# Methodology and Sources

The history of affirmative action in the United States is contested. Between 1978 and 2023 five major Supreme Court cases grappled with the constitutionality of affirmative action in higher education: Bakke in 1978, the Michigan cases challenging the undergraduate and law school's admissions policies in 2003, the twice-reviewed Fisher case finally decided in 2016, and finally the SFFA cases decided in 2023.[[1]](#footnote-1) In each of the cases the Court ended up validating the use of race in admissions, but restricted both the methods and the permissible reasons for engaging in such rationales. It was over litigating and debating these cases and their aftermath that the rationales for engaging in race-based affirmative action efforts were forged and forged again. This ongoing debate, that manifested in the recent *SFFA* cases, started in a case called Bakke.[[2]](#footnote-2) 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.[[3]](#footnote-3) In my previous work from 2019, I qualitatively analyzed the hundreds of amicus curiae briefs that were submitted to the Court in affirmative action cases over the years, to reveal that the meaning of diversity was never fixed, but dynamic and constantly renegotiated.[[4]](#footnote-4)

The focus of this article is different. Its goal is to discover how two completely different understandings of affirmative action and its value co-exist in our law and our society—one remedial and rooted in the past and one utilitarian and divorced from history—and why the latter is winning both in Courts in the public debate. Drawing on *democratic constitutionalism* scholarship that 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,[[5]](#footnote-5) this article turns to the hundreds amicus curiae briefs submitted to the court in the affirmative action cases from *Grutter* to *SFFA*. Amicus curiae briefs have two important roles. The first is “talking to the Court,” aiming to influence the law of the case, the result.[[6]](#footnote-6) In some cases, such as in the case of the amici brief submitted by high-ranking individual in the military in the *Grutter* case., they are very successful in presuming this role.[[7]](#footnote-7) But, amici briefs have another very important role, that is the role of talking “through the court” to the people—members of the amici organization as well as to the general public.[[8]](#footnote-8) 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.” [[9]](#footnote-9) Through the analysis of the amicus curiae briefs submitted in the affirmative action cases, this article explores why universities, student groups, scholars, the USA government, NGOs, business and other individuals and organizations think race-conscious affirmative in important.

Thus, for a better account of how the utilitarian understanding of diversity became crushingly dominant in the discourse over affirmative action, and how the remedial justification of affirmative action got erased, this article preforms an qualitative and algorithmic analysis of the amicus curiae briefs submitted the Court in the affirmative action cases over the year. The qualitative analysis reveals, through close reading of the briefs, the deep narratives of meaning making by the litigants and the amici in each of the cases. In order to improve the qualitative analysis, I used a content analysis program, allowing me to identify distinctive terms (which are otherwise difficult to detect), serving as a first step toward interpretive analysis. While, the computer does not “understand” these terms, these observations serve as a valuable point of investigative for my qualitative analysis. More specifically, in this article uses a keyword-in-context (KWIC) function, which allows terms to be searched in a large data set—in this article, of amici briefs—and then viewed in their natural context within a particular document, making this exploration more effective.[[10]](#footnote-10)

The algorithmic analysis is a form computerized text analysis (a type of Machine Learning), that builds on the qualitative findings to quantitatively examine those trends over time and in comparison, to one another. More specifically, I used Linguistic Inquiry and Word Count (LIWC), a method adapted from Natural Language Processing (NLP), [[11]](#footnote-11) for this I used Antconc 4.2.0, multiplatform toolkit developed for carrying out corpus linguistics research and data-driven learning.[[12]](#footnote-12) Specifically, we used two NLP methods: keyness tool and collocates tool.

The *keyness* analysis was carried out in order to identify the words that are unusually frequent (or infrequent) in amicus brief submitted to the Court in one of the cases (a corpus) in comparison with the amicus brief submitted to the Court in another case. The keyness analysis provides an indication of a keyword’s importance in a given corpus relative to a reference corpus.[[13]](#footnote-13) “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.”[[14]](#footnote-14)

The *collocates* method was used 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.[[15]](#footnote-15) In this article, the method was used to identify which words appeared most frequently on the seven words to the right and seven words to the left of the word diversity. This allowed me to recognize, not only the general trends and narratives told about affirmative action in the briefs, but to also explore how these took part in the interoperation and interpretation of diversity.

1. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Fisher v. University of Texas, 570 U.S. 297 (2013); Fisher v. University of Texas, 579 U.S. 365 (2016); 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-1)
2. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). [↑](#footnote-ref-2)
3. See infra part \_\_\_ [↑](#footnote-ref-3)
4. *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-4)
5. *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); Post, *supra* note 63, at 8 (explaining that constitutional culture "encompasses extrajudicial beliefs about the substance of the Constitution"); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 Calif. L. Rev. 1323, 1325, 1341 (2006) (employing the term "constitutional culture" to explore how "changes in constitutional understanding emerge from the interaction of citizens and officials," and explains that "[c]ollective deliberation helps establish what things mean and why they matter"). For a review of the literature in the field, *see* Robert M. Cover, *The Supreme Cour, 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-5)
6. 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); Paul M. Collins, Jr., *The use of amicus briefs*, 14 Annu. Rev. Law Soc. Sci. 219-237 (2018).‏ [↑](#footnote-ref-6)
7. *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.”). [↑](#footnote-ref-7)
8. Refer to my work, but more generally to reva++; *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-8)
9. Paul M. Collins, Jr., *The use of amicus briefs*, 14 Annu. Rev. Law Soc. Sci.219, 220-21 (2018). [↑](#footnote-ref-9)
10. 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); For the content analysis, this article uses the KWIC feature of 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. [↑](#footnote-ref-10)
11. For a survey about this methis, *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-11)
12. 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. [↑](#footnote-ref-12)
13. *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-13)
14. *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-14)
15. Xu Lihang et al., *Collocates*, AntConc Manual (2018), <https://antconc-manual.readthedocs.io/en/latest/collocates.html>. [↑](#footnote-ref-15)