# The Shift toward Utilitarian Diversity: the *Fisher* Amici talking to [discourse with?] Swing Justice Kennedy

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

This 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 median 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.* By the time *Fisher* reached the Court, Anthony Kennedy, another Reagan appointee who was already considered a swing justice in many pivotal decisions including some on issues of race, was expected to cast the deciding vote in the *Fisher* cases.[[4]](#footnote-4) It was only natural that the attention of advocates of affirmative action made a strategic shift, the aim now being to convince Justice Kennedy, who had already articulated some of his convictions with respect to affirmative action in the past.

Examining the cases leading to *Fisher,* as advocates of affirmative action in the *Fisher* cases must have done, we see clearly that Justice Kennedy had a rather specific vision of diversity. First, it is important to note that he had dissented in *Grutter,* criticizing the majority for giving schools too much deference in choosing their method while vindicating their goals. Finding that “[m]any academics at other law schools who are ‘affirmative action’s more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.’”[[5]](#footnote-5) Heather Gerken suggests that Justice Kennedy was worried because Justice O’Connor’s argument in *Grutter* was much broader and less disciplined than had been Justice Powell’s in *Bakke*.[[6]](#footnote-6) Second but more importantly, Justice Kennedy had played a significant role in a 2007 case called *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 and struck down the specific program but concurred on several points. First, he acknowledged that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”[[7]](#footnote-7) Second, while objecting to individual student-assignment policies based on race, Justice Kennedy makes it clear that schools may take race into account, as long as they are facially neutral.[[8]](#footnote-8) Reva Siegel suggests that in doing so, Justice Kennedy vindicated a concern about social cohesion, worried both about the effect of extreme racial stratification on society and about race-conscious efforts that might aggravate and cause resentment among those who perceive themselves unjustly affected.[[9]](#footnote-9) If Gerken and Siegel are correct about Justice Kennedy—and I suspect they are—it is not surprising that when a new challenge reached the Court, advocates of affirmative action, as this section shows, re-couched their interest in diversity in what I call utilitarian terms that adhere more directly to Justice Powell’s original interest in the benefits of diversity and propose to benefit *everyone* in society, thus making them less likely to create social balkanization.

Indeed, when a new challenge reached the Court in 2013, the diversity rationale changed immensely. In previous work that focused on the transformation of the meaning of diversity between *Grutter* and *Fisher*, I showed that by the 2010s diversity was largely no longer infused with egalitarian values, instead being perceived as the servant of 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, they were less emphasized and often overshadowed by utilitarian goals such as professional development and economic prosperity.[[10]](#footnote-10) 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 but were mainly instrumentalized to promote external interests, such as social unity or market productivity, instead of focusing on equality as a primary goal per se.[[11]](#footnote-11)

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

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

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

An algorithmic analysis of the *Fisher I* and *Fisher II* amicus briefs highlights the salience of the utilitarian trend in both sets of briefs. Here, as in the *Michigan* cases, I used the Keynessfunction to identify words that appear with unusual frequency in the \_\_\_ *Fisher* amicus briefs compared to the amicus briefs submitted to the Court in the two other groups of cases examined in this article: *Michigan* and *SFFA*.[[24]](#footnote-24) In the comparison of the *Fisher* amici with both the *Michigan* amici and the *SFFA* amici, no words that nightly 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* cases and *SFFA* cases.[[25]](#footnote-25) The words *benefits, innovation, workforce, preparation,* however, appear with unusual frequency in the *Fisher* amicus briefs in comparison with those relating to *Michigan*.[[26]](#footnote-26) More significantly, the collocates analysis showed that *benefits, educational, profession, prepares, invention,* and *workforce* a likely to appear in the seven words next to *diversity*.[[27]](#footnote-27) This analysis validates the proposition that in both *Fisher I* and in *Fisher II*, the amici who supported affirmative action reinterpreted the meaning of diversity to vindicate utilitarian values.

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

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