# Introduction

On June 2023, in a case called *Student for Fair Admissions* v. *Harvard* and *Student for Fair Admissions v. UNC* (hereinafter: the *SFFA* cases) a majority of six Justices terminated the use of race-conscious affirmative action as we know it.[[1]](#footnote-1) The dissent strongly opposed this result. But the outcome was not the only matter under deep disagreement in this case. For the first time in nearly a decade, the justices openly disagreed *why* should the Court warrant affirmative action constitutional, and on which interests are compelling enough to justify the use of race in college admission policies.[[2]](#footnote-2) The majority, at least formally, re-affirmed the state’s interest in the utilitarian benefits that flow from student body diversity as a sole compelling interest that can potentially allow the consideration of race in higher education admission. The dissent, on the other hand, unsettled the boundaries of the conversation over affirmative action and asserted that egalitarian interests—both remedial and prospective aspirations for equal citizenship—are as, if not more compelling. These are two very different views about why affirmative action matters and what are the stakes in losing it. The former is currently winning in and outside of courts. *How did affirmative action get divorced from its historical roots 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 to the Court in the affirmative action cases, this article reveals how the conceptions about the role of affirmative action shifted over the years. In 1978, in a case called *Regents of the University of California v. Bakke*,[[3]](#footnote-3) the Court put constraints over what interests can count as compelling for affirmative action. But this article shows that *Bakke* was only the beginning of this conversation. It shows how remedial interests which were rejected in *Bakke*, found their way back to the conversation about affirmative action through the resignification of the diversity rationale by amici curiae briefs supporting the universities in the case of *Grutter v. Bollinger* in 2003,[[4]](#footnote-4) and eventually by the Court itself. But the meaning of diversity shifted again. When the next challenge reached the Court in the 2013 *Fisher v. University of Texas at Austin*,[[5]](#footnote-5) amici curiae briefs largely deserted the egalitarian vision of diversity and instead focused on its utilitarian benefits to the educational process and to the professional preparation of students. In the recent challenge of *SFFA*,[[6]](#footnote-6) the utilitarian interpretation of diversity only grew more dominant in the amici briefs, leaving no room for discussion about past and current racial disparities in America and how universities address them. This utilitarian vindication of affirmative action is, this article argues, losing by wining—both on Courts and in the realm of public opinion.[[7]](#footnote-7)

Largely expecting the outcome of the *SFFA* cases, the recent literature on affirmative action started grappling with the consequence of a Court case striking down race-conscious admission policies,[[8]](#footnote-8) and scholarly and public attention is devoted to possible race-neutral means for increasing student body diversity.[[9]](#footnote-9) Such endeavors aiming to figure out *how* universities can promote student body diversity in the day 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 come up with race-neutral alternatives that might help to promote diversity in the short run, this article shifts focus to the long time struggle over affirmative action in America.

This article suggests that affirmative action is losing the battel over public opinion, at least in part, because Americans lost track of why it mattered in the first place and why it should matter. Contrary to common understandings of this problem, I argue that the problem is not of diversity per-se,[[10]](#footnote-10) but rather, with how it was interpreted and shaped in the interaction between the Court and non-legal in the past decade. Drawing on democratic constitutionalism literature and on the understanding that constitutional understandings shift over time through the interactions between Courts and other legal and non-legal actors,[[11]](#footnote-11) this article turns to 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.[[12]](#footnote-12) Using this mixed methodology, the first distinct contribution this article makes to the literature, is to provide a detailed historical account of how this ultra utilitarian understanding of affirmative action developed and ultimately came to prevail.[[13]](#footnote-13) 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.[[14]](#footnote-14) Finally, I suggest pathways forward—not for winning the next challenge in Court, but for possibly wining back the public in the long run.[[15]](#footnote-15)

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, as well as one Justice Kennedy, considered by then to be the swing Justice on the Court.[[16]](#footnote-16) Amicus curiae briefs filed in support of the university were strategic. Aiming to convince Justice Kennedy, the university and the majority of the amici supporting it decided to go back on the egalitarian interpretation of diversity that was common among the *Grutter* amici in 2013 and 2016, and instead emphasized the utilitarian benefits of diversity to education and the economy. And, at least to some degree, it worked. Justice Kennedy, who 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.[[17]](#footnote-17) This win, however, came with a cost. Terms that can vindicate how past and present forms of racism still determines opportunities today were gradually erased from the public vocabulary that became more and more confined to understanding race in terms of group identity and culture, almost as if it was a commodity.[[18]](#footnote-18) Less than a decade later, by the time the *SFFA* challenges reached the Court, the composition of the Court 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. But even though there was no longer anyone on the Court that could have been convinced, universities and most of their amici, continued making claims, I suggest, on autopilot mode, emphasizing the exact same ahistorical utilitarian benefits of diversity, detached from the remedial legacy of affirmative action and from any prospective democratic aspiration of equal citizenship.

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 liberals. To the contrary, in a thorough analysis of the decision, this article shows how the utilitarian approach to diversity ended up serving 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 rendered that they were also not sufficiently coherent to survive strict scrutiny. Doing so, the Chief Justice, 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.”[[19]](#footnote-19)

Both dissenters, each employing her distinct approach, challenged the ongoing legal, academic, and public conversation regarding the value of racial diversity and the stakes in losing affirmative action. Over the past five decades, the boundaries of this conversation 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 rejuvenated the diversity rationale by infusing it with historical context, remedial considerations, and aspirational goals of redistribution and democracy. Justice Jackson endorsed these very ideals but contends that they can directly stand as compelling state interests for affirmative action, even beyond the confines of the diversity framework. It is now time, I suggest, to follow these bravely drafted dissenting opinions and restate what is at stake in losing the battle over affirmative action. Doing so, advocates of affirmative action do not have to disregard doctrine and past precedent, but instead can and should, reclaim the value of racial diversity in terms of racial justice.

The article preceded as follows…

1. Students for Fair Admissions v. Harvard, 600 U.S. \_\_\_ (2023). For a comprehensive account of the ruling, *see infra* Part \_\_\_. [↑](#footnote-ref-1)
2. 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-2)
3. *See* *Bakke*, 438 U.S. 265. [↑](#footnote-ref-3)
4. Grutter v. Bollinger, 539 U.S. 306 (2003). [↑](#footnote-ref-4)
5. 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-5)
6. Students for Fair Admissions v. Harvard, 600 U.S. \_\_\_ (2023). [↑](#footnote-ref-6)
7. *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, or affirmative action, which is a practice used by colleges and universities to boost racial diversity within their student bodies.”); *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,” by a margin of 70 to 21 percent, a majority of whites favored special training for women and minorities to improve their employment prospects and, by 71 to 21 percent, 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-7)
8. 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), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4354321> (aiming to better understand the implications of the Court’s commitment to colorblindness on facially race-neutral strategies for promoting diversity and reducing racial disparity); 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 liability that could follow for the SFFA cases expected embrace of colorblindness); 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-8)
9. *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 and 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) (“In Place, Not Race, Cashin reimagines affirmative action and champions place-based policies, arguing that college applicants who have thrived despite exposure to neighborhood or school poverty are deserving of special consideration.”); 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> (“abandoning legacy preferences and substantially boosting socioeconomically disadvantaged applicants would make Harvard “far less white, wealthy, and privileged”). [↑](#footnote-ref-9)
10. *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 is not a terrible rationale for affirmative action. In some contexts, it is a pretty good one (*e.g.,* sociology, education, law); in others, somewhat less so (*e.g.,* conceptual physics). But in all contexts, it 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) (enumerating four rationales behind universities utilizing 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-10)
11. *See infra* note \_\_\_. [↑](#footnote-ref-11)
12. For a detailed explanation of the methodology and sources used in this article, *see infra* Part I. [↑](#footnote-ref-12)
13. *See infra* Part \_\_\_. [↑](#footnote-ref-13)
14. *See infra* Part \_\_\_. [↑](#footnote-ref-14)
15. *See infra* Part \_\_\_. [↑](#footnote-ref-15)
16. *See infra* notes \_\_ and accompanying text. [↑](#footnote-ref-16)
17. Fisher v. University of Texas (*Fisher II*), 579 U.S. 365 (2016); *see infra* Part \_\_. [↑](#footnote-ref-17)
18. 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* notes \_\_\_, and accompanying text. [↑](#footnote-ref-18)
19. Students for Fair Admissions v. Harvard, No. 21-707, slip op. at 47 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting), <https://www.supremecourt.gov/opinions/slipopinion/22>. [↑](#footnote-ref-19)