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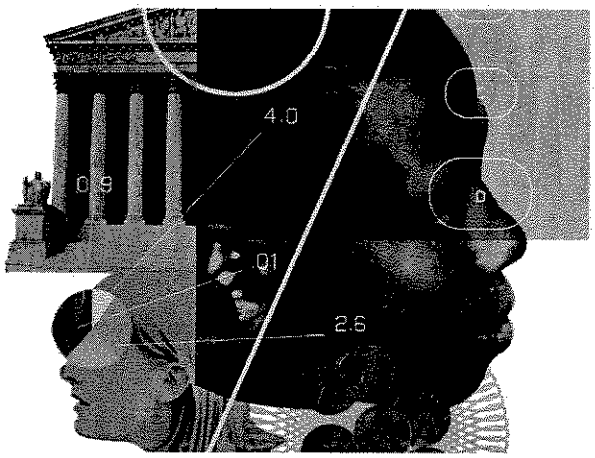
COMMENTARY

How a New Report May Hasten the End of Racial Preferences in Admissions



Stuart Bradford for The Chronicle

By Richard D. Kahlenberg | JULY 23, 2015

With the U.S. Supreme Court set to rehear the *Fisher v. University of Texas at Austin* case challenging affirmative action in the coming term, the results of an important new survey released Tuesday by the American Council on Education may unwittingly undercut the arguments of supporters of race-conscious admissions.

Among other things, the report documents how college officials reacted to the original *Fisher* decision in 2013. In short, colleges didn't take the ruling very seriously. The headline finding is that "when asked directly whether the *Fisher* ruling affected their admissions or enrollment management practices, only 13 percent of institutions responded in the affirmative."

This new information is deeply problematic for supporters of affirmative action because the nonchalant response to the earlier *Fisher* decision may well embolden conservative justices — including swing vote Anthony Kennedy — to

make a more definitive statement about racial preferences in the *Fisher II* case.

By way of background, in 2013 the Supreme Court ruled 7 to 1 that colleges could pursue racial diversity but imposed on them "the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." The opinion suggested that colleges would receive "no deference" on this question, a substantial departure from a 2003 ruling in *Grutter v. Bollinger* that supported racial preferences at the University of Michigan Law School.

The *Fisher* case was meant to send a strong signal to colleges: It was time to change the way of doing business. Rather than simply counting race in admissions, colleges would first have to show that alternatives — such as giving a boost to economically disadvantaged students of all races, or admitting all high-school students in the top of their high-school classes — wouldn't work.

After issuing the *Fisher* ruling, the Supreme Court remanded the case to the Fifth Circuit to apply the new standard. To the surprise of many, the lower court approved the university's use of racial preferences even though its top-10-percent plan — providing automatic admission to students with the highest GPAs in each high school — produced as much racial and ethnic diversity as using race had in the past. When the Supreme Court took the case back on appeal last month, many read this as suggesting that the high court wants to make clear it means business.

For that reason, the ACE report, finding that almost 90 percent of colleges are making no changes to admission after *Fisher* will very likely give fodder to those seeking a more emphatic statement against racial preferences in *Fisher II.*

Another key finding in the report may give the justices — especially Anthony Kennedy — reason to come down hard on racial preferences. Kennedy likes racial diversity but doesn't like using racial preferences to get there, so it's significant that ACE finds that in several states where affirmative action has been banned (often by voter referendum), new strategies have been devised. The report notes: "The 19 institutions in our study that discontinued the consideration of race subsequently poured their energies into alternative diversity strategies." For example, after bans were imposed, 53 percent increased consideration of overcoming adversity, and 42 percent increased emphasis on socioeconomic disadvantage. Other colleges eliminated legacy preferences, which tend to benefit white and wealthy students.

As Kedra Ishop, an admissions official at the University of Michigan, noted in the report, "Diversity doesn't become less important because the court limits how we can achieve it."

The study finds that some colleges (including minority-serving institutions) report never having used race in admissions and that many of these same institutions don't use socioeconomic status either. These findings, the authors suggest, "cast doubt" on an argument I have advanced that when racial affirmative action is taken away, colleges often switch to socioeconomic affirmative action. But I've never argued that colleges that have failed from the beginning to show a commitment to racial diversity will turn to class as an alternative. If colleges never cared from the first instance about racial or socioeconomic diversity, why would a ban on racial preferences affect them one way or another?

The authors also take a gratuitous slap at Texas' 10-percent plan. "Campus racial diversity as an outcome of the Texas plan depends to some extent on racial segregation in Texas public schools — an inequitable and troubling scenario on

which to base admissions policy." But why should it be troubling that the Texas plan ingeniously raises up those students who have been the unfortunate victims of school segregation? As Sheryll Cashin argues in *Place, Not Race,* those students are far more deserving of special consideration than minority students who have attended affluent schools.

The ACE report, titled "Race, Class, and College Access: Achieving Diversity in a Shifting Legal Landscape," does offer some important insights into ways that colleges can employ race-neutral strategies and reports on which methods colleges find most useful. In the survey of 338 nonprofit four-year institutions, for example, 78 percent use targeted recruitment of minority students at the application stage. Moreover, once students are admitted, 72 percent of institutions reported that an "effective" technique involves "targeted yield recruitment initiatives (e.g. visit days for admitted students, receptions in students' hometowns, calls from faculty) to encourage admitted minority students to enroll." These are precisely the types of activities that Justice Kennedy will probably encourage colleges to employ before resorting to racial preferences in admissions.

Of course, the most important indicator of commitment to race-neutral strategies is not whether colleges check a list for having a program, but whether such programs are pursued diligently. A university may allow transfers from community colleges as an indirect way of promoting diversity, for instance, but it matters whether a substantial portion of students are admitted through this avenue, or just a handful. A college may claim that low-income students receive an admissions boost, but what if careful analysis finds that the boost to underrepresented minorities dwarfs any preference for socioeconomic status, as some research has found at selective colleges? So long as rich kids outnumber

poor kids by 14 to one at selective institutions, it seems clear that colleges could do much more to pursue socioeconomic diversity as a race-neutral strategy for boosting racial diversity.

ACE's report declares a commitment to race-conscious affirmative-action programs — but the study's findings may in fact hasten the day that colleges must pursue racial diversity by other means.

Richard D. Kahlenberg, a senior fellow at the Century Foundation, is editor of The Future of Affirmative Action: New Paths to Higher Education Diversity After Fisher v. University of Texas *(Century Foundation Press, 2014).*

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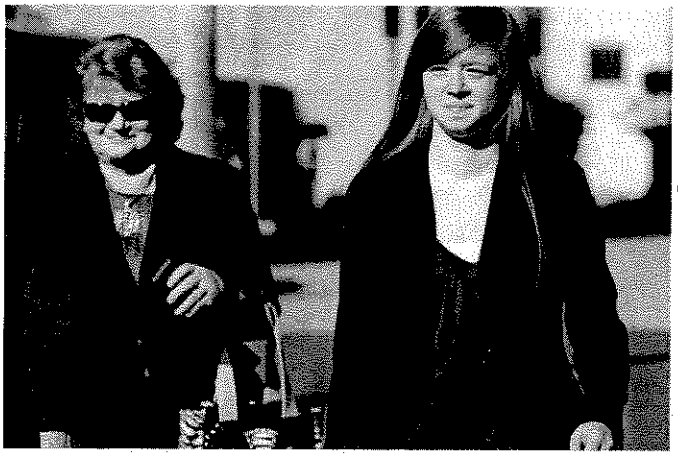
What the Supreme Court Will Be Asking as It Revisits Affirmative Action



Jay Janner, Austin American-Statesman, AP Images

Abigail Fisher (right) arrived at a federal courthouse in Austin last month for a hearing in her case against the U. of Texas.

By Peter Schmidt | DECEMBER 07, 2015

WASHINGTON

When the U.S. Supreme Court hears arguments on Wednesday in a legal battle over race-conscious admissions at the University of Texas, look for the justices to focus less on the broad debate over such policies than on nuts-and-bolts questions defining when they stray beyond established law.

The Supreme Court has taken up the dispute before, handing down a June 2013 ruling in which a 7-to-1 majority held that lower courts had erred by approving Texas' policy without giving it sufficiently strict legal scrutiny. The high court's decision to revisit the case, *Abigail Noel Fisher v. University of Texas at Austin,* No. 14-981, signals that at least four justices suspect that the lower courts again had failed to get it right in approving the university's policy a second time.

Conceivably, a majority of justices could reach beyond the narrow scope of the case to a question not presented by either party: whether to abandon the court's past willingness to let colleges consider race as part of holistic admissions processes. Some conservative advocacy groups have filed friend-of-the-court briefs urging the justices to strike down all race-conscious admissions policies as impossible to square with federal antidiscrimination laws, while several higher-education and civil-rights groups focused their briefs on opposing that possible outcome.

The justices, however, will find no arguments for the policies' complete elimination in briefs for Ms. Fisher, a white woman rejected by Texas in 2008. What those briefs request is a finding that Texas disobeyed the court's guidance by considering applicants' race unnecessarily, despite having achieved sufficient diversity through race-neutral means.

Here is a breakdown of the key questions before the court:

What's the real basis of the lawsuit?

The two sides frame the legal challenge in starkly different terms.

Ms. Fisher's legal team says it asks the court only to find that Texas failed to narrowly tailor its policy and considered race unnecessarily in pursuing its compelling interest in campus diversity.

Not so, says the university. It calls the narrow-tailoring challenge a ruse, a pretext for a backdoor attack on court precedents holding that academic freedom requires giving colleges leeway to decide what mix of students meets their educational needs.

At the crux of the disagreement is whether Austin enrolls enough black and Hispanic students even without considering applicants' race. Ms. Fisher's lawyers say yes. They note that it enrolls more such students than most other flagships through Texas' "top 10 percent" plan, a law guaranteeing admission based on high-school class rank.

The university says such figures don't tell the full story, because the beneficiaries of such percent plans disproportionately come from disadvantaged, heavily minority high schools. Lacking among them are students who have distinct talents not captured by the metric of class rank or who come from high schools that are more integrated or that don't rank graduates.

The two sides trade accusations of stereotyping. Texas says Ms. Fisher's lawyers assume little variation among members of minority groups. Ms. Fisher's lawyers say Texas assumes students from low-income or predominantly minority schools have deficits that hinder their ability to contribute to diversity. If Texas truly wants more minority students from relatively affluent or integrated settings, they argue, it should stop giving extra consideration to economically disadvantaged applicants and start giving an edge to those from top high schools.

Is Texas being honest about its policy's underpinnings?

Having never gone to trial, the case presents a daunting number of unsettled factual disputes. Among them is a disagreement over Texas' true motives when it adopted its race-conscious admission policy in 2004, a year after the Supreme Court reaffirmed the constitutionality of such policies and thereby overturned appeals-court rulings barring them in Texas and elsewhere. The question is important because the court has said such policies must be designed to meet a clearly articulated government interest, and has precluded the fashioning of after-the-fact rationales for policies already in place.

Ms. Fisher's lawyers assert that the university professed no concern about diversity within minority populations in adopting the race-conscious policy and initially defending it. Back then, they argue, Texas spoke of wanting to have a student body that better reflected the state's highly diverse population and of wanting to promote diversity within its classrooms.

The Fisher lawyers responded by attacking the demography-based rationale as divorced from educational concerns, and by saying that Texas cannot maintain diversity within classrooms without using impermissibly large admissions preferences to bring about huge increases in minority enrollments. They allege that Texas, recognizing its vulnerability to such arguments, came up with the intraracial-diversity rationale to try to shore up its case.

Texas says such assertions distort the record because it never claimed to seek enrollments matching state demographics and lamented its lack of diversity within classrooms only as a symptom of a bigger problem.

What do the numbers say?

Texas enrolls 75 percent of each freshman class through the state's top-10-percent plan, and considers race as part of a holistic admissions process used to fill remaining seats. The opposing sides in the case have offered up sharply different assessments of the outcomes of the two admissions processes. In sorting through their conflicting claims, the court will need to decide which numbers matter: counts of admittees, or only of students who actually enroll? Just Texans, or also students from elsewhere?

Along with claiming that the state's 10-percent plan brings the Austin campus enough diversity, Ms. Fisher's lawyers argue that the university's consideration of race in holistic admissions actually brings in too few black and Hispanic students to pass the court's muster. (They cite a 2007 Supreme Court ruling, involving a

Seattle public-school integration plan, that treated the small impact of the plan's race-conscious provisions as a fatal flaw signaling that race-neutral means might work better.)

Here the fight over numbers continues. Texas predicts that its minority enrollments will drop substantially without race-conscious admissions. Ms. Fisher's lawyers peg the expected decline at a few dozen students, a loss easily recuperable through tweaks in the holistic process's academic standards.

Should the Supreme Court even be hearing the case?

Throughout the legal battle, Texas has argued that Ms. Fisher lacks any real standing to be before the courts. She would have been denied admission, it says, even if race had played no role. Moreover, it adds, in enrolling at Louisiana State University and earning a bachelor's degree there in 2012, she rendered her case moot. As it did during the last round before the Supreme Court heard the case, Texas asks the justices to either dismiss her lawsuit or drop the case as having been taken up in error.

Ms. Fisher's lawyers say that what matters is not whether Texas would have admitted her but whether it subjected her to unequal treatment. They argue that it's never too late for a court to order Texas to return her application fee.

Peter Schmidt writes about affirmative action, academic labor, and issues related to academic freedom. Contact him at peter.schmidt@chronicle.com.

This article is part of:

'Fisher' in Context: Making Sense of Today's Oral Arguments

THE CHRONICLE OF HIGHER EDUCATION

ADMINISTRATION

A Closer Look at a Comment From Justice Scalia That Sparked Outrage

By Beckie Supiano | DECEMBER 09, 2015

Justice Antonin Scalia lit up the Internet on Wednesday after oral arguments in the Supreme Court's reconsideration of a closely watched affirmative-action case, by raising the idea that African-American students might fare better at a "slower-track school."

Here's what Justice Scalia had to say in the arguments over the case, *Abigail Noel Fisher v. University of Texas at Austin:*

> Justice Scalia: There are — there are those who contend that it does not benefit African-Americans to — to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a less — a slower-track school where they do well. One of — one of the briefs pointed out that — that most of the — most of the black scientists in this country don't come from schools like the University of Texas.
>
> Mr. Garre: So this court —
>
> Justice Scalia: They come from lesser schools where they do not feel that they're — that they're being pushed ahead in — in classes that are too — too fast for them.

Reaction online was swift and fierce. Here are a few examples:

> 2015 is exposing the reality that racism exists at the highest levels of American jurisprudence. Scalia is a racist pic.twitter.com/PnM34FGHyh
>
> — Shaun King (@ShaunKing) December 9, 2015

Jedidah Isler, PhD
@JedidahIslerPhD

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Appalled and disappointed (but NOT surprised) at Scalia's misinformed comments about the readiness of #BlackandSTEM ow.ly/VGhnk

3:17 PM - 9 Dec 2015

Scalia: Affirmative action doesn't help 'bla...
What a supremely outrageous thing to say.
nydailynews.com

52 31

Vanessa K. De Luca
@Vanessa_KDeLuca

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If I listened to #Scalia I never would have applied to and graduated from 2 Ivy League schools. This level of ignorance is dangerous.

12:35 PM - 9 Dec 2015

304 382

What was the justice referring to, anyhow? Let's break his comments into two parts. We'll start with this question of whether students would "do well" at the University of Texas at Austin or someplace "less advanced."

'Fisher' in Context: Making Sense of Today's Oral Arguments

What will tomorrow's college admissions look like? Campus experts weren't certain after the Supreme Court's first ruling in *Fisher v. University of Texas at Austin,* in 2013. Nor are they certain now, as the court heard new oral arguments in the case on Wednesday.

But there's much to say about the future of race in admissions. A collection of *Chronicle* articles that puts *Fisher* in a broader campus context is available here.

Here Justice Scalia appears to be referring to the idea of "mismatch," which argues that students who are admitted to a college under a preference, despite having weaker academic credentials than the college's typical student, are less likely to succeed there.

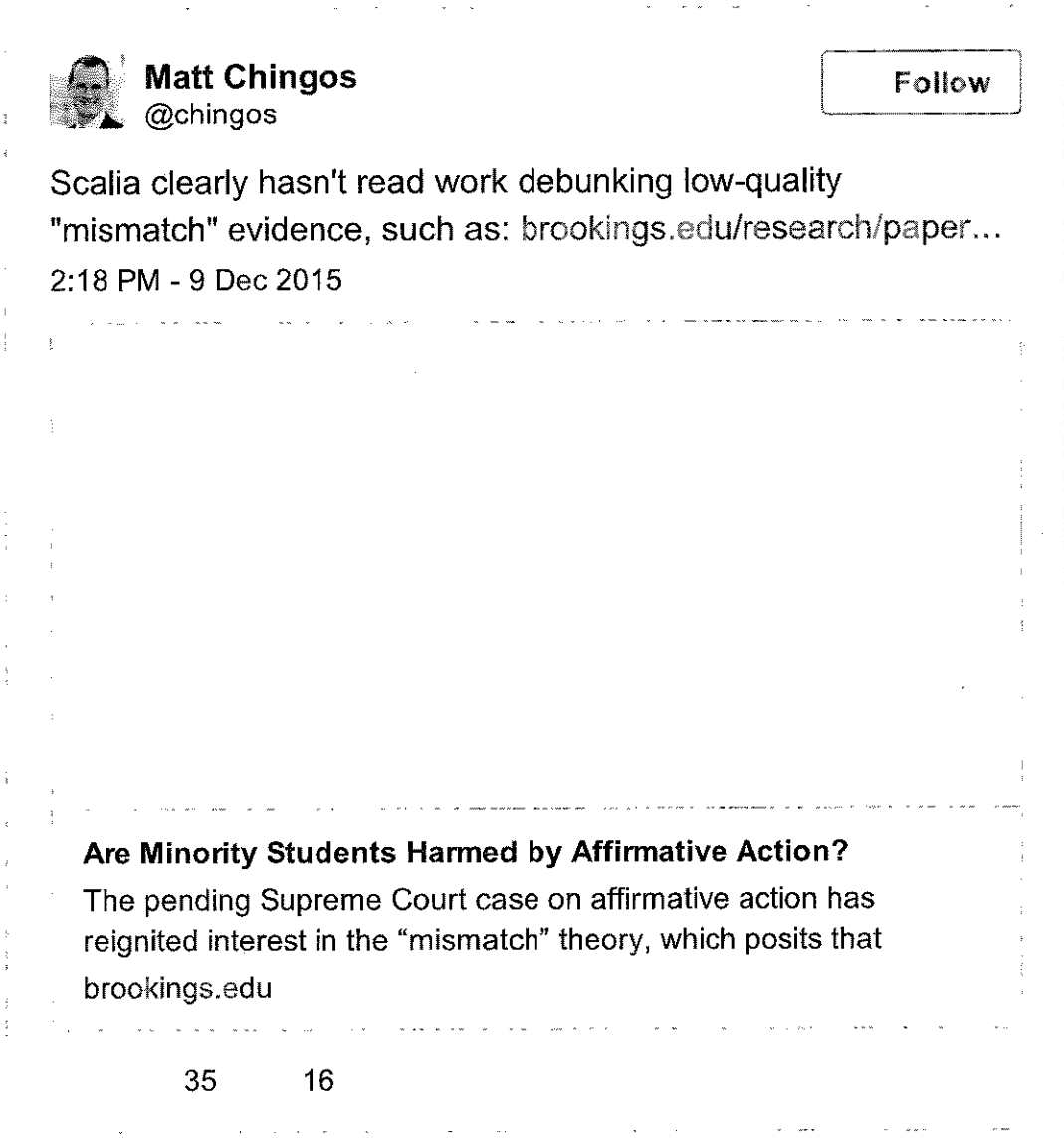
It's an idea that's been studied and debated for years. Richard H. Sander, an economist and law professor at the University of California at Los Angeles, released a controversial study over a decade ago arguing that there would be more black lawyers if law schools got rid of racial preferences.

In a blog post published on Wednesday for the John William Pope Center for Higher Education Policy, a conservative think tank, Mr. Sander laid out his take on where research on mismatch currently stands. "Only demagogues (of which there is, unfortunately, no shortage)," he wrote, "or people who haven't read the relevant literature can still claim that mismatch is not a genuine problem."

In an interview with *The Chronicle,* he noted that "mismatch has been really controversial," but said "there's an emerging consensus that this is a real thing." The evidence is most compelling, Mr. Sander said, in two contexts. One is law school; the other, he said, is the sciences: Students who receive large preferences and who plan to study science have high attrition out of those majors. The

preferences need not be based on race, Mr. Sander added — they could also be for athletes or legacies, for instance. And Mr. Sander lamented that the issue remained difficult to study because colleges kept their practices opaque.

Another scholar who's studied mismatch had a decidedly different take, which he broadcast on Twitter:



Matthew M. Chingos, a senior fellow at the Urban Institute, was one of the authors of *Crossing the Finish Line: Completing College at America's Public Universities,* a scholarly book based on research that found whatever students' grades and test scores, they were more likely to graduate if they attended a more-selective college.

Mismatch is "not crazy-sounding in theory," Mr. Chingos said in an interview. And there are circumstances under which it would happen: "If we took someone who couldn't read, they'd be unlikely to succeed at Harvard."

Harvard, of course, has an admissions process, in part for that reason.

The serious question, Mr. Chingos said, is whether colleges' affirmative-action policies admit students who are not likely to succeed there. "There is no high-quality empirical evidence in support of that hypothesis," he said.

The basis for the second part of Justice Scalia's comment, that "most of the black scientists in this country don't come from schools like the University of Texas," was not immediately clear. But he may have been referencing research showing that historically black colleges play an outsize role in producing African-American graduates who go on to earn doctorates in science, technology, engineering, and mathematics.

That point doesn't quite connect to the mismatch one, Mr. Chingos said. He offered an analogy: Most Pell Grant recipients who earn bachelor's degrees don't get them from top colleges. That's a question of enrollment patterns and volume.

But a particular Pell-eligible student would still have a higher chance of graduating if he or she went to a more-selective college.

Beckie Supiano writes about college affordability, the job market for new graduates, and professional schools, among other things. Follow her on Twitter @becksup, or drop her a line at beckie.supiano@chronicle.com.

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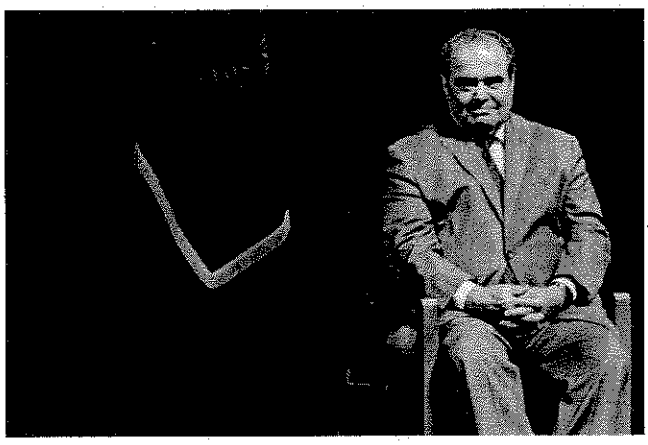
Antonin Scalia's Death Probably Won't Affect 'Fisher,' but It Could Change the Future of Affirmative Action

By Eric Hoover and Eric Kelderman | FEBRUARY 14, 2016

WASHINGTON



Jim Mone, Associated Press

Antonin Scalia, who died on Saturday, was perhaps the Supreme Court's most vociferous opponent of race-conscious admissions policies. With his passing, said one affirmative-action expert, "there's no doubt that the lightning rod on this set of issues is gone."

The death on Saturday of Antonin Scalia, the sharp-tongued justice who shaped constitutional debates for nearly 30 years, could end up shifting the Supreme Court's ideological balance. But his absence is unlikely to affect the highly anticipated ruling in *Fisher v. University of Texas at Austin*, the pending legal challenge to race-conscious college-admissions policies. In short, the math still seems to favor the court's conservative wing.

In 2008 Abigail N. Fisher, who is white, sued the university, asserting she had been unfairly denied admission because of the flagship campus's race-conscious admissions policy. Although the U.S. Court of Appeals for the Fifth Circuit ruled in Austin's favor, the Supreme Court later ruled that the lower court had not sufficiently scrutinized the policy. After the appeals court again said the university's policy could stand, the high court took up the case a second time. The justices heard oral arguments in December — during which Justice Scalia sparked outrage with comments on African-American students — and the court's ruling in the case, No. 14-981, is expected later this year.

What happens to pending rulings when a justice dies? Votes he or she has cast in cases that have not been publicly decided become void, according to Thomas C. Goldstein, a lawyer who publishes the widely read Scotusblog. In a post published on Saturday, he wrote: "If Justice Scalia's vote was not necessary to the outcome — for example, if he was in the dissent or if the majority included more than five justices — then the case will still be decided, only by an eight-member court."

Scalia's Death Could Leave Other Key Cases in Limbo

In some other cases that affect academe, Justice Antonin Scalia could have been the difference between a 5-to-4 vote and a deadlock. What happens in those cases?

The justices have a few options:

Put cases on hold: They could delay those cases until they have a new ninth member and then hold a second set of oral arguments, said Mark C. Rahdert, a law professor at Temple. Or they could move forward, in which case a tie would result in the Supreme Court's affirming the lower-court decision, but without giving it the same legal precedent granted to other rulings of the high court.

Special ruling: Another option would be to rule that the cases had been "improvidently granted," meaning that the court would acknowledge that it should not have accepted the cases on appeal in the first place, Mr. Rahdert said.

What to do about likely 4-4 splits? William E. Thro, general counsel of the University of Kentucky, said it's likely the court could hold off on several other cases that have an impact on higher education because Justice Scalia's death leaves a likely 4-to-4 tie. Among them is *Friedrichs v. California Teachers Association,* in which a group of teachers argues that mandatory union fees violate their right to free speech.

Another controversial case that could be held over is a challenge to the Affordable Care Act's mandate that employers provide access to contraceptives under their health-insurance coverage. Several religious colleges have joined the effort to undo the mandate despite changes the Obama administration's has made in the rule. That case will now probably end in a 4-to-4 split, Mr. Thro said, meaning it's unlikely there will be a ruling this term.

The *Fisher* case was already down one member. Justice Elena Kagan, representing the court's liberal wing, had recused herself because, as U.S. solicitor general, she was involved in the Obama administration's submission of a brief supporting the University of Texas. In her absence, the court was widely expected to rule, 5 to 3, against the university, with Justice Anthony M. Kennedy joining his conservative counterparts.

Some legal experts said on Sunday that they now foresee a 4-to-3 ruling against the university. "The simple bottom line is, as consequential as Justice Scalia's death may be to some cases, it's highly unlikely that it will have a significant impact on the *Fisher* case," said Arthur L. Coleman, a former deputy assistant secretary in the U.S. Department of Education's Office for Civil Rights.

Mark C. Rahdert, a professor of law at Temple University, agreed that the court was likely to rule in Ms. Fisher's favor. He cited Justice Kennedy's past position questioning the need to increase racial diversity on the Austin campus. "I foresee the prospect of *Fisher* being decided this term because the votes are there," he said.

Michael A. Olivas, director of the Institute for Higher Education Law and Governance at the University of Houston, said the case's complicated procedural history makes it difficult to predict how the justices will rule. On *Fisher*'s first trip to the Supreme Court, the justices voted, 7 to 1, to send the case back to the appeals court without deciding on the merits of the university's enrollment plan, he said. There are questions about whether Ms. Fisher even has legal standing to sue the university, he said, since she has already gone on to graduate from Louisiana State University at Baton Rouge.

Because the oral arguments in the case took place so recently, it seems unlikely that draft opinions have already started circulating among the justices — a process that can result in shifting positions, said Mr. Olivas, who also serves as interim president of the University of Houston-Downtown.

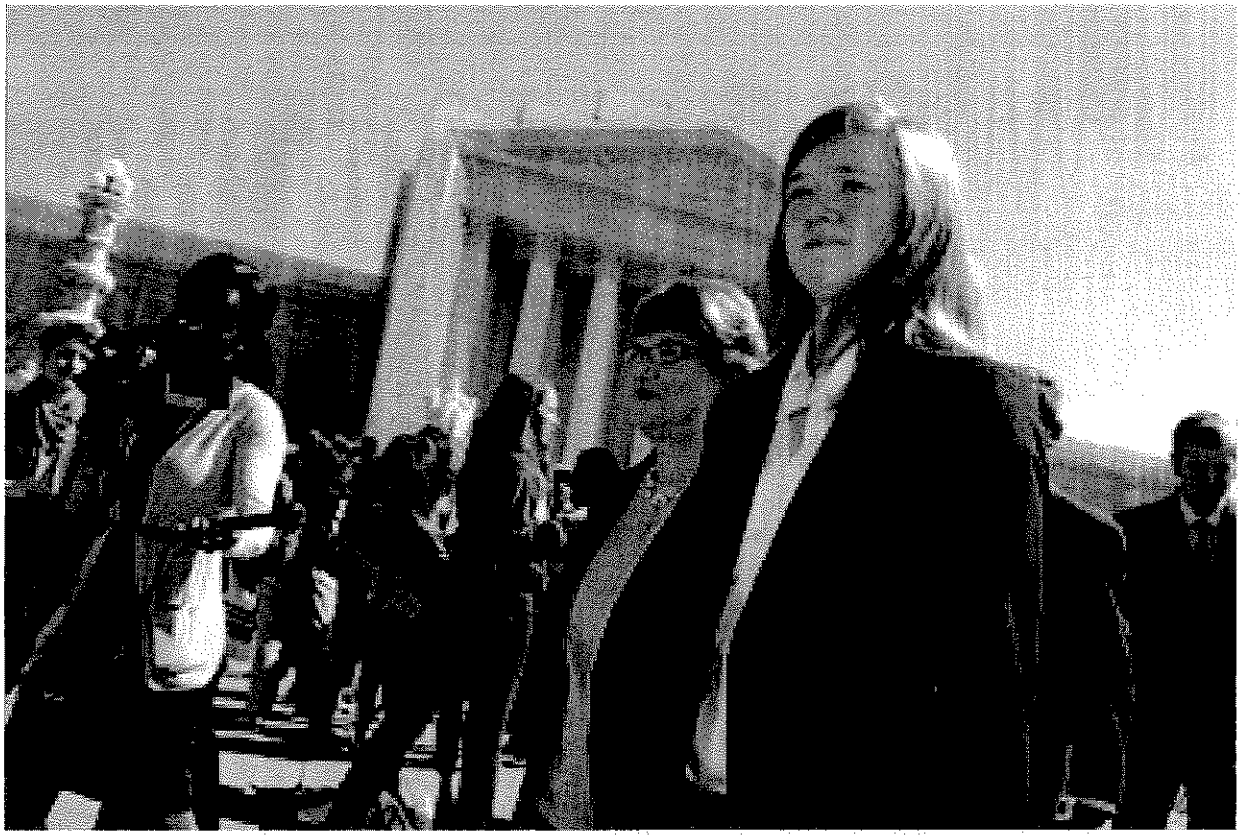
'A Role Besides Voting'

That said, the loss of a passionate affirmative-action critic might have a much greater effect on the court's decisions in future cases. "That's the really interesting question," said Mr. Coleman, a managing partner and co-founder of

EducationCounsel LLC. Although other justices have criticized race-conscious admissions policies, he said, "there's no doubt that the lightning rod on this set of issues is gone."

That saddened Roger Clegg, president and general counsel of the Center for Equal Opportunity, which opposes race-conscious admissions policies. "It's depressing," he said. "How depressing will depend on who replaces him, but it's quite unlikely that we'll have somebody who can fill those shoes."

Understanding 'Fisher' — and Affirmative Action



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Mr. Clegg's organization joined a brief filed by the Pacific Legal Foundation in support of Ms. Fisher. He doesn't believe that Justice Scalia's absence will affect the court's ruling — which, he predicted, will deliver a loss to Texas and weaken the foundation of race-conscious admissions programs. "The only caveat is that justices do have a role besides just voting," he said. "There's also how persuasive they are with one another, and Justice Scalia won't be there to argue with other justices as they go through the writing of the different opinions."

Jeffrey Rosen, a professor at George Washington University's law school, doesn't sense doom for race-conscious policies in the *Fisher* case. "Justice Scalia was willing to go much farther than Justice Kennedy in imposing a color-blind rule across the board," he said. "He had very distinctive views of the Constitution and color-blindness."

Justice Scalia leaves behind many forceful criticisms of race-based admissions programs. Perhaps none is more revealing than a 1979 essay published in the *Washington University Law Quarterly*, which Mr. Rosen described in a 1993 article in *The New Republic*. In the essay, the future justice describes his contempt for the notion that relatively recent immigrants should somehow make amends for past oppression of African-Americans. Describing how his father had come to the United States from Sicily as a teenager, he wrote: "Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man." In the piece he described himself as an "anti-hero" in the debate over race-conscious policies.

Exactly what the departure of the influential and polarizing justice means for the Supreme Court — and higher education — is not yet clear. Yet Mr. Rosen suggested one thing is certain: "how significant his replacement will be in determining the future of affirmative action."

Eric Hoover writes about admissions trends, enrollment-management challenges, and the meaning of Animal House, *among other issues. He's on Twitter @erichoov, and his email address is eric.hoover@chronicle.com.*

Eric Kelderman writes about money and accountability in higher education, including such areas as state policy, accreditation, and legal affairs. You can find him on Twitter @etkeld, or email him at eric.kelderman@chronicle.com.