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## ESSAY

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### VICTORY IS DEFEAT: THE IRONIC CONSEQUENCE OF JUSTICE SCALIA'S DEATH FOR *FISHER v. UNIVERSITY OF TEXAS*

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#### INTRODUCTION

The recent death of Justice Antonin Scalia on February 13, 2016, leaves the U.S. Supreme Court in ideological equipoise.<sup>1</sup> The Court is seemingly at a 4–4 impasse on many charged cases until Justice Scalia is replaced.<sup>2</sup> However, the immediate effect of Justice Scalia's absence is not as simple in

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1 Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito form the conservative bloc on the Court—to which Justice Scalia also belonged. Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan form the liberal bloc. See Dan Roberts & Sabrina Siddiqui, *Anthony Kennedy: How One Man's Evolution Legalized Marriage for Millions*, *GUARDIAN* (June 26, 2015), <http://www.theguardian.com/us-news/2015/jun/26/kennedy-ruling-gay-marriage-supreme-court> [<https://perma.cc/9BF7-GL66>] (discussing how Justice Kennedy often serves as the Court's swing vote). Of the conservative Justices, Justice Kennedy has been the most likely to crossover and side with the liberal bloc. *Id.*

2 On March 16, 2016, President Barack Obama nominated Chief Judge Merrick Garland of the United States Court of Appeals for the District of Columbia Circuit to replace Justice Scalia. Michael D. Shear, Julie Hirschfeld Davis & Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, *N.Y. TIMES* (Mar. 16, 2016), <http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html> [<https://perma.cc/H8YN-5D23>]. However, a number of Republican senators—including Senate Majority Leader Mitch McConnell—have stated repeatedly that the Senate will not act on President Obama's nomination and Justice Scalia's seat will remain vacant until the next President is inaugurated in 2017. *Id.*

all cases. For example, in *Fisher v. University of Texas at Austin (Fisher II)*<sup>3</sup>—the pending case about race-conscious university admissions at the University of Texas at Austin (UT)—one might think that Justice Scalia's absence would yield a ruling more favorable to proponents of affirmative action. But *Fisher II* could actually turn out worse for affirmative action proponents than it would have with Justice Scalia on the Court. And ironically, this may happen if Justice Anthony Kennedy votes with the liberal Justices to uphold UT's race-conscious policy.

The reasons for this irony are threefold. First, Justice Elena Kagan recused herself from *Fisher*, due to her role in earlier phases of the case when she was Solicitor General under the Obama Administration.<sup>4</sup> With Justice Scalia's death, seven Justices will decide *Fisher II*—eliminating, rather than creating, the possibility of a tie. Because Justice Kennedy is still the Court's swing vote, his view will probably be outcome-determinative in *Fisher II*. Justice Kennedy is likely to write a controlling opinion, as has often been the case in the past decade<sup>5</sup>—but this time by a 4–3 vote. Assuming a ruling on the merits, his *Fisher II* opinion will become Supreme Court precedent and apply to the entire nation.

Second, with Justice Kagan recused, the effect of Justice Scalia's absence on *Fisher II* actually depends on Justice Kennedy's vote. If Justice Kennedy votes to strike down UT's race-conscious admissions policy, then Justice Scalia's absence does not matter as much. Under that scenario, Justice Kennedy's opinion would control *Fisher II* either with Scalia (by a 5–3 majority) or without him (by a 4–3 majority). Either of these would reverse the Fifth Circuit and set precedent.

But if Justice Kennedy votes to uphold UT's policy, Justice Scalia's absence comes into play. With Justice Scalia still on the Court, an affirmance by Kennedy would have led to a 4–4 tie in *Fisher II*, thereby passively upholding the decision of the Fifth Circuit without setting any precedent. Since Justice Scalia is gone, however, a Justice Kennedy affirmance would now control *Fisher II* and set precedent.

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<sup>3</sup> See 135 S. Ct. 2888 (2015) (mem.) (granting certiorari). This followed the Court's prior ruling in *Fisher I*. See *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (2013) (remanding the case back to the Fifth Circuit to apply the correct standard of strict scrutiny). This Essay will refer to the case simply as "*Fisher*" when referencing the entire *Fisher* litigation.

<sup>4</sup> Adam Liptak, *Supreme Court Justices' Comments Don't Bode Well for Affirmative Action*, N.Y. TIMES (Dec. 9, 2015), <http://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html> [<https://perma.cc/X66K-FTSB>].

<sup>5</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (5–4 decision) (Kennedy, J., for the Court) (holding that states may not deny to same sex couples the fundamental right to marry).

Third, *Fisher II* itself is unusual for an affirmative action case.<sup>6</sup> The main issue is not the implementation of UT's race-conscious policy, but whether UT needs that policy at all. Petitioner Abigail Noel Fisher contends that UT attains its compelling interest in diversity with Texas's Top Ten Percent Law (TTPL)<sup>7</sup> alone.<sup>8</sup> The TTPL, which grants automatic admission to UT for top Texas public high school students, accounts for three-quarters of UT's admitted class<sup>9</sup> on a race-neutral basis.<sup>10</sup> UT's use of race applies only to the remainder. Both parties in *Fisher* conceded that UT's race-conscious policy is consistent with the Supreme Court's *Grutter v. Bollinger*<sup>11</sup> precedent.<sup>12</sup> The

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6 For the history of *Fisher* up until the Supreme Court's ruling in *Fisher I*, see Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 498-504 (2012). For commentary on the *Fisher I* decision, see generally Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV 761 (2015) [hereinafter Harpalani, *Broadly Compelling*]. For commentary on the prospects of *Fisher II*, see Vinay Harpalani, *Fisher v. Texas, The Remix*, ISCOTUSNOW BLOG (July 18, 2015), <http://blogs.kentlaw.iit.edu/iscotus/fisher-v-texas-the-remix> [<https://perma.cc/V879-CL8C>]. For a reaction to the *Fisher II* oral argument, see Vinay Harpalani, *The Fishing Expedition Continues: Will There Be a Fisher III?*, ISCOTUSNOW BLOG (Dec. 14, 2015), <http://blogs.kentlaw.iit.edu/iscotus/will-there-be-a-fisher-iii> [<https://perma.cc/JT8M-NYN8>] [hereinafter Harpalani, *Fishing Expedition Continues*]. Finally, for court documents related to the *Fisher* litigation, see FISHER VS. TEX., UNIV. OF TEX. AT AUSTIN, <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html> [<https://perma.cc/S8S7-HR6B>] (last visited Mar. 26, 2016).

7 See TEX. EDUC. CODE ANN. § 51.803 (West 1997). Originally, the TTPL guaranteed admission to UT to the top 10% of each graduating class in all Texas public high schools. *Id.* The law has since been amended to cap the number of students admitted to UT under the TTPL. Currently, UT need only admit 75% of its class through the TTPL, which does not guarantee a slot to every student in the top 10% of their high school class. TEX. EDUC. CODE ANN. § 51.803(a-1) (West 2015).

8 See, e.g., Brief for Petitioner at 31-37, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (asserting that UT could not demonstrate the necessity of its affirmative action plan because of the TTPL); see also Brief for Petitioner at 2, *Fisher II*, No. 14-981 (U.S. Sept. 3, 2015) (arguing that UT's affirmative action plan is "highly dubious" because of the TTPL).

9 See EDUC. § 51.803(a-1).

10 The *Fisher* litigation has assumed that the TTPL is "race neutral"—meaning there is no direct and explicit consideration of race in the decisionmaking process. Nevertheless, this is a debatable assumption. Harpalani, *Broadly Compelling*, *supra* note 6, at 764 n.3.

11 See 539 U.S. 306 (2003) (upholding the University of Michigan Law School's use of race as a flexible admissions factor in a holistic, individualized review of applicants); see also *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down the University of Michigan's use of race as a rigid, mechanical admissions factor without individualized review in its undergraduate admissions). The *Grutter-Gratz* framework defines the scope of constitutionally permissible and impermissible uses of race in university admissions.

12 See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 234 (5th Cir. 2011) (noting that Petitioner "do[es] not allege that UT's race-conscious admissions policy is functionally different from . . . the policy upheld in *Grutter* . . . [but rather] question[s] whether UT needs a *Grutter*-like policy."), *rev'd*, *Fisher I*, 133 S. Ct. 2411 (2013). At the *Fisher II* oral argument, Petitioner did raise a new argument, subtly distinguishing between UT's policy and the one upheld in *Grutter*. See Transcript of Oral Argument at 4-8, 16-17, *Fisher II*, No. 14-981 (U.S. Dec. 9, 2015) (arguing that UT's policy is "not truly holistic" because race is not considered at the exact same time as applicant's academic qualifications and the entirety of the applicant's profile). However, this is a rather minor distinction, and for most of the *Fisher* litigation, Petitioner has conceded that UT's policy is functionally similar

parties also conceded that UT's policy is actually more modest in scope than the University of Michigan Law School policy upheld in *Grutter*.<sup>13</sup> Consequently, Justice Kennedy could actually vote to affirm UT's modest policy and still narrow the scope of *Grutter*, curbing affirmative action in university admissions in the process. With these considerations in mind, this Essay turns to examine the possible outcomes in *Fisher II* and their impact on affirmative action more broadly.

## I. A VOTE AGAINST UT

Justice Kennedy may well vote to strike down UT's race-conscious admissions policy. He could accept Petitioner's main argument and find that UT has not demonstrated that it needs to use this policy, in addition to the TTPL, to attain the educational benefits of diversity. This would be a loss for affirmative action, but Justice Scalia's absence does not affect it.

Moreover, Justice Kennedy is unlikely to vote to overturn *Grutter* altogether. Although he dissented in *Grutter*, Justice Kennedy has recognized a compelling interest in diversity in three separate Supreme Court opinions.<sup>14</sup> In fact, for proponents of affirmative action, the silver lining here could be a narrowly framed ruling: one that focuses on the effects of the TTPL and thus has little applicability beyond UT.

## II. A VOTE FOR UT

Alternatively, Justice Kennedy could vote to uphold UT's race-conscious admissions policy, based on its modesty. In his *Grutter* dissent, Justice Kennedy stated: "There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity," so long as universities make sure "that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking."<sup>15</sup> Even though he found that the

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to the one upheld in *Grutter*. For a longer discussion of these points, see Harpalani, *Fishing Expedition Continues*, *supra* note 6.

<sup>13</sup> See *infra* notes 16–17, 23–24 and accompanying text (noting Petitioner's argument that UT's race-conscious policy has only minimal effects).

<sup>14</sup> See *Fisher I*, 133 S. Ct. at 2418 ("The attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797–98 (2007) (Kennedy, J., concurring in part) ("[A] district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity . . ."); *Grutter*, 539 U.S. at 392–93 (Kennedy, J., dissenting) ("To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process.").

<sup>15</sup> *Grutter*, 539 U.S. at 392–93 (Kennedy, J., dissenting).

University of Michigan Law School plan did not fulfill this requirement, Justice Kennedy could hold that UT's policy does satisfy it.

Paradoxically, one of Petitioner's arguments could tilt Justice Kennedy in that direction. Petitioner has argued that UT's use of race is too modest to yield any diversity benefits and that UT cannot demonstrate that race was a deciding factor in the admission of any students.<sup>16</sup> Consequently, Petitioner has contended that UT's race-conscious policy did not further any compelling interest.<sup>17</sup> But at the *Fisher I* oral argument, Justice Kennedy was at least initially antithetical to Petitioner's contention.<sup>18</sup> And UT effectively countered Petitioner, arguing that the modesty of its race-conscious policy was a "constitutional virtue, not a vice,"<sup>19</sup> because it demonstrated UT's commitment to phasing out the use of race and finding race-neutral alternatives.<sup>20</sup>

If Justice Kennedy votes to uphold UT's race-conscious policy based on its modesty, his opinion would control *Fisher II* 4–3 and set precedent. This would not have been the case if Justice Scalia were still a member of the Court, as such an affirmance by Kennedy would then have resulted in a 4–4 tie. But ironically, because UT's race-conscious admissions policy is more modest than the plan upheld in *Grutter*, Justice Kennedy could actually approve UT's plan and still limit the scope of *Grutter*—dealing a blow to proponents of affirmative action.

In fact, Kennedy could craft a *Fisher II* affirmance that focuses directly on the modesty of UT's plan—building on his *Grutter* dissent<sup>21</sup>—thereby making such modesty a defining principle of a constitutional, race-conscious university admissions policy. As Professors Ian Ayres and Sidney Foster note, *Grutter* itself is agnostic on the weight of race in the admissions process.<sup>22</sup>

16 See Brief for Petitioner, *Fisher I*, *supra* note 8, at 38–39 ("UT is unable to identify any students who were ultimately offered admission due to their race who would not have otherwise been offered admission." (internal quotation marks omitted)).

17 See *id.* at 38–42 (arguing that racial classifications are unnecessary).

18 Transcript of Oral Argument at 22, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11–345) (asking Petitioner's counsel: "You argue that the University's race-conscious admission plan is not necessary to achieve a diverse student body because it admits so few people—so few minorities. And I had trouble with that . . . [I]f it's so few, then what's the problem?").

19 Brief for Respondents at 36, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11–345).

20 *Id.* For other critiques of Petitioner's argument, see Harpalani, *Broadly Compelling*, *supra* note 6, at 796–99 (noting that if universities phase out the use of race in admissions gradually, it logically follows that at some point the use of race will be small but still constitutional; that a small number of students can still provide the educational benefits of diversity; and that it is difficult to "smoke out" modest uses of race). *But see* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 523 n.27 (2007) ("At least as a theoretical matter, narrow tailoring requires not only that preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest.").

21 See *supra* note 15 and accompanying text.

22 See Ayres & Foster, *supra* note 20, at 526 (noting that the *Grutter* Court did not "engage in an inquiry into how much weight each school placed on race").

Professors Ayres and Foster argue that the University of Michigan Law School's race-conscious policy was outcome determinative for many applicants.<sup>23</sup> This stands in contrast to UT's policy, which Petitioner has contended did not make a difference for any minority applicants.<sup>24</sup> Professors Ayres and Foster further suggest that courts should impose a limit on the weight of race in university admissions.<sup>25</sup> Thus, Justice Kennedy's opinion could both affirm UT's policy and create such a limiting principle on race-conscious admissions policies.

Although such a ruling in *Fisher II* would technically be a victory for UT, it would further limit universities' use of race in admissions. This would be a worse outcome for affirmative action proponents than if Justice Scalia had been on the Court and Justice Kennedy's opinion had no precedential value. Quite ironically, in Justice Scalia's absence, affirmative action may suffer even if Justice Kennedy affirms UT's policy. There is little prospect for an affirmative action victory in *Fisher II* if the Court reaches the merits.

### III. A PUNT

The best result for affirmative action would be another punt: a remand all the way back to the district court for more fact-finding. Justice Kennedy, along with Justice Samuel Alito, did discuss this prospect at the *Fisher II* oral argument. Both of them wondered if additional facts could settle the issue of whether UT really needs its race-conscious policy to attain the educational benefits of diversity.<sup>26</sup> This result would delay matters further for UT, but it is probably the only way for Justice Kennedy to write a controlling opinion that does not narrow *Grutter*.

### CONCLUSION

If the Supreme Court rules on the merits of *Fisher II*, supporters of race-conscious university admissions should brace for disappointment, even if UT's policy is affirmed. Indeed, affirmance may actually be worse in the long run for supporters than a decision striking down the policy. Affirmative

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<sup>23</sup> See *id.* at 529-33 (noting that the University of Michigan Law School admissions plan upheld in *Grutter* had a greater percentage of applicants for whom race determined admissions outcome than the undergraduate plan struck down in *Gratz*).

<sup>24</sup> See *supra* note 16 and accompanying text.

<sup>25</sup> See Ayres & Foster, *supra* note 20, at 582-83 (advocating a return to the "minimum necessary preference requirement").

<sup>26</sup> Transcript of Oral Argument, *Fisher II*, *supra* note 12, at 18-23.

action jurisprudence today is an Orwellian double-edged sword,<sup>27</sup> and as the late Professor Derrick Bell predicted after *Grutter*, “civil rights victory” here will be “hard to distinguish from defeat.”<sup>28</sup>

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<sup>27</sup> Cf. GEORGE ORWELL, 1984, at 4 (1950) (giving ironic political slogans: “War is Peace,” “Freedom is Slavery,” and “Ignorance is Strength”). The title of this Essay, “Victory is Defeat,” is based on these slogans.

<sup>28</sup> Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).