# B. Egalitarian Diversity Pushes Back: *Grutter* and *Gratz*

# 1. The Amicus Briefs

It was half a century later that a challenge to race-conscious affirmative-action policies in higher education reached the Supreme Court in *Gratz v. Bollinger*[[1]](#footnote-1) and *Grutter v. Bollinger*[[2]](#footnote-2) (hereinafter, jointly: “the *Michigan* cases” or “*Michigan*”). In *Gratz,* the affirmative-action admissions policy of the University of Michigan’s undergraduate program was challenged, and *Grutter* adjudicated a challenge to the affirmative-action admissions policy of the University of Michigan Law School. The University of Michigan (hereinafter, U-M or the University) initially implemented race-conscious affirmative admission measures during the 1960s. In 1991, Lee Bollinger, the University’s president at the time, initiated efforts to reframe these measures to focus on diversity in accordance with Justice Powell’s opinion in *Bakke*.[[3]](#footnote-3) At the undergraduate level, preference points were automatically assigned to applicants from disadvantaged minority groups. In contrast, the law school established an individualized holistic review process that considered race just one of several factors that were thought to enhance diversity.[[4]](#footnote-4) In 1997, plaintiffs, represented by the Center for Individual Rights (CIR) brought legal challenges against both the undergraduate and the law-school admissions policies of the University. The dispute culminated in two Supreme Court cases, *Gratz* and *Grutter,* that were jointly heard in 2003, with separate decisions issued that same year.[[5]](#footnote-5)

The Michigancases ignited significant public engagement in both support of and opposition to affirmative action, leading to the submission of eighty-eight amicus briefs in *Grutter* (sixty-four in support of affirmative action) and sixty-two in *Gratz* (forty in support of affirmative action).[[6]](#footnote-6) These briefs addressed various aspects of the debate over the “how” of the matter, concerning the permitted practices of race-conscious admission policies. More importantly, they went on to discuss the “why” question, debating the justifications for affirmative action. Now, however, the debates over which state interests are compelling enough to justify affirmative action became integral to the interpretation of diversity. In *Bakke*, Justice Powell dismissed the objective of addressing societal discrimination through affirmative action but permitted a restricted consideration of race in admission decisions in order to enhance the educational benefits of diversity.[[7]](#footnote-7) The University of Michigan’s defense, as well as that of most amici in both cases, appeared to adhere to the limitations established in *Bakke* and refrained from explicitly offering direct remedial justifications. Upon closer examination of the amicus briefs, however, it becomes evident that their understanding of diversity, unlike Justice Powell’s, was infused with egalitarian concerns.

Almost all amici that supported affirmative action adhered to the qualifications of diversity imposed in *Grutter* but reinterpreted it and infused it with new meanings. They broadened the concept of diversity beyond its limited pedagogical interpretation, augmenting it with forward- and backward-looking egalitarian principles. Thus, by reinterpreting the diversity rationale, the amici challenged the limitations that the Court had imposed in *Bakke* and *Croson* and reintroduced the conversation about the egalitarian role of affirmative action through the back door. Jack Balkin correctly observed that *Bakke’*s diversity delineation allowed affirmative action to continue while erasing its egalitarian roots.[[8]](#footnote-8) What he and other critics of diversity did not notice, however, is that the *Michigan* amici reshaped the concept to encompass both remedial and distributive egalitarian values.

The pedagogical and utilitarian understandings of diversity, prominent in Justice Powell’s opinion, were not absent from the amici briefs.[[9]](#footnote-9) However, these same briefs were also deeply steeped in the history of racial discrimination. The *Michigan* amici perceived diversity as a concept that reflects deep concern about ongoing racial inequality. As I showed in my previous work, the amici in *Michigan*, particularly those from academia, put forward an egalitarian interpretation of diversity.[[10]](#footnote-10) In this article, I use a newly available content-analysis program and its keyword-in-context (KWIC) function to systematically search the *Michigan* amici briefs for the term *diversity* and analyze how the *Michigan* amici used it in its more traditional context. Thus, as I demonstrate below, I was able to show methodically that while the amici recognized and touted the utilitarian pedagogical benefits of diversity, they also infused diversity with remedial and traditional egalitarian values as well as distributive and democratic ideals.

*Remedial interests and history*. Justice Powell’s approach to diversity was criticized for erasing the history of racial discrimination and past wrongs. This history, however, was reintroduced by the University of Michigan itself and its amici. In its brief, U-M explained that “[d]espite noble aspirations and considerable progress, our society remains deeply troubled by issues of race. Against that backdrop, there are important educational benefits—for students and for the wider society—associated with a diverse, racially integrated student body.”[[11]](#footnote-11) U-M further stressed the remedial logic asserting that contemporary inequalities are “rooted in centuries of racial discrimination” and that these “inequalities will eventually be eliminated.”[[12]](#footnote-12) Other amici followed this path and tied diversity to the history of racial discrimination. In a resounding paragraph that could have been written in response to the Court’s recent ruling in *SFFA*, the Black Women Lawyers Association of Greater Chicago asserted that:

Certain amici have raised the question, when will this use of race to achieve diversity end? They suggest that there is no logical ending, However, they are wrong. The logical ending is when race no longer matters in America. We will know that we have reached that point when a child born black has the same opportunity in America as a child born white in America . . . . Until the research reflects that the historic legacy of *slavery* and its continued discriminatory effect has disappeared, we must use race conscious means to keep the doors of opportunity open to African-Americans in America.[[13]](#footnote-13)

This commitment to ameliorating lingering racial inequality was prevalent among academic amici and others. The United Negro College Fund explained that “[t]he compelling nature of the governmental interest in fostering racial diversity … cannot be understood fully without consideration of the history of racial exclusion, segregation, and discrimination that, for centuries, permeated all aspects of the Nation’s educational system.”[[14]](#footnote-14) Northeastern University focused on its unique role in preparing members of minority groups as professionals and explained the importance of the goal of “ maximiz[ing] the effectiveness of its community policing strategy” and “remedy[ing] the effects of past discrimination.”[[15]](#footnote-15) Other amici in the *Michigan* cases, such as the National School Boards Association, focused on the “[r]acial and ethnic gaps in educational opportunity and achievement [that] persist across the nation,” declaring that “[c]losing these gaps is a compelling national priority that may necessitate race-conscious policies, including efforts to promote diversity or prevent racial isolation.”[[16]](#footnote-16) Other amici simply argued that “[the] interest in achieving student diversity and in remedying discrimination are closely-related.”[[17]](#footnote-17) Yet others argued more explicitly that “[d]iscrimination is prevalent in our society, otherwise diversity would have occurred naturally . . . . [T]he present lack of diversity is a direct result of America’s history of racial and gender discrimination.” Therefore, they explain, “[d]iversity cannot be completely separated from integration.”[[18]](#footnote-18)

*Forward-looking distributive and democratic ideals*. Diversity, for Justice Powell, is a future-oriented rationale meant to benefit the educational process of all students.[[19]](#footnote-19) Many amici agreed that diversity is crucial for the future, not only because it fosters creativity and exploration but also because it constitutes what it means to be an equal citizen in America. Notably, the Bush administration submitted an amicus brief objecting to the use of race by the university but also maintaining that:

Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective. Measures that ensure diversity, accessibility and opportunity are important components of government’s responsibility to its citizens.[[20]](#footnote-20)

With these words, the United States government linked its democratic commitment to equal opportunity, and accessibility to diversity. The Bush administration further observed in its brief that “[i]f undergraduate and graduate institutions are not open to all individuals and broadly inclusive to our diverse national community, then the top jobs, graduate schools, and the professions will be closed to some.”[[21]](#footnote-21) This amicus brief had a strong influence both on other briefs that quoted its wording and on the Court’s ruling.[[22]](#footnote-22)

Other groups of officials argued in their amici briefs that “[e]nsuring the continuation of our democracy is a compelling interest and diversity is essential to achieving that goal”[[23]](#footnote-23) and that “[t]he Equal Protection Clause was born of our belief in human equality and guarantees equal treatment and equal opportunity for all Americans regardless of race. At its heart, the Equal Protection Clause recognizes that the diversity of our Nation is one of its greatest strengths.”[[24]](#footnote-24) Similarly, the amici briefs of elite colleges articulated their pedagogical interests in diversity but concurrently stressed their commitment “to make certain that no racial or ethnic group is excluded from that vital process[,] . . . ensuring that minorities are not excluded from the professions and positions of future leadership.”[[25]](#footnote-25) In a highly influential amicus brief submitted by retired military officers, the utilitarian benefits of diversity were similarly closely connected, their argument being that diversity is an absolute necessity for “the military’s ability to fulfill its principal mission to provide national security” and that there is an “indivisible link exist[s] between military efficiency and equal opportunity.”[[26]](#footnote-26)

Thus, as I show, the *Michigan* amici challenged Powell’s narrow interpretation of diversity, augmenting it it with history and a commitment to remedying past wrongs, as well as an egalitarian-democratic vision of diversity and affirmative action. Conducting an algorithmic analysis of the amici briefs highlights the salience of this strategy. I used the Keynessfunction to identify words that appear with unusual frequency in the ninety-nine *Michigan* amici briefs compared to the amici briefs submitted to the Court in the two other groups of cases this article examines—the *Fisher* cases and the SFFA cases.[[27]](#footnote-27) The words “remedial,” “minority,” and “discrimination” appeared with unusual frequency in the *Michigan* amici in comparison with both the Fisher and the SFFA amici, discussed in the following sections.[[28]](#footnote-28) Similarly, the collocates analysis showed that the words “educational” and “benefits” were likely to appear in the seven words next to diversity, as were the words “minority,” “accessibility,” “segregation,” “past,” “democratic,” and “openness.”[[29]](#footnote-29) The strategy taken by many of the amici in the *Michigan* cases appears to have influenced the Court. As I show in the next section, egalitarian values attributed to diversity, especially forward-looking ones, became part of the Court’s understanding of diversity and its importance.

# 2. The Democratic Vision of Diversity in *Grutter*

The *Michigan* rulings upheld the use of race in higher-education admission policies and were considered a victory by advocates of affirmative action.[[30]](#footnote-30) In *Grutter,* the Court upheld the law school’s holistic admissions policy. In *Gratz,* the Court invalidated the undergraduate admissions policy but decided, for the reasons set forth in *Grutter*, that diversity is a compelling state interest.[[31]](#footnote-31) The interpretative framework constructed by the amici in *Michigan* was reflected in the Court’s opinion in *Grutter*, written by Justice O’Connor, where the Court identified two main goals that diversity promotes.

*First*, the Court recognized the utilitarian pedagogical and market-driven objective of preparing students for the workforce, writing that student-body diversity “promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.[[32]](#footnote-32) . . . . Today’s increasingly global marketplace [requires skills that] can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”[[33]](#footnote-33) Diversity, the Court acknowledged, may also help “break down racial stereotypes.”[[34]](#footnote-34) These benefits are especially valuable, the Court continued, because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have ‘the greatest possible variety of backgrounds.”[[35]](#footnote-35)

The *second* and more dominant benefit that the Court attributes to diversity is the forward-looking egalitarian objective of sustaining American democracy. In an underappreciated passage, Justice O’Connor lays out a democratic vision of diversity in higher education. According to this rationale, student body diversity is how we know—indeed, is the only way we can know—that institutions of higher education—the holders of “knowledge and opportunity”—are “accessible to all individuals regardless of race or ethnicity.”[[36]](#footnote-36) Education, Justice O’Connor explains, is charged with a “fundamental role in maintaining the fabric of society[[37]](#footnote-37) [and] [n]owhere is the importance of such openness more acute than in the context of higher education.”[[38]](#footnote-38) Citing the government’s brief, the Court concluded that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.”[[39]](#footnote-39) Diversity in higher education, stated the Court in *Grutter*, is a way to ensure that the “path to leadership” is “visibly open to talented and qualified individuals of every race and ethnicity.”[[40]](#footnote-40) According to the Court, without the openness that diversity represents, the legitimacy of the country’s leadership, institutions, and democracy is in jeopardy.[[41]](#footnote-41) Justice O’Connor concludes this section of the opinion by finding “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation . . . essential if the dream of one Nation, indivisible, is to be realized.”[[42]](#footnote-42)

“As lawyers and judges must,” Jack Greenberg avers, Justice O’Connor “couched her opinion in categories of earlier cases, she ventured out of them to write about the world we live in and its needs,”[[43]](#footnote-43) focusing not necessarily on past discrimination but on the social conditions of inequality and “what affirmative action can do to help fix [them].” [[44]](#footnote-44) In this sense, Justice O’Connor’s rationale was based less on the history of racial discrimination in America but more on the beneficial role of affirmative action in ameliorating conditions of inequality, some of which stem from past and current discrimination and others not. Her forward-looking account of diversity is not symmetrical; rather, it seems to recognize the inequality of opportunities available to minority and majority groups. In *Grutter,* the Court expressed its expectation that “[Twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”[[45]](#footnote-45) This time limit, as Robert Post explains, is evidence that the justices believed that affirmative action play a role in a process of remedying these unequal conditions.[[46]](#footnote-46)

Thus, the Court in *Grutter* expressed two forward-looking values of diversity: a utilitarian value of diversity that promotes improved learning and professional outcomes and the democratic value of the equal distribution of educational opportunities to all races in society. Despite this strong egalitarian and democratic interpretation of diversity, amici and justices in affirmative-action cases in ensuing decades steered diversity toward an almost totally utilitarian meaning.

1. *Gratz.* [↑](#footnote-ref-1)
2. *Grutter.* [↑](#footnote-ref-2)
3. Wendy Parker, The Story of Grutter *v.* Bollinger: Affirmative Action Wins, in EDUCATION LAW STORIES 83, 86- 87 (Michael A. Olivas & Ronna Greff Schneider eds., 2007) [↑](#footnote-ref-3)
4. See Grutter v. Bollinger, 539 U.S. 306, 337 (2003) ("Here, the Law School engages in a highly individualized, holistic review of each applicant’s file. . . . Unlike the program at issue in Gratz . . . the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity." (citing Gratz v. Bollinger, 539 U.S. 244, 271-72 (2003))). [↑](#footnote-ref-4)
5. Gratz, 539 U.S. 244; Grutter, 539 U.S. 306. [↑](#footnote-ref-5)
6. Cite the office date base of the Supreme Court. + add an explanation about the 44 overlapping briefs. [↑](#footnote-ref-6)
7. Regents of the Univ. of Cal. v. Bakke, 438 **U.S. 265, 310** -12 **(1978)** (plurality opinion). [↑](#footnote-ref-7)
8. Jack M. Balkin, Plessy, Brown, and Grutter: A Play in Three Acts, 26 CARDOZO L. REV. 1689, 1723 (2005). ("Powell allowed universities to admit members of previously disadvantaged groups without having to state directly that they were remedying past societal discrimination.") [↑](#footnote-ref-8)
9. It was especially dominant in the amici briefs submitted by businesses. See e.g. Brief for Amici Curiae **65** Leading Am. Buss, in Support of Respondents at **5,** *Grutter,* **539 U.S. 306;** [↑](#footnote-ref-9)
10. Bloch, 1165- [↑](#footnote-ref-10)
11. Brief for Respondents, Gmtter, supra note 95, at 12; see also Brief for Respondents at 25, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) [hereinafter Brief for Respondents, Gratz]. [↑](#footnote-ref-11)
12. Brief for Respondents, Grtter, supra note 95, at 33. [↑](#footnote-ref-12)
13. Brief Amicus Curiae of the Black Women Lawyers Association of Greater Chicago, Inc., in Support of Respondents. Gratz. P. 14. [↑](#footnote-ref-13)
14. **Brief for the United Negro College Fund and Kappa Alpha PSI as Amici Curiae in Support of Respondents, 8** [↑](#footnote-ref-14)
15. Amicus Curiae Brief of Northeastern University Supporting the Respondents, Gratz, at 3. [↑](#footnote-ref-15)
16. **Brief of Amici Curiae National School Boards Association, et al., in Support of Respondents, Grutter, 8** [↑](#footnote-ref-16)
17. Brief of Latino Organizations as Amici Curiae in Support of Respondents, Grutter, p? [↑](#footnote-ref-17)
18. **Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents, Grutter, 7. For more examples, focusing specifically on the academic amici, see Bloch, 1170-1172** [↑](#footnote-ref-18)
19. See infra note… [↑](#footnote-ref-19)
20. Brief for the United States as Amicus Curiae Supporting Petitioner, 5 [↑](#footnote-ref-20)
21. Id. At 7 [↑](#footnote-ref-21)
22. E.g. brief of King County Bar Association as Amicus Curiae in Support of Respondents. For the Grutter opinion see infra… [↑](#footnote-ref-22)
23. **Brief of Members of the United States Congress as Amici Curiae in Support of Respondents, 9** [↑](#footnote-ref-23)
24. Brief of Representative Richard A. Gephardt et al. as Amici Curiae Supporting Respondents at 3, Grutter, 539 U.S. 306 (No. 02-241.) [↑](#footnote-ref-24)
25. Harvard Brief, Grutter, supra note 101, at 3, 12. For a broad account to the academic briefs, see… [↑](#footnote-ref-25)
26. Brief of John Conyers,Jr., Member of Congress et al. as Amici Curiae in Support of Respondents at 11, Grutter, 539 U.S. 306 (No. 02-241))). [↑](#footnote-ref-26)
27. See supra [↑](#footnote-ref-27)
28. Rank and numbers [↑](#footnote-ref-28)
29. Rank and numbers [↑](#footnote-ref-29)
30. Devins, Neal (2003). "Explaining Grutter v. Bollinger.” University of Pennsylvania Law Review. 152 (1): 347; 381 [↑](#footnote-ref-30)
31. *Id.* at **330 (bring relevant quote).**  [↑](#footnote-ref-31)
32. Id. at 330 (quoting Brief of the Am. Educ. Research Ass’n et al. as Amici Curiae in Support of Respondents at 3, Grutter, 539 U.S. 306 (No. 02-241). [↑](#footnote-ref-32)
33. Id. [↑](#footnote-ref-33)
34. Id. [↑](#footnote-ref-34)
35. *Id.* (quoting Appendix to Petition for Certiorari at 246a, 244a, *Gmtiter,* **539 U.S. 306** (No. **02-241)).** [↑](#footnote-ref-35)
36. 331 [↑](#footnote-ref-36)
37. id [↑](#footnote-ref-37)
38. Citing us [↑](#footnote-ref-38)
39. 332, cutining the us brief at 13 [↑](#footnote-ref-39)
40. *Id.* at **332.**  [↑](#footnote-ref-40)
41. *Id.* at **332-3 (In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.)** [↑](#footnote-ref-41)
42. Id. 332. [↑](#footnote-ref-42)
43. Greenberg, J. (2003). Diversity, the university, and the world outside. Columbia Law Review, 103(6), 1610 [↑](#footnote-ref-43)
44. Id. 1621. [↑](#footnote-ref-44)
45. Grutter *v.* Bollinger, 539 U.S. 306 , 343 (2003). [↑](#footnote-ref-45)
46. Post, supra \_\_, at 67. [↑](#footnote-ref-46)