# The Shift toward Utilitarian Diversity: The *Fisher* Amici Discourse with Swing Justice Kennedy

In 2013 a new challenge to affirmative action in higher education reached the Court in *Fisher v. University of Texas at Austin*.[[1]](#footnote-1) The new case concerned a recently adopted race-conscious admissions policy at the University of Texas (UT), whose admissions policy had a complex history shaped by years of litigation. After the university’s first race-conscious admissions policy was invalidated in 1996, the Texas legislature adopted the “top 10 percent plan” as an alternative, automatically admitting the top 10 percent of high-school graduating classes from across the state. To enhance diversity following the *Grutter* decision, UT introduced an additional, more personalized admissions plan for applicants who were not admitted through the percentage plan, that considered various factors, including race.[[2]](#footnote-2) In *Fisher I*, the petitioner challenged the constitutionality of UT’s consideration of race for individual applicants, arguing that the university had a race-neutral alternative. The Fifth Circuit upheld UT’s policy.[[3]](#footnote-3)

By the time this first *Fisher* case reached the Supreme Court, the swing justice on the bench was Justice Anthony Kennedy. Undoubtedly, the history of affirmative action in the Supreme Court is entangled in the history of swing justices. First, it was the Nixon-appointed Justice Lewis F. Powell who became recognized as a swing justice for casting the deciding vote in *Bakke*. His successor in this role was the Reagan-appointed Justice Sandra Day O’Connor, who cast the deciding vote upholding race-conscious affirmative action in *Grutter.* And finally, Justice Kennedy, another Reagan appointee, who was already considered a swing justice in many pivotal decisions, including some on issues of race, was expected to cast the deciding vote in the *Fisher* cases.[[4]](#footnote-4) It was only natural that advocates of affirmative action made a strategic shift, their aim now being to convince Justice Kennedy, who had already articulated some of his convictions with respect to affirmative action in past decisions.

Examining the cases leading up to *Fisher,* as advocates of affirmative action in the *Fisher* cases must have done, we see clearly that Justice Kennedy had a rather specific vision of diversity. First, it is important to note that he had dissented in *Grutter,* criticizing the majority for both deferring too much to schools regarding their choice of admissions methods and for justifying the schools’ goals, writing that: “[m]any academics at other law schools who are ‘affirmative action’s more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.’”[[5]](#footnote-5) Heather Gerken suggests that Justice Kennedy was concerned because Justice O’Connor’s argument in *Grutter* was much broader and less systematic than had been Justice Powell’s in *Bakke*.[[6]](#footnote-6)

Even more importantly, Justice Kennedy had played a significant role in the 2007 case of *Parents Involved in Community Schools* v. *Seattle School District No. 1*. In this case, the Court addressed the constitutionality of race-based K–12 school-assignment plans in Kentucky as part of their efforts to promote racial diversity in schools. Justice Kennedy voted with the majority to strike down the specific program and issued a concurrence on several points. First, he acknowledged that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”[[7]](#footnote-7) Second, while objecting to individual student-assignment policies based on race, Justice Kennedy makes it clear that schools may take race into account, as long as their means are “facially race-neutral.”[[8]](#footnote-8) Reva Siegel suggests that Justice Kennedy’s measured analysis reflected a concern about social cohesion, worried both about the effect of extreme racial stratification on society and about race-conscious initiatives that might aggravate and cause resentment among those who perceive themselves as unjustly affected.[[9]](#footnote-9) If Gerken and Siegel are correct about Justice Kennedy—and I suspect they are—it is not surprising that when *Fisher’s* new challenge reached the Court, advocates of affirmative action, as this section shows, recouched their interest in diversity in what I call utilitarian terms. They now more directly adhered to Justice Powell’s original interest in the tangible benefits of diversity, arguing that the diversity benefits of affirmative action policies extended to *everyone* in society, thereby making these policies less likely to create social Balkanization.

Indeed, when *Fisher I* reached the Court in 2013, the diversity rationale had changed immensely. In previous work focusing on the transformation of the meaning of diversity between *Grutter* and *Fisher*, I showed that by the 2010s, diversity was largely no longer infused with egalitarian values, instead being perceived as serving pedagogical and economic purposes, such as preparing students for success in a diverse society and enhancing workforce efficiency. While the egalitarian and democratic aspects of diversity had not vanished altogether at this time, they received far less attention and were often overshadowed by utilitarian goals, such as professional development and economic prosperity.[[10]](#footnote-10) Although references to Justice O’Connor’s articulation of “the path to leadership being visibly open to talented and qualified individuals” in *Grutter* were frequently cited in this period, they were mainly instrumentalized to promote external interests, such as social unity or market productivity, instead of focusing on equality as a primary and compelling goal per se.[[11]](#footnote-11)

With few exceptions, the majority of academic and other amicus briefs in *Fisher* were interested primarily in diversity’s utilitarian benefits, or what David Wilkins recognized, in the context of corporate settings, the legal profession in particular, as “market-based diversity arguments.”[[12]](#footnote-12) Focusing on the pedagogical and market-driven advantages of race-based affirmative action, the briefs emphasized preparing students for business leadership in a diverse world. These amici viewed the concept of diversity as a means to foster a stimulating learning environment, train citizens for a heterogeneous society, and promote collaboration and cross-racial understanding.[[13]](#footnote-13) While some mentioned the value of overcoming stereotypes, the main emphasis was on the social utility of a diverse citizenry rather than its intrinsic egalitarian value.[[14]](#footnote-14) It was by contributing to diverse viewpoints and experiences that diversity was seen as serving the greater good of the market and society.[[15]](#footnote-15)

In 2013, the Court in *Fisher I*, in an opinion authored by Justice Kennedy, reversed the Fifth Circuit’s decision upholding UT’s race-conscious admissions policy, demanding closer scrutiny of race-conscious admissions programs.[[16]](#footnote-16) UT, the Court held, must demonstrate “that available, workable race-neutral alternatives do not suffice” before it turns to considering the applicant’s race,”[[17]](#footnote-17) and remanded the case for review. At this point, the Court did not provide any new vision of diversity. Instead, it restated Justice Powell’s opinion in *Bakke,* holding that an interest in the educational benefits that flow from a diverse student body encompasses a variety of values, such as improved classroom dialogue and mitigation of racial isolation and stereotypes.[[18]](#footnote-18) And while it upheld and cited *Grutter*, the Court did not refer to any of the more egalitarian and democratic aspirations that Justice O’Connor’s opinion had validated.[[19]](#footnote-19)

After the Court remanded *Fisher I* in July 2014, the Fifth Circuit reaffirmed UT’s race-conscious admissions policy, now applying a stricter standard of scrutiny.[[20]](#footnote-20) Abigail Fisher, the petitioner, argued that the University had not clearly articulated its compelling interest and that the racial consideration race was not sufficiently narrowly tailored, as the University already had a successful race-neutral alternative.[[21]](#footnote-21) The case once again reached the Supreme Court. In *Fisher II*, UT’s admissions policy continued to generate considerable public attention. UT received support from sixty-eight amicus briefs; the petitioner enjoyed the support of fourteen.[[22]](#footnote-22) Many amici, however, filed briefs that were entirely or nearly identical to those they had filed in *Fisher I*, with the vast majority of briefs in both *Fisher* cases promoting a utilitarian pedagogical and commercial interest in diversity.[[23]](#footnote-23)

An algorithmic analysis of the *Fisher I* and *Fisher II* amicus briefs highlights the salience of the utilitarian trend in both sets of briefs. Here, as in the *Michigan* cases, I used the Keynessfunction to identify words that appear with unusual frequency in the *Fisher* amicus briefs compared to the amicus briefs submitted to the Court in the two other pairs of cases examined in this article: *Michigan* and *SFFA*.[[24]](#footnote-24) In the comparison of the *Fisher* amici with both the *Michigan* amici and the *SFFA* amici, no words that clearly identify either a utilitarian trend or an egalitarian trend appeared with unusual frequency, probably due to the strong resemblance of the amicus briefs submitted in the *Fisher* and *SFFA* cases.[[25]](#footnote-25) The words *benefits, innovation, workforce, preparation,* however, appear with unusual frequency in the *Fisher* amicus briefs in comparison to those in *Michigan*.[[26]](#footnote-26) More significantly, the collocates analysis showed that *benefits, educational, profession, prepares, invention,* and *workforce* were likely to appear within a seven-word proximity to *diversity*.[[27]](#footnote-27) This analysis validates the proposition that in both *Fisher I* and *Fisher II*, the amici supporting affirmative action reinterpreted the meaning of diversity to endorse utilitarian values.

In its decision in *Fisher II,* issued in 2016, the Court upheld race-conscious admission policies in higher education. Delivering the opinion of the Court, Justice Kennedy affirmed that “the educational benefits that flow from student body diversity” are a compelling state interest.[[28]](#footnote-28) He did not offer any new or determining understanding of diversity. Instead, as Richard Ford observes,[[29]](#footnote-29) he allowed greater deference to the universities “in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”[[30]](#footnote-30) Unlike past (and future) cases, it seems that in *Fisher II,* the Court took a step back and invited the universities to define their own compelling interest in student-body diversity.

1. Fisher I [↑](#footnote-ref-1)
2. Fisher l, 133 S. Ct. 2411, 2416 (2013). [↑](#footnote-ref-2)
3. Fisher v. Univ. ofTex. at Austin, 631 F.3d 213, 217 (5th Cir. 2011), vacated, 133 S. Ct. 2411 (2013). [↑](#footnote-ref-3)
4. Allen Rostron, Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground, 107 NW. L. REV. COLLOQUY 74 (2012-2013). For an account of Justice Kennedy as the swing justice on other related issues, see Richard Brust, The Man in the Middle: Justice Kennedy’s Opinion in the Gay Rights Case Underlines His Growing Influence, 89 A.B.A. J. 24, 25 (2003). [↑](#footnote-ref-4)
5. Grutter, Kennedy 393. [↑](#footnote-ref-5)
6. Gerken, Heather. “Justice Kennedy and the domains of Equal Protection.” 13 *Harvard Law Review* 104, 117 (2007). (“Perhaps he objected to Justice O’Connor’s argument in *Grutter* because it—arguably unlike Powell’s in *Bakke*54—went well beyond a domain-centered narrative. While she certainly emphasized educational diversity, her arguments extended beyond law schools, as Justice Scalia argued sharply in his dissent.”) [↑](#footnote-ref-6)
7. Parents Involvedת, Kennedy p 783 [↑](#footnote-ref-7)
8. Id. At 797 [↑](#footnote-ref-8)
9. Reva B. Siegel, From Colorblindness to Antibalkanization An Emerging Ground of Decision in Race Equality Cases, 120 YALEL.J. 1278, 1294 (2011). [↑](#footnote-ref-9)
10. Bloch, Diversity Gone Wrong, 1181- [↑](#footnote-ref-10)
11. Id. at [↑](#footnote-ref-11)
12. Wilkins, David B. “From” Separate Is Inherently Unequal” to” Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar.” Harvard Law Review 117.5 (2004): 1548-1615. (describing the shift in arguments used to promote diversity in corporate settings. The article discusses how the rationale for diversity in the legal profession, particularly among black lawyers, has evolved from an emphasis on remedying historical discrimination (“Separate Is Inherently Unequal”) to a more market-oriented approach that highlights the business benefits of diversity (“Diversity Is Good for Business”)). [↑](#footnote-ref-12)
13. Id. At 1183 [↑](#footnote-ref-13)
14. Id. At 1184 [↑](#footnote-ref-14)
15. Using the KWIC tool for analyzing how the word diversity was used in its context in the amici briefs, I will mention a few novel examples: Brief for Amici Curiae the College Board and the National School Boards Association et al. (“ [↑](#footnote-ref-15)
16. Fisher I case [↑](#footnote-ref-16)
17. Id. At 2420 [↑](#footnote-ref-17)
18. Id. At 2418 [↑](#footnote-ref-18)
19. See e.g. Fisher, at 2411. [↑](#footnote-ref-19)
20. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 637 (5th Cir. 2014). [↑](#footnote-ref-20)
21. Fisher II, petitioner brief. [↑](#footnote-ref-21)
22. The Supreme Court records. [↑](#footnote-ref-22)
23. Bloch, Diversity gone wrong, 1191. [↑](#footnote-ref-23)
24. *See* Fisher I, *supra* note ???; Fisher II, *supra* note ???; Harvard, *supra* note ???; UNC, *supra* note ???. [↑](#footnote-ref-24)
25. Note some of the words the could be identifies. [↑](#footnote-ref-25)
26. values [↑](#footnote-ref-26)
27. Rank and numbers [↑](#footnote-ref-27)
28. Fisher II, 136 S. Ct. 2198, 2210 (2016). [↑](#footnote-ref-28)
29. See Richard T. Ford, Did the Supreme Court Just Admit Affirmative Action is About RacialJustice?, VoX (July 5, 2016, 12:02 PM), http://www.vox.com/2016/7/5/12085412/-supreme-court-aflirmativeaction- decision-racial-justice-lisher-abigail-diversity. [↑](#footnote-ref-29)
30. Fisher II, 2214. [↑](#footnote-ref-30)