# The pushback of Egalitarian Diversity Grutter & Gratz

# The Amici Briefs

It was a half century later that a challenge to race-conscious affirmative action policies in the realm of higher education reached the Supreme Court in *Gratz c. Bollinger*[[1]](#footnote-1) and *Grutter v. Bollinger*[[2]](#footnote-2) (together: the “Michigan cases”). Gratz was a case challenging the affirmative action admissions policy of the University of Michigan's undergraduate program ,and Grutter v. Bollinger was a case challenging the affirmative action admissions policy of the University of Michigan Law School. The University of Michigan (referred to as U-M or the University) initially implemented race-conscious affirmative admission measures during the 1960s. In 1991, Lee Bollinger, who was the University's president at the time, initiated efforts to reframe these measures to focus on diversity in alignment with Justice Powell's opinion in the Bakke case.[[3]](#footnote-3) At the undergraduate level, preference points were automatically assigned to applicants from disadvantaged minority groups. In contrast, the law school had established an individualized holistic review process where race was just one among multiple factors considered to enhance diversity.[[4]](#footnote-4) In 1997, plaintiffs represented by the Center for Individual Rights (CIR) legally challenged both the undergraduate and law school admissions policies of the University. This legal dispute culminated in two Supreme Court cases, Gratz and Grutter, which were jointly heard and subsequently decided in 2003.[[5]](#footnote-5)

The *Michigan cases* ignited significant public engagement both in support of and opposition to affirmative action, leading to the submission of 88 amicus briefs submitted in the Grutter case (64 in support of affirmative action) and 62 in the Gratz case (40 in support of affirmative action).[[6]](#footnote-6) These briefs addressed various aspects of the debate over the “how” question, concerning the permitted practices of race-conscious admission policies, but more importantly, they continued discussing the “why” question, debating the justifications for affirmative action. But, the debates over which are compelling state interests to justify affirmative action, were now internal 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 to enhance the educational benefits of diversity.[[7]](#footnote-7) The University of Michigan defense, as well as most of the amici in the two cases appeared to adhere to the limitations established by Bakke and refrained from explicitly invoking direct remedial justifications. However, upon closer examination of the amicus briefs, it becomes evident that their understanding of diversity, unlike Justice Powell's, was infused with egalitarian concerns.

The amici supporting of affirmative action played the game, almost all of them adhered to the category of diversity imposed by the Grutter opinion, but they reinterpreted it and infused it with new meanings. They broadened the concept of diversity beyond its limited pedagogical interpretation and infused it with forward-looking and backward-looking egalitarian principles. Thus, by reinterpreting the diversity rationale, the amici pushed back on the limitations the Court imposed in *Bakke* and in *Croson* and reinfused the conversation about the egalitarian role of affirmative action through the back door. Jack Balkin observed correctly that diversity allowed affirmative action to continue while erasing its egalitarian roots,[[8]](#footnote-8) but what he and other critics of diversity did not notice, is that the Michigan amici reappropriated it to encompass both remedial and distributive egalitarian values.

The pedagogical and utilitarian understandings of diversity, prominent in the Powell’s opinion, did not disappear from the amici briefs.[[9]](#footnote-9) However, those same briefs were also deeply rooted in the history of racial discrimination. The Michigan amici perceived diversity as a concept that reflects their deep concern about the ongoing racial inequality. As I showed in my previous work, the amici in the *Michigan* cases, and in particular the academic amici, offered an egalitarian interpretation of diversity.[[10]](#footnote-10) This article uses a newly available content analysis program and its *keyword-in-context* (KWIC) function, to systematically search the *Michigan* amici briefs for the term *diversity* and observe how it was used in its natural context in the Michigan case amici. As demonstrated bellow, this article was able to methodically show that while amici recognized and advocated for the utilitarian pedagogical benefits of diversity, they also infused diversity with egalitarian values, (1) remedial and backward looking, as well as (2) distributive and democratic ideals.

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

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

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

*Forward-looking distributive and democratic ideals*. Diversity, for Justice Powell was a future oriented rationale, meant to benefit the educational process of all students.[[19]](#footnote-19) Many amici, agreed that diversity is crucial for the future, but not only because it fosters creativity and exploration, but because it constitutes what it means to be an equal citizen in America. Notably, the Bush administration submitted an amici brief, objecting to the use of race by the University, but also vindicating that “[e]nsuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective. Measures that ensure diversity, accessibility and opportunity are important components of government's responsibility to its citizens.”[[20]](#footnote-20) It is in those words that the United States’ government tied its democratic obligation to equal opportunity and accessibility to diversity. It was further explained in that brief that “[i]f undergraduate and graduate institutions are not open to all individuals and broadly inclusive to our diverse national community, then the top jobs, graduate schools, and the professions will be closed to some.”[[21]](#footnote-21) The brief was highly influential, both on other briefs that cited this language and on the Court’s ruling.[[22]](#footnote-22)

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

The *Michigan* amici, this article shows, pushed back on Powell’s narrow interpretation of diversity, and infused it with history and commitment to remedying past wrongs, as well as with an egalitarian-democratic vision of diversity and of affirmative action. This strategy becomes even more prevalent through the algorithmic analysis of the amici briefs. I used the *Keyness* function to identify the words that were unusually frequent in the ninety-nine Michigan amici in comparison with the amicus brief submitted to the Court in the two other groups of cases this article examines – the Fisher cases and the SFFA cases.[[27]](#footnote-27) The words “remedial” “minority” and “discrimination” were unusually frequent in the Michigan amici in comparison to both the Fisher and SFFA amici discussed in the following sections.[[28]](#footnote-28) Similarly, the collocates analysis showed that while the words “educational” and “benefits” were likely to appear in the seven words next to diversity, so were the words “minority,” “accessibility”, “segregation”, “past”, “democratic and “openness”.[[29]](#footnote-29) The strategy employed by many of an the amici in the Michigan cases, seems to have reached the Court. As the next section shows, egalitarian, especially those forward-looking, values attributed to diversity, became part of the Court’s understanding of diversity and its importance.

# The Democratic Vision of Diversity in Grutter

The Michigan cases upheld the use of race in higher education admissions policies and were considered a win by the advocates of affirmative action.[[30]](#footnote-30) In Grutter, the Court upheld the law school's holistic admissions policy. In Gratz, the Court invalidated the undergraduate admissions policy, but that for the reasons set forth in Grutter, it decided that diversity is a compelling state interest.[[31]](#footnote-31) The interpretative framework set by the amici in the Michigan cases 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*, O’Connor recognized the utilitarian pedagogical and market-driven objective of preparing students for the workforce. It found that student body diversity “promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”[[32]](#footnote-32) “Today’s increasingly global marketplace” requires skills that “"can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[[33]](#footnote-33) Diversity, the Court recognized, can also help "break down racial stereotypes,"[[34]](#footnote-34) but these benefits, were especially valuable in the opinion because "'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.’”[[35]](#footnote-35)

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

Jack Greenberg explains that “as lawyers and judges must, she [O’Connor] couched her opinion in categories of earlier cases, she ventured out of them to write about the world we live in and its needs.”[[43]](#footnote-43) Justice O’Connor eyes, he explains, are not necessarily on past discrimination, but on the social conditions of inequality, and “what affirmative action can do to help fix it.” [[44]](#footnote-44) In that sense, Justice O’Connor did not focus on the history of racial discrimination in America, but it seems that affirmative action does have a role in ameliorating conditions on inequality, some of which are result of past and current discrimination and some are not. Her forward-looking account of diversity is not symmetrical, but rather seems to recognize the inequality in opportunities open to minority and majority groups. In Grutter, the Court expected that “"25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[[45]](#footnote-45) This time limit, as Robert Post explains, is evidence that the Justices believed that affirmative action can partake in a process of remedying those unequal conditions.[[46]](#footnote-46)

The Grutter Court thus expressed two forward looking values of diversity. First, a utilitarian value of diversity that promote better learning and professional outcomes, and she second, a democratic value in the equal distribution of educational opportunities to all races in society. Despite this strong egalitarian and democratic interpretation of diversity, the amici and Justices in the affirmative action cases in following decades, steered diversity to a an almost absolute utilitarian meaning.

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