**The End of Affirmative Action: it is Not the How it is the Why**

***Ofra Bloch[[1]](#footnote-1)\****

*Abstract:* In *Students for Fair Admissions v. Harvard (SFFA)*, a majority of six justices effectively ended race-conscious affirmative action policies in college admissions. While recent scholarship on affirmative action is dedicated to *how* universities and others can still apply racial diversity post-*SFFA*, the focus of this article is on the long-term struggle for affirmative action in the United States. With recent polls show that affirmative action is also losing in the realm of public opinion, this article argues that public approval of affirmative action is declining because Americans have lost sight of *why* affirmative action originally mattered and why it should continue doing so. Employing a mixed methodology—qualitatively and algorithmically analyzing the hundreds of amicus curiae briefs submitted in the affirmative action cases over the years—this article provides a detailed historical account of how affirmative action became divorced from its historical egalitarian roots, becoming valued instead in terms of its utilitarian, market-driven benefits. I then argue that while the utilitarian approach to affirmative action was once a successful strategic choice, it came with a cost of reframing the public discourse to minimize the saliency of racial discrimination in the United States. In a comprehensive analysis of the *SFFA* cases, I show how this utilitarian approach is now actually losing by winning in Court, serving as a double-edged sword further restricting the use of affirmative action. Finally, I suggest that, somewhat ironically, the Court’s current composition makes today an especially auspicious time to reclaim affirmative action in terms of racial justice and remind Americans how it was always integral to the fight for equal citizenship.

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# Introduction

On June 2023, in the cases of *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. UNC* (hereinafter: the *SFFA* cases) a majority of six Justices severely limited, if not effectively ended, the use of affirmative action in college admissions.[[2]](#footnote-2) The dissent strongly opposed this result. However, not only the outcome was subject to profound disagreement in this case. In fact, for the first time in nearly a half a century, the justices openly disagreed about *why* affirmative action matters, and about which interests are compelling enough to justify the use of race in college admission policies.[[3]](#footnote-3) The majority, at least formally, reaffirmed the state’s interest in the utilitarian benefits that flow from student body diversity as a *sole* compelling interest that can potentially justify considering race in higher education admissions. The dissent, on the other hand, challenged the boundaries of the debate over affirmative action and insisted that egalitarian interests—both remedial and prospective aspirations for equal citizenship—are equally, if not more, compelling. These are two very different views about why affirmative action matters and what the stakes are in losing it. With the former view currently prevailing in and outside of courts, two questions must be asked: *How did affirmative action become divorced from its egalitarian rationale tooted in the civil rights era and instead valued in terms of its educational and economic benefits? And what is at stake in this transformation?*

In order to answer these questions, this article offers a historical account of the changing landscape of compelling interests in affirmative action in higher education. Conducting a *qualitive and algorithmic* analysis of the amicus curiae briefs filed with the Court in the affirmative action cases, this article reveals how the conceptions of the role of affirmative action shifted over the years: first restricted by the 1978 Court in *Regents of the University of California v. Bakke*[[4]](#footnote-4) to the educational benefits of student body diversity; then through the reframing of diversity to include egalitarian values by the amicus briefs filed in the cases of *Gratz v. Bollinger[[5]](#footnote-5)* and *Grutter v. Bollinger*[[6]](#footnote-6) (together: the *Michigan* cases) and eventually by the 2003 Court itself; and finally turning to a utilitarian, market-driven approach to diversity by the amicus briefs filled in the 2013 *Fisher v. University of Texas at Austin* case.[[7]](#footnote-7) The utilitarian interpretation of diversity grew even more dominant in the amicus briefs in the recent *SFFA* litigation,[[8]](#footnote-8) leaving almost no room for discussion about past and current racial disparities in America and how universities should address them.

The utilitarian vision of affirmative action was long persuasive, helping to convince swing justices to uphold affirmative action. But with the shifting composition of the Court to a conservative supermajority, it has become a double-edged sword—formally adopted by the *SFFA* majority, only to deemed practically unworkable. The utilitarian vision for affirmative action is *losing by winning*, not only in courts, but also, I argue, in the realm of public opinion,[[9]](#footnote-9) where the diminished support for affirmative action can be attributed to Americans losing sight of the vital role of affirmative action in an unequal society.

Largely expecting the outcome of the *SFFA* cases, the recent literature on affirmative action has begun grappling with the consequences of a Court case striking down race-conscious admission policies,[[10]](#footnote-10) and considerable scholarly and public attention is devoted to possible race-neutral means for increasing student body diversity.[[11]](#footnote-11) Such endeavors aiming to explore *how* universities can promote student body diversity after *SFFA* are likely to attract more institutional and scholarly attention in the future. The focus of this article is different. Instead of trying to devise race-neutral alternatives that might help in promoting diversity in the short run, this article shifts the focus to the long-term struggle over affirmative action in America. Using a mixed methodology, the article makes three distinct contributions to the literature. The first is to provide a detailed historical account of how an ultra-utilitarian understanding of affirmative action developed and ultimately came to prevail.[[12]](#footnote-12) Second, I offer a comprehensive analysis of the *why* question in the *SFFA* ruling, revealing which, if any, compelling interest might justify the use of race in the post *SFFA* world.[[13]](#footnote-13) Finally, I consider the costs of adhering to the utilitarian discourse about affirmative action and suggest possible directions forward—not for winning the next challenge in Court, but for possibly winning back public opinion in the long run.[[14]](#footnote-14)

This article suggests that affirmative action is losing the battle over public opinion, at least in part, because Americans have lost sight of why affirmative action mattered in the first place and why it should continue to do. Since *Bakke*, critics have been sounding the alert about the dangers of adopting the diversity rationale; [[15]](#footnote-15) I argue that the problem is not of diversity per se, but rather, of how it was interpreted and shaped in the interaction between the Court and non-legal parties, particularly in the past decade. Drawing on democratic constitutionalism literature and on the recognition that constitutional interpretations shift over time through the interactions between Courts and other legal and non-legal actors,[[16]](#footnote-16) this article examines the hundreds of amicus briefs filed in the major affirmative action cases over the years. Through qualitative research, the article reveals the deep narratives of meaning the amici were making. Building on the qualitative findings, the newly available computerized text analysis tools used in this article enabled me to recognize trends of meaning-making over time and in comparison to one another,[[17]](#footnote-17) showing how the utilitarian approach took over the discourse about affirmative action.

First, the article shows how egalitarian interests—both remedial and prospective aspirations about equal citizenship, which were rejected in *Bakke—*reentered the discourse about affirmative action through the reinterpretation of the diversity rationale by amicus curiae briefs supporting the universities in the *Michigan* cases, and following their ensuing partial adoption by the Court.[[18]](#footnote-18) Second, I turn to examine the *Fisher* litigation. When Abigail Fisher challenged the race-conscious admission program of the University of Texas in 2013, the composition of the Court was rather balanced, with four conservative and four liberal justices, in addition to Justice Kennedy, considered by then to be the swing Justice on the Court. Amicus curiae briefs filed in support of the university were strategic. Aiming to convince Justice Kennedy and perhaps other Americans, the university and the majority of the amici supporting it decided to relinquish the egalitarian interpretation of diversity that was common among the *Grutter* amici in 2003, and, instead, emphasized the utilitarian benefits of diversity to education and the economy. And, at least to some degree, this strategy worked. Justice Kennedy, who had previously objected to the use of race in affirmative action programs, upheld the race-conscious holistic admission program employed by UT to promote the compelling state interest in the educational benefits that flow from student body diversity.[[19]](#footnote-19) The article then examines how the controversy over the role of affirmative action was manifested in the recent *SFFA* litigation. By the time the *SFFA* challenges reached the Court less than a decade later, the composition of the Court had changed dramatically. There was no longer a swing justice, but rather a conservative supermajority of six justices, who were highly likely to strike down the use of race in college admission programs regardless of how they are justified. Even though there was no longer anyone on the Court that could have been convinced, I argue that the universities and most of their amici continued making claims partly on autopilot mode, emphasizing the same ahistorical utilitarian—both educational and business driven—benefits of diversity, detached from the remedial legacy of affirmative action and from any prospective democratic aspiration of equal citizenship.[[20]](#footnote-20) This win, however, came with a cost. Terms that can substantiate how past and present forms of racism still determine opportunities today were gradually erased from the public vocabulary, which became more and more confined to understanding race in terms of group identity and culture, almost as if it was a commodity.[[21]](#footnote-21)

In *SFFA*, the promise of better learning outcomes and a more prosperous economy that student body diversity provides did not move the needle for any of the Justices, conservative or liberal. On the contrary, in a thorough analysis of the decision, this article shows how the utilitarian approach to diversity ultimately served as a double-edged sword for affirmative action. Chief Justice Roberts, writing for the Court, found the educational and other utilitarian benefits that flow from diversity to be “commendable goals,” yet, at the same time, he determined that they were also not sufficiently coherent to survive the test of strict scrutiny. The Chief Justice thus formally validated diversity as the sole compelling interest to justify the use of race in college admissions, and simultaneously made its use nearly, if not completely, impossible. As Justice Sotomayor puts it, it is “nothing but an attempt to put lipstick on a pig. The Court’s opinion circumscribes universities’ ability to consider race in any form by meticulously gutting respondents’ asserted diversity interests.”[[22]](#footnote-22)

Both dissenters, each employing a distinct approach, challenged the ongoing legal, academic, and public discourse regarding the value of racial diversity and the stakes in losing affirmative action. Over the past five decades, the boundaries of this debate have progressively narrowed, focusing solely on diversity and, ultimately, on a specific, isolated perception of diversity. Justices Sotomayor and Jackson, joined by Justice Kegan, rejected the utilitarian and ahistorical interpretation of affirmative action. Justice Sotomayor revitalized the diversity rationale by infusing it with historical context, remedial considerations, and aspirational goals of redistribution and democracy. Justice Jackson not only endorsed these very ideals but also maintained that they can directly serve as compelling state interests for affirmative action, even beyond the confines of the diversity framework.

It is now time, I suggest, to reverse direction and to follow the dissenters, who ceased trying to persuade their fellow conservative justices on the bench and instead started speaking to the people. Somewhat ironically, the conservative supermajority could be liberating for advocates of racial justice. It is thus an especially auspicious time to reclaim what is at stake in losing the battle over affirmative action. To do that advocates of affirmative action need not disregard doctrine and past precedent altogether. Instead, they can and should reclaim the value of racial diversity in terms of racial justice. Public debate—through law and politics—requires that participants remain faithful to some shared ideal that is larger and more important than any particular issue on which they disagree.[[23]](#footnote-23) This uniting ideal is not and cannot simply be utilitarian benefits that flow from student body diversity. The motivation to cultivating racial diversity should not depend on whether studies can prove that such diversity benefits learning, the economy or even healthcare.[[24]](#footnote-24) Instead, a much more comprehensive and meaningful aspiration about American democracy, where all are equal participants, regardless of their race, should be revived.

The article proceeds in five parts. *Part I* introduces the sources and methodologies this article uses. *Part II* explores how interpretations of affirmative action and its value have changed over time. Each of its five sections is dedicated to one of the major affirmative action cases from the past fifty years and analyzes the amicus curiae briefs filed in each of these cases. Section A outlines the limitations the *Bakke* Court imposed on what constitutes a compelling interest for affirmative action. Section B explores how, despite these limits, questions about affirmative action’s role evolved and were reinfused with egalitarian values by the amici in the *Michigan* cases and partly adopted by the Court. In Section C, the article details how universities and supporters shifted from egalitarian diversity to utilitarian market-driven views in the *Fisher* cases. Section D shows how the *SFFA* amicus briefs continued emphasizing diversity’s utilitarian benefits while disregarding the reality of racial discrimination. Section E concludes this Part by comparing the empirical findings of an analysis of the language used in the briefs conducted on each of the cases, highlighting shifts in how the role of affirmative action is perceived. *Part III* provides an analysis of the *SFFA* ruling, exploring which, if any, interests are considered compelling enough to warrant race-conscious admission policies after *SFFA*. In *Part IV*, I point to possible pathways for moving forward in the long-term struggle for affirmative action. *Part V* concludes.

# Methodology and Sources

Affirmative action has consistently been a subject of dispute in the United States. Between 1978 and 2023, five major Supreme Court cases grappled with the constitutionality of affirmative action in higher education: *Bakke* in 1978,[[25]](#footnote-25) *Gratz v. Bollinger*[[26]](#footnote-26) and *Grutter v. Bollinger*[[27]](#footnote-27) (hereinafter, jointly: “the *Michigan* cases”), challenging the admissions policies of the University of Michigan’s undergraduate and law-school programs in 2003, the twice-reviewed *Fisher* case finally decided in 2016,[[28]](#footnote-28) and, finally the *SFFA* cases, decided in 2023.[[29]](#footnote-29) In all of the cases, the Court ultimately validated the use of race in admissions but restricted both the methods and the permissible reasons for using race as a factor in admission policies. It was in the litigation and adjudication of these cases, in the interactions between citizens, officials, and courts, that the rationales for engaging in race-based affirmative action were forged and forged again. This ongoing debate, manifested in the recent *SFFA* cases, began with *Bakke*.[[30]](#footnote-30) As explained in detail in the next section, in *Bakke* the Court decided that diversity is the almost sole permissible justification for race-conscious admission policies.[[31]](#footnote-31) In SFFA however, the majority and the dissenters strongly disagreed on what interests should be permissible to allow the use of race in admissions.

The goal of this article is threefold: to discover how two completely different understandings of affirmative action and its value coexist in U.S. law and politics—one egalitarian and rooted in the past, and one utilitarian and divorced from history; to ascertain why the latter is prevailing both in court and in the public debate; and to evaluate its Implications. Drawing on *democratic constitutionalism* scholarship (also known as popular constitutionalism), which established the idea that formal law-making and adjudication are platforms for democratic deliberation and public debate through which changes in legal and constitutional understandings of citizens and officials take place,[[32]](#footnote-32) this article turns to the hundreds of amicus briefs submitted to the Supreme Court in the affirmative-action cases from *Michigan* cases to *SFFA*. Amicus briefs play two important roles. The first is “talking *to* the court” and aiming to influence the outcome in case law.[[33]](#footnote-33) In some cases, as in an amicus brief submitted by a high-ranking member of the military in *Grutter*, the amici assume this role very successfully.[[34]](#footnote-34) Amicus briefs, however, have another very important function of talking “*through* the court” to the people—members of the amicus organization as well as the public at large.[[35]](#footnote-35) Indeed, according to Paul M Collins, “[s]cholars have reached a general consensus that amici are motivated by two primary factors in choosing to file amicus briefs: to influence judicial outcomes and to attend to organizational maintenance concerns,” by which “membership organizations can highlight to their members and patrons that they are active on significant matters of public policy.” [[36]](#footnote-36) By analyzing amicus briefs submitted in the affirmative-action cases, this article explores why universities, student groups, scholars, the U.S. Federal government, NGOs, businesses, and other individuals and organizations consider race-conscious affirmative action important.

Thus, to better understand how the utilitarian understanding of diversity became overwhelmingly dominant in the discourse over affirmative action, and how the remedial justification of affirmative action was erased, this article preforms a qualitative and algorithmic analysis of the amicus briefs submitted to the Court in the affirmative-action cases over the years. Through a close reading of the briefs, this qualitative analysis reveals the deep narratives of meaning that the litigants and the amici offered in each of the cases. To improve the qualitative analysis, I used a content-analysis program that enabled me to identify distinct terms (otherwise difficult to detect) as a first step toward an interpretive analysis. While a computer does not “understand” these terms, the observations thus obtained serve as a valuable point of investigation for my qualitative analysis. More specifically, in this article I use a keyword-in-context (KWIC) function that allows terms to be searched across a large dataset—in this article, of amici briefs—and then viewed in their natural context within a particular document, making the exploration more effective.[[37]](#footnote-37)

The newly available algorithmic analysis used in this article is a form of computerized text analysis (a type of machine learning) that builds on the qualitative findings to quantitatively examine trends over time and compared to one another. To perform such an analysis, I used Linguistic Inquiry and Word Count (LIWC), a method adapted from Natural Language Processing (NLP),[[38]](#footnote-38) via the Antconc 4.2.0, multiplatform toolkit, which was developed for corpus linguistics research and data-driven learning.[[39]](#footnote-39) Specifically, I used two NLP methods: a “keyness” tool and a “collocates” tool.

My purpose in the *keyness* analysis was to identify words that appear unusually frequently (or infrequently) in the amicus briefs submitted to the Court in one of the cases (a corpus) in comparison with amicus briefs submitted to the Court in another case. The keyness analysis gives an indication of the importance of a keyword in a given corpus relative to a reference corpus.[[40]](#footnote-40) “A word is said to be ‘key’ if . . . its frequency in the text when compared with its frequency in a reference corpus is such that the statistical probability as computed by an appropriate procedure is smaller than or equal to a p-value specified by the user.”[[41]](#footnote-41)

The *collocates* method is employed in a more focused manner to learn which words appear most frequently on the left and on the right of the word of the search term.[[42]](#footnote-42) In this article, I used it to determine which words appeared most frequently in the seven words to the right and the seven words to the left of the word *diversity*. This enabled me to recognize not only the general trends and narratives about affirmative action in the briefs but to also explore what role these terms played in in the interpretation of diversity and how it shifted over time.

# Egalitarian Commitments Out; Utilitarian Benefits In – How did we get Here?

This part explores the shifting interpretations of affirmative action and the value attributed to it over time. Section A outlines the constraints the Court has imposed on the affirmative action discourse in *Bakke*. Section B investigates how, even within these limitations, questions regarding the function of affirmative action in higher education were not definitively resolved by the Court, but, instead, evolved through an ongoing conversation sparked by the *Michigan* amici who reinfused diversity with egalitarian values. It then describes the decision in the *Grutter* case that accepted parts of the egalitarian interpretation of diversity. In Section C, this article shows how diversity was strategically reinterpreted by the universities and their supporters in the *Fisher* cases, shifting from historical and prospective egalitarian principles to pedagogical and market-driven utilitarian considerations, which were also adopted by the Court. Section D explores the *SFFA* amicus briefs, demonstrating how most supporters of race-conscious affirmative action continued to emphasize the utilitarian benefits of diversity, while disregarding the reality of racial discrimination that continues to warrant the need for such policies. Section E concludes by comparing the empirical findings of an analysis conducted on each of the cases and their amicus briefs, showing the key transformations in what the advocates of affirmative action deem worth fighting for.

## *The Death of the Remedial Rationale and the Birth of Diversity in* Bakke

In 1978, the Supreme Court ruling in *Bakke* declared the University of California Davis Medical School’s admissions program, which reserved sixteen spots for minority students out of a class of one hundred, invalid.[[43]](#footnote-43) Despite disqualifying Davis’s specific affirmative action program, Justice Lewis Powell, in a plurality opinion, approved the use of race in admissions if necessary to promote a “compelling state interest.”[[44]](#footnote-44) Applying a strict scrutiny test to cases of race classifications, Justice Powell questioned which state interests would qualify as sufficiently compelling. He acknowledged that “[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.”[[45]](#footnote-45) However, he distinguished between the legitimate narrow interest in “redress[ing] the wrongs worked by specific instances of racial discrimination” and the illegitimate objective of “remedying of the effects of ‘societal discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past.”[[46]](#footnote-46) Justice Powell determined that the interest in remedying past discrimination would be compelling only if a university could identify specific instances of institutional discrimination, thus excluding broader societal discrimination that was considered a principle motivation for affirmative action in the day before *Bakke*.[[47]](#footnote-47) Consequently, his narrowing of the remedial logic made this rationale impractical for use in the context of higher education.[[48]](#footnote-48)

As an alternative compelling interest to remedying past institutional discrimination, Justice Powell offered the diversity rationale. “[T]he attainment of a diverse student body,” he held, is “of paramount importance” to the University’s mission and “compelling in the context of a university’s admissions program.”[[49]](#footnote-49) The diversity justification has, to some extent, been evident for over a century,[[50]](#footnote-50) but the diversity rationale embraced by Justice Powell in *Bakke* first appeared in an amicus brief submitted by Harvard in an earlier case that was dismissed and forgotten.[[51]](#footnote-51) Justice Powell positioned diversity as the primary justification for upholding race-conscious admissions policies, thereby shaping future legal discourse and public debates around the diversity interest.

For Justice Powell, diversity was, first and foremost, a pedagogical value.[[52]](#footnote-52) His primary focus was on “educational benefits that flow from an ethnically diverse student body.”[[53]](#footnote-53) “[T]he right to select those students who will contribute the most to the ‘robust exchange of ideas” follows from the academic freedom of the university, according to Justice Powell.[[54]](#footnote-54) According to his plurality decision, the compelling state interest of diversity is divorced from the history of the civil rights movement that gave birth to these practices and, instead, engages with the utilitarian benefits of diversity. Thus, for Justice Powell, diversity is not a good in itself but an instrument to achieve other, pedagogical and market-driven, goals: “[A] student with a particular background,” Powell writes, “whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”[[55]](#footnote-55) Following this instrumental logic, diversity, according to Justice Powell, is not necessarily or even dominantly about race; rather, it “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”[[56]](#footnote-56) And, as John Jeffries observed, for Justice Powell, diversity involves improving the pedagogical experience of *all* students, rather than any specific group in society.[[57]](#footnote-57) Thus, following Justice Powell’s rationale, diversity may be pursued by race-conscious means, due to its pedagogical values.

Justice Thurgood Marshall, who, twenty-four years earlier, as a civil-rights lawyer, had spearheaded the *Brown v Board of Education* litigation to dismantle racial segregation in public schools, [[58]](#footnote-58)joined the *Bakke* plurality. However, he offered a different rationale behind affirmative action, one deeply rooted in history:

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society…. I do not believe that the Fourteenth Amendment requires us to accept that fate…. It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation’s past treatment of Negroes…. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.[[59]](#footnote-59)

The forceful language in Justice Marshall’s opinion was largely forgotten until recently.[[60]](#footnote-60) Instead, it was Justice Powell’s sole-authored yet controlling opinion had paramount influence over affirmative action and the discourse that surrounding it. As Stanford Levinson described, it was as if the Court in *Bakke* had ordered: stop talking about rectifying past social injustice and start talking about diversity.[[61]](#footnote-61) Although not in the context of higher education, in *City of Richmond* v. *J.A. Croson Co.* (1989), the Court further distanced affirmative action from the project of remedying past wrongs.[[62]](#footnote-62) In *Croson*, the Court declared unconstitutional an ordinance that gave preference to minority-owned firms in awarding municipal construction contracts. While acknowledging that addressing specific instances of past discrimination, supported by statistical evidence, was valid, the *Croson* court, echoing the *Bakke* decision, prohibited remedying “societal discrimination.”[[63]](#footnote-63) The constraints and limitation established in *Bakke* and reiterated in *Croson* pushed educational institutions toward embracing diversity, not remedying past injustice, as a compelling interest. Indeed, diversity has been the controlling rationale behind affirmative action policies ever since.

Critics of *Bakke* and the diversity rationale mourn the loss of the remedial rationale. Charles R. Lawrence wrote that “Powell’s restriction on backward-looking affirmative action incorporates the big lie into affirmative action doctrine,” explaining that “[d]espite overwhelming evidence of continuing racial discrimination, the Court tells us our nation has overcome its racism.”[[64]](#footnote-64) And Derrick Bell explained that diversity was disconnected from the moral grounds that originally justified affirmative action, and that without a more sound justification, minorities are left vulnerable, dependent on the grace of the universities and their benefits.[[65]](#footnote-65)

But as the next section demonstrates, the value of diversity has never been a fixed measure. Its meaning has been subject to contestation, renegotiation, and resignification.[[66]](#footnote-66) Going beyond the narrow doctrinal analysis of the Court’s opinions, this article builds on both a qualitative analysis of the litigants’ and amicus briefs filed with the Court in subsequent cases that challenged affirmative action. It shows that the value assigned to diversity and, with it, the justifications for applying affirmative action measures, were actually not set by the Court in *Bakke* but evolved over time in lengthy debates among universities, social movements, and the Court.

## *The Emergence of Egalitarian Diversity*

### The Egalitarian Pushback by the *Michigan* Amici

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*[[67]](#footnote-67) and *Grutter v. Bollinger*[[68]](#footnote-68) (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*.[[69]](#footnote-69) 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.[[70]](#footnote-70) 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 day.[[71]](#footnote-71)

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), with.[[72]](#footnote-72) 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.[[73]](#footnote-73) 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.

In the wake of *Bakke*, universities aligned their admission policies with the standards and restrictions imposed by Justice Powell.[[74]](#footnote-74) University officials who once spoke about their race-conscious efforts in remedial terms changed course and began advocating for the benefits of student body diversity.[[75]](#footnote-75) By the time the *Michigan* cases reached the Court, however, the composition of the Court had shifted: it was now Justice Sandra Day O’Connor who was likely to be the swing voter on this issue. Justice O’Connor had been appointed by President Reagan in 1981 but within a few years on the Supreme Court, she became recognized as a “swing justice,” casting the deciding vote in many pivotal cases and holding immense power at the time.[[76]](#footnote-76) It is thus very likely that UM and its amici were paying special attention to Justice O’Connor when drafting their briefs. Judging by her positions on affirmative action outside the realm of higher education in cases preceding *Grutter,* Justice O’Connor’s views on race conscious affirmative action appear to have been ambivalent, shifting over time. In *Wygant* v. *Jackson Board of Education* (1986), Justice O’Connor formally adopted the *Bakke* diversity framework but, at the same time, was highly suspicious of racial classification in the affirmative-action context.[[77]](#footnote-77) As time passed, however, her opinions became increasingly tolerant of race-conscious affirmative action and more supportive of the rationale of aspiring to a nation of equal citizens.[[78]](#footnote-78) Thus, although—perhaps because—Justice O’Connor never validated one clear view of the diversity rationale, she did reveal growing concern about “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country,” as diversity became a more strongly debated issue. Whether as a strategy aimed at swaying Justice O’Connor or as an opportunity to legitimize values they held important, universities and their amici, as this section shows, started to reinfuse diversity with egalitarian meaning.

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.[[79]](#footnote-79) 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.[[80]](#footnote-80) 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.[[81]](#footnote-81) In this article, I use a newly available content-analysis program to validate and broaden my findings. More specifically, I use the 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 context.[[82]](#footnote-82) 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.”[[83]](#footnote-83) 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.”[[84]](#footnote-84) 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.[[85]](#footnote-85)

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.”[[86]](#footnote-86) 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.”[[87]](#footnote-87) 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.”[[88]](#footnote-88) Other amici simply argued that “[the] interest in achieving student diversity and in remedying discrimination are closely related.”[[89]](#footnote-89) 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.”[[90]](#footnote-90)

*Forward-looking distributive and democratic ideals*. Diversity, for Justice Powell, is a future-oriented rationale meant to benefit the educational process of all students.[[91]](#footnote-91) 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.[[92]](#footnote-92)

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.”[[93]](#footnote-93) This amicus brief had a strong influence both on other briefs that quoted its wording and on the Court’s ruling.[[94]](#footnote-94)

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”[[95]](#footnote-95) 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.”[[96]](#footnote-96) 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.”[[97]](#footnote-97) 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.”[[98]](#footnote-98)

Thus, as I show, the *Michigan* amici challenged Powell’s narrow interpretation of diversity, augmenting it with history and a commitment to remedying past wrongs, as well as an egalitarian-democratic vision of diversity and the means to achieve it: 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. 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.[[99]](#footnote-99) 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.”[[100]](#footnote-100) 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 some forms of race-conscious admission policies and were considered a victory by advocates of affirmative action.[[101]](#footnote-101) 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.[[102]](#footnote-102) 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.[[103]](#footnote-103) . . . . Today’s increasingly global marketplace [requires skills that] can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”[[104]](#footnote-104) Diversity, the Court acknowledged, may also help “break down racial stereotypes.”[[105]](#footnote-105) 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.”[[106]](#footnote-106)

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.”[[107]](#footnote-107) Education, Justice O’Connor explains, is charged with a “fundamental role in maintaining the fabric of society[[108]](#footnote-108) [and] [n]owhere is the importance of such openness more acute than in the context of higher education.”[[109]](#footnote-109) 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.”[[110]](#footnote-110) 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.”[[111]](#footnote-111) According to the Court, without the openness that diversity represents, the legitimacy of the country’s leadership, institutions, and democracy is in jeopardy.[[112]](#footnote-112) 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.”[[113]](#footnote-113)

“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,”[[114]](#footnote-114) focusing not necessarily on past discrimination but on the social conditions of inequality and “what affirmative action can do to help fix [them].” [[115]](#footnote-115) In this sense, Justice O’Connor’s rationale was based less on the history of racial discrimination in America but more on the 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.”[[116]](#footnote-116) 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.[[117]](#footnote-117)

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 a democratic value of 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.

## *The Shift toward Utilitarian Diversity: The Fisher Amici Try to Convince 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*.[[118]](#footnote-118) 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.[[119]](#footnote-119) 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.[[120]](#footnote-120)

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.[[121]](#footnote-121) It was only natural that advocates of affirmative action made what seems like 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 race and 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.’”[[122]](#footnote-122) 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*.[[123]](#footnote-123)

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.”[[124]](#footnote-124) 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.”[[125]](#footnote-125) 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.[[126]](#footnote-126) If Gerken and Siegel are correct about Justice Kennedy—and I suspect they are—it is not surprising that when *Fisher I* reached the Court, advocates of affirmative action, as this section shows, reframed 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 how the meaning of diversity was transformed between *Grutter* and *Fisher*, I showed that by 2013, 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 and subjected to utilitarian goals, such as professional development and economic prosperity.[[127]](#footnote-127) 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 the amicus briefs, 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.[[128]](#footnote-128)

With few exceptions, the majority of academic and other amicus briefs in *Fisher I* 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.”[[129]](#footnote-129) 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.[[130]](#footnote-130) 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.[[131]](#footnote-131) It was by contributing to diverse viewpoints and experiences that diversity was seen as serving the greater good of the market and society.[[132]](#footnote-132)

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.[[133]](#footnote-133) UT, the Court held, must demonstrate “that available, workable race-neutral alternatives do not suffice” before it turns to considering the applicant’s race,”[[134]](#footnote-134) 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.[[135]](#footnote-135) 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.[[136]](#footnote-136)

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.[[137]](#footnote-137) 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.[[138]](#footnote-138) 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.[[139]](#footnote-139) 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.[[140]](#footnote-140)

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*. 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. The words *benefits, innovation, workforce, preparation,* however, appear with unusual frequency in the *Fisher* amicus briefs in comparison to those in *Michigan*.[[141]](#footnote-141) 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*.[[142]](#footnote-142) 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.[[143]](#footnote-143) He did not offer any new or determining understanding of diversity. Instead, as Richard Ford observes,[[144]](#footnote-144) 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.”[[145]](#footnote-145) 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.

## *Utilitarian Diversity on Steroids (and Its Exceptions): the SFFA Amicus Briefs*

Less than a decade after the Court upheld the use of race-conscious admission policies in *Fisher* (2016), affirmative action in higher education was challenged once again. The lawsuits were initiated by Students for Fair Admissions, Inc. (hereinafter: SFFA), a nonprofit organization based in Arlington, Virginia, established by the same Edward Blum who was involved in the lawsuit against the University of Texas in *Fisher*. In November 2014, SFFA filed separate lawsuits against Harvard College, Harvard University’s undergraduate division, and the University of North Carolina at Chapel Hill (hereinafter UNC and jointly the SFFA cases), arguing that their race-conscious admissions programs violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment, respectively. The initial lawsuit against Harvard College, claimed that the college’s admissions policy, which took race into account, unfairly discriminated against Asian American applicants. SFFA argued that Asian Americans are notably less likely to be accepted to Harvard than are similarly qualified white, Black, or Hispanic applicants.[[146]](#footnote-146) The second lawsuit, filed against UNC, the state’s leading public university, claimed that the university’s use of race as a factor in its undergraduate admissions process violated both Title VI and the Constitution. Unlike Harvard, which is private, UNC, a public university, is subject to the Fourteenth Amendment’s mandate of equal protection.[[147]](#footnote-147) SFFA contended that neither Harvard’s nor UNC’s policies served a compelling state interest, nor were they sufficiently narrowly tailored due to their rejection of workable race-neutral alternatives.[[148]](#footnote-148) The district courts upheld both Harvard and UNC’s admission programs.[[149]](#footnote-149)

The Supreme Court granted certiorari to these cases in 2022. The timing here is important. Only six years had passed between the 2016 ruling in the second *Fisher* and the Court’s decision to hear the *SFFA* cases. In *Fisher*, the supporters of affirmative action arguments were, I argue, directed to trying to sway the decision of Justice Anthony Kennedy, the “swing Justice” on the Court. By 2022, however, Justice Kennedy had retired and the Court no longer had a swing justice. The composition of the Court had changed dramatically, three appointments by President Trump having placed control of the institution in the hands of a conservative supermajority of six justices against three liberal justices.[[150]](#footnote-150) At that point, it was clear that the Court was very unlikely to allow the race-conscious admission policies of public and private universities to continue, at least not in any familiar form.[[151]](#footnote-151) As Melissa Murray explains: “They really are in this sort of moment where they can do whatever they like . . . . The decision to hear the admissions case[s] suggests that ‘they’re just checking things off their list and affirmative action will be next.’”[[152]](#footnote-152)

In July 2022, the Supreme Court announced that it would hear the two cases and was presented with 93 amicus briefs.[[153]](#footnote-153) Assuming that amicus briefs often play two roles at the same time—talking to the court and talking through the court and to the people—this section shows that the vast majority of amicus briefs submitted in support of race-conscious affirmative action in SFFA neglected the latter role. Allen Rostron explained how the Fisher litigation all revolved around Justice Kennedy.[[154]](#footnote-154) The SFFA amici were, in a way, liberated from this narrow strategic form of argument, allowing them to reason more broadly about the importance of affirmative action. To make the broader claim, the SFFA amici briefs in support of the Harvard and UNC did not have to discard the diversity framework; instead, they could have tried to assign it new meaning, much as the *Michigan* amici did. Somewhat paradoxically, given that the outcome of the *SFFA* cases was largely foreseen, I suggest in this article that the amici could have treated this as an opportunity or a venue to remind their students, members, staff, and the public why affirmative action matters beyond its utilitarian benefits.

Notwithstanding the new composition of the Court, the majority of amici supporting the universities, as well as respondents themselves, decided to adhere to and even expand the utilitarian interpretation of diversity. As demonstrated below, the majority of the amici briefs followed the path of the *Fisher* amicus briefs and emphasized the pedagogical and market-oriented benefits of diversity, with one notable exception: The respondents and some of their amici did turn to history to refute SFFA’s argument that the Equal Protection Clause of the Fourteenth Amendment, as interpreted in *Brown* v. *Board of Education*, is “colorblind” and permits no racial classifications by institutions of education.[[155]](#footnote-155) Most notably, Harvard College dedicated a section of its respondent brief to “Text and History” and argued that “absolute neutrality has never been a universal constitutional principle, either at the time of ratification or in the Court’s jurisprudence. The Congress that adopted the Fourteenth Amendment rejected the ‘absolutis[t]’ view SFFA prefers (Br.51) and authorized numerous measures that benefited African Americans in the aftermath of the Civil War.”[[156]](#footnote-156) Similarly, UNC argued in their respondent brief that SFFA’s colorblind construction of the Constitution “ignores the original meaning of the Fourteenth Amendment, defies this Court’s longstanding jurisprudence, and overlooks the compelling benefits that flow from diverse institutions of higher learning.”[[157]](#footnote-157) Despite this reference to the history of racial discrimination in some of the briefs, the respondents and majority of the amici failed to tie this history to their interest in diversity, thus largely negating the egalitarian roots and democratic aspirations of affirmative action.

Harvard opened its brief by stating that:

Harvard College seeks an exceptional student body diverse in many dimensions . . . [D]iversity “lead[s] to greater knowledge” for everyone, “as well as the tolerance and mutual respect that are so essential to the maintenance of our civil society.” . . . To achieve that objective, Harvard individually evaluates . . . the ways applicants might contribute to one another’s educational experience given their backgrounds, talents, interests, and perspectives.[[158]](#footnote-158)

Only later did Harvard assert that “a person’s race—like their home state, national origin, family background, or interests—is part of who they are, and that in seeking the benefits of a diverse student body, universities may consider race as one among many factors, provided they satisfy strict scrutiny.”[[159]](#footnote-159) Similarly, UNC, opened its brief by stating that:

In choosing to pursue such diversity and its educational benefits, UNC embodies the nation’s highest ideals and best traditions. On campus, diversity promotes the robust exchange of ideas, fosters innovation, and nurtures empathy and mutual respect. It also looks to the future, equipping students with the tools and experiences necessary for success in the modern world. In UNC’s academic judgment, diversity is central to the education it aims to provide the next generation of leaders in business, science, medicine, government, and beyond.[[160]](#footnote-160)

UNC also noted that there is a unique challenge in admitting underrepresented minorities and that “[as] a Southern flagship university that for most of its history excluded racial minorities from admission altogether—[it] continues to have much work to do.” [[161]](#footnote-161) Then, however, it also defined this lack of representation as important because it “limits opportunities for exposure and learning.”[[162]](#footnote-162)

The amici briefs from other academic institutions focused almost exclusively on the pedagogical and economic utility of diversity. Thirty-three selective private residential colleges made it clear in their amicus briefs that they value diversity because: “[s]tudies consistently show that diversity—including racial diversity—meaningfully improves learning experiences, complex thinking, and non-cognitive abilities. Diversity also generates pedagogical innovations and decreases prejudice. These benefits are especially pronounced at liberal arts colleges and small universities, where smaller class sizes lead to greater engagement among diverse students.”[[163]](#footnote-163) MIT and Stanford articulated their particular interest in diversity for the science, technology, engineering, and mathematics (STEM) field, asserting that: “[n]ot only does diversity promote better outcomes for students in STEM, it contributes to better science. As such, American businesses at the forefront of innovation in STEM depend on the availability of a diverse cross-section of talented graduates from the nation’s most rigorous and elite institutions.”[[164]](#footnote-164) Similarly, the Association of American Medical Colleges saw diversity in the education of physicians and other healthcare professions as “a medical imperative . . . Diversity literally saves lives by ensuring that the Nation’s increasingly diverse population will be served by healthcare professionals competent to meet its needs.”[[165]](#footnote-165) Brown University and other elite institutions of higher education strongly emphasized how “[d]iversity fosters a more robust spirit of free inquiry [,] . . . encourages dialogue that sparks new insights, . . . [and] prepares Amicis’ graduates to pursue innovation in every field.”[[166]](#footnote-166) For these and other academic amici, diversity is a means to achieve educational goals, such as better educational experience for their students and better preparing their graduates for the ever-changing global workforce.[[167]](#footnote-167)

In an amicus brief in support of the universities, the Biden administration focused primarily on the importance of diversity for the military.[[168]](#footnote-168) It did mention in its brief that the absence of diversity in the officer corps also undermined the military’s legitimacy by fueling “perceptions of racial / ethnic minorities serving as ‘cannon fodder’ for white military leaders.’”[[169]](#footnote-169) However, instead of connecting these ideas about legitimacy to a larger vision of American democracy, it subordinated them to national security interests in “[the] overall readiness and mission accomplishment” of the military.[[170]](#footnote-170) Notably, the Federal Bureau of Investigation, referenced in the brief, did recognize “the need to reflect the communities that we serve, because when people look at us, they need to see themselves. If they don’t see themselves, it’s harder for them to trust us . . .. ”[[171]](#footnote-171) More generally, while the Biden administration recognized not only the education benefits of diversity, but also the “civil” ones, it refrained from recognizing the broader democratic value of diversity that was recognized in *Grutter* and that reflects an obligation to openness among all institutions and positions of leadership. Other public officials and civil society organizations seconded this approach, stressing the importance of diversity and, in some cases, its anti-stereotyping effects for the greater good of better preparing students for the “workforce of the world economy.”[[172]](#footnote-172)

The strong trend toward a utilitarian view of diversity was amplified by professional and business amici. A brief submitted by Microsoft and other technology companies emphasized that “[r]acial and other diversity improves scientific endeavors and the innovation of new technologies. A racially diverse workforce so helps guard against the possibility that science and technology companies will be out of touch with their increasingly diverse and global customer base.”[[173]](#footnote-173) The HR Policy Association added in its brief that “[a] diverse workforce is essential for successful business outcomes” and that “[d]iverse teams constituting individuals from a wide variety of backgrounds and perspectives perform better than their homogenous counterparts, particularly in an increasingly global consumer market.”[[174]](#footnote-174) Major American business enterprises wrote that “[d]iverse workforces improve Amici’s business performance—and thus strengthen the American and global economies.”[[175]](#footnote-175)

*An egalitarian alternative:* The utilitarian business case for diversity is strong and dominant in the *SFFA* briefs. Several amici, however, took an alternative approach, reinfusing the conversation about affirmative action with egalitarian values. The majority of these amicus briefs either present the objective of remedying past wrongs as an alternative to the diversity rationale or simply fail to tie this goal to the discussion of the diversity rationale. In this sense, these briefs revive the history of racial disparities in America and the role of affirmative action in correcting it but risk being overlooking the scope of the permissible interest in diversity. Most explicitly, a group of Black women law scholars asserted that while diversity is “a sufficient basis on which to reaffirm the constitutionality of race-conscious admissions programs, [there is a] far more compelling justification for race-conscious admissions programs [:] remedying the lasting and lived effects of centuries of racial discrimination against Black people and other historically underrepresented groups.”[[176]](#footnote-176) Citing Justice Marshall’s opinion in *Bakke*, this group goes on to argue*,* that “race-conscious admissions programs are constitutionally permissible ‘to redress the continuing effects of past discrimination.’”[[177]](#footnote-177) The Washington Bar Association and the Women’s Bar Association of the District of Columbia, wrote little for or against diversity but instead directly justified affirmative action as a remedial tool, rather distinctively arguing that in order “[t]o understand the importance of affirmative action, one must be careful to remember this country’s history, which underscores the dire need for race-sensitive policies. The Fourteenth Amendment was put into place to correct the injustices perpetrated against Black Americans through centuries of enslavement and second-class citizenship.”[[178]](#footnote-178) Similarly, a group of twenty-five Harvard student and alumni organizations rooted their argument for affirmative action in the history of the civil rights era, and then argued:

The absence of equal educational opportunities undermines democracy because it allow[s] a subset of the population to either hoard or be deprived of the kinds of educational opportunities that allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy.[[179]](#footnote-179)

Historically Black Colleges articulated a similar vision in its brief, recapturing the history of racial discrimination in higher education from slavery to our days and connecting it to the interest in diversity by stating that “student body diversity—remains as compelling today . . . [because] [r]espondents and other top schools have yet to achieve that goal and thereby enable students of all races to participate fully and equally in academic life.”[[180]](#footnote-180)

The egalitarian alternative was powerful and eventually proved persuasive for the minority opinions in *SFFA—*which, however, remained minority opinions. The dominant values that the vast majority amici attributed to diversity specifically, and to affirmative action more broadly, were utilitarian, as my algorithmic analysis confirms. I used the keynessfunction to identify words that were unusually frequent in the *SFFA* amici briefs in comparison to the amici briefs submitted to the Court in the two previous affirmative action cases that I examined. The words *innovation* and *benefits* occurred with unusual frequency in the *SFFA* amici briefs in support of the universities, in comparison to both the *Michigan* and *Fisher* amici briefs.[[181]](#footnote-181) Similarly, the collocates analysis showed that *benefits* was the word most likely to appear in a seven-word proximity to diversity in the SFFA amici briefs. Other words likely to appear in proximity to diversity in the *SFFA* amicus briefs were *racial, educational, achieve, profession, innovation,* and *business*.[[182]](#footnote-182) This analysis confirms that while some amici made an egalitarian case for affirmative action, the SFFA amici’s overwhelmingly dominant plea for diversity was utilitarian.

## *How Diversity Could Have Gone Right but Did Not – Interim Summary*

The literature on affirmative action often marks 1978 as the end of the debate over the permissible reasons for engaging in race-conscious admission policies in higher education or, as I call it in this article—the *why* question. It was in the 1978 *Bakke* decision that Justice Powell dramatically restricted the conversation over this question by adopting diversity and, more specifically, the pedagogical benefits that flow from diversity, as the primary rationale for sanctioning the consideration of race in higher-education admissions policies.[[183]](#footnote-183) However, this section shows that the *why* question was not actually settled in *Bakke*. The University of Michigan and the seventy-two amicus briefs supporting its race-conscious admission policy in the *Michigan* cases challenged the narrow rationale on which Justice Powell rested the court’s *Bakke* decision. Seeking to prevail in the case by working within the framework imposed by the Court in *Bakke*, they reinterpreted diversity to reflect egalitarian values, both remedial and democratic.[[184]](#footnote-184) This strategy worked, as the Court in *Grutter* broadened its interpretation of diversity to include prospective egalitarian values and democratic aspirations.[[185]](#footnote-185)

By the time the next challenges to affirmative action reached the Court, however—in the 2013 and 2016 *Fisher* cases—the university and the one-hundred forty (seventy-two in *Fisher I* and sixty-eight in *Fisher II*) amicus briefs supporting its admission policy were concerned less with articulating their concerns about racial justice and more with convincing Justice Kennedy, who was then the swing justice on the bench. Consequently, the respondents and their amici supporters adopted a highly utilitarian approach toward diversity, focusing on its benefits for the educational process, innovation, and the economy—and the Court in *Fisher* followed.[[186]](#footnote-186) By the time the Court agreed to hear the *SFFA* cases, its composition had changed dramatically, to clear conservative supermajority that favored rejecting the use of race in admission policies. This new reality could have provided the universities and other proponents of affirmative action an opportunity to remind their members in particular, and the public more generally, what is at stake in the debate over affirmative action beyond utilitarian benefits and why there are good retrospective and prospective egalitarian reasons to allow it. However, the universities and most of their amici squandered this chance. Instead, they continued stressing the utilitarian benefits of diversity, pointing to new evidence about how student-body diversity better prepares students for the global workforce and benefits the educational environment, medical care, business, national security, and the economy at large.[[187]](#footnote-187)

With the conversation about the *why* question restricted to the diversity ideal, almost all the amici made their claims about why affirmative action matters by reinterpreting and redefining this value. A comparative analysis of the amicus briefs that I conducted using algorithmic tools further amplifies these tendencies. The following dotted graph compares the rankings of various collocates of the word *diversity* in the amicus briefs pertaining to the three major challenges to affirmative action in higher education since *Bakke*: the *Michigan* cases in 2003, the *Fisher* cases that were finally decided in 2016, and the *SFFA* case from 2023. The ranking comports with their Log-Likelihood values as processed by the Antconc collocate tool. The collocates represent words or phrases that frequently appear together in the specific context of the word *diversity*. The vertical axis represents the reversed rank values, number 1 being the most likely to appear in proximity to *diversity;* the horizontal axis displays the collocates. I tracked keywords that reflected either an egalitarian approach or a utilitarian one and observed which were most likely to appear in proximity to the seven words preceding or following *diversity* in the amicus briefs in the affirmative-action cases.

My key observations are that the words *racial, benefits,* and *educational* consistently enjoy high frequencies across all three cases, indicating their prominence in the respective contexts. *Racial* ranks first in all three cases, maintaining its position as the highest-ranked collocate. *Educational* and *benefits* consistently rank within the top five, indicating their continuing relevance. *Benefits,* however, climbs from fifth in *Michigan* cases to second in the *Fisher* and *SFFA* cases. The ranking of *minority* fluctuates, falling significantly from 2003 to 2016 and rebounding significantly in 2023, yet far from its rank in 2003. *Democratic* behaves similarly. The graph shows clearly that several collocates of *diversity* are distinct to particular cases. For example, *business* and *professions* are relevant only to 2023; *invention* and *excellence* to 2016, and *segregation, openness,* and *past* to 2003. *Profession* and *workforce* demonstrate fluctuations in their rankings, showing potential shifts in attention and importance over time.

The dotted graph provides insights into the changing frequencies of different collocates over time. The data suggest shifts in emphasis and evolving trends within the context of the given dataset. These findings are consistent with the trends described in this section. Words identified with the egalitarian understanding of diversity, such as *minority* and *democratic*, were much more likely to appear in proximity to *diversity* in the *Michigan* cases and many words associated with the utilitarian pivot to diversity were much more likely or even distinct to the *Fisher* and *SFFA* cases.

**Comparison of collocates of the word *diversity* according to their likelihood ranks over time (2003, 2016, and 2023)**[[188]](#footnote-188)

A screen shot of a graph

Description automatically generated

# The Why Question—Which (if any) Interests Count as Compelling in *SFFA*?

“It’s the end of affirmative action” shouted countless news and opinion pieces headlines in the days following the ruling in *Student for Fair Admissions* v. *Harvard* and *Student for Fair Admissions v. UNC* (hereinafter: *SFFA*) in late June 2023.[[189]](#footnote-189) It was indeed on June 29, 2023, that the Supreme Court of the United States issued the landmark *SFFA* decision, severely limiting, if not entirely terminating, the use of race-conscious affirmative action in college admissions. In a 6–3 decision spearheaded by the conservative justices, the Court declared that holistic affirmative action programs in college admissions, that consider race as one factor among many, violate the Equal Protection Clause of the Fourteenth Amendment and are thus unconstitutional as well as in violation of Title VI of the Civil Rights Act of 1964. [[190]](#footnote-190)

This section of the article does not survey everything written in the *SFFA* opinions but rather provides a comprehensive account of the rationales the justices count as permissible for allowing race-conscious admission policies and the distinct values that the justices attributed to affirmative action in college admissions. It shows that while ostensibly recognizing the educational benefits of diversity as the sole interest that can justify the use of race in admissions, the majority also renders this rationale unworkable. The dissenters, in contrast, no longer adhere to the narrow utilitarian interest in diversity and instead remind universities, businesses, the United States government, and the public at large that the state’s interest in racial diversity reflects a much broader aspiration rooted in America’s past of racial discrimination and is vital for America’s future as a multiracial democracy.

Chief Justice Roberts delivered the opinion of the Court, in which all six conservative justices joined. Race-conscious admission policies in higher education, the Chief Justice declared, are discriminatory and unconstitutional: “Eliminating racial discrimination means eliminating all of it.”[[191]](#footnote-191) He then specified that college admissions programs may take race into consideration to enable applicants to demonstrate—for example, in their application essays—how their racial background influenced their character in a manner that has a tangible impact on the university. Even then, however, schools may not use race in determining admissions: A student “must be treated based on his or her experiences as an individual—not on the basis of race,” Roberts wrote.[[192]](#footnote-192) The majority ruling effectively, though not explicitly, overturned *Bakke*, *Grutter*, and *Fisher*, in which the Court upheld the use of race in admission policies as one of several factors that may be considered in order to achieve a diverse student body. Justices Thomas, Alito, Gorsuch, Kavanaugh, and Coney Barrett joined the Chief Justice’s opinion. The Court’s three liberal justices dissented. Justices Sotomayor and Jackson both wrote dissenting opinions, with which Justice Kagan joined. “Today, this Court stands in the way and rolls back decades of precedent and momentous progress,” Justice Sotomayor stated,[[193]](#footnote-193) adding that “[b]ecause the majority’s judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.”[[194]](#footnote-194)

The Court, examining the constitutionality of race-conscious affirmative action as it did in previous cases, applied a two-step test of strict scrutiny, asking whether the specific admissions policies were used in (1) a narrowly tailored manner to achieve (2) a compelling state interest.[[195]](#footnote-195) The Chief Justice emphasized that it was not overruling *Bakke*, ostensibly accepting diversity as a compelling state interest that may justify the use of race in university admissions; at the same time finding that the universities’ admissions programs were not narrowly tailored.[[196]](#footnote-196) A close reading of the opinions in this case, however, reveals that the majority actually deviates from precedent and that the justices are also deeply divided as to which, if any, compelling state interest can justify the use of race in admission policies in 2023. Thus, *SSFA* represents the first time since challenges to race-conscious affirmative actions were brought before the Court in Bakke that the justices were divided not only on “how” to design affirmative action in a permissible way but also on “why” affirmative action should count as constitutionally permissible in the first place.

Before delving into the disagreement over the values the justices deem compelling enough to justify using race as a factor in the admissions process, it is important to understand another fundamental issue subject to deep disagreement in this case: the correct interpretation of the Equal Protection Clause of the Fourteenth Amendment. The majority promotes a vision of the constitution that is colorblind, and thus views affirmative action as an attempt to “pick[] winners and losers based on the color of their skin.”[[197]](#footnote-197) By applying this rationale, the Chief Justice, in effect, creates a complete symmetry between racially discriminatory acts and racially affirmative actions.[[198]](#footnote-198) Invoking the legacy of *Brown*, he writes that while the majority adheres to the “Separate but equal is ‘inherently unequal,’” ruling of *Brown*, the dissent considers *Brown* contextual only.[[199]](#footnote-199) Thomas added in his concurrence that “the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens’ skin color and focus on their individual achievements.”[[200]](#footnote-200) These statements are expressions of what scholars have long recognized as the “anti-classification” principle, according to which the Equal Protection Clause prohibits all race-based classifications, regardless of their goal.[[201]](#footnote-201) The minority strongly disagrees, endorsing a completely different interpretation of the Fourteenth Amendment and its legacy. Similarly claiming to adhere to the legacy of *Brown,* Justice Sotomayor concludes that “[f]rom Brown to Fisher, this Court’s cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment’s vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.”[[202]](#footnote-202) And that “[i]Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.”[[203]](#footnote-203) The dissenters express what the literature often deems an “anti-subordination” approach, under which, the constitution does not prohibit race classifications per-se, but rather holds a promise for equal citizenship and that laws and government should work to fulfill that promise, not inhibit it.[[204]](#footnote-204) As this section shows, these strongly opposing world views about the constitution and what kind of equal protection it provides fueled and continue to fuel the controversy over why, if at all, the constitution should allow race-conscious affirmative measures.

*What is then a compelling state interest for applying race-conscious affirmative action in higher education according to the Chief Justice?* Reviewing the universities’ policies under the strict scrutiny test, the Chief Justice added that “universities operate their race-based admissions programs in a manner that is ‘sufficiently measurable to permit judicial [review]’” . . . rather than “amorphous.”[[205]](#footnote-205) On this basis, he examines the interests that the universities consider compelling, listing all the benefits of diversity to which the respondents referred in their briefs, all of which are utilitarian. Harvard’s goals, he states, citing its respondent brief, are: “(1) ‘training future leaders in the public and private sectors’; (2) preparing graduates to ‘adapt to an increasingly pluralistic society’; (3) ‘better educating its students through diversity’; and (4) ‘producing new knowledge stemming from diverse outlooks.’”[[206]](#footnote-206) UNC, the Chief Justice continues, has similar utilitarian objectives in mind: “(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem solving; [and] (4) preparing engaged and productive citizens and leaders,’” as well as the separate anti-stereotyping goal of “enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”[[207]](#footnote-207)

Although these are *commendable goals* [emphasis added],” the Chief Justice stated: “they are not sufficiently coherent for purposes of strict scrutiny.”[[208]](#footnote-208) Continuing, he explains that the objectives, while compelling, are not “sufficiently coherent,” and are rather, “standardless,” “imprecise,” and unmeasurable: “plainly overboard.”[[209]](#footnote-209) According to Chief Justice Roberts, the problem lies not with diversity per se but with its elusive nature in the educational mission. “[T]he question in this context,” he explains, “is not one of no diversity or of some: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.”[[210]](#footnote-210) “The interests that respondents seek,” he concludes, “though plainly worthy, are inescapably imponderable.”[[211]](#footnote-211)

This is, I argue, a misleading assertion. The Chief Justice’s reasoning, while appearing to validate diversity as the only compelling state interest, at the same time makes its use nearly impossible. He achieves this result by adopting the utilitarian approach to diversity as it was presented by the universities, while simultaneously showing how the approach is incoherent and not sufficiently compelling on its own. In essence, the Chief Justice is telling educational institutions that while their interests in the educational and economic benefits of diversity are theoretically worthy, in practice, they are not sufficiently limited in scope (not “measurable and concrete”[[212]](#footnote-212)) or in time (“lack[ing] a logical end point”[[213]](#footnote-213)) to justify the use of race. And because the *SSFA* majority, like those preceding it, rejected the interest of remedying societal discrimination as a valid basis for race-conscious admissions policies, its majority decision seems to be leaving the universities with very few options. In this sense, the Chief Justice is actually overruling decades of precedent that permitted the use of race in admission policies to promote student body diversity.[[214]](#footnote-214) In her dissent, Justice Sotomayor criticizes the majority and explains that “to avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation.” And adds that: “Members of this majority pay lip service to respondents’ ‘commendable’ and ‘worthy’ racial diversity goals, [while] […] they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them.”[[215]](#footnote-215) The majority, Justice Sotomayor insists, even rejects the narrower interest in the educational interests that flow from diversity.[[216]](#footnote-216)

Justice Thomas follows an apparently different route, flatly rejecting precedents that uphold race-conscious affirmative action. In so doing, he adheres to his long-standing view of a “colorblind” Constitution that does not allow race classifications “regardless of whether intended to help or hurt.”[[217]](#footnote-217) For this reason, he determines that all racial classifications are subject to the strictest scrutiny. From this point of departure, his opinion converges more closely with that of the Chief Justice. In *Grutter,* Justice Thomas wrote, the Court “recognized ‘only one’ interest sufficiently compelling to justify race-conscious admissions programs: the ‘educational benefits of a diverse student body.’”[[218]](#footnote-218) In the years since *Grutter*, however, Justice Thomas explains that he has “sought to understand exactly how racial diversity yields educational benefits. With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their amici can explain that critical link.”[[219]](#footnote-219) The goals the universities specified, Justice Thomas argues, are vague and their causal connection to diversity is unclear.[[220]](#footnote-220) Furthermore, he questions the advantages of racial diversity as opposed to other forms of diversity. “It may be the case that exposure to different perspectives and thoughts can foster debate, sharpen young minds, and hone students’ reasoning skills. But, it is not clear how diversity with respect to race, qua race, furthers this goal,” he writes.[[221]](#footnote-221) To further the educational goals of the respondents and their amici and to enhance “creativity” and “innovation,” Justice Thomas urges universities to seek “individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation.”[[222]](#footnote-222) Quoting his own concurring opinion in *Fisher I*, Justice Thomas equates segregation to affirmative action and states that “just as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s] . . . the alleged educational benefits of diversity cannot justify racial discrimination today.”[[223]](#footnote-223) Thus, unlike the Chief Justice, who theoretically recognized the educational benefits of diversity as compelling, Justice Thomas seems to reject the diversity rationale altogether, objecting to the idea that anything can justify what he sees as racial discrimination.

While Justices Gorsuch’s and Kavanaugh’s concurrences add little to the debate over what may be considered a compelling state interest in race-conscious admission policies, the dissents of Justices Sotomayor and Jackson definitely make a contribution, each resuscitating the egalitarian legacy of affirmative action in a different way.

In her dissenting option, Justice Sotomayor closely ties diversity to both its *remedial roots* and the *democratic vision* it inspires. She opens her opinion by stating that “[t]he Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality”[[224]](#footnote-224) and explains that [t]his guarantee can constitutionally be enforced through race-conscious means. In *Brown*, Justice Sotomayor continues, the Court recognized, “the harm inflicted by segregation and the ‘importance of education to our democratic society.’”[[225]](#footnote-225) She then directly connects this long-standing constitutional remedial legacy and its manifestation in *Brown* to diversity and its benefits by observing that “[f]or 45 years, the Court extended Brown’s transformative legacy to the context of higher education, allowing colleges and uni­versities to consider race in a limited way and for the lim­ited purpose of promoting the important benefits of racial diversity.”[[226]](#footnote-226) *Bakke, Grutter,* and *Fisher,* she writes, are extensions of *Brown*’s legacy. It is a compelling state interest of the highest order, Justice Sotomayor asserts, that “universities pursue the benefits of racial diversity and ensure that ‘the diffusion of knowledge and opportunity’ is available to students of all races.”[[227]](#footnote-227) Justice Sotomayor then makes the general claim that “[e]quality requires acknowledgment of inequality” and adds that the context of racial exclusion informs Harvard’s and UNC’s admission policies and their racial diversity goals.[[228]](#footnote-228) Following a lengthy description of racial discrimination and exclusion in America’s higher education system, she writes that “acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion.”[[229]](#footnote-229)

As for the utilitarian role of diversity, Justice Sotomayor turns to the amicus briefs filed with the Court, lists all the benefits of diversity as a “national security imperative,” and touts diversity as also providing “equitable and effective public services” and better “healthcare access and health outcomes,” “academic achievement” and “business performance.”[[230]](#footnote-230) Yet unlike most of the amicus briefs that she cites, Justice Sotomayor subjects these utilitarian benefits to the test of the greater good of equal citizenship in a democratic society, explaining that “today’s decision harms not just re­spondents and students but also our institutions and dem­ocratic society more broadly.”[[231]](#footnote-231) Furthermore, Justice Sotomayor views diversity and equality as inseparable if not interchangeable. For example, she remarks that “[t]oday’s decision further entrenches racial inequality by making these pipelines to leadership roles less diverse” and that “[a] less diverse pipeline to these top jobs accumulates wealth and power unequally across racial lines, exacerbating racial disparities in a society that already dispenses prestige and privilege based on race.”[[232]](#footnote-232) Justice Sotomayor then ties this egalitarian vision of diversity not just to the past but to the democratic vision that relies on diversity:

The Court ignores the dangerous consequences of an America where its leadership does not reflect the diversity of the People. A system of government that visibly lacks a path to leadership open to every race cannot withstand “scrutiny in the eyes of the citizenry. Gross disparity in representation” leads the public to wonder whether they can ever belong in our Nation’s institutions, including this one, and whether those institutions work for them . . .. *True equality of educational opportunity in racially diverse schools is an essential component of the fabric of our democratic society* [emphasis added].[[233]](#footnote-233)

Thus, for Justice Sotomayor, the interest in diversity is not and cannot be understood without close attention to its historical roots in the struggle for racial justice, and it cannot and should not be valued independently of its crucial role in sustaining American democracy.

Justice Jackson joins Justice Sotomayor’s dissent without qualifications but writes separately because she takes a slightly different route with respect to the question of which interests are compelling enough to allow race-conscious affirmative action. She provides a remarkable account of the history of racial discrimination in the United States—starting with slavery, onward to the Civil War, and through Reconstruction and Jim Crow—explaining how this history is a history of the law of the land. Racial preferences to non-black people, created by law and under the law, Justice Jackson explains, created the reality of racial inequality that Americans face today, a reality of “[g]ulf-sized race-based gaps. . . created in the distant past but have indisputably been passed down to the present day through the generations.”[[234]](#footnote-234) It is very clear that, in Justice Jackson’s view, history is the root of the rationale for affirmative action. “History speaks,” she writes. “In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.”[[235]](#footnote-235) Both historical and present-day racial inequalities inform “how and why race matters to the very concept of who ‘merits’ admission.”[[236]](#footnote-236)

Justice Jackson is ambivalent about the utilitarian values of diversity. While making the utilitarian case for diversity, she rejects the premise that it can be the sole compelling reason for applying race-conscious admission policies. She argues very persuasively for the benefits of student body diversity. “The diversity that UNC pursues for the betterment of its students and society is not a trendy slogan. It saves lives,” she writes.[[237]](#footnote-237) Justice Jackson then draws on amicus briefs and research to demonstrate how and why diversity matters. She shows how Black doctors are much more likely to save the lives of Black newborns and provide their Black patients with more accurate care more generally.[[238]](#footnote-238) She does not, however, stop with a rather narrow utilitarian interest in diversity. It is these programs, she writes, that diversify the medical profession and also “open doors to every sort of opportunity—[and] helps address the aforementioned health disparities (in the long run) as well.”[[239]](#footnote-239) Justice Jackson further explains how diversity in higher education helps everyone, enabling students to attain “a greater appreciation and understanding of civic virtue, democratic values, and our country’s commitment to equality.”[[240]](#footnote-240) Diversity, she acknowledges, benefits the economy as well. All these utilitarian, educational, and even economic benefits of diversity, however, seem to be but a bonus, the cherry on top of the cake, because what needs to be done, “the only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively *striving to achieve true equality for all Americans* [emphasis added].[[241]](#footnote-241)

Unlike Justice Sotomayor, however, who at least formally adopts Justice Powell’s opinion in *Bakke* but reinterprets it in a way that reinfuses diversity with egalitarian and democratic values, Justice Jackson seems to flatly reject the idea that an interest as narrow as this can serve as the sole compelling interest for affirmative action. She writes that “[f]or one thing—based, apparently, on nothing more than Justice Powell’s initial say so—it drastically discounts the primary reason that the racial diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court’s own analytical dustbin.”[[242]](#footnote-242) In a short yet decisive passage, she denounces the majority in this case, as well as in past ones, for drastically undermining the primary rationale behind the need for racial diversity, which can be understood only in the historical context of racial discrimination.[[243]](#footnote-243)

Both dissenters, each in her own manner, unsettles the legal, academic, and public debate about why racial diversity should be valued. During the past fifty years, the answer to this question has become increasingly narrow and restricted, focused not only on diversity but eventually on a very specific vision of diversity that is disconnected from the retrospective context of racial discrimination and the prospective aspiration of overcoming the disparities that it caused. Justices Sotomayor and Jackson both refuse to adhere to this utilitarian and ahistorical understanding of the affirmative action. Justice Sotomayor reclaims the diversity rationale and reinfuses it with both historical context and remedial interests as well as prospective redistributive and democratic aspirations. Justice Jackson supports the same ideals but believes they can serve directly as a compelling state interest for affirmative action, even outside the diversity framework.

Both Chief Justice Roberts and Justice Thomas strongly object to this reasoning and somewhat ironically attack the dissenters for breaking from precedent while availing themselves of the mantle of *stare decisis*.[[244]](#footnote-244) Thomas writes that “[t]he dissents too attempt to stretch the diversity rationale, suggesting that it supports broad remedial interests . . .. [b]ut language—particularly the language of controlling opinions of this Court—is not so elastic.”[[245]](#footnote-245) He then asserts that “[t]he Court refuses to engage in this lexicographic drift, seeing these arguments for what they are: a remedial rationale in disguise.”[[246]](#footnote-246) The dissenters, however, write not to convince any of their conservative peers on the bench but rather, I suggest, to remind us why race-conscious affirmative action ever mattered in the first place and why it still matters today.

# After the End of Affirmative Action: Pathways Forward

Only a few hours after the *SFFA* ruling was issued, the then President-elect of Harvard University, Claudine Gay, released a video in response. In it, Guy acknowledged that the decision would “change *how* we pursue the educational benefits of diversity,”[[247]](#footnote-247) adding that: “In the coming weeks, we will be working to understand the decision and its implications for our policies.”[[248]](#footnote-248) Other universities, public officials, and commentators began evaluating the implications of the *SFFA* decision, which ended the use of once permissible race-conscious admission programs.[[249]](#footnote-249) They joined a growing body of scholarship, having expected this outcome, was endeavoring to evaluate its implications for institutions of higher education as well as for the education system, government, and the workforce.[[250]](#footnote-250) This literature, focusing on the *how* question—the methos universities are still permitted to apply to increase racial diversity—is only likely to grow in the coming months and years.

A no less important aspect of the *SFFA* decision that warrants public and scholarly attention is the *why* question. The conservative supermajority of the 2023 Court was not convinced that race-conscious affirmative action should be saved.[[251]](#footnote-251) And even before the *SSFA* decision was issued, it was clear to many that the battle to save these measures was doomed. It might take decades to change the composition of the Court, but in the meantime universities, public and private institutions must have a compelling reason to fight for racial diversity on campus and beyond. Now, it is the fight for public opinion concerning affirmative action that matters, and affirmative action seems to be losing in that sphere as well. Americans are losing sight of what is at stake in jettisoning affirmative action and why this issue is vital. According to several recent surveys, most Americans today think college admissions programs should not consider race and ethnicity.[[252]](#footnote-252) While affirmative action has always been a controversial issue in the United States, I argue that that the utilitarian case for diversity, which has become the controlling rationale for affirmative action, does not adequately or effectively explain to the public what is at stake in the battle over affirmative action.

First, it is important to diagnose the problem correctly. Some critics mourn the defeat of remedial rationales that one justified affirmative action and warn that diversity is “a serious distraction in the ongoing efforts to achieve racial justice.”[[253]](#footnote-253) It is argued in this article, however, that there is nothing wrong with the diversity rationale per se. Rather, as my analysis shows, diversity is a neutral vessel that can carry different values. According to the Merriam-Webster Dictionary, diversity is “the condition of having or being composed of differing elements. [E]specially: the inclusion of people of different races . . . cultures, etc. in a group or organization.”[[254]](#footnote-254) The question of *why* this condition is worth fighting for is a totally different one. As this paper shows, the answers to the *why* question have shifted dramatically over time: from an interest in rectifying past injustice and democratic aspirations towards utilitarian pedagogical and market benefits.[[255]](#footnote-255)

The hyper-utilitarian approach to diversity, which came to control the discourse about affirmative action in the debate over the *Fisher* cases and, even more dramatically in the *SFFA* litigation, fails, I argue, to articulate the stakes in banishing race-conscious affirmative action. Jack Balkin observed that “‘diversity’ [is] a code word for representation in enjoyment of social goods by major ethnic groups who have some claim to past mistreatment.”[[256]](#footnote-256) Amicus briefs are indeed highly strategic documents, but they also indicate to the public what matters and why. Indeed, the utilitarian strategy appears to have grown to such an extent over time as to consume the essence of affirmative action and, in fact, to take over the discourse over the issue within and outside the courts.[[257]](#footnote-257) In Claudine Guy’s aforementioned video, released just hours after the *SFFA* decision was issued, the president-elect of Harvard University not only reaffirmed Harvard’s commitment to diversity but also explained to current and future students at Harvard and to the public at large why student body diversity matters. Clarifying the values that Harvard is fighting for when it defends race-conscious admission policies, Guy declared that: “[f]or nearly nine years, Harvard vigorously defended our admissions process and our belief that we all benefit from learning, living, and working alongside people of different backgrounds and experiences.”[[258]](#footnote-258) Continuing, she assured her viewers that Harvard would comply with the Court’s decision but that this would not change the values in which Harvard believes. “We continue to believe—deeply—that a thriving, diverse intellectual community is essential to academic excellence and critical to shaping the next generation of leaders. Every day, this is borne out in Harvard classrooms, where our students have the chance to put their ideas into conversation with other points of view, experiences, and perspectives.” [[259]](#footnote-259)

President-elect Guy was right; these benefits of diversity are important. The stakes in losing the battle over affirmative action, however, are about so much more, and it is time, I argue, to openly admit it. “The diversity rationale attempts to assuage white people's feelings of outrage and resentment… In essence, the diversity rationale attempts to comfort white people who lose out on coveted spots in an incoming class by assuring them that other white people - the ones who secured a seat - are winners.” Khiara Bridges writes.[[260]](#footnote-260) This, she adds, “has been cold comfort to many aggrieved white people, a fact that might explain the diversity rationale's likely defeat next Term in the Court's decision in Harvard.”[[261]](#footnote-261) Back in 2013, aiming to convince the then-swing justice on the bench, Kennedy, it might have made strategic sense for academic amici like Harvard to confine their arguments to the utilitarian benefits of diversity.[[262]](#footnote-262) With the changing composition of the Court to a six-to-three majority for striking down race-conscious affirmative action,[[263]](#footnote-263) however, and with growing public objections to the practice, it is time to remind Americans that the future of America as a multiracial democracy is at stake in this fight.

Justices Sotomayor and Jackson have already begun. In outreaching dissents that no longer confine themselves to the narrow utilitarian understanding of diversity, they reconnect affirmative action to its historical roots in the civil rights movement’s Second Reconstruction of the 1950s and 1960s and infuse diversity with remedial and democratic values.[[264]](#footnote-264) Justice Jackson resists the Court’s adherence to the narrow diversity rationale as adopted in Justice Powell’s plurality opinion in *Bakke* and invests substantial parts of her opinion in placing this current battle over affirmative action in its proper historical and moral context. “History speaks,” Justice Jackson writes. “In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.”[[265]](#footnote-265) Not allowing colleges to take race into account in their admission programs “condemns our society to never escape the past that explains how and why race matters to the very concept of who ‘merits’ admission.”[[266]](#footnote-266) For Justice Jackson, it is the ability to address racial injustices that is at stake in losing affirmative action. Justice Sotomayor took a seemingly safer approach, confining herself more closely to the diversity framework but recharging it with egalitarian ideals. In the concluding paragraph of her opinion, she addressed the public, writing:

Notwithstanding this Court’s actions . . . society’s progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society’s needs for diversity in education. Despite the Court’s unjustified exercise of power, the opinion today will serve only to highlight the Court’s own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, “the arc of the moral universe” will bend toward racial justice despite the Court’s efforts today to impede its progress. Martin Luther King “Our God is Marching On!” Speech (Mar 25, 1965).[[267]](#footnote-267)

In this remarkable passage, Justice Sotomayor calls on universities and other institutions to continue to pursue diversity not because it is good for the educational process, better prepares students for the workforce, or promotes the creation of knowledge, but because it is a matter of racial justice. *Why?* First, by subjecting the plea for racial diversity to other benefits that must be proved, diversity is not only morally minimized, but it also becomes contingent on the ability of such studies to prove that diversity has compelling benefits.[[268]](#footnote-268) What happens if scholars try to prove the opposite – that racial homogeneity has some utilitarian benefits? Second, affirmative action is one of the few institutional responses to racial injustice. Therefore, the way universities, public officials, business, civil-society organizations, professionals, and courts define their commitment to these efforts is important for both law and politics. Despite the continued influence of race on educational opportunities, the utilitarian paradigm hinders the public’s ability to acknowledge this reality fully. Overlooking historical and current racial inequalities and their significance today enables individuals and institutions to disregard how much race still matters. Therefore, universities and other advocates of affirmative action should consider ceasing to operate on autopilot mode as they embrace a purely utilitarian and market-driven approach to diversity. With additional challenges to race-conscious but race-neutral admission policies anticipated,[[269]](#footnote-269) universities and other advocates of affirmative action cannot risk discarding diversity altogether. Instead, they should follow Justice Sotomayor’s lead and reinfuse the diversity framework with egalitarian meanings that can, over time, change the terms of debate over racial inequality in America, first on campuses in the public sphere, and then, perhaps one day, in the courtroom.

# Concluding Thoughts

With the composition of the Court unlikely to shift in the near future, it might take decades before race-conscious affirmative action admission programs may be viable in Court. Scholars are devoting significant attention to examining alternative facially race-neutral methods to foster racial diversity. These efforts are worthwhile. But unless we also focus on the long-term struggle over public opinion on affirmative action, universities and other public and private institutions might eventually decline to employ these and other strategies to bolster diversity. Responding to the *SFFA* ruling, President Biden declared:

While the Court can render a decision, it cannot change what America stands for. America is an idea — an idea unique in the world. An idea of hope and opportunity, of possibilities, of giving everyone a fair shot, of leaving no one behind. We have never fully lived up to it, but we’ve never walked away from it either. We will not walk away from it now.[[270]](#footnote-270)

Departing from any recent acceptable language about affirmative action, including that used by his own administration in their amicus brief, President Biden is reminding Americans that affirmative action is part of a long American tradition of fighting for equal opportunity; and he is reminding universities of their commitment to it. This statement, together with the inspiring visions offered by the *SFFA* dissenters closely linking affirmative action to its remedial roots in the civil rights era, seems like a promising start. It is now time for universities and other advocates of affirmative action to restate their diversity missions in similar terms in and outside the courtroom.

1. \* Ofra Bloch is an assistant professor at Tel-Aviv University Faculty of Law. I want to thank Reva Siegel . Vered; RA – Livia; Yahel; Sara. Funding Safra [↑](#footnote-ref-1)
2. Students for Fair Admissions v. Harvard, 600 U.S. \_\_\_ (2023). For a comprehensive account of the ruling, *see infra* Part \_\_\_. [↑](#footnote-ref-2)
3. The last time the justices openly discussed and disagreed on the question of which interests should count as compelling enough for allowing race-conscious affirmative action in higher education was in Regents of the University of California v. Bakke, 438 U.S. 265, 314 (1978); For an account of the ruling in Bakk, *see infra* Part \_\_. [↑](#footnote-ref-3)
4. *See* *Bakke*, 438 U.S. 265. [↑](#footnote-ref-4)
5. 539 U.S. 244 (2003). [↑](#footnote-ref-5)
6. Grutter v. Bollinger, 539 U.S. 306 (2003). [↑](#footnote-ref-6)
7. The case was litigated twice. First as: Fisher v. University of Texas at Austin (*Fisher I*), 570 U.S. 297 (2013), when the case was reamended; And second as: Fisher v. University of Texas (*Fisher II*), 579 U.S. 365 (2016). [↑](#footnote-ref-7)
8. Students for Fair Admissions v. Harvard, 600 U.S. \_\_\_ (2023). [↑](#footnote-ref-8)
9. *See* Gabriella Borter, *Most Americans think college admissions should not consider race -Reuters/Ipsos poll*, Reuters (Feb. 16, 2023), <https://www.reuters.com/world/us/most-americans-think-college-admissions-should-not-consider-race-reutersipsos-2023-02-15/> (“*Sixty-two* percent of Americans say race and ethnicity should not be considered at all in college admissions… The public opinion poll, which surveyed 4,408 adults from Feb. 6-13, found that 73% of Republicans and 46% of Democrats said they were against race-conscious admissions.”); *see also* Nick Anderson et al., *Over 6 in 10 Americans favor leaving race out of college admissions, Post-Schar School poll finds*, Wash. Post (Oct. 22, 2022 ), <https://www.washingtonpost.com/education/2022/10/22/race-college-admissions-poll-results/> (according to this poll 63% of Americans would support the Court banning colleges from considering race and ethnicity in admission decisions); John Gramlich, *Americans and affirmative action: How the public sees the consideration of race in college admissions, hiring*, Pew Research Center (Jun. 16, 2023), <https://www.pewresearch.org/short-reads/2023/06/16/americans-and-affirmative-action-how-the-public-sees-the-consideration-of-race-in-college-admissions-hiring/> (“In a survey conducted in spring 2023, *half* of U.S. adults said they disapprove of selective colleges and universities taking race and ethnicity into account in admissions decisions in order to increase racial and ethnic diversity. A third of adults approved of this, while 16% were not sure.”).

   Past surveys showed greater support of race-conscious affirmative action, *see* Thomas A. Johnson, *Survey Indicating Whites Favor Affirmative Action Is Questioned*, N.Y. Times (Feb. 21, 1979), https://www.nytimes.com/1979/02/21/archives/survey-indicating-whites-favor-affirmative-action-is-questioned.html?searchResultPosition=4 (“The survey. found that, “as long as there are no rigid quotas,” 71 to 21 percent of whites favored “special programs for college and graduate school admission.”). It is important to note, however, that public opinion about affirmative action is difficult to measure and is influenced by the survey’s wording. [↑](#footnote-ref-9)
10. For recent scholarship aiming to understand the broad implications of the Court’s ban of race-conscious admission policies in higher education beyond higher-education beyond higher education, *see e.g.,* Sonja B. Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76(1) Stan. L. Rev. (forthcoming Jan. 2024), (aiming to better understand the implications of the Court’s commitment to colorblindness on facially race-neutral strategies for promoting diversity); Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 Harv. L. Rev. 23, 135-167 (2022) (assessing the *SFFA* cases and the potential threat to disparate-impact that might follow frp, the colorblind approach); Jennifer Lee, *Asian Americans, affirmative action & the rise in anti-Asian hate*, 150(2) Dædalus 180-198 (2021) (writing on the relationship of racial discrimination towards Asian Americans and affirmative action with respect to the SFFA cases). More broadly, *see* *Series: Affirmative Action at a Crossroads*, The University of Chicago Law Review Online, <https://lawreviewblog.uchicago.edu/2020/10/30/aa-series/> (last visited Aug. 7, 2023) (a series of short essays dedicated to the current crossroad of affirmative action).

    For literature aiming to assess how a ban on affirmative action might affect student body diversity, *see e.g.,* Mark C. Long & Nicole A. Bateman, *Long-run changes in underrepresentation after affirmative action bans in public universities*, 42(2) Educ. Eval. Policy Anal.188-207 (2020).‏ [↑](#footnote-ref-10)
11. *See e.g.,* Meera E. Deo, *The end of affirmative action*, 100 N.C. L. Rev. 237 (2021); Glenn Ellison & Parag A. Pathak, *The efficiency of race-neutral alternatives to race-based affirmative action: Evidence from Chicago’s exam schools*, 111(3) Am. Econ. Rev. 943-975 (2021)‏ (suggesting how affirmative action could look like after the end of affirmative action); Dominique J. Baker, *Pathways to Racial Equity in Higher Education: Modeling the Antecedents of State Affirmative Action Bans*, 56(5) Am. Educ. Res. J.1861–1895 (2019). For somewhat less recent responses to the demise of race based affirmative action, *see* Sheryll Cashin, Place, Not Race: A New Vision of Opportunity in America (2014) (considering the place-based alternative for affirmative action); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL L. REV. 1037 (1996) (suggesting the use of class in affirmative action policies); Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049 (2017) (criticizing the turn to class-based affirmative action).

    For the connection between student diversity and challenges to legacy admissions, *see* Jeannie S. Gersen, *The End of Legacy Admissions Could Transform College Access*, The New Yorker (Aug. 8, 2023), <https://www.newyorker.com/news/daily-comment/the-end-of-legacy-admissions-could-transform-college-access>. [↑](#footnote-ref-11)
12. *See infra* Part \_\_\_. [↑](#footnote-ref-12)
13. *See infra* Part \_\_\_. [↑](#footnote-ref-13)
14. *See infra* Part \_\_\_. [↑](#footnote-ref-14)
15. *See e.g.,* Richard T. Ford, *Affirmative-Action Jurisprudence Reflects American Racial Animosity but Is Also Unhappy in Its Own Special Way*, U. Chi. L. Rev. Online 110 (2020) (Diversity… implicitly relies on the stronger, denied rationale of remedying societal discrimination. “Diversity” seems designed to let universities make timid steps to address racial injustice without ever having to talk about racism.); Walter B. Michaels, The Trouble with Diversity: How We Learned to Love Identity and Ignore Inequality 19-20 (2007) (arguing that the American obsession with racial diversity masks the "real problem" of socioeconomic inequality); Derrick Bell, *Diversity's Distractions*, 103 Colum. L. Rev. 1622, 1622 (2003) (showing diversity as a means to maintain admission opportunities for affluent and privileged students); Kenneth B. Nunn, *Diversity as a Dead-End,* 35 Pepp. L. Rev. 705, 723 (2008) (arguing that diversity enables individuals of color to be leveraged by the educational institution, ultimately serving the interests of white students and catering to their educational requirements). [↑](#footnote-ref-15)
16. *See infra* note \_\_\_. [↑](#footnote-ref-16)
17. For a detailed explanation of the methodology and sources used in this article, *see infra* Part I. [↑](#footnote-ref-17)
18. *See* *infra* section \_\_\_. [↑](#footnote-ref-18)
19. *see infra* Part \_\_. [↑](#footnote-ref-19)
20. *See infra* section \_\_\_ [↑](#footnote-ref-20)
21. See Nancy Leong, *Racial Capitalism*, 126 Harv. L. Rev. 2151, 2152 (2013) (Identifying this process “commodification of racial identity, thereby degrading that identity by reducing it to another thing to be bought and sold.”); *see also infra* Part \_\_\_.. [↑](#footnote-ref-21)
22. Students for Fair Admissions v. Harvard, No. 21-707, slip op. at 47 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting). For the complete account, see infra part \_\_. [↑](#footnote-ref-22)
23. For a discussion, see Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*¸ 98 CALIFORNIA LAW REVIEW 1319 (2010). [↑](#footnote-ref-23)
24. The amicus briefs in the SSFA case are full of such studies. Other examples include, Adam Chilton et al, *Assessing Affirmative Action's Diversity Rationale*, 122 Colum. L. REV. 331 (2022) (investigating whether the number citations to articles that a law review publishes change after it adopts a diversity policy). <https://www.statnews.com/2023/04/14/black-doctors-primary-care-life-expectancy-mortality/> (showing that black people in counties with more Black primary care physicians live longer). More generally about this argument, see *infra* part \_\_\_. [↑](#footnote-ref-24)
25. *Regents of the Univ. of Cal.* v. *Bakke,* 438 U.S. 265 (1978); [↑](#footnote-ref-25)
26. 539 U.S. 244 (2003). [↑](#footnote-ref-26)
27. 539 U.S. 306 (2003). [↑](#footnote-ref-27)
28. *Fisher* v. *University of Texas,* 570 U.S. 297 (2013); *Fisher* v. *University of Texas,* 579 U.S. 365 (2016); [↑](#footnote-ref-28)
29. *Students for Fair Admissions* v. *Harvard*, 600 U.S. \_\_\_ (2023); *Students for Fair Admissions* v. *University of North Carolina,* 600 U.S. \_\_\_ (2023). [↑](#footnote-ref-29)
30. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). [↑](#footnote-ref-30)
31. See *infra* part \_\_\_ [↑](#footnote-ref-31)
32. *See* Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 374 (2007) (proposing a model of “democratic constitutionalism” to analyze the understandings and practices by which constitutional rights have historically been established); Larry D. Kramer, *The Supreme Court, 2000 Term-Foreword: We the Court*, 115 Harv. L. REV. 5, 6-10 (2001) (comparing the concept of judicial supremacy against the concept of popular constitutionalism). For further review in the field, *see* Robert M. Cover, *The Supreme Court, 1982 Term. Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 4-5 (1983) (describing how legal meaning is created, emphasizing that it does not require formal lawmaking). [↑](#footnote-ref-32)
33. Joseph D. Kearney & Thomas W. Merrill, *Influence of amicus curiae briefs on the supreme court*, 148 U. Pa. L. Rev. 743 (1999).‏ (Arguing that the justices will incorporate language from amicus briefs into their opinions based on the extent to which the amicus briefs contribute to their ability to make effective law and policy). More generally, see Bruce J. Ennis, *Effective amicus briefs*, 33 Cath. UL Rev. 603 (1983); Paul M. Collins Jr. et al., *The Influence of Amicus Curiae Briefs on US Supreme Court Opinion Content*, 49 *Law & Soc. Rev.* 917 (2015) (examining the ways amicus curiae briefs effect judicial opinion). [↑](#footnote-ref-33)
34. *See e.g.,* Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents at 9-10, Fisher v. University of Texas, 570 U.S. 297 (2013) (No. 11-345), and it’s influence on the majority opinion by Justice O’Connor; *See also* Sylvia H. Walbolt & Joseph H. Lang Jr., *Amicus Briefs Revisited*, 33 Stetson L. Rev. 171, 180 (2003) (“explaining that this amicus brief achieved its purpose of persuading the Court to consider important national ramifications outside the narrow scope of one university's admissions procedures.”); *see* Bruce J. Ennis. [↑](#footnote-ref-34)
35. Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 Fla. St. U.L. Rev. 315 (2008) (arguing for the importance of amicus participation in a democratic system). [↑](#footnote-ref-35)
36. Paul M. Collins, Jr., *The use of amicus briefs*, 14 Annu. Rev. Law Soc. Sci.219, 220-21 (2018). [↑](#footnote-ref-36)
37. Michael Evans et al., *Recounting the courts? Applying automated content analysis to enhance empirical legal research*, 4(4) J. Empirical Legal Stud. 1007, 1021 (2007). [↑](#footnote-ref-37)
38. For a review of this method, *see* Martin Hrabálek & Vladimir Đorđević, *The “Heretic” debate on European asylum quotas in the Czech Republic: A content analysis*, 19(4) Kontakt e296-e303 (2017). [↑](#footnote-ref-38)
39. Laurence Anthony, AntConc [Computer software], *Laurence Anthony’s Website*, Center for English Language Education in Science & Engineering, School of Science and Engineering, Waseda University (2022), <https://laurenceanthony.net/software.html> [hereinafter: AntConc]. [↑](#footnote-ref-39)
40. *See* Douglas Biber, Ulla Connor, & Thomas A. Upton, Discourse on the Move: Using Corpus Analysis to Describe Discourse Structure (John Benjamin, Amsterdam, 2007). [↑](#footnote-ref-40)
41. *See* Mike Scott, WordSmith Tools Manual (6th ed., Liverpool: Lexical Analysis Software Ltd. 2011); *See also* Eyal Rabin, Vered Silber-Varod, Yoram M. Kalman & Marco Kalz, *Identifying learning activity sequences that are associated with high intention-fulfillment in MOOCs*, *in* European Conference on Technology Enhanced Learning 224, 228 (Cham: Springer International, 2019) (“The statistical significance of keyness is calculated by using the value of log likelihood and the size of the differences is calculated by effect size”). [↑](#footnote-ref-41)
42. Xu Lihang et al., *Collocates*, AntConc Manual (2018), <https://antconc-manual.readthedocs.io/en/latest/collocates.html>. [↑](#footnote-ref-42)
43. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). [↑](#footnote-ref-43)
44. *Id.* at 287, 320. [↑](#footnote-ref-44)
45. *Id* at 307. [↑](#footnote-ref-45)
46. *Id.* [↑](#footnote-ref-46)
47. See Hugh Davis Graham, *The origins of affirmative action: Civil rights and the regulatory state*, 523 The Ann’ of the American Academy of Pol. and Soc. S. 1, 50-62 (1992). [↑](#footnote-ref-47)
48. Richard A. Posner, *The Bakke Case and the Future of “Affirmative Action,”* 67 Calif. L. Rev. 171, 178- 80 (1979) (asserting that according to Justice Powell, remedial actions should only rely on legislative determinations of previous unlawful discrimination). [↑](#footnote-ref-48)
49. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-314 (1978). [↑](#footnote-ref-49)
50. David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 Va. J. Soc. Pol’y & L. 158, 174 (2018).‏ [↑](#footnote-ref-50)
51. *Id.* at 169 (referring to Defunis v. Odegaard, 416 U.S. 312 (1974)). [↑](#footnote-ref-51)
52. Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. Rev. 1613, 1624 (2007) (explaining how Powell’s articulation of diversity was rooted in the unique mission of the university as an educational institution). [↑](#footnote-ref-52)
53. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978). [↑](#footnote-ref-53)
54. *Id*. at 312-13. [↑](#footnote-ref-54)
55. *Id.* at314. [↑](#footnote-ref-55)
56. *Id.* at 315. [↑](#footnote-ref-56)
57. John C. Jeffries, Jr., *Bakke Revisited*, 2003 Sup. Ct. Rev. 1, 7 (2003). [↑](#footnote-ref-57)
58. Brown v. Bd. Of Ed., 347 U.S. 483 (1954). [↑](#footnote-ref-58)
59. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396-400 (1978)

    . [↑](#footnote-ref-59)
60. As I will discuss later, it was recently brought back to life by Justice Sotomayor in the SFFA case, *see* *generally* Students for Fair Admissions v. Harvard, 600 U.S. 9, 140-208 (2023) (6-2 decision) (Sotomayor, J., dissenting). [↑](#footnote-ref-60)
61. *See* Sanford Levinson, Wrestling with Diversity 16 )Duke Univ. Press, 2003(; *see also* Asad Rahim, *Diversity to deradicalize*, 108(5) Cal. L. Rev. 1423, 1457 (2020).‏ [↑](#footnote-ref-61)
62. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 511 (1989). [↑](#footnote-ref-62)
63. *Id.* [↑](#footnote-ref-63)
64. Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F.L. Rev. 757, 767-8 (1997); *See also* Ronald Dworkin, *The Bakke Decision: Did It Decide Anything?*, 25(13) New York Rev. Books 20, 21-25 (1978). (Diversity “*does not supply a sound intellectual foundation for the compromise the public found so attractive.*”) [↑](#footnote-ref-64)
65. Derrick A. Bell, Jr., *Introduction: Awakening after Bakke*, 14 Harv. C.R.-C.L. L. Rev. 1, 5 (1979) (“[P]ost-Bakke minorities must rely on the interest of schools in exercising their discretion to admit a small number of minority students whose numbers will be dictated by the school’s interest in diversity, rather than on either the magnitude of past racial wrongs or on the minority students’ potential for future achievement.”). [↑](#footnote-ref-65)
66. For my previous work on the subject, *See* Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry into the Evolving Meaning of Diversity from Bakke to Fisher*, 20 U. Pa. J. Const. L. 1145 (2017). [↑](#footnote-ref-66)
67. Gratz v. Bollinger, 539 U.S. 244 (2003). [↑](#footnote-ref-67)
68. Grutter v. Bollinger, 539 U.S. 306 (2003). [↑](#footnote-ref-68)
69. 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-69)
70. *See* *Grutter*, 539 U.S. at 337 (“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*, 539 U.S. at 271-72)). [↑](#footnote-ref-70)
71. Gratz, 539 U.S. 244; *Grutter*, 539 U.S. 306. [↑](#footnote-ref-71)
72. *Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)*, Supreme Court of the United States, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/02-241.htm (last visited Aug. 7, 2023); *Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/02-516.htm> (last visited Aug. 7, 2023). There were forty-five overlapping amicus briefs, thus the data set for these cases together, include 45 amicus briefs. [↑](#footnote-ref-72)
73. Regents of the University of California v. Bakke, 438 U.S. 265, 310-12 (1978). [↑](#footnote-ref-73)
74. Earl M. Maltz, *Ignoring the Real World: Justice O'Connor and Affirmative Action in Education*, 57 Cath. U. L. Rev. 1045, 1047 (2008). [↑](#footnote-ref-74)
75. *See Id.* at 1048; *see also* Sanford Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 577 (2000) (“[B]ecause of Justice Powell's emphasis on the almost unique legitimacy of 'diversity' as a constitutional value, it has become the catchword-indeed, it would not be an exaggeration to say 'mantra'-of those defending the use of racial or ethnic preferences.”); *see also* *supra* note 116. (“In the years since Bakke, elite universities have become ever more committed to the goal of achieving a racially diverse student body.”). [↑](#footnote-ref-75)
76. Kristin M. McGaver, *Getting Back to Basics: Recognizing and Understanding the Swing Voter on the Supreme Court of the United States*, 101 Minn. L. Rev. 1247, 1275-76 (2017). [↑](#footnote-ref-76)
77. Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (O'Connor, J., concurring) (Justice O'Connor was part of the five Justices who ruled that the affirmative action provision under consideration was unconstitutional, but held diversity to be a compelling interest). [↑](#footnote-ref-77)
78. *See* City of Richmond v. JA. Croson Co. 488 U.S. 469, 505-06 (1989) (In Croson Justice O’Connor joined the majority reiterating the view that race-conscious measures were to be subject to strict-scrutiny and made it very hard to for race-conscious programs to survive such constitutional review. Nonetheless, her language suggested that she shares “the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement” but is suspicious of race-classification). [↑](#footnote-ref-78)
79. 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-79)
80. 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 v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-80)
81. *supra* note 65, at 1165. [↑](#footnote-ref-81)
82. This specific analysis was done by using the KWIC tool, AntConc. [↑](#footnote-ref-82)
83. *See* Brief for Respondents at 12, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241); *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-83)
84. Brief for Respondents at 33, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-84)
85. Brief Amicus Curiae of the Black Women Lawyers Association of Greater Chicago, Inc., in Support of Respondents at 14, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516). [↑](#footnote-ref-85)
86. Brief for the United Negro College Fund and Kappa Alpha PSI as Amici Curiae in Support of Respondents at 8, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-86)
87. Amicus Curiae Brief of Northeastern University Supporting the Respondents at 3, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516). [↑](#footnote-ref-87)
88. Brief of Amici Curiae National School Boards Association, et al., in Support of Respondents at 8, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-88)
89. Brief of Latino Organizations as Amici Curiae in Support of Respondents at 23, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-89)
90. Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents at 7, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241); For more examples, focusing specifically on the academic amici, *see* *supra* note 65, at 1170-1172. [↑](#footnote-ref-90)
91. *See* ???, *supra* note \_\_\_. [↑](#footnote-ref-91)
92. Brief for the United States as Amicus Curiae Supporting Petitioner at 5, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-92)
93. *Id.* at 7. [↑](#footnote-ref-93)
94. *See e.g.*, Brief of King County Bar Association as Amicus Curiae in Support of Respondents. [↑](#footnote-ref-94)
95. Brief of Members of the United States Congress as Amici Curiae in Support of Respondents at 20, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-95)
96. Brief of Representative Richard A. Gephardt et al. as Amici Curiae Supporting Respondents at 3, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-96)
97. Brief of Harvard University as Amici Curiae Supporting Respondents at 3, 12, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241); For a broad account of the academic amici, *see* *supra* note 65, at 1183-86. [↑](#footnote-ref-97)
98. Brief of John Conyers, Jr., Member of Congress et al. as Amici Curiae in Support of Respondents at 11, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-98)
99. All within the 30th most likely words to appear in the briefs. The word “inventors” was also rather likely to appear, but this was the only word that could be identified as utilitarian in the top one-hundred words likely to appear in comparison to the other two groups of amicus briefs of Fisher and SFFA cases. This specific analysis was done by using the Keyness tool, *see* Laurence Anthony, AntConc. [↑](#footnote-ref-99)
100. This specific analysis was done by using the Collocates tool, AntConc. For an elaborate discussion of these findings, *see* *infra* part II.E [↑](#footnote-ref-100)
101. Neal Devins, *Explaining Grutter v. Bollinger*, 152(1) U. Pa. L. Rev. 347, 381 (2003). [↑](#footnote-ref-101)
102. *Id.* at 330. [↑](#footnote-ref-102)
103. *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-103)
104. *Id.* [↑](#footnote-ref-104)
105. *Id.* [↑](#footnote-ref-105)
106. *Id.* (quoting Appendix to Petition for Certiorari at 246a, 244a, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241)). [↑](#footnote-ref-106)
107. Grutter v. Bollinger*,* 539 U.S. 306, 331 (2003) (O'Connor, J. majority). [↑](#footnote-ref-107)
108. *Id.* [↑](#footnote-ref-108)
109. Citing us *Id.* (citing Brief for the United States as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-109)
110. *Id.* at 332 (citing Brief for the United States as Amicus Curiae Supporting Petitioner at 13, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241)). [↑](#footnote-ref-110)
111. *Id.* at 332. [↑](#footnote-ref-111)
112. *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-112)
113. *Id.* at 332. [↑](#footnote-ref-113)
114. Jack Greenberg, *Diversity, the university, and the world outside*, 103(6) Colum. L. Rev. 1610, 1611 (2003). [↑](#footnote-ref-114)
115. *Id.* at 1621. [↑](#footnote-ref-115)
116. Grutter *v.* Bollinger, 539 U.S. 306, 343 (2003). [↑](#footnote-ref-116)
117. Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 64 (2003). (“Grutter's requirement that affirmative action programs be temporary… remains committed to affirmative action programs primarily for remedial reasons… The implicit logic of remedy actually pervades much of the rhetoric of Grutter.”). [↑](#footnote-ref-117)
118. Fisher v. University of Texas, 570 U.S. 297 (2013). [↑](#footnote-ref-118)
119. *Id.* at 302. [↑](#footnote-ref-119)
120. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217 (5th Cir. 2011), *vacated*, 570 U.S. 297 (2013). [↑](#footnote-ref-120)
121. Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107(2) Nw. L. Rev. Colloquy 74 (2012); 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-121)
122. Grutter v. Bollinger, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting). [↑](#footnote-ref-122)
123. Heather Gerken, *Justice Kennedy and the domains of Equal Protection*, 13 Harv. L. Rev. 104, 117 (2007) (“Perhaps he objected to Justice O’Connor’s argument in *Grutter* because it—arguably unlike Powell’s in *Bakke*—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-123)
124. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007). [↑](#footnote-ref-124)
125. Id. at 797. [↑](#footnote-ref-125)
126. Reva B. Siegel, *From Colorblindness to Antibalkanization an Emerging Ground of Decision in Race Equality Cases*, 120 Yale L.J. 1278, 1294 (2011). [↑](#footnote-ref-126)
127. *Supra* note 65, at 1181-89. [↑](#footnote-ref-127)
128. *Id.* [↑](#footnote-ref-128)
129. David B. Wilkins, *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, 117(5) Harv. L. Rev. 1548-1615 (2004) (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-129)
130. *Supra* note 65, at 1183. [↑](#footnote-ref-130)
131. *Id.* at 1184. [↑](#footnote-ref-131)
132. 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 of Amici Curiae Emory Outlaw and Emory Latin American Law Students Association in Support of Respondents, Fisher v. University of Texas, 570 U.S. 297 (2013) (No. 11-345), 2 (“Diversity in the classroom is a compelling government interest because it is essential to good pedagogy. Diversity increases the number of perspectives available to students by bringing together students with very different life experiences. It prepares students to effectively contribute to an increasingly diverse and globalized workforce”); Brief of National Women's Law Center, et al., as Amici Curiae in Support of Respondents, Fisher v. University of Texas, 570 U.S. 297 (2013) (No. 11-345) (each section of their brief is dedicated to another utilitarian benefit of diversity).; Brief of the American Association for Affirmative Action as Amicus Curiae in Support of Respondents, Fisher v. University of Texas, 570 U.S. 297 (2013) (No. 11-345) 15 (“Texas also has a compelling interest in the economic benefits that flow from diversity on campus.”). This specific analysis was done by using the KWIC tool, AntConc. [↑](#footnote-ref-132)
133. Fisher v. University of Texas, 570 U.S. 297 (2013). [↑](#footnote-ref-133)
134. *Id.* at 306. [↑](#footnote-ref-134)
135. *Id.* at 304. [↑](#footnote-ref-135)
136. *See e.g.,* *Id* at 297. [↑](#footnote-ref-136)
137. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 637 (5th Cir. 2014). [↑](#footnote-ref-137)
138. Brief for Petitioner, Fisher v. University of Texas, 579 U.S. 365 (2016) (No. 14-981). [↑](#footnote-ref-138)
139. These numbers are taken from the Supreme Court records, *see* *No. 14-981 Fisher v. University of Texas*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-981.htm> (last visited Aug. 07, 2023). The total of amicus brief submitted in both cases combined was 183. [↑](#footnote-ref-139)
140. *Supra* note 65, at 1191. [↑](#footnote-ref-140)
141. This specific analysis was done by using the keyness tool, *see* Laurence Anthony, AntConc. [↑](#footnote-ref-141)
142. This specific analysis was done by using the Collocates tool, AntConc. For an elaborate discussion of these findings, see *infra* part II.E. [↑](#footnote-ref-142)
143. Fisher v. University of Texas, 579 U.S. 365, 377 (2016). [↑](#footnote-ref-143)
144. See Richard T. Ford, *Did the Supreme Court Just Admit Affirmative Action is About Racial Justice?*, VOX (Jul. 5, 2016, 12:02 PM), http://www.vox.com/2016/7/5/12085412/-supreme-court-aflirmativeaction- decision-racial-justice-lisher-abigail-diversity. [↑](#footnote-ref-144)
145. Fisher v. University of Texas, 579 U.S. 365, 401 (2016). [↑](#footnote-ref-145)
146. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 6 (U.S. Jun. 29, 2023) (Roberts, J., majority). [↑](#footnote-ref-146)
147. *Id*. [↑](#footnote-ref-147)
148. Brief for Petitioner at 23, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-148)
149. Students for Fair Admissions v. Harvard, 980 F.3d 157 (1st Cir. 2020); Students for Fair Admissions v. Univ. of N. Carolina, 567 F. Supp. 3d 580 (M.D.N.C. 2021). [↑](#footnote-ref-149)
150. Amy Howe, *Court will hear challenges to affirmative action at Harvard and University of North Carolina*, ScotusBlog (Jan. 24, 2022, 11:44 AM), <https://www.scotusblog.com/2022/01/court-will-hear-challenges-to-affirmative-action-at-harvard-and-university-of-north-carolina/> (“The composition of the court has changed significantly since then: […] Kennedy retired in 2018 and was replaced by Justice Brett Kavanaugh, while Justice Amy Coney Barrett succeeded Ginsburg, who died in 2020. It was therefore a much more conservative court that considered the latest petitions asking the justices to revisit the issue.”) [↑](#footnote-ref-150)
151. John Kroger, *The End of Affirmative Action: The legal context and likely impact of the coming ruling*, Inside Higher Ed. (Oct. 30, 2022), <https://www.insidehighered.com/blogs/leadership-higher-education/end-affirmative-action> (“Even if Roberts gets only two of these three votes, affirmative action will be a thing of the past in higher education admissions”). [↑](#footnote-ref-151)
152. Greg Stohr, *Harvard Race Case Punctuates Supreme Court’s Turn to Right*, Bloomberg News (Jan. 24, 2022, 2:48 PM), <https://www.bloomberg.com/news/articles/2022-01-24/harvard-race-case-punctuates-supreme-court-s-sharp-turn-to-right?sref=qZlN2rKN#xj4y7vzkg>; *see also* Jonathan P. Feingold, *Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action*, 58 Harv. C.R.-C.L. L. Rev. 143, 146 (2023); Asees Bhasin & Gregory Curfman, *Gutting Grutter: The Effect of the Loss of Affirmative Action on Diversity among Physicians*, 20 Ind. Health L. Rev. 1 (2023); *see also* Stephanie Saul, *If Affirmative Action Ends, College Admissions May Be Changed Forever*, N.Y. Times (Jan. 15, 2023), https://www.nytimes.com/2023/01/15/us/affirmative-action-admissions-scotus.html. [↑](#footnote-ref-152)
153. *See* Order in Pending Cases, 600 U.S. (2023) (No. 20-1199 & 21-707); The Court decided to hear the cases separately to allow Justice Ketanji Brown Jackson to participate in the UNC case, while recusing herself from the Harvard case. [↑](#footnote-ref-153)
154. Rostron, *supra* note120*.* [↑](#footnote-ref-154)
155. Brief for Petitioner at 47, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). (“Because Brown is our law, Grutter cannot be. Just as Brown overruled Plessy’s deviation from our “colorblind” Constitution,. . . this Court should overrule Grutter’s.”) [↑](#footnote-ref-155)
156. Brief for Respondent at 23, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-156)
157. Brief by University Respondents at 27, Students for Fair Admissions v. UNC 600 U.S. \_\_\_ (2023) (No. 21-707). For a brief dedicated to the remedial history of the Fourteenth Amendment, *see* Brief of Professors of History and Law as Amici Curiae in Support of Respondents at 2, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-157)
158. Brief for Respondent at 1, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-158)
159. *Id.* at 2. [↑](#footnote-ref-159)
160. Brief by University Respondents at 1, Students for Fair Admissions v. UNC 600 U.S. \_\_\_ (2023) (No. 21-707). [↑](#footnote-ref-160)
161. *Id.* at 7. [↑](#footnote-ref-161)
162. *Id.* [↑](#footnote-ref-162)
163. Brief of Amherst, et al., at 3, 5-1, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-163)
164. Brief amici curiae of Massachusetts Institute of Technology, et al., at 11, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-164)
165. Brief for Amici Curiae Association of American Medical Colleges et al. in Support of Respondents at 3-4, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-165)
166. Brief amici curiaefor Massachusetts Institute of Technology, et al., at 28, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-166)
167. *See e.g.,* Brief amici curiae of American Educational Research Association, et al. as Amici Curiae in Support of Respondents at 10, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199) (“Student Body Diversity Leads to Educational Benefits such as Improvements in Cognitive Abilities, Critical Thinking, and Self-Confidence”); Brief of Amici Curiae Deborah Cohen & 67 other Professors in Support of Respondents at 9, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199) (“Scholarly research supports the conclusion that all students benefit from racial and ethnic diversity on college campuses and demonstrates that those benefits outlast a student’s time on a college campus and have proven positive impacts on American business and our society”); Brief Amicus Curiae of the University of Michigan in Support of Respondents at 7–8, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199) (“exchange of ideas and viewpoints “is livelier, more spirited, and simply more enlightening and interesting when students have the greatest possible variety of backgrounds”); Brief Amici Curiae of the American Council on Education & 39 Other Higher Education Groups at 14, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199) (“Student diversity, including racial and ethnic diversity, improves learning outcomes and promotes academic success.”) [↑](#footnote-ref-167)
168. Brief amicus curiae of United States Supporting Respondents at 12, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199) (“the Nation’s military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse-and who have been educated in diverse environments that prepare them to lead increasingly diverse forces”> [↑](#footnote-ref-168)
169. *Id.* at 13. [↑](#footnote-ref-169)
170. *Id.*  [↑](#footnote-ref-170)
171. *Id.* at 19. [↑](#footnote-ref-171)
172. *See e.g.* Brief of Southern Governors as Amici Curiae in Support of Respondents at 6, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199) (“Students learn to accept and appreciate traditions and backgrounds different than their own. By broadening their horizons in this way, students become better prepared to join the workforce of the world economy.”); Brief amici curiae of Adm. Charles S. Abbot, et al., in Support of Respondents at 2, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199) (Thirty-five top former military leaders write that “[t])he importance of maintaining a diverse, highly qualified officer corps has been beyond legitimate dispute for decades. History has shown that placing a diverse Armed Forces under the command of homogenous leadership is a recipe for internal resentment, discord, and violence. By contrast, units that are diverse across all levels are more cohesive, collaborative, and effective.”). [↑](#footnote-ref-172)
173. Brief for Amici Curiae Applied Materials, Inc., et al., in Support of Respondents at 3-4, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-173)
174. Brief for Amicus Curiae HR Policy Association in Support of Respondents at 4, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-174)
175. Brief amici curiae of Major American Business Enterprises as Amici Curiae Supporting Respondents at 1, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-175)
176. Brief amici curiae of Black Women Law Scholars in Support of Respondents at 22-23, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-176)
177. *Id.* at 23-24. [↑](#footnote-ref-177)
178. Brief of the Washington Bar Association & the Women’s Bar Association of the District of Columbia as Amici Curiae in Support of Respondents at 2–3, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-178)
179. Brief of Amici Curiae 25 Harvard Student and Alumni Organizations in Support of Respondent President and Fellows of Harvard College, at 45, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-179)
180. *See* Brief amici curiae of HBCU Leaders and National Association for Equal Opportunity in Higher Education at in Support of Respondents 22, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199). [↑](#footnote-ref-180)
181. Rank and numbers [עפרה צריכה להשלים] [↑](#footnote-ref-181)
182. This specific analysis was done by using the Collocates tool, AntConc. For an elaborate discussion of these findings, see *infra* part II.E. [↑](#footnote-ref-182)
183. *See* *supra* part II.A. [↑](#footnote-ref-183)
184. *See supra* part II.B.1 [↑](#footnote-ref-184)
185. *See supra* Part II.B.2 [↑](#footnote-ref-185)
186. *See supra* part II.C. [↑](#footnote-ref-186)
187. *See Supra* Part II.D. [↑](#footnote-ref-187)
188. Anthony, L. (2022). AntConc (Version 4.2.0) [Computer Software]. Tokyo, Japan: Waseda University. Available at https://www.laurenceanthony.net/software [↑](#footnote-ref-188)
189. *See e.g,* German Lopez, *The End of Affirmative Action*, N.Y. Times (Jun. 30, 2023), <https://www.nytimes.com/2023/06/30/briefing/affirmative-action-supreme-court-decision.html>; Jelani Cobb, *The End of Affirmative Action*, The New Yorker (Jun. 29, 2023), <https://www.newyorker.com/magazine/2023/07/10/the-end-of-affirmative-action>. Also *see supra* note \_\_. [↑](#footnote-ref-189)
190. Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199), Justice Ketanji Brown Jackson recused herself from taking part in the Harvard case due to her previous role as a member of Harvard’s Board of Overseers while the case was in progress in lower federal courts. However, she joined the dissenting opinion concerning the companion case involving UNC. Jackson wrote a separate dissent about the UNC case, joined by Sotomayor and Kagan. [↑](#footnote-ref-190)
191. Students for Fair Admissions v. Harvard, No. 21-707, slip op. at 15 (U.S. Jun. 29, 2023) (Jackson, J., dissenting). [↑](#footnote-ref-191)
192. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 40 (U.S. Jun. 29, 2023) (Roberts, J., majority). (he explained that “[a] benefit to a student who overcame racial discrimination, for example, must be tied to that student’s courage and determination”). [↑](#footnote-ref-192)
193. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 3 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting). [↑](#footnote-ref-193)
194. Students for Fair Admissions v. Harvard, No. 21-707, slip op. at 2 (U.S. Jun. 29, 2023) (Jackson, J., dissenting). [↑](#footnote-ref-194)
195. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 15 (U.S. Jun. 29, 2023) (Roberts, J., majority). [↑](#footnote-ref-195)
196. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 19-20 (U.S. Jun. 29, 2023) (Roberts, J., majority), in footnote 4 of his opinion, Roberts wrote that the decision does not address “the potentially distinct interests that military academies may present” and actually exempts the military academies from this ruling. [↑](#footnote-ref-196)
197. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 38 (U.S. Jun. 29, 2023) (Roberts, J., majority). [↑](#footnote-ref-197)
198. *Id.* [↑](#footnote-ref-198)
199. *Id.* (“Separate but equal is “inherently unequal,” said Brown. 347 U. S., at 495 (emphasis added). It depends, says the dissent.”) [↑](#footnote-ref-199)
200. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 22 (U.S. Jun. 29, 2023) (Thomas, J., concurring).

     *Id.* [↑](#footnote-ref-200)
201. Jack M. Balkin & Reva B. Siegel, *The American civil rights tradition: Anticlassification or Antisubordination*, 2(1) Issues Leg. Scholarsh. (2003). [↑](#footnote-ref-201)
202. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 17 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting). [↑](#footnote-ref-202)
203. *Id.* [↑](#footnote-ref-203)
204. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976); *see also* Balkin & Siegel, *supra* note 200. [↑](#footnote-ref-204)
205. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 22 (U.S. Jun. 29, 2023) (Roberts, J., majority). [↑](#footnote-ref-205)
206. *Id.* at 23. [↑](#footnote-ref-206)
207. *Id.* [↑](#footnote-ref-207)
208. *Id.* [↑](#footnote-ref-208)
209. *Id.* [↑](#footnote-ref-209)
210. *Id.* [↑](#footnote-ref-210)
211. *Id.* at 24. [↑](#footnote-ref-211)
212. *Id.* at 26 [↑](#footnote-ref-212)
213. *Id.* at 30. [↑](#footnote-ref-213)
214. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 36 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting((“There is no better evidence that the Court is overruling the Court’s precedents than those precedents themselves.”). [↑](#footnote-ref-214)
215. *Id.* at 42-43. [↑](#footnote-ref-215)
216. *Id.* at 43. [↑](#footnote-ref-216)
217. *See* Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 2 (U.S. Jun. 29, 2023) (Thomas, J., concurring); *see also*, id. at 51 ("The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”). [↑](#footnote-ref-217)
218. *Id.* at 23. [↑](#footnote-ref-218)
219. *Id.* at 24. [↑](#footnote-ref-219)
220. *Id.* [↑](#footnote-ref-220)
221. *Id.* [↑](#footnote-ref-221)
222. *Id.* at 25-26. [↑](#footnote-ref-222)
223. *Id.* at 26 (citing his concurrence in Fisher v. University of Texas, 570 U.S. 297, 320 (2013)). [↑](#footnote-ref-223)
224. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 1 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting). [↑](#footnote-ref-224)
225. *Id.* at 2. [↑](#footnote-ref-225)
226. *Id.* at 2. [↑](#footnote-ref-226)
227. *Id.* at 16. [↑](#footnote-ref-227)
228. *Id.* at 21-22. [↑](#footnote-ref-228)
229. *Id.* at 25. [↑](#footnote-ref-229)
230. *Id.* at 65-66 (“Dozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially di­verse college graduates to crucial professions.”). [↑](#footnote-ref-230)
231. *Id.* at 65. [↑](#footnote-ref-231)
232. *Id.* at 67. [↑](#footnote-ref-232)
233. *Id.* at 67. [↑](#footnote-ref-233)
234. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 1 (U.S. Jun. 29, 2023) (Jackson, J., dissenting). [↑](#footnote-ref-234)
235. *Id.* at 11. [↑](#footnote-ref-235)
236. *Id.* at 16. [↑](#footnote-ref-236)
237. *Id.* at 230. [↑](#footnote-ref-237)
238. *Id.* at 23 (citing from Brief for Amici Curiae Association of American Medical Colleges et al. in Support of Respondents, Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199)). Some of the statistical claims made in the amicus brief and then by Justice Jackson, were later refuted. *See* Ted Frank, *Justice Jackson’s Incredible Statistic*, WSJ (2023)<https://www.wsj.com/articles/justice-jacksons-incredible-statistic-black-newborns-doctors-math-flaw-mortality-4115ff62>. [↑](#footnote-ref-238)
239. *Id.* [↑](#footnote-ref-239)
240. *Id.* [↑](#footnote-ref-240)
241. *Id.* at 26. [↑](#footnote-ref-241)
242. *Id.* at 28. [↑](#footnote-ref-242)
243. *Id*. at 27 (establishing that “really matters is the creation of “pathways to upward mobility for long excluded and historically disempowered racial groups. Our Nation’s history more than justifies this course of action. And our present reality indisputably establishes that such programs are still needed.”). [↑](#footnote-ref-243)
244. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 36 (U.S. Jun. 29, 2023) (Roberts, J., majority). [↑](#footnote-ref-244)
245. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 30 (U.S. Jun. 29, 2023) (Thomas, J., concurring). [↑](#footnote-ref-245)
246. *Id.* at 30. [↑](#footnote-ref-246)
247. *See* minute 0:05 *in*, Harvard University, President-Elect Claudine Gay Message to the Community, YouTube (Jun. 29, 2023), <https://www.youtube.com/watch?v=AoGjh3tbPm4>. [↑](#footnote-ref-247)
248. *Id.* (minute 1:29). [↑](#footnote-ref-248)
249. See e.g. Letter from Peter Salovey, President of Yale University (Jun. 29, 2023) (<https://president.yale.edu/president/statements/supreme-court-decisions-regarding-admissions-higher-education>) (“t will take some time to fully consider the implications of the Court’s decisions and review our admissions policies in light of them. As we do this work, I write today to reaffirm Yale’s unwavering commitment to creating and sustaining a diverse and inclusive community. This principle is core to our mission of teaching aspiring leaders to serve all sectors of society and improving the world through research and scholarship, education, preservation, and practice.”); Letter from Robert A. Brown, President of Boston University (Jun. 29, 2023) (<https://www.bu.edu/marcom/html-emails/projects/president/supreme-court-decision/index.html>) (“The ruling limits powerful tools… Boston University is committed to inclusive excellence, built on a diverse student body. To the extent permitted by law, we will sustain this commitment.”) [↑](#footnote-ref-249)
250. See *supra* notes \_\_. [↑](#footnote-ref-250)
251. *See* *supra* part \_\_\_ [↑](#footnote-ref-251)
252. *See* generally, *supra* note 8. [↑](#footnote-ref-252)
253. Derrick Bell, *Diversity’s Distractions*, 103 Colum. L. Rev. 1622, 1622 (2003). [↑](#footnote-ref-253)
254. *See* *Diversity*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/diversity> (last visited Aug. 7, 2023); *see also diversity*, Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/diversity> (last visited Aug. 7, 2023) (“the fact of many different types of things or people being included in something; a range of different things or people”). [↑](#footnote-ref-254)
255. *See* *supra* part \_\_\_. [↑](#footnote-ref-255)
256. Sanford Levinson, *supra* note 60 (quoting a letter from Jack Balkin). [↑](#footnote-ref-256)
257. For examples of the contemporary utilitarian interpretation in university documents, see *Columbia Issues Statement on Affirmative Action Cases*, Columbia University News (Jul. 05, 2023), <https://news.columbia.edu/news/columbia-issues-statement-affirmative-action-cases> (“The Columbia University community represents a wide array of experiences and backgrounds. This diversity is central to our identity -- it reflects the cultural richness of New York City as well as our mission to foster meaningful interactions and prepare students to make a difference in the world.”); Santa J. Ono & Laurie K. McCauley, *Statement on Supreme Court’s Affirmative Action ruling*, Office of the President University of Michigan (Jun. 29, 2023), <https://president.umich.edu/news-communications/messages-to-the-community/statement-on-supreme-courts-affirmative-action-ruling/> (“We believe racial diversity benefits the exchange and development of ideas by increasing students’ variety of perspectives, promoting cross-racial understanding and dispelling racial stereotypes. It helps prepare students to be leaders in a global marketplace and increasingly multicultural society.”); Sian Leah Beilock, *Letter From the President on Affirmative Action*, Dartmouth News (Jun. 29, 2023), <https://home.dartmouth.edu/news/2023/06/letter-president-affirmative-action> (“diversity, including racial diversity, is vital to our mission of knowledge creation in service to society. Research… shows that diverse teams lead to better outcomes”). [↑](#footnote-ref-257)
258. Harvard University, *President-Elect Claudine Gay Message to the Community*, YouTube (Jun. 29, 2023), <https://www.youtube.com/watch?v=AoGjh3tbPm4>. (minute 0:17). [↑](#footnote-ref-258)
259. *Id.* (minute 0:33) [↑](#footnote-ref-259)
260. Bridges, *supra* note 9 at 137 [↑](#footnote-ref-260)
261. *Id.* [↑](#footnote-ref-261)
262. *See supra* part \_\_; Reva B. Siegel, *The Supreme Court, 2012 Term - Foreword: Equality Divided*, 127 Harv. L. Rev. 43 (2013) (After years of criticism, the Justices have come to view that affirmative action decisions have more legitimacy (or persuasive authority) if the Justices emphasize the benefits that applying strict scrutiny provides to all, rather than the special protections it provides to some.) [↑](#footnote-ref-262)
263. *See supra* [↑](#footnote-ref-263)
264. *See supra* part \_\_ and specifically notes \_\_\_\_. [↑](#footnote-ref-264)
265. *Students for Fair Admissions* v. *Harvard,* No. 20-1199, slip op. at 11 (U.S. Jun. 29, 2023) (Jackson, J., dissenting). [↑](#footnote-ref-265)
266. *Id.* at 15. [↑](#footnote-ref-266)
267. *Students for Fair Admissions* v. *Harvard,* No. 20-1199, slip op. at 69 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting). [↑](#footnote-ref-267)
268. *See* *supra* \_\_\_. [↑](#footnote-ref-268)
269. For an account of such cases, *see* Starr, *supra* note 9. [↑](#footnote-ref-269)
270. https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/29/remarks-by-president-biden-on-the-supreme-courts-decision-on-affirmative-action/ [↑](#footnote-ref-270)