2013); Irene V. Blair, John F. Steiner & Edward P. Havranek, *Unconscious (Implicit) Bias and Health Disparities: Where Do We Go From Here?*, 15 PERMANENTE J. 71 (2011).

152 MATTHEW, *supra* note 146, at 48.

153 *Id.* at 49.

discrimination that arises from them will not be extremely harmful to his . . . patient's health.¹⁵⁴

Similarly, an infamous 2016 study out of the University of Virginia revealed that nearly half of a sample of medical students and residents endorsed at least one false belief about the biological differences between Black and White patients (e.g., “[B]lack people’s skin is thicker than [W]hite people’s skin.”). These beliefs further correlated with racial bias in pain perception and treatment recommendation accuracy.¹⁵⁵

Racial misrepresentations in medical schools also play a significant role in fomenting racial disparities in health care. A recent study published in the *New England Journal of Medicine* examined nearly nine hundred lectures from twenty-one courses in one particular medical school and found “five key domains in which educators misrepresent[ed] race in their discussions, interpretations of race-based data, and assessments of students’ mastery of race-based science.”¹⁵⁶ The domains were semantics, prevalence without context, race-based diagnostic bias, pathologizing race, and race-based clinical guidelines.¹⁵⁷

In recent years especially, medical schools have attempted various strategies to advance health equity in medical education, ranging from implicit bias training¹⁵⁸ to supplementary curricula¹⁵⁹ in structural competency, cultural humility, and anti[-]racism.¹⁶⁰ Particularly with such initiatives in their nascent stage,¹⁶¹ however, diversity in medical schools can play an important role in

¹⁵⁴ *Id.*

¹⁵⁵ Kelly Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PSYCH. & COGNITIVE SCIS. 4296, 4296 (2016).

¹⁵⁶ Christine Amutah et al., *Misrepresenting Race — The Role of Medical Schools in Propagating Physician Bias*, 384 NEW ENG. J. MED. 872, 872 (Mar. 4, 2021), <https://www.nejm.org/doi/full/10.1056/nejmms2025768>. The authors “found similar misrepresentations of race” in their home institutions. *Id.*

¹⁵⁷ *Id.* at 873, tbl. 1.

¹⁵⁸ See Swapna Reddy, *Implicit Bias Curricula in Medical School: Student and Faculty Perspectives*, HEALTH AFFS. (Jan. 15, 2020), <https://www.healthaffairs.org/doi/10.1377/forefront.20200110.360375/full/>; see, e.g., Karen Nitkin, *New Anti-Bias Training at the School of Medicine*, JOHN HOPKINS MED. (Sept. 8, 2020), <https://www.hopkinsmedicine.org/news/articles/new-bias-and-racism-training-at-the-school-of-medicine>.

¹⁵⁹ See Stacy Weiner, *Medical Schools Overhaul Curricula to Fight Inequities*, ASS’N OF AM. MED. COLLS. (May 25, 2021), <https://www.aamc.org/news-insights/medical-schools-overhaul-curricula-fight-inequities>; see also Sean Treacy-Abarca et al., *Enhancing Existing Medical School Curricula with an Innovative Healthcare Disparities Curriculum*, 21 BMC MED. EDUC. 613 (2021) (developing a “novel resource-conserving health [] care disparities curriculum to enhance existing medical school lectures”).

¹⁶⁰ Amutah et al., *supra* note 156, at 872.

¹⁶¹ See Nao Hagiwara et al., *A Call for Grounding Implicit Bias Training in Clinical and Translational Frameworks*, 395 LANCET 1457 (2020) (noting gaps in current implicit bias training);

reducing racial bias and misrepresentation in the medical context, in addition to advancing other important goals that can improve health care.

B. Advantages of a Diverse Medical School Class

With respect to combating racial biases and misrepresentations in medical education, a study published by the Arizona Medical Education Research Institute found that students drive the majority of discussions on diversity in medical schools.¹⁶² Importantly, medical student activism has consistently “triggered new collaborations among students, faculty, and administrators to rethink how race is addressed in the medical curriculum.”¹⁶³

National protests against racial discrimination in police actions and beyond have had particular salience on college campuses. Because of the shifting terrain of pre-medical undergraduate education, in which students have been exposed to more history and sociology of medicine, current medical students are sometimes more aware than their professors of how racism manifests in medicine and medical education—including the intensifying scientific controversies regarding human genetic variation.¹⁶⁴

Medical students specifically have played a crucial role in decolonizing the medical school curriculum.¹⁶⁵ As one example, efforts by two medical students at

Jeffrey F. Milem et al., *The Important Role that Diverse Students Play in Shaping the Medical School Curriculum*, ARIZ. MED. EDUC. RSCH. INST., available at [https://coe.arizona.edu/sites/default/files/Milem,O'Brien,Miner,Bryan,Castillo-Page,Schoolcraft\(2012\)-The_Important_Role_that_Diverse_Students_Play_in_Shaping_the_Medical_School_Curriculum.pdf](https://coe.arizona.edu/sites/default/files/Milem,O'Brien,Miner,Bryan,Castillo-Page,Schoolcraft(2012)-The_Important_Role_that_Diverse_Students_Play_in_Shaping_the_Medical_School_Curriculum.pdf) (noting that students and family members described efforts to include diversity within the medical school curriculum as “minimal . . . at best”).

¹⁶² Milem et al., *supra* note 161, at 3-4.

¹⁶³ Lundy Braun & Barry Saunders, *Avoiding Racial Essentialism in Medical Science Curricula*, 19 AM. MED. ASS'N J. ETHICS 518, 518 (2017), <https://journalofethics.ama-assn.org/article/avoiding-racial-essentialism-medical-science-curricula/2017-06>.

¹⁶⁴ *Id.*

¹⁶⁵ See Deborah Fadoju, *Sounding the Alarm: Six Strategies for Medical Students to Champion Anti-Racism Advocacy*, DOVE PRESS (Jan. 18, 2021), <https://www.dovepress.com/sounding-the-alarm-six-strategies-for-medical-students-to-champion-ant-peer-reviewed-fulltext-article-JHL>; see also Sarah H.M. Wong et al., ‘Decolonising the Medical Curriculum’: Humanising Medicine Through Epistemic Pluralism, Cultural Safety and Critical Consciousness, LON. REV. EDUC. (May 19, 2021), <https://uclpress.scienceopen.com/hosted-document?doi=10.14324/LRE.19.1.16> (describing how students in the United Kingdom are at the forefront of efforts to decolonize the medical curriculum); Braden Hexom, *Beyond Medical School: The Frontier of Medical Activism*, AM. MED. ASS'N J. ETHICS (Jan. 2004), <https://journalofethics.ama-assn.org/article/beyond-medical-school-frontier-medical-activism/2004-01> (noting efforts by medical students to change medical school curricula); cf. Merlin Chowkwanyun, *Biocitizenship on the Ground: Health Activism and the Medical Governance Revolution*, in *BIOCITIZENSHIP: THE POLITICS OF BODIES, GOVERNANCE, AND POWER* 178, 178-203 (Kelly E. Happe et al. eds., 2018) (discussing the history of medical student activism during the

the Yale School of Medicine encouraged the institution to incorporate a health equity trend into the curriculum, and “an art tour and reflection exploring the expression of bias in [W]estern culture and its impact on patient-provider interactions” is now required as part of the curriculum for first-year students.¹⁶⁶ Other medical schools have similarly changed their curriculum to ameliorate racial biases in health care in response to student activism.¹⁶⁷ Accusing the medical community of being “complicit in legitimizing claims of racial difference throughout the history of the United States,” several medical students from the University of Washington School of Medicine argued that “[c]omprehensive reform in medical education” was “necessary to dismantle the remnants of [an] inherited racist system” and issued a series of recommendations aimed towards reforming the medical school curriculum.¹⁶⁸ All of this suggests that a diverse student body can push the medical school as a whole towards greater racial awareness and understanding.

Unsurprisingly, this phenomenon has positive effects beyond medical school. White students who attend more racially diverse medical schools are “more likely [than their counterparts] to rate themselves as highly prepared to care for minority populations and value equitable access to care more strongly.”¹⁶⁹ In its amicus brief submitted on behalf of Harvard and the University of North Carolina, the Association of American Medical Colleges similarly recognized that diverse student populations can generate significant

civil rights and War on Poverty era, including debates over the narrowness of the curriculum).

166 Abigail Roth, *Medical Students Leave ‘Indelible’ Mark on the School’s Curriculum*, YALE NEWS (May 11, 2018), <https://news.yale.edu/2018/05/11/medical-students-leave-indelible-mark-schools-curriculum>.

167 See, e.g., Timothy M. Smith, *Rebuilding Medical Curricula to Treat Race as Social Construct*, AM. MED. ASS’N (Mar. 16, 2021), <https://www.ama-assn.org/delivering-care/public-health/rebuilding-medical-curricula-treat-race-social-construct>; Hafza Inshaar et al., *A Call for Curricular Reform: Recognising the Importance of Race-Based Medical Education, Racism and Bias*, 56 MED. EDUC. 1147 (2022); ICAHN SCH. OF MED. AT MT. SINAI, <https://changenow.icaohn.mssm.edu/race-bias/> (last visited Jan. 24, 2023).

168 Edwin Nieblas-Bedolla et al., *Changing How Race Is Portrayed in Medical Education: Recommendations from Medical Students*, 95 ACAD. MED. 1802 (2020).

169 Max Jordan Nguemeni Tiako et al., *Medical Schools as Racialized Organizations: How Race-Neutral Structures Sustain Racial Inequality in Medical Education — A Narrative Review*, 37 J. GEN. INTERNAL MED. 2259, 2263 (2022); see also Press Release, Univ. Cal. L.A., Diversity at Medical Schools Makes Stronger Doctors, Study Shows (Sept. 9, 2008), available at <https://www.uclahealth.org/news/diversity-at-medical-schools-makes-stronger-doctors-study-shows> (describing similar findings in research conducted at the University of California, Los Angeles). To clarify, this Article does not seek to advance the offensive suggestion that the purpose of diversity is to improve the education of White students. Underrepresented minority students should and do attend medical school for the same reason as all other students—to become the very best doctors they can and ultimately provide the very best care for their patients, irrespective of their patients’ race. The purpose of highlighting these findings is to aid the argument that the diversity rationale is a sufficiently strong state interest to justify affirmative action in the medical school context.

gains for health care.

[M]edical educators have learned—through both scientific research and years of experience—that health disparities can be minimized when professionals have learned and worked next to colleagues of different racial and ethnic backgrounds in environments that reflect the ever-increasing diversity of the society the profession serves. Thus, diversity in medical education yields better health outcomes not just because minority professionals are often more willing to serve (and often very effective at serving) minority communities, but *because all physicians become better practitioners overall as a result of a diverse working and learning environment.*¹⁷⁰

In short, the evidence suggests that diversity produces better medical students, more attuned to their racial biases and misinformation in their medical curricula. These medical students, of course, subsequently become doctors who are better equipped to understand the health care needs of diverse patient populations.

Admitting diverse medical school classes improves health care in other ways as well. First, for some patients, particularly those from minority groups, the race or ethnicity of their physician may be an important factor.¹⁷¹ In fact, racial/ethnic correspondence between patient and physician has been found to promote better communication, trust, and clinical outcomes.¹⁷² Second, diversity can boost creativity and innovation in the medical context.¹⁷³ Third, there is ample evidence that physicians from historically marginalized groups are more likely to work with medically underserved communities, which can markedly improve health care access.¹⁷⁴

¹⁷⁰ Brief for Association of American Medical Colleges et al. as Amici Curiae Supporting Respondents, *Students for Fair Admissions*, 600 U.S. at ____ (slip op.), at 5 (emphasis added).

¹⁷¹ See Junko Takeshita et al., *Association of Racial/Ethnic and Gender Concordance Between Patients and Physicians with Patient Experience Ratings*, JAMA NETWORK OPEN (Nov. 9, 2020); Thomas A. Laveist & Amani Nuru-Jeter, *Is Doctor-Patient Race Concordance Associated with Greater Satisfaction with Care?*, 43 J. HEALTH SOC. BEHAVIOR 296 (2002).

¹⁷² See Marcella Alsan et al., *Does Diversity Matter for Health? Experimental Evidence from Oakland* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24787, 2018); Takeshita et al., *supra* note 171.

¹⁷³ See Talia H. Swartz et al., *The Science and Value of Diversity: Closing the Gaps in Our Understanding of Inclusion and Diversity*, 220 J. INFECTIOUS DISEASES S33 (2019); Quin Capers IV et al., *The Urgent and Ongoing Need for Diversity, Inclusion, and Equity in the Cardiology Workforce in the United States*, 10 J. AM. HEART ASS'N (2021).

¹⁷⁴ See Capers IV et al., *supra* note 173; Andrea N. Garcia et al., *Factors Associated with Medical School Graduates' Intention to Work with Underserved Populations: Policy Implications*

In *Bakke*, Justice Powell did assume that “in some situations a State’s interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification” but rejected this argument merely because the record contained “virtually no evidence” that the admissions policy further this interest.¹⁷⁵ The amicus brief submitted by several states on behalf of Harvard and the University of North Carolina summarizes several benefits. “[T]he States now well know from abundant research the myriad ways in which medical student and clinician diversity leads to improved health outcomes, health [] care access, and patient satisfaction for patients from persistently burdened, medically underserved communities.”¹⁷⁶

Notably, both Justice Sotomayor and Justice Jackson incorporated discussion on health disparities in their dissents, particularly the latter.

Health gaps track financial ones. When tested, Black children have blood lead levels that are twice the rate of White children—“irreversible” contamination working irremediable harm on developing brains. Black (and Latino) children with heart conditions are more likely to die than their White counterparts. Race-linked mortality-rate disparity has also persisted, and is highest among infants.

So, too, for adults: Black men are twice as likely to die from prostate cancer as White men and have lower [five]-year cancer survival rates. Uterine cancer has spiked in recent years among all women—but has spiked highest for Black women, who die of uterine cancer at nearly twice the rate of “any other racial or ethnic group.” Black mothers are up to four times more likely than White mothers to die as a result of childbirth. And COVID[-19] killed Black Americans at higher rates than White Americans.

“Across the board, Black Americans experience the highest rates of obesity, hypertension, maternal mortality, infant mortality, stroke, and asthma.” These and other disparities—the predictable result of opportunity disparities—lead to at least 50,000 excess deaths a year for Black Americans vis-à-vis White Americans. That is [eighty] million excess years of life lost from just 1999 through 2020.

for *Advancing Workforce Diversity*, 93 ACAD. MED. 82 (2018).

¹⁷⁵ *Bakke*, 438 U.S. at 310.

¹⁷⁶ Brief for Massachusetts et al. as Amici Curiae Supporting Respondents, *Students for Fair Admissions*, 600 U.S. at ____ (slip op.), at 10-11.

Amici tell us that “race-linked health inequities pervad[e] nearly every index of human health” resulting “in an overall reduced life expectancy for racial and ethnic minorities that cannot be explained by genetics.” Meanwhile—tying health and wealth together—while she lays dying, the typical Black American “pay[s] more for medical care and incur[s] more medical debt.”¹⁷⁷

All of this suggests that it is not “inescapably imponderable” interests that justify a diverse medical student population, but well-established advantages for medical students that translate into robust, concrete health benefits for the population at large, particularly historically marginalized groups. It is even more true now than in *Bakke* that diversity in medical school admissions is a compelling state interest for constitutional purposes.

C. *Reparations versus Diversity Rationale in Bakke: The Mixed Effect of Affirmative Action in Medical Schools Since Bakke*

In *Bakke*, the UC Davis School of Medicine recognized that a diverse physician workforce was a compelling national interest and that the appalling history of racial discrimination in the United States curtailed the realization of this important objective.¹⁷⁸ Underrepresented minorities did not historically have opportunities to attend medical school, which led the medical school to implement its plan to reserve sixteen seats in each class for underrepresented minority students.

Although Justice Powell did permit affirmative action—and diversity is clearly compelling in the medical school context—viewed in hindsight, it is unfortunate that he so strongly opposed the reparations rationale, which is perhaps a more compelling logical and rhetorical idea than diversity. While the absolute number of physicians from minority racial and ethnic groups has increased over time, the physician workforce does not currently match the demographics of the population of the United States.¹⁷⁹ Data from the Association of American Medical Colleges from 2021 on the racial and ethnic composition of medical school enrollees are as follows¹⁸⁰:

¹⁷⁷ *Students for Fair Admissions*, 600 U.S. at ____ (slip op., at 13-14) (Jackson, J., dissenting) (citations omitted).

¹⁷⁸ *Bakke* Brief for Petitioner, *supra* note 21, at *32-33; Reply Brief for Petitioner, *Bakke*, 438 U.S. (No. 76-811), 1977 WL 187980, at *2.

¹⁷⁹ Elle Lett et al., *Trends in Racial/Ethnic Representation Among U.S. Medical Students*, JAMA NETWORK OPEN (Sept. 4, 2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2749233>.

¹⁸⁰ Ass’n of Am. Med. Colls., *2021 Fall Applicant, Matriculant, and Enrollment Data Tables*

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

With affirmative action admissions policies now ended, the situation will likely only worsen. Two empirical studies have examined changes in the numbers of underrepresented minority medical students before and after state-initiated bans on affirmative action in higher education. In the first, medical school matriculation rates were examined before and after six state-level affirmative action bans were instituted (California, Washington, Florida, Texas, Michigan, and Nebraska). Following the implementation of the bans, matriculation rates for underrepresented minority students in public medical schools declined by 17.2%.¹⁸¹ In a second empirical study, twenty-one public medical schools in eight states that implemented affirmative action bans were matched to control schools in states without bans. Following the implementation of the bans, the percentage of underrepresented minority students decreased from 14.8% to 10.0%, a 32% decrease, compared with a slight increase in the control schools.¹⁸²

These two studies raise the concern that this national ban on affirmative action programs in higher education may significantly reduce the number of underrepresented minority students in medical schools, which would eventually translate into even lower rates of diversity among the physician workforce in the United States.

V. CONCLUSION

The outcome of *Students for Fair Admissions* is disappointing, but it is largely not surprising to knowledgeable observers of the Court. Yet one notable instance in which the majority demonstrates at least some recognition of the potential consequences of this holding is footnote four in the majority opinion.¹⁸³

(Dec. 2021), <https://www.aamc.org/media/57761/download?attachment>.

181 Liliana M. Garces & David Mickey-Pabello, *Racial Diversity in the Medical Profession: The Impact of Affirmative Action Bans on Underrepresented Student of Color Matriculation in Medical Schools*, 86 J. HIGHER EDUC. 264 (2015).

182 Dan P. Ly, *Affirmative Action Bans and Enrollment of Students from Underrepresented Racial and Ethnic Groups in U.S. Public Medical Schools*, 175 ANNALS OF INTERNAL MED. 873 (2022).

183 See, e.g., Charlie Savage, *Highlights of the Affirmative Action Opinions and Dissents*,

The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.¹⁸⁴

Certainly, there is much to criticize about this footnote, and Justice Jackson does so in a particularly astute and stinging manner.¹⁸⁵ Yet this potentially leaves open, perhaps just a crack, contexts in which race-based admissions systems might present uniquely compelling interests that justify the continuation of affirmative action. Even if the Court deems diversity as presenting overly nebulous interests in the undergraduate context, the analysis presented herein makes clear that medical school interests are distinct—justifying the continued use of race-conscious admissions in medical schools, even in the wake of *Students for Fair Admissions*.

We acknowledge, though, that this is an unlikely prospect; the majority, after all, consistently refers to its analysis as encompassing higher education admissions programs generally and expressly identifies only military academies as having “potentially distinct interests.”¹⁸⁶ So, for medical schools committed to educating a diverse physician workforce prepared to meet the health care needs of an increasingly diverse society, the stakes could not be higher, and there is no time to lose. Medical schools, and all institutions of higher learning, must begin to prepare alternative strategies to ensure an education system that promotes racial diversity. Richard Kahlenberg, who served as an expert witness on behalf of Students for Fair Admissions, has noted that universities prohibited from using race-conscious admissions systems “have adopted an array of progressive policies that indirectly promote racial diversity,” including “increas[ing] financial-aid budgets, tak[ing] top-ranking students from high schools in poor communities, dropp[ing] the use of legacy preferences, and increas[ing] admission of students who transfer from community colleges.”¹⁸⁷ Others have

N.Y. TIMES (June 29, 2023), <https://www.nytimes.com/2023/06/29/us/politics/affirmative-action-ruling-highlights.html>.

¹⁸⁴ *Students for Fair Admissions*, 600 U.S. at ____ (slip op., at 22 n.4).

¹⁸⁵ *Id.* at 29 (Jackson, J., dissenting). She writes: “The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom (a particularly awkward place to land, in light of the history the majority opts to ignore).”

¹⁸⁶ *Id.* at 22 n.4.

¹⁸⁷ Richard D. Kahlenberg, *The Affirmative Action that Colleges Really Need*, ATLANTIC

proposed the increased use of pathway programs, or partnerships between a medical school and an undergraduate institution that prepare underrepresented pre-medical school students to become competitive applicants,¹⁸⁸ and incorporating mentorship structures for potential medical professionals.¹⁸⁹ Importantly, many of the members of the *Students for Fair Admissions* majority seem open to these types of strategies.¹⁹⁰ While these may be imperfect solutions for ensuring that underrepresented minority students continue to have the opportunity to matriculate at institutions of higher learning, such institutions must begin contemplating how to attain diverse student bodies immediately. The wealth of our economy, the health of our citizens, and the soul of our country are at stake.

(Oct. 26, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-harvard-affirmative-action-legacy-admissions-equity/671869/>.

188 Roy H. Hamilton, Suzanne Rose & Horace M. DeLisser, *Defending Racial and Ethnic Diversity in Undergraduate and Medical School Admission Policies*, JAMA NETWORK (Dec. 7, 2022), <https://jamanetwork.com/journals/jama/fullarticle/2799539>.

189 See Brendan Murphy, *Boost for 3 Big Ideas to Improve Diversity in Medical Education*, AM. MED. ASS'N (Nov. 9, 2021), <https://www.ama-assn.org/education/medical-school-diversity/boost-3-big-ideas-improve-diversity-medical-education>.

190 See *Students for Fair Admissions*, 600 U.S. at ____ (slip op., at 51, 53, 55-56) (Thomas, J., concurring); *id.* at 14 n.4 (Gorsuch, J., concurring); *id.* at 8 (Kavanaugh, J., concurring). Ominously, though, there is little doubt that many of these approaches that do not explicitly consider race will also face intensive legal scrutiny. At the end of May, the Fourth Circuit narrowly upheld a new admissions process at a prestigious public high school in Virginia that had replaced its admissions exam with an essay and begun assigning weight to poorer students and those learning English. See *Coal. for T.J. v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023). Professor Jeannie Suk Gersen, a Harvard Law School professor, has warned that the next legal battles are likely to be over deemphasizing test scores or boosting applicants from poorly funded high schools. Even mechanisms like the Top Ten Percent Plan in Texas may be vulnerable. Jeannie Suk Gersen, *After Affirmative Action Ends*, NEW YORKER (June 26, 2023), <https://www.newyorker.com/news/daily-comment/after-affirmative-action-ends>.