ESSAY

Affirmative Action Survives Again in the Supreme Court on a Legal Technicality: An Analysis of *Fisher v. University of Texas at Austin*

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If I may digress to share a privileged part of my autobiography, Howard University School of Law J.D. 1969 trained me to become a social engineer. Charles Hamilton Houston mentored Justice Marshall and also, my mentor, the late Herbert O. Reid, the Charles Hamilton Distinguished Professor of Law at Howard University School of Law. Thus, Houston taught Marshall and Reid, and Reid trained me from 1966–1969 in civil rights theory and practice. Therefore, I consider myself a third-generation social engineer.

INTRODUCTION

This Essay developed from a talk that I delivered at the tenth annual Wiley A. Branton/*Howard Law Journal* Symposium entitled *Civil Rights at a Critical Juncture: Confronting Old Conflicts and New Challenges*. I analyzed a case in the Supreme Court's October 2012 Term that marks the third time in thirty-seven years that the justices deliberated on the question of affirmative action in admission to institutions of higher education.

Both supporters and opponents of the use of race in admissions by colleges and universities anticipated yet another major ruling by the Supreme Court's June 24, 2013 decision in *Fisher v. University of Texas at Austin*.[1] Instead, the High Court punted the case back to the lower courts on a legal technicality, deliberately sidestepping the constitutionality of affirmative action for the time being.[2]

An article published around the same time asserted that, "[r]ace-conscious affirmative action is perhaps the most contentious issue in education policy, and challenges to race-conscious admissions policies, both in courts and at the ballot box, have been regular events over the past three decades."[3] That challenge[4] will continue in *Fisher* in the next round of litigation as the lower federal court of appeals or district court seek to apply what some commentators call a "clarification of the [narrowly tailored] means" test dating back to *Wygant v. Jackson*

For most of four decades in the legal profession, I have followed in the footsteps of Houston and Reid as a law professor and a civil rights lawyer. (In a tribute to Justice Thurgood Marshall, I describe key members of the Howard University School of Law faculty who played a significant role on the legal team in the *Brown v. Board of Education* case. John C. Brittain, *The Culture of Civil Rights Lawyers: A Tribute to Justice Thurgood Marshall*, 25 CONN. L. REV. 599 (1993).) In one of my proudest accomplishments, I was one of the lead attorneys in a landmark school desegregation case decided by the Connecticut Supreme Court in 1996 styled, *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996). For further discussion on this case, see John C. Brittain, *Why Sheff v. O'Neill is a Landmark Decision*, 30 CONN. L. REV. 211 (1997). I learned from the master social engineers at Howard University School of Law; they taught me how to use law as a means of bringing about social changes. Some of these social engineers include James M. Nabrit, Jr., President of Howard University and co-counsel in *Brown*; my mentor, Professor Reid, co-counsel in *Bolling v. Sharpe*, a companion case with *Brown*; Professor George E. C. Hayes, another co-counsel in *Brown* with Marshall; and Spottswood W. Robinson, an additional lawyer on the *Brown* team. William Bryant, a former Howard Law professor, once said, "There's no denying that Thurgood Marshall is a direct bequest to us from Charles [Hamilton] Houston." Ken Gormley, *A Mentor's Legacy: Charles Hamilton Houston, Thurgood Marshall and the Civil Rights Movement*, 78-JUN A.B.A. J. 62, 63 (1992). I consider myself a beneficiary of that legacy.

1. 133 S. Ct. 2411 (2013).

2. *Id.*

3. Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367, 368 (2013).

4. *Id.*

Board of Education,[5] and more recently articulated in *Gratz v. Bollinger*[6] and *Grutter v. Bollinger*,[7] or what others call an entirely new standard. In the past, the Supreme Court has sought "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[8] Now, however, the Court has coined an additional moniker, that "[s]trict scrutiny must not be strict in theory but *feeble* in fact."[9]

This Essay will explore the history and potential impact of the Court's recent pronouncement of the test for determining the constitutionality of affirmative action in admissions. More specifically, this Essay will trace the application of the *second prong* of the strict scrutiny test—namely the dimensions of the means used to achieve the beneficial goals of diversity in higher education. The topics will include: the narrowly tailored with the least restrictive means method; the role of race-neutral means in the equation and any exhaustion of them; the Court's scope of deference to UT; and the Court's own requirement of independent judicial review of the means. My goal, in the words of the call of the Symposium, is to explore "strategies on how we, as social engineers[,] can move forward"[10] in civil rights with consciousness of race in admissions.

In this Essay, I conclude that the Court's new clarification of the second prong of the strict scrutiny test is clear, though some conflicting language used by the majority muddles the picture. As a result of such conflicting language, the Court explained the narrowly tailored standard, but not how a university can meet its burden of showing that race-neutral means fail to achieve the compelling interest in the educational benefits of diversity or exactly how courts are to refuse to defer to a university's determination that it cannot use race-neutral means to achieve the narrowly tailored standard. At the same time though, the Court acknowledged UT's experience and expertise in adopting or rejecting admissions processes.[11] And finally, this Essay discovers a line of doctrines that traces from Justice Lewis Powell's plurality opinion in *Bakke*,[12] through Justice Anthony Kennedy's dis-

5. 476 U.S. 267, 274, 279 (1986) (plurality opinion).
6. 539 U.S. 244, 269 (2003).
7. 539 U.S. 306, 333, 339–40 (2003).
8. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995).
9. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013) (emphasis added).
10. Howard Law Journal, Civil Rights at a Critical Juncture: Confronting Old Conflicts and New Challenges (2013).
11. *See Fisher*, 133 S. Ct. at 2420.
12. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287–91, 305–09, 311–19 (1978) (plurality opinion) (i.e., Sections III-A, IV-A, IV-B, IV-D, and V-A (Powell, J., concurring)).

sent in *Grutter*,[13] and ending with an understanding of Kennedy's majority opinion in *Fisher*.[14] In the end, affirmative action walked out of the Supreme Court in *Fisher* still legal and available to universities, more by default but no less the law.

I. *FISHER*'S TECHNICAL RULING

The Supreme Court originally agreed to decide the question presented as follows: "Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit UT's use of race in undergraduate admissions decisions."[15]

By a vote of 7-1,[16] the Supreme Court vacated the judgment of the United States Court of Appeals for the Fifth Circuit, and remanded the case to the appellate court.[17] Without deciding the constitutionality of UT's affirmative action plan, but reaffirming diversity in higher education as a compelling goal, the Court articulated what some believe is a clarification, but what others refer to as a new application of the strict scrutiny standard.

Under the strict scrutiny standard, a public institution of higher public education must show that the use of race in admissions decisions (the means chosen) is necessary (the least restrictive means and narrowly tailored) for furthering its goals (which must be a compelling interest). In *Fisher*, the Supreme Court found that the lower court erred in "not apply[ing] the correct standard of strict scrutiny."[18] "Once [a] [u]niversity has established that its goal of diversity is consistent with strict scrutiny," it has the burden of proving "that the *means* [that it has] chosen . . . to attain diversity are narrowly tailored to that goal."[19] On the means part of the strict scrutiny test, "[a] [u]niversity receives *no deference*[,]" and "it is for the courts . . . to ensure that [this burden has been met]."[20]

13. *See* Grutter v. Bollinger, 539 U.S. 306, 387–95 (2003) (Kennedy, J., dissenting).
14. *See* 33 S. Ct. at 2415–22.
15. *11-345 Fisher v. Univ. of TX at Austin*, SUPREME CT., http://www.supremecourt.gov/qp/11-00345qp.pdf) (last visited Mar. 15, 2014).
16. *Fisher*, 133 S. Ct. at 2414 (writing for the majority, Justice Kennedy joined by Chief Justice Roberts, Scalia, Thomas, Breyer, Alito, and Sotomayor; Justice Kagan did not participate in the case); *id.* at 2422 (Scalia, J., concurring); *id.* at 2422 (Thomas, J., concurring); *id.* at 2432 (Ginsburg, J., dissenting).
17. *Fisher*, 133 S. Ct. at 2422.
18. *Id.* at 2415.
19. *Id.* at 2419–20 (emphasis added).
20. *Id.* at 2420 (emphasis added).

Furthermore, the majority in *Fisher* found that while UT does not have to "exhaust[ ] . . . every *conceivable* race-neutral alternative," the courts cannot simply adopt "[UT]'s serious, good faith consideration of workable race-neutral alternatives."[21] "The reviewing court must . . . be satisfied that no [available] workable race-neutral" means would accomplish UT's objectives.[22] "If a nonracial approach could promote the substantial interest about as well and at tolerable administrative expense, then [a] university may not consider race."[23] While the *Fisher* decision clearly appears to reaffirm UT's goals as part of the strict scrutiny test, at least insofar that the holistic use of race in the admissions process can be permissible in achieving the state interest of diversity, the majority sent the case back to the Fifth Circuit Court of Appeals to determine the second prong of the means part of the test, namely: "[W]hether [UT] has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."[24]

The majority in *Fisher*[25] relied upon three cases as precedent for its clarification of the means prong of the strict scrutiny test: *Grutter*,[26] *Bakke*,[27] and *Wygant*.[28] Whereas, the first two cases dealt with affirmative action in higher education,[29] *Wygant* arose in an employment context where white employees were laid-off on the basis of race under a collective bargaining agreement to maintain the racial ratio of teachers, as opposed to having a future hiring opportunity affected.[30] *Wygant* thus further illustrates the Court's articulation of the second

21. *Id.* (emphasis in original) (internal quotation marks omitted).

22. *Id.*

23. *Id.* (citation omitted) (internal quotation marks omitted) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986)) (plurality opinion) ("The term [']narrowly tailored,[] so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the classification at issue must [']fit[] with greater precision than any alternative means. *See* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727, n.26 (1974). [']Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense.[] Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975).") (citations altered from the original) (bracketed word as quoted in the Opinion).

24. *Fisher*, 133 S. Ct. at 2421.

25. *See id.* at 2417, 2420.

26. Grutter v. Bollinger, 539 U.S. 306 (2003).

27. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion).

28. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality opinion); *see supra* note 23.

29. *See Grutter*, 539 U.S. at 311; *Bakke*, 438 U.S. at 269.

30. *See Wygant*, 476 U.S. at 269–70.

prong of the test for affirmative action in *Fisher*'s case.[31] To be sure, "the means chosen by the [Government] to effectuate its purpose must be *narrowly tailored* to the achievement of that goal."[32] There must be a "*most exact* connection between justification and classification"—a demanding standard.[33] Chosen means must necessarily contain a "logical stopping point"[34] and not lag for an indefinite period "long past the point required by any legitimate remedial purpose."[35]

As the Plaintiffs in *Fisher* continually remind courts, affirmative-action programs disadvantage parties who played no part in past discrimination.[36] It bears emphasizing that, while unfair, disadvantages to innocent bystanders are permissible; indeed, despite the exigent standards outlined by Justice Powell in *Wygant*, the Court nonetheless conceded that:

> As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a sharing of the burden by innocent parties is not impermissible. . . . [Especially if] the actual burden shouldered by nonminorit[ies] . . . is relatively light.[37]

Unlike people who lost their jobs as a result of racial classifications, the Court distinguishes this from situations where a person is disadvantaged in pursuing one particular opportunity—without change to present circumstances:

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board's selection of layoffs as the means

31. *Id.*at 279.
32. *Id.* at 274 (emphasis added) (internal quotation marks omitted).
33. *Id.* at 280 (emphasis added).
34. *Id.* at 275.
35. *Id.*
36. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded by* 133 S. Ct. 2411(2013). The Fifth Circuit heard oral arguments on November 13, 2013.
37. *Wygant*, 476 U.S. at 280–82 (citations omitted) (internal quotations and citations omitted).

> to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.[38]

The majority in *Fisher* appears to cite *Wygant*, less for the facts and holding in that case, but for its sixth footnote, referring to a quote by Greenawalt concerning intense judicial scrutiny of a non-racial approach.[39] Greenawalt's article probes a wide variety of pro and cons of affirmative action and ultimately concludes, "that two of the asserted purposes of preferential admissions, the amelioration of harmful stereotypes and compensation for injustice, can support a policy of preference as broad as that employed by the University of Washington Law School in the *Defunis* case."[40]

With what the *Harvard Law Review* calls, "*Fisher*'s recalibration of the affirmative action strict scrutiny analysis,"[41] I will turn next to the remand *Fisher* with a possible prediction of how the Fifth Circuit will reanalyze Texas's affirmative action plan.

II. REMAND TO THE FIFTH CIRCUIT: A NEW ROUND OF LITIGATION

Following the remand of *Fisher* to the Fifth Circuit, that court requested that the parties file supplemental briefs on any issues that the parties deemed relevant, while also including a list of seven of its own topics.[42] Two issues the court articulated concerned the strict scrutiny test.[43] What happens next in the Fifth Circuit is a matter of speculation, but the parties have expressed their desires in post remand briefs and oral argument.

First, appellant Abigail Fisher has understandably resisted any attempts to prolong the case by further remanding it to the district court (which would further risk finding more facts unfavorable to her position), and admonished the Fifth Circuit to apply strict scrutiny with

38. *Id.* at 283–84 (footnotes omitted).

39. *See id.* at 280 n.6; Greenwalt *supra* note 23 and accompanying text.

40. Greenawalt, *supra* note 23 at 599 (citing Defunis v. Odegaard, 94 U.S. 1704 (1974) (per curiam)). *Defunis* was the first affirmative action case to reach the Supreme Court, but it was found moot because the unsuccessful plaintiff would have graduated from law school by the time the Court would have decided the case.

41. *Fourteenth Amendment—Equal Protection Clause—Public-University Affirmative Action*—Fisher v. University of Texas at Austin, 127 HARV. L. REV. 258, 267 (2013).

42. *See* Letter from Lyle W. Cayce, Clerk, Fifth Circuit of Appeals, to Parties' (Sept. 12, 2013), http://www.utexas.edu/vp/irla/Documents/Sheduling%20Order.pdf.

43. The questions are: "(3) If this court elects to not remand [to the district court] how ought it apply strict scrutiny as directed by the Supreme Court on the record now before it?" and, "(7) What workable alternatives to the use of race were available to the University that were not being deployed?" *Id.*

facts comprising no more than those in the existing record (and thereby rule in her favor).[44] That record below consists of cross-motions by the parties for summary judgment—both parties ideally wishing for a fully favorable decision without the need for any further proceedings. Indeed, at least as far as Fisher is concerned, as she has the most to lose in the event of a remand, as her counsel reminded so unsubtly at oral argument, "the Supreme Court *instructed* that this Court undertake the responsibility of applying traditional standards of strict scrutiny to UT's racial admissions preferences in the first instance, . . . circumscrib[ing] the *limited area* in which this Court could defer to UT's academic judgment."[45] However, this should beg the question of why the Supreme Court bothered to remand the case in the first place.

Fisher disingenuously emphasizes that UT was given a '"full and fair opportunity' . . . to present 'all evidence available to [it]' . . . regarding the rationale for and operation of its use of racial preferences in admission."[46] This contention would make sense but for the Supreme Court's remand, changing the context of the second prong of the strict scrutiny test, which the courts must now apply. Logically one cannot presumably have a full and fair opportunity to prepare for the Supreme Court's unforeseeable remand. Fisher's brief even concedes that "[i]n its prior appearance before [the Fifth Circuit], UT was able to avoid confronting [with exacting clarity what constitutes "critical mass"] because the [Fifth Circuit's] 'good-faith' deference made it unnecessary to provide clear answers."[47] Therefore, how else can the case thus proceed other than with a remand to the district court for further fact-finding to construe the Supreme Court's clarification of narrow tailoring?

Second, appellee UT at Austin, confidently maintains, "the [Supreme] Court did not hold that [UT's affirmative action] plan was invalid in any respect. . . . Instead . . . the Court sent the case back for reconsideration of the narrow-tailoring analysis in light of its decision

44. Plaintiff-Appellant's Supplemental Reply Brief, at 4 ("The only course 'consistent' with the Supreme Court's mandate is for the 'Court of Appeals' to apply the correct strict-scrutiny standard 'in the first instance' based on 'this record.'"); *see also id.* at 5 ("The opinion makes clear that the question being remanded is 'whether *this record* . . . is sufficient' to sustain UT's admissions program against constitutional challenge.") (emphasis in original).

45. Plaintiff-Appellant's Supplemental Reply Brief, at 1 (emphasis added).

46. *Id.* at 7 (alteration in original) (quoting in part Washington v. Finlay, 664 F.2d 913, 925–26 (4th Cir. 1981)).

47. *Id.* at 32.

reiterating that *Grutter* and *Bakke* do not provide for deference on narrow tailoring."[48] UT also confidently maintains that the existing record suffices for the three-judge panel of the Fifth Circuit to determine that its contested affirmative action plan is narrowly tailored per prior Supreme Court holdings; but it would willingly accept a further remand to the district court for "additional evidence."[49]

Failing to appreciate that university admissions is not an exact science, Fisher has steadfastly maintained that UT has already achieved critical mass in its admissions through its "Top Ten Percent Law,"[50] and that any other use of race is categorically prohibited as non-narrowly tailored.[51] However, as UT contends, Fisher overestimates the sufficiency of this law in obtaining holistic rather than mere numerical diversity.[52] Emphasizing that *Bakke* eschewed mere "numerology" via straightforward unapologetic quotas,[53] UT reminds the court that it is constitutionally permitted (if not admonished) to "conduct[ ] the individualized assessments necessary to assemble a student body that is not just *racially* diverse, but *diverse along all the qualities valued by [UT].*"[54] Despite Fisher's insistence on the sufficiency of the Top Ten Percent Law, it was carefully considered by UT and deliberatively debunked as neither a "work[able]"[55] nor "alternative"[56] race-neutral method.[57] (Ignoring the arguments of *Grutter* and UT regarding the non-alternative nature of the alternatives upon which Fisher keeps insisting, Fisher states that, "[r]acial preferences can *never* be necessary unless preexisting or reasonably available race-neutral alternatives cannot produce the critical mass necessary to achieve the educational benefits of diversity."[58])

48. Supplemental Brief for Appellees, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 09-50822), 2013 WL 5885633, at *25 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003)).

49. *See id.* at 26, 52.

50. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2433 (Ginsburg, J., dissenting) (providing a frank description of the UT's Top Ten Percent Plan, which automatically admits those high school graduates, who rank in the top ten percent based upon the accumulated grape point average to a University of Texas state university).

51. *See, e.g.*, Plaintiff-Appellant's Supplemental Reply Brief, at 36–37.

52. *See* Supplemental Brief for Appellees, at 35.

53. *See id.*

54. *Id.* at 32 (quoting *Grutter,* 539 U.S. at 340) (emphasis added).

55. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279 n.8 (1986) (plurality opinion) (confirming how popularly-approved-of classifications are problematic no matter how popular).

56. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (requiring that race-neutral alternatives be considered before resorting to race-based classifications).

57. *See* Supplemental Brief for Appellees, at 29–30.

58. Plaintiff-Appellant's Supplemental Reply Brief, at 9.

And finally, Amicus NAACP Legal Defense and Education Fund ("LDF"), hopeful for a favorable opinion of the three-judge panel as it has been inclined in the past, has also contended that that court could find for UT on the existing record, but to a less timid extent than UT, arguing in favor of further remand, should the court feel that further facts are useful.[59] Albeit in a footnote, Amicus reminds the court that race should be considered "as part of a broader effort to achieve exposure to widely diverse people, cultures, ideas, and viewpoints."[60] Amicus does not mince words when it criticizes Fisher's "narrow focus on the bottom-line numeric impact on minority enrollment [that] inappropriately treats all minority students as fungible."[61]

Indeed, referring to the following as "'[c]ontext' that 'matters.'"[62] Amicus encourages such remand, as "additional fact development should dispel any doubt about the deleterious impact of the substantial racial isolation that was an unavoidable aspect of campus life for those who attended [UT]," and "the pronounced chilling effect that such incidents may have on minority students[ ]."[63] Amicus further encourages the taking into account of "personal experience[ ] [testimony to] bring[ ] the cold numbers convincingly to life."[64]

To be sure, looking at the numbers holistically, UT does not "flunk[ ] narrow-tailoring."[65] Going beyond mere numbers and giving minimal concession to Fisher's unyielding claims that minority-enrollment numbers do indeed appear at least "modest,"[66] Amicus touts multiplier effects of these numbers in terms of their impact on cross-racial interaction.[67]

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59. *See* Supplemental Brief of Amici Curiae the Black Student Alliance at the Univ. of Tex. at Austin, the Black Ex-Students of Tex., Inc., and the NAACP Legal Defense & Educational Fund, Inc. ("LDF") [hereinafter "Amicus"] in Support of Appellees, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013), (No. 09-50822), 2013 WL 6080487, at *10–11. The Fifth Circuit has permitted Amicus to participate in oral argument throughout the litigation.

60. Supplemental Brief of Amici, at 22 n.6 (internal quotation marks omitted) (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723 (2007)).

61. Supplemental Brief of Amici, at 22 (citation omitted).

62. Supplemental Brief of Amici, at 16 (citing Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

63. Supplemental Brief of Amici, at 13–14.

64. Supplemental Brief of Amici, at 17 (internal quotation marks omitted) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977)).

65. Supplemental Brief of Amici, at 20.

66. *Compare* Supplemental Brief of Amici, at 18 (citing *Grutter*, 539 U.S. at 393 (confirming the constitutionality of "considering race as one *modest* factor among many others to achieve diversity") (Kennedy, J. dissenting) (emphasis added)), *with* Plaintiff-Appellant's Supplemental Reply Brief, at 26 (complaining of UT's "reverse-engineer[ing] a justification for racial discrimination that has made . . . an *infinitesimal* contribution") (emphasis added).

67. *See* Supplemental Brief of Amici, at 20–21.

III. A RELUCTANT PREDICTION OF THE FUTURE IN THE CASE

After fully dissecting the Supreme Court's super majority opinion, reviewing the briefs and oral arguments, and studying the Fifth Circuit's issues that it wished to see addressed on remand, one can safely reach several conclusions about the strict scrutiny test. First, the Supreme Court appears to have reaffirmed its precedents on the first prong of the test: universities have a compelling state interest in pursuing "the educational benefits of a more diverse student body."[68] And second, the sole issue remaining for resolution by the Fifth Circuit or district court is the issue of narrow tailoring, though that issue is now settled in principle, as explained throughout this discussion.

Critically, that court, without affording deference to UT, must independently determine if UT satisfies its burden of proof that the means are narrowly tailored—with or without additional proof from the parties. However, Fisher claims that any effort to continue achieving diversity for the educational benefits reopens the goals part of the strict scrutiny test, while Amicus asserts the opposite with the statement: "The *means* used to achieve a compelling interest are the focus of narrow-tailoring, not the *end* [goal] itself."[69]

I suggest that the most lightening-rod words from the Supreme Court's opinion in *Fisher* are that while UT does not have to "exhaust[ ] . . . every *conceivable* race-neutral alternative," the courts cannot simply adopt the "[UT]'s . . . serious, good faith consideration of workable race-neutral alternatives."[70] Further, "[t]he . . . court must . . . be satisfied that no [available] workable race-neutral" means would accomplish UT's objectives.[71] And finally, the Court said, "[i]f a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense, then [UT] may not consider race."[72] In this process, the Supreme Court clarified that UT was not entitled to deference on the means part in contrast to deference to the University on the compelling interests' part of the strict scrutiny test. Yet, the Court pronounced that this clarification, which

68. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2417.

69. Supplemental Brief of Amici, at 8 (emphasis added).

70. *Fisher*, 133 S. Ct. at 2420 (emphasis in original) (internal quotation marks omitted).

71. *Id.*

72. *Id.* at 2420 (internal quotation marks omitted) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (plurality opinion) (quoting Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975)).

the majority said was at odds with *Grutter*, does not create a new heightened standard.[73] And with a nod to UT, the Court further announced that "[A] court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes."[74]

It does thus appear that UT will still command relevance in the means analysis. However, as much as the Supreme Court clarified the second prong of the strict scrutiny test, it obfuscated it. While the burdens placed on the courts and universities are clarified, the Supreme Court leaves lower courts with some ambiguity in application of the second prong of the test.

IV. AN ODE TO JUSTICE LEWIS POWELL?

While the principle that public universities are constitutionally permitted to take an applicant's race into consideration has remained—subject to a strict scrutiny test—the Court did not actually decide whether UT's admissions program passed muster.[75] Indeed, for some, *Fisher* merely restated what legal scholars had assumed was obvious. So much so that the Court might have just as easily engaged in what court-watchers coin a "GVR" (Grant, Vacate, Remand), i.e., without calling for oral argument or merits briefing, the Court will grant a petition for a writ of certiorari, vacate the opinion of the lower court to which certiorari is sought, and remand the case to that court for further consideration in light of a previous case.[76] Indeed, upon initial reading, the Court might as well have just granted Fisher's petition for a writ of certiorari to the Fifth Circuit, vacated its opinion, and remanded Fisher's case back to it for further consideration in light of *Grutter*.

However, upon a more careful reading, *Fisher* neither breaks new ground, nor gives a redundant encore of *Grutter*'s majority opinion. Overall, *Fisher* represents the wishes of Justice Kennedy.[77] In Justice Kennedy's dissent in *Grutter* (joined by no other justice), he pays homage to *Bakke*—albeit arguable dicta sections written by Justice

73. *See id.* at 2020–21.

74. *Id.* at 2420.

75. *See id.* at 2421.

76. *See Glossary of Legal Terms*, SCOTUSBLOG, http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/ (last visited Feb. 3, 2014).

77. *See, e.g.*, Sean Lengell, *Anthony Kennedy Turns Moderation into Power*, WASH. EXAMINER (Jan. 10, 2014, 11:38 AM), http://washingtonexaminer.com/anthony-kennedy-turns-moderation-into-power/article/2541804.

Powell and joined only by Justice Powell himself, for the most part[78]; Justice Kennedy explicitly states, "[t]he [separate] opinion by Justice Powell, in my view, states the correct rule for resolving this case."[79] Just like Justice Powell, and consistent with his opinion in *Fisher*, Justice Kennedy does believe that consideration of race can play a constitutional role in furthering a public university's compelling interest in diversity.[80] (However, as he has insisted in both *Grutter* and *Fisher*, a specific test of strict scrutiny must be passed.)[81] To be sure, Justice Kennedy's opinion in *Fisher*[82] takes Justice Powell's *Bakke*[83] dicta (where most portions of the opinion did not garner more than one vote, let alone five) and his own *Grutter*[84] dissent (also dicta by definition) and turns them into the majority opinion. *Fisher* thus represents Justice Kennedy's (and Justice Powell's) views on affirmative action in public higher education—but with precedential value and not a mere "semantic distinction."[85]

There is an urban legend about a professor who gave an A to a plagiarized paper because the paper had actually been written by him when he was a student—at which point he only got a B.[86] As the professor felt that the paper had always deserved an A, rather than penalizing the plagiarizer, he used the opportunity to finally give it the A that it deserved.[87] By way of analogy, the professor is Justice Powell and the student is Justice Kennedy—though Justice Kennedy has in no way plagiarized Justice Powell. On the contrary, before writing the majority opinion in *Fisher*, Justice Kennedy had written in his lone dissent in *Grutter* that despite his disagreement with the majority, consideration of race can nonetheless be permissible; Justice Powell's individual opinion in *Bakke* and plurality opinion in *Wygant* deserved to be the controlling tests, i.e., those opinions did not get the A that they

78. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287–91, 305–09, 311–19 (1978) (plurality opinion) (i.e., Sections III-A, IV-A, IV-B, IV-D, and V-A (Powell, J., concurring)).

79. Grutter v. Bollinger, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting).

80. *See Grutter*, 539 U.S. at 387–95 (Kennedy, J., dissenting)*; see also* Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 (2007) (illustrating his views in support of racial and ethnic divert in K-12 grades).

81. *See* 539 U.S. at 387–95 (Kennedy, J., dissenting); 133 S. Ct. 2411, 2415–22.

82. *See* 133 S. Ct. at 2415–22.

83. *See Bakke*, 438 U.S. at 287–91, 305–09, 311–19 (i.e., Sections III-A, IV-A, IV-B, IV-D, and V-A (Powell, J., concurring)).

84. *See* 539 U.S. at 387–95.

85. *Bakke*, 438 U.S. at 289 (Powell, J., concurring).

86. *The Old Man and the 'C'*, SNOPES.COM, http://www.snopes.com/college/homework/profpaper.asp (last updated Jun. 28, 2011).

87. *Id.*

deserved.[88] In *Fisher*, with proper attribution, Justice Kennedy has taken Justice Powell's individual-*Bakke* and plurality-*Wygant* opinions and proudly given them an A. With Justice Powell's fingerprints all over *Fisher*, the opinion is indeed his—albeit from beyond the grave.

V. INFLUENCE OF JUSTICE KENNEDY'S SWING VOTE

Justice Anthony Kennedy is one of the most influential members on the Court, especially in race cases, because he often provides the swing vote that tips the case for the majority. As predicted, he wrote the opinion in which six of his colleagues across the liberal to conservative spectrum on the Court joined him. But agreed with him in what? The *Fisher* decision decided to allow the affirmative action precedent established in *Grutter* to continue for the indefinite future. Affirmative action survived not by a decision on the merits, but through a default to the status quo precedent of *Grutter*, which upheld diversity in colleges and universities ten years earlier. The default in favor of affirmative action resulted from, what I refer to as, the technical decision that avoided the ultimate question of the most controversial policy in higher education. With a clarification of the legal doctrine created by the Court to determine when a university may take race in account to promote the educational benefits of diversity now firmly set, the remainder of this case, and presumably the future of affirmative action will be determined by lower courts on a factual basis.

Classic Kennedy? He has expressed views that some would call liberal, especially on LGBT rights[89] and the death penalty,[90] but he could insist all along that these views are based on what he views as conservative rationales; as long as he gets to write the controlling opinion, he has no problem. Indeed, he dissented in *Grutter* not because he felt that the use of race in admissions was categorically unconstitutional, but rather because he felt that the University of Michigan's plan did not pass strict scrutiny. Now that he finally had a chance to articulate his views in *Fisher*, he was not going to pass up

88. *Compare Bakke*, 438 U.S. at 287–91, 305–09, 311–19 (1978) (i.e., Sections III-A, IV-A, IV-B, IV-D, and V-A (Powell, J., concurring) (containing Justice Powell's essentially lone opinion)), *and* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269–84 (1986) (plurality opinion) (containing Justice Powell's Opinion), *with* Grutter v. Bollinger, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting) ("The [separate] opinion by Justice Powell [in *Bakke*], in my view, states the correct rule for resolving this case. The Court, [in the instant case], does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.").

89. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2682–97 (2013); Lawrence v. Texas, 539 U.S. 558, 562–79 (2003); Romer v. Evans, 517 U.S. 620, 623–36 (1996).

90. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 52–85 (2010).

the chance to reframe the divisive issue of affirmative action in the way that he wanted.

CONCLUSION

The clarification of the strict scrutiny rule articulated in *Fisher*—i.e., no deference to UT in the means part of the test; independent review by the court; and some display by UT of exhaustingly calculated race-neutral means—only belies a missed message that if a nonracial means could accomplish the goal at a tolerable expense, then UT may not consider race. All could later come out in the wash during further proceedings where there is no guarantee that if Fisher or UT lost, the Court would be inclined to accept their appeal a second time. In all three of the major higher-education affirmative action cases decided by the Supreme Court—*Bakke*, *Grutter*, and *Fisher*—affirmative action managed to endure, though with limitations. It remains to be seen in *Fisher* how the lower courts will interpret the new clarification of the narrowly-tailored prong of the strict scrutiny test. The line is narrow[91] (pun intended) between the logo of the test, "strict in theory, but fatal in fact,"[92] and the new version announced in *Fisher*, "strict in theory but *feeble* in fact."[93] Will courts interpret the new clarification to mean that no university can meet the test, or will public institutions of higher education be unwilling to expend the substantial financial resources when sued in court?

The role of the social engineer in the model of Charles Hamilton Houston is to prodigiously study law from every doctrinal and strategic perspective. Once reasonably confident in the theory and the tactics, Houston believed in selectively commencing test cases. Today, whether filing a new case for social change, or defending existing civil rights doctrines that benefit people of color, this Essay is intended to enable the social engineer to continue in the Houstonian tradition.

In summary, I cannot predict with any degree of certainty how the lower court will apply the Supreme Court's guidance on the second prong of the strict scrutiny test. Therefore, like the Court, I, too, will punt in making a prediction until a lower court rules on the legality of the precise means of affirmative action at UT.

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91. *See Bakke*, 438 U.S. at 319 (Powell, J., concurring) (citing McLeod v. Dilworth, 322 U.S. 327, 329 (1944)).

92. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995).

93. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013) (emphasis added).