FISHER II

WHOSE BURDEN, WHAT PROOF?

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THE ULTIMATE OUTCOME IN *Fisher v. University of Texas* was greeted by supporters of affirmative action as a clear victory.[1] They had cause to worry after the Supreme Court's initial decision in the case, *Fisher I*, that the University of Texas could not meet "the demanding burden of strict scrutiny."[2] Yet the Court in *Fisher II* held that the University had carried its burden, or more precisely, that Fisher had not carried her burden of showing that the University had failed to carry its burden.[3] This convoluted layering of burdens upon burdens comes from a literal reading of the majority opinion, by Justice Kennedy. To be sure, he wrote on behalf of a Court diminished by the untimely death of Justice Scalia and the recusal of Justice Kagan, but the absence of their votes does not undermine the force of *Fisher II* as a precedent. In dissent, Justice Thomas would have held that the University could not consider race at all. He also joined, with the Chief Justice, in Justice Alito's dissent, which concluded that the University had failed to meet its burden of proving that its affirmative action plan was narrowly tailored to serve a compelling government interest.

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[1] Erwin Chemerinsky, All Students Gain from a Ruling That Values Diversity, Nat'l L.J. 22 (June 27, 2016); Richard Primus, Affirmative Action in College Admissions, Here to Stay, N.Y. Times (June 23, 2016).

[2] 133 S. Ct. 2411, 2415 (2013).

[3] 136 S. Ct. 2198, 2210 (2016).

These divisions among the justices, familiar from past decisions on affirmative action, nevertheless represent only the beginning of the uncertainty created by *Fisher II*. Justice Kennedy wrote the earlier opinion in *Fisher I*, which held that the Fifth Circuit had given too much deference to the University, which had to carry the entire burden of proof on the issue of "narrow tailoring": whether "available, workable race-neutral alternatives do not suffice."[4] In *Fisher II*, Justice Kennedy quoted this language.[5] Yet he also framed the question before the Court in terms of the plaintiff's burden of proof: "whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected."[6] So which is it? Did the University or did Fisher have the burden of proof? Both sides cannot have the burden of proof on the same issue. The whole point of assigning the burden of proof is to identify the party who loses if the evidence is inadequate. The opinions in *Fisher I* and *II* are internally divided on this issue.

This division cannot be dismissed as a procedural quibble. If anything is clear about affirmative action, it is the absence of definitive evidence on achieving the benefits of diversity through race-neutral alternatives. On a literal reading of *Fisher II*, the Court held that the evidence in the record after eight years of litigation generated no reasonable inference that, at the time Fisher was denied admission, there were any race-neutral alternatives available to the University. If this is the correct reading of the majority opinion, it relegated Justice Alito's detailed criticism of the University's evidence to the category of unreasonable hairsplitting.[7] Whatever one thinks of his criticism, it is hard to dismiss it as unreasonable. It is much easier to conclude that Fisher failed to carry her burden of proof. On this interpretation of *Fisher II*, emphasizing the weakness of Fisher's case rather the strength of the University's, the burden of proof performed its traditional role of allowing courts to reach a determinate result in the face of uncertainty.

In *Fisher I* and *II*, however, the allocation of the burden of proof does not so much overcome divisions about the evidence as it expresses divisions

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[4] 133 S. Ct. at 2420.

[5] 136 S. Ct. at 2207-08.

[6] *Id.* at 2210.

[7] *Id.* at 2224-38 (Alito, J., dissenting).

over affirmative action. *Fisher I* contains only a passing reference to the plaintiff's burden and frames it as a burden of pleading, only of "placing the validity of a University's adoption of an affirmative action plan in issue."[8] Justice Alito made the same point in *Fisher II*: that the entire burden of proof was on the University.[9] His dissent takes on its sharpest tone in pointing out perceived departures in Justice Kennedy's later opinion from his earlier one. Disputes over the sufficiency of the University's evidence, so far from being resolved, just became disputes over the assignment of the burden of proof.

Justice Kennedy, despite his own misgivings over affirmative action expressed in *Fisher I*, sought to bridge the divisions on this issue, if only provisionally, in *Fisher II*. Justice Powell tried to do the same thing in his separate opinion in *Bakke v. Regents of the University of California*.[10] But that opinion, now over 35 years old, "amounted to a proclamation of ambivalence that dramatically recognized and proclaimed the existence of legitimate moral and constitutional claims on both sides of the issue."[11] It did not deny the existence of any room for reasonable disagreement. And Justice Powell gave helpful guidance, to be sure only as a single justice, by citing the Harvard affirmative action plan as a suitable means of considering race in admissions.[12] Justice Kennedy, by contrast, pointed out that "[t]he University's program is *sui generis*."[13]

Despite these differences, Justice Kennedy's opinion in *Fisher II* might still be cast in the same mold as Justice Powell's opinion in *Bakke*. This article addresses the possibility that *Fisher II* might usher in a new period of acceptance of affirmative action, less by giving universities a template for rejecting race-neutral alternatives than by making it harder for plaintiffs to rely on the existence of such alternatives. Part I considers interpretations of *Fisher II* to get around the paradox of assigning the burden of proof on the same issue to both parties, either by redefining the burden on each party

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[8] 133 S. Ct. at 2420.

[9] 136 S. Ct. at 2238-39 (Alito, J., dissenting).

[10] Regents of the University of California v. Bakke, 438 U.S. 265, 305 (opinion of Powell, J.).

[11] Paul J. Mishkin, The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action, 131 U. Pa. L. Rev. 907, 917 (1983).

[12] 438 U.S. at 316-17.

[13] 136 S. Ct. at 2208.

or by narrowing the scope of the decision. Part II examines the evidence on the issue of available and workable race-neutral alternatives. Do universities still have to prove the actual absence of such alternatives or only conformity with the "state of the art" at the time the admissions decision was made? Or do plaintiffs have to demonstrate the existence of these alternatives? This comment concludes by considering the likely effect of *Fisher II* on future litigation over affirmative action. We begin with the interpretation of *Fisher II*.

I. Finding the Holding

Fisher II invites several different readings, no one of which decisively excludes the others. Because of its ambiguity over the burden of proof, *Fisher II* lays much of the risk of uncertainty at the feet of reverse discrimination plaintiffs. They can no longer point to the use of race in a university's admission process and then simply wait for the university to carry its burden of proof. Instead, plaintiffs have to shoulder some indefinite share of the burden to show that race-neutral alternatives are both "available" and "workable."[14] As a consequence, they are faced with an amplified risk of losing in litigation, with a corresponding deterrent effect explored more fully in Part II. In this part, we look at the origins of this uncertainty by examining the two main approaches to interpreting the holding in *Fisher II* on the burden of proof.

A. The Doctrinal Reading

Summary judgment tests whether a party with the burden of production has met it, either in minimal fashion or in overwhelming fashion, depending upon who moves for summary judgment. If the opposing party makes the motion, the party with the burden of production only needs to generate a reasonable inference to a conclusion in its favor, but if the party with the burden of production makes the motion, that party must present overwhelming evidence by excluding any other reasonable inference. Under *Fisher I*, the burden of production was on the University to show that the use of race met the standards of strict scrutiny. But since *Fisher II* upheld summary judgment for the University, the holding must have been that the only reasonable inference – not just *a* reasonable inference – from the

[14] *Id.* at 2214.

record was that strict scrutiny had been satisfied – that the use of race was narrowly tailored to serve compelling state interests.

On a literal interpretation of the opinion, the University must have presented overwhelming evidence and Fisher must have failed to present evidence that led to a reasonable inference to the contrary. On this interpretation, *Fisher II* does not conform to the usual configuration on summary judgment: where a defendant moves for summary judgment to test whether the plaintiff has met her burden of production.[15] Since Fisher did not have the burden of production, her obligation to come forward with evidence was not triggered by the University's motion for summary judgment alone, but by the University's evidence which, if not contradicted by Fisher's evidence, led to only one reasonable inference: that the University should prevail.

What about the burden of persuasion? The Court seemed to assign that to Fisher in identifying the narrow question before it as whether she had "shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected."[16] The burden of persuasion, however, has no direct application to motions for summary judgment, which test whether the burden of production is satisfied. The burden of persuasion primarily works to tell the factfinder at trial what to do if the evidence is in equipoise: to find against the party with this burden. In *Fisher II*, the burden of persuasion seems to play an even more marginal role. If the Court did hold that the only reasonable inference from the record was that strict scrutiny had been satisfied, it follows that Fisher could not have met her burden of persuasion. If the University carried its burden of production by overwhelming evidence, then Fisher could not have carried her burden of persuasion to prove the contrary by a preponderance of the evidence.

If the reference in the opinion to Fisher's burden of persuasion was redundant, then it appears to be dicta not necessary to the decision. Opponents of affirmative action might be tempted to draw this conclusion. But if they do, they also have to concede that Fisher's evidence failed to generate a reasonable inference that the University failed to justify its use of race. They can avoid taking on the burden of persuasion in future cases only by admitting how weak Fisher's evidence was in this case. But what if future

[15] Celotex Corp. v. Catrett, 477 U.S 317, 322, 324 (1986).

[16] 136 S. Ct. at 2210.

plaintiffs in Fisher's position cannot do any better? Aren't they also likely to suffer entry of summary judgment against them? To forestall this consequence of *Fisher II*, opponents of affirmative action might want to minimize its implications entirely. This option takes us away from a doctrinal reading of the opinion to a pragmatic reading.

B. The Pragmatic Reading

An interpretation of *Fisher II* that departs from a narrow focus on legal doctrine does not necessarily result in a narrow interpretation of the decision. By opening up the frame of reference to other considerations, a pragmatic reading also opens up the possibility that these considerations will systematically recur in other cases. Unless *Fisher II* is treated like the proverbial restricted railroad ticket, "good for this day and train only,"[17] it implies that similar cases, with similar complexity in the evidence, will result in the same outcome.

The Court refused to remand the case a second time because "a remand would do nothing more than prolong a suit that has already persisted for eight years and cost the parties on both sides significant resources."[18] The protracted duration of the case apparently led the Court to depart from a strict doctrinal interpretation of the standards for summary judgment. To the extent it used summary judgment as a substitute for trial, it could bring Fisher's burden of persuasion more directly into play, by resolving doubts in the evidentiary record against Fisher.

On the doctrinal view, that maneuver appears to be an abuse of summary judgment, bending procedural rules to reach a favorable result on the merits. This is an approach that the Court itself forswore in *Celotex Corp. v. Catrett*,[19] in limiting an earlier civil rights case that found barely enough evidence to survive a motion for summary judgment.[20] The Supreme Court, however, was hardly alone in engaging in this maneuver in *Fisher*, where the

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[17] Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

[18] 136 S. Ct. at 2209.

[19] 477 U.S. 317 (1986).

[20] In *Celotex*, the Court rejected a broad reading of *Adickes v. Kress*, 398 U.S. 144, 157-58 (1970), a civil rights case that shifted the burden of production onto defendants who move for summary judgment. *Celotex*, 477 U.S. at 325.

district court entered summary judgment for the University and the Fifth Circuit twice affirmed that judgment. More generally, the "vanishing trial" in federal civil actions has been laid partly at the feet of increased dispositions on summary judgment.[21] Although the percentage of federal civil cases decided on summary judgment remains in the single digits, the percentage of cases decided at trial has sunk below two percent.[22] It is therefore neither unusual nor surprising that *Fisher II* dispensed with the need for a trial.

Despite disclaimers in the opinion that indicate it might be of limited precedential effect,[23] *Fisher II* might be more representative of modern civil litigation than the Court is willing to admit. The Court relied heavily on the extensive record developed by the University[24] and then invited more development of the record in case of a future challenge to its affirmative action plan.[25] This invitation looks initially like an offer the University couldn't refuse: an admonition that it has a continuing burden of proof. Another look, however, reveals that it was also an offer that the plaintiff could not refuse. As the Court summarized Fisher's suggested alternatives to considering race, none "have been shown to be 'available' and 'workable' means through which the University could have met its educational goals, as it understood and defined them in 2008."[26] Apparently, it was Fisher who had to make this showing. More evidence required of the defendant generates a reciprocal demand for more evidence from the plaintiff. *Fisher II* makes attacks on affirmative action look more like complex regulatory or mass tort cases than a simple civil rights action over explicit consideration of race.

The Court's reference to the baseline date of 2008, when Fisher was denied admission, raises the issue of delay again and the futility of remanding the case for trial. What would a trial have added to the lengthy record already generated on the University's motion for summary judgment? Not much, and still less evidence relevant to the state of the admissions art in

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[21] Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Emp. Leg. Stud. 459, 483-84 (2004).

[22] *Id.* at 462-64.

[23] 136 S. Ct. at 2209.

[24] *Id.* at 2210-14.

[25] *Id.* at 2209-10, 2215.

[26] *Id.* at 2214-15.

2008. From this perspective, the Court understandably treated the motion for summary judgment as something of a substitute for trial that triggered the plaintiff's burden of persuasion. Although the Court offered the disclaimer that it was "drawing all reasonable inferences in her favor,"[27] the discussion in this part and the next one reveals exactly how tenuous that disclaimer was. At best, it could be maintained only by recharacterizing several issues of fact as questions of law, which have a surprising degree of breadth and significance.

II. Reconsidering the Evidence

Satisfying strict scrutiny involves an inquiry into both ends and means: what constitutes a "compelling government interest" and whether the use of race has been "narrowly tailored" to serve that interest. The first inquiry tends to focus on questions of law and the second on questions of fact. Universities that engage in race-conscious admissions have to satisfy both elements of strict scrutiny. One way to alleviate the burden of proof that they bear on the issue of means is to expand the number and scope, as a matter of law, of the ends that qualify as compelling government interests. This part begins by asking whether *Fisher II* engaged in this strategy. It then turns to the factual issues that remained for the University. If only a few remained, then Justice Kennedy's opinion could be interpreted mainly to reflect reasonable disagreements with Justice Alito on questions of law rather than unreasonable disagreements on questions of fact. This view of *Fisher II* yields surprisingly broad implications despite the several disclaimers that the decision might be limited to its facts.

A. Compelling Ends

Fisher II reaffirms two compelling interests from *Bakke* and *Grutter v. Bollinger*,[28] and more significantly, specifically approves the way in which the University of Texas deployed them. The first is the interest in diversity recognized in *Bakke*[29] and the second is the interest in academic quality

[27] *Id.* at 2210.

[28] 539 U.S. 306 (2003).

[29] 438 U.S. at 311-15 (opinion of Powell, J.). *Grutter* reached the same conclusion. 539 U.S. at 330.

recognized in *Grutter*.[30] These interests as newly reformulated serve to blunt most of the objections put forward by Fisher to the University's affirmative action plan.

Diversity becomes in *Fisher II* a detailed list of goals that the University adopted: "the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivation of a set of leaders with legitimacy in the eyes of the citizenry."[31] The goals also included "an academic environment that offers a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders."[32] These goals might be dismissed by critics of affirmative action, as indeed they were by Fisher and by Justice Alito in dissent, as well-meaning platitudes devoid of content. But they now have been endorsed by the Supreme Court as a sufficiently specific articulation of the benefits of diversity. Moreover, the majority appears to have reached this conclusion as a matter of law, inviting other universities to frame their goals in exactly the same terms.

It remains possible that some elements of fact entered into the majority's finding of sufficiency, for instance, that the University acted in good faith after long study of the need for race-conscious admissions. The majority also cautioned that the "University's goals cannot be elusory or amorphous."[33] Yet even on these issues the University was entitled to deference if it provided "a reasoned, principled explanation" for pursuing its articulated goals.[34] To the extent any factual issues remained, the University's burden of proof on those issues was effectively diminished by the deference it received.

The second compelling interest identified by the Court concerned the University's "reputation for academic excellence."[35] This, too, amounted to a holding as a matter of law that can be easily invoked by other institutions of higher education. The University's interest in academic excellence blocked Fisher's argument that it could have increased minority represen-

[30] *Id.* at 339.

[31] 136 S. Ct. at 2211 (citations and internal quotation marks omitted).

[32] *Id.* (citations and internal quotation marks omitted).

[33] *Id.*

[34] *Id.* (citations and internal quotation marks omitted).

[35] *Id.* at 2213.

tation by giving weight to socioeconomic factors rather than academic merit through some form of holistic, race-neutral review. The University was not required to sacrifice its academic reputation in order to gain the benefits of diversity.

In a similar vein, the University's compelling interests in academic reputation and in diversity combined to defeat Fisher's argument that the University could rely on the Top Ten Percent Plan to achieve diversity. According to the majority, Fisher "would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students."[36] Moreover, she could not "assert simply that increasing the University's reliance on a percentage plan would make its admission policy more race neutral."[37] The Top Ten Percent Plan depended on segregated neighborhoods and schools to achieve increased minority representation, an apparently factual issue that nevertheless generalizes to any situation in which a similar plan is proposed as a race-neutral alternative. If the plan was chosen for this reason, it appears to be racially motivated. And the majority suggests that plaintiffs like Fisher must establish that such plans are, in fact, race neutral. Once again, although nominally limited to its facts, *Fisher II* has implications that extend readily to other challenges to affirmative action, less by clarifying what universities must do to defend their plans than by indicating what plaintiffs must prove in order to overturn them.

B. Narrowly Tailored Means

The preceding analysis shows how legal questions of compelling ends become intertwined with factual questions about alternative means. The existence of race-neutral alternatives goes to the heart of the constitutional requirement of "narrow tailoring": government can make race-conscious decisions only when compelling interests cannot be achieved by other means. The majority duly enumerated the alternatives proposed by Fisher and then offered rebuttals to them one by one. Justice Alito, in turn, offered a critique of the majority's reasoning in some detail. This section does not

[36] *Id.*

[37] *Id.*

rehearse the back and forth of those arguments, an exercise that would tend to reveal reasonable disagreements over what the evidence established. Instead of debating the existence of reasonable inferences in favor of Fisher, this section tries to explain how the majority reached the conclusion that there weren't any.

The majority began by noting that the University of Texas had gone through a kind of "natural experiment" in trying out alternatives to race-conscious admissions. In response to the Fifth Circuit's decision in *Hopwood v. University of Texas*,[38] barring any consideration of race, the University of Texas adopted purely race-neutral criteria for evaluating applicants. These included a holistic review of personal characteristics and social background, in addition to the usual criteria of academic success. This admissions regime lasted from 1996 to 1997, until the Texas legislature adopted the Top Ten Percent Plan. The University followed that plan, again without any explicit consideration of race, until the Supreme Court overruled *Hopwood* in *Grutter v. Bollinger*[39] in 2003 and allowed consideration of race as a factor in holistic review. A year later, after a detailed review of its admissions procedures, the University adopted the affirmative action plan challenged in *Fisher*. The review found that the wholly race-neutral procedures, even when augmented by the Top Ten Percent Plan, failed to generate a critical mass of African-American and Hispanic students, resulting in many of them feeling isolated and with nearly four-fifths of classes without any African-American students or with only a single one.[40]

Few universities have gone through the same process of experimentation and *Fisher II* does not require them to do so.[41] The threat of litigation alone would incline other universities to imitate the University of Texas, by developing the same evidence that it did and by following the details of its affirmative action plan. One thing they would not have to do is imitate the Top Ten Percent Plan, which the Court has now suspected of being racially motivated and a threat to academic excellence.[42]

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[38] 78 F.3d 932, 934-35, 948 (1996).

[39] 539 U.S. 306 (2003).

[40] 136 S. Ct. at 2212-13.

[41] *Id.* at 2214.

[42] *Id.* at 2213.

The evidence generated by the University of Texas, as Justice Alito pointed out in a detailed critique, was neither precise nor rigorous.[43] Instead of sharply defining the benefits of racial diversity, the University appealed to broadly defined benefits of meeting and learning with people of different backgrounds and of educating a new generation of students from minority backgrounds. The statistics were rigorous only in establishing that purely race-neutral means (like those used by the University from 1996 to 1997) and ostensibly race-neutral means (like the Top Ten Percent Plan, used between 1998 and 2004) resulted in the admission only of a token number of minority students. This evidence, and the accompanying evidence of the few minority students in many classes at the University, did not establish the benefits of diversity, but only the absence of diversity itself.

This evidence, to be sure, was documented at length in the record, but it left open several avenues for reasonable doubt about the benefits of diversity. Justice Alito enumerated two that appeared particularly telling: first, that the University had not explained why students admitted through its affirmative action plan would be more likely than other minority students to diversify the classroom experience; and second, why the University had not taken account of Asian-American students in assessing the degree of racial isolation at the University.[44] One need not be persuaded by these arguments to conclude that they raise reasonable inferences supporting Fisher's argument that the University's use of race should not survive strict scrutiny.

This perspective on the evidence reinforces the conclusion that the University did not really bear the entire burden of proof. It also reveals that the standard for sufficient proof is not social scientific validity but something like adherence to managerial best practices. The legal standard is the state of the art, not the state of the science, of admissions decisions in higher education. Once a university has shown that it conforms to the state of the art, the burden appears to shift back to those attacking affirmative action to identify race-neutral alternatives that are both "available" and "workable."[45] Shifting the burden of production repeatedly among the parties looks more like a relic of common law pleading, in the form of decla-

[43] *Id.* at 2211-12.

[44] *Id.* at 2226-30.

[45] *Id.* at 2214.

ration, plea, replication, and so on,[46] than it does an effective means of resolving an intensely debated constitutional issue. The implications of the burden of production at each stage tend to be subordinated to the end result, creating more equivocation than transparency, and leaving the parties with the risk that they might fail to meet an uncertain burden of proof.

Those risks loom particularly large for plaintiffs challenging affirmative action, who did not previously have to assemble evidence that race-neutral alternatives were "available" and "workable." They now must consider whether they are likely to prevail on the merits, and if not, whether they should bring suit at all. They certainly will be more selective about the institutions they sue and more cautious in assessing the vulnerability of those institutions to liability. The obscurity of *Fisher II* in assigning the burden of proof hides these risks behind procedural obscurity and makes those risks all the more difficult for plaintiffs to assess. As an overall litigation strategy, opponents of affirmative action can ill afford another expensive and prolonged stalemate like the one they suffered in *Fisher II*. Instead of undermining affirmative action, such a result would just entrench it further behind an increasingly thick veil of substantive and procedural equivocation. *Fisher II* seems to submerge criticism of affirmative action in a fog of litigation that shows few signs of dissipating.

Conclusion

It comes as no surprise that the latest decision on affirmative action, like earlier decisions, distorted rather than clarified principles of substantive law, for instance, on exactly how strict "strict scrutiny" is. That its distorting effects have extended to procedure should therefore also come as no surprise. Viewing *Fisher II* through a procedural lens reveals how deep-seated the ambivalence over affirmative action remains and how it translates into the mechanics of litigation. The parties and the lower courts do not know who has the burden of proof on which issues and how heavy that burden is.

Race-conscious programs in higher education, employment, and elsewhere have operated for several decades as if they had been fully affirmed by the courts, while a close look at the opinions reveals continued diffi-

[46] Benjamin J. Shipman, Handbook of Common Law Pleading 25 (3d ed. 1923).

dence. Perhaps the constitutionality of affirmative action represents a judgment, as Alex Bickel noted, that it is "not intolerable."[47] After decades of controversy and litigation, constitutional law has not moved beyond this tepid endorsement and has enhanced the risks faced by plaintiffs like Fisher. By prolonging its ambivalence over affirmative action, *Fisher II* works ironically and in the opposite direction, to indefinitely prolong the continuation of affirmative action plans themselves.

[47] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 129 (1962) (quoting C.P. Curtis, A Modern Supreme Court in a Modern World, 4 Vand. L. Rev. 427, 433 (1951)).