# 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.[[1]](#footnote-1) The dissent strongly opposed this result. 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.[[2]](#footnote-2) 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. In 1978, in the case of *Regents of the University of California v. Bakke*,[[3]](#footnote-3) the Court placed constraints over what interests can be considered as compelling to justify affirmative action. As this article demonstrates, *Bakke* was not the end of this conversation, but only the beginning of it. This article shows how remedial interests, which were rejected in *Bakke*, found their way back to the discourse about affirmative action through the reinterpretation of the diversity rationale first by amicus curiae briefs supporting the universities in the cases of *Gratz v. Bollinger[[4]](#footnote-4)* and *Grutter v. Bollinger*[[5]](#footnote-5) (together: the *Michigan* cases) in 2003, and, eventually, by the Court itself. But the meaning of diversity shifted yet again. When the next challenge reached the Court in the 2013 *Fisher v. University of Texas at Austin* case,[[6]](#footnote-6) amicus 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 in *SFFA*,[[7]](#footnote-7) the utilitarian interpretation of diversity only grew more dominant in the amicus briefs, leaving no room for discussion about past and current racial disparities in America and how universities ought to address them. This article argues that this utilitarian justification of affirmative action results in losing by winning—both in Courts and in the realm of public opinion.[[8]](#footnote-8)

Largely expecting the outcome of the *SFFA* cases, the recent literature on affirmative action has begun grappling with the consequence of a Court case striking down race-conscious admission policies,[[9]](#footnote-9) and considerable scholarly and public attention is devoted to possible race-neutral means for increasing student body diversity.[[10]](#footnote-10) 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.

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. Contrary to common understandings of this problem, I argue that the problem is not of diversity per se,[[11]](#footnote-11) but rather, of how it was interpreted and shaped in the interaction between the Court and non-legal parties 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,[[12]](#footnote-12) 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.[[13]](#footnote-13) Using this 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.[[14]](#footnote-14) 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.[[15]](#footnote-15) Finally, I suggest possible directions forward—not for winning the next challenge in Court, but for possibly winning back public opinion in the long run.[[16]](#footnote-16)

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.[[17]](#footnote-17) 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.[[18]](#footnote-18) 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.[[19]](#footnote-19) 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. Despite the fact that 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 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.

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.”[[20]](#footnote-20)

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 stop navigating this controversy and to follow these bravely drafted dissenting opinions. It is time to reclaim what is at stake in losing the battle over affirmative action. In this endeavor, 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—in law and in politics—requires that participants remain faithful to some shared ideal that is larger and more important than any particular issue that they disagree on.[[21]](#footnote-21) This uniting ideal is not and cannot be the utilitarian benefits that flow from student body diversity, but a much larger aspiration about American democracy where all are equal participants, regardless of their race.

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. It is composed from five suctions, each dedicated to one of the major affirmative action cases from the past fifty years and analyzes the amicus curiae briefs filled in each of these cases. Section A outlines the Court's limitations on compelling interests for affirmative action imposed in *Bakke*. Section B explores how, despite these limits, questions about affirmative action's role evolved and were reinfused with egalitarian values by the amici in *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 SFFA amicus briefs continued emphasizing diversity's utilitarian benefits while disregarding the reality of racial discrimination. Section E concludes by comparing the empirical findings of an analysis conducted on each of the cases, highlighting shifts how the role of affirmative action is perceived. *Part III* provides an analysis of the SFFA ruling, exploring which, if any, interests count as compelling enough to warrant race-conscious admission policies after SFFA. In *Part IV*, I point to possible pathways moving forward in the long-term fight for affirmative action. *Part V* concludes.

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. 539 U.S. 244 (2003). [↑](#footnote-ref-4)
5. Grutter v. Bollinger, 539 U.S. 306 (2003). [↑](#footnote-ref-5)
6. 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-6)
7. Students for Fair Admissions v. Harvard, 600 U.S. \_\_\_ (2023). [↑](#footnote-ref-7)
8. *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-8)
9. 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-9)
10. *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-10)
11. *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-11)
12. *See infra* note \_\_\_. [↑](#footnote-ref-12)
13. For a detailed explanation of the methodology and sources used in this article, *see infra* Part I. [↑](#footnote-ref-13)
14. *See infra* Part \_\_\_. [↑](#footnote-ref-14)
15. *See infra* Part \_\_\_. [↑](#footnote-ref-15)
16. *See infra* Part \_\_\_. [↑](#footnote-ref-16)
17. *See infra* notes \_\_ and accompanying text. [↑](#footnote-ref-17)
18. Fisher v. University of Texas (*Fisher II*), 579 U.S. 365 (2016); *see infra* Part \_\_. [↑](#footnote-ref-18)
19. 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-19)
20. 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>. For the complete account, see infra part \_\_. [↑](#footnote-ref-20)
21. For a discussion, see Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*¸ 98 CALIFORNIA LAW REVIEW 1319 (2010). [↑](#footnote-ref-21)