

DIVERSITY GONE WRONG: A HISTORICAL INQUIRY INTO THE EVOLVING MEANING OF DIVERSITY FROM *BAKKE* TO *FISHER*

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Diversity has played an unparalleled role in America's affirmative action law and politics, most recently in Fisher v. University of Texas at Austin (Fisher II). However, our understanding of diversity is insufficient, particularly in the arena of higher education. This Article aims to enhance this understanding by offering a sociohistorical account of how the diversity rationale has evolved over time, which supplements the existing literature that has focused on judicial decisions. By analyzing the numerous amicus briefs filed before the Supreme Court in cases challenging affirmative action over the years, this Article demonstrates that questions about the value of diversity in higher education were not settled in Regents of the University of California v. Bakke or subsequent cases, but rather were renegotiated by citizens and officials. The Article then shows how judicial and professional understandings of diversity have shifted from egalitarian notions of racial equality towards market-driven utilitarian ideals. In turn, this utilitarian framework has come to shape the way universities and student activists think, talk, and act regarding questions of racial justice. It has steered the public vocabulary and imagination away from identifying past and present racial inequality, as well as its relevance to the mission of higher education.

The Article concludes by suggesting that it is imperative to reinfuse diversity with egalitarian ideals. Universities and others who invoke diversity claims in courts or on campus should not only acknowledge the utilitarian benefits of diversity that make affirmative action less controversial, but also keep sight of the egalitarian perspective that is at the core of racial justice.

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INTRODUCTION

Racial diversity eliminates racial identifiability; racial identifiability is important evidence of segregation and discrimination Considering race and ethnicity in admissions alleviates past and present inequalities and discrimination Diversity, desegregation, and past discrimination are doctrinally distinct, but factually, they are deeply interconnected.

—Amicus Brief, *Grutter v. Bollinger* (2003)¹

Put simply, students need to learn how to work with, market to, and buy from people from diverse backgrounds and cultures.

—Amicus Brief, *Fisher v. University of Texas at Austin* (2013)²

Diversity has played a growing role in shaping America’s affirmative action law and politics—most recently in *Fisher v. University of Texas at Austin* (*Fisher II*)³—determining questions of access to higher education. Over the years, the United States Supreme Court has embraced the value of diversity as the primary rationale for sanctioning the consideration of race in higher education admissions policies.⁴ Nowadays, the question of how universities define their interest in diversity not only plays a role in licensing or restricting such policies in court, but also shapes the public conversation about racial justice on campus.⁵ Our understanding of this concept however, remains insufficient. What makes diversity a constitutionally compelling interest? What values does it express? And most importantly, *when do diversity claims promote equality and when do they inhibit it?*

In an attempt to begin answering these questions, this Article offers a sociohistorical account of diversity in the realm of higher education. It shows how, despite doctrinal constraints imposed by the Court, questions about the role of affirmative action in higher education were not settled in *Regents of the University of California v. Bakke*⁶ or thereafter, but forged in an ongoing conversation over the value of diversity. The meaning of diversity, the

¹ Brief of Am. Law Deans Ass’n as Amicus Curiae in Support of Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter ALDA Brief, *Grutter*].

² Brief of Amherst et al., Amici Curiae Supporting Respondents at 29, *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Amherst Brief, *Fisher I*].

³ 136 S. Ct. 2198, 2210, 2215 (2016) (upholding the University of Texas at Austin’s affirmative action program and noting that diversity constitutes a compelling interest).

⁴ Except for the narrow and mostly dormant interest in remedying specific instances of institutional racial discrimination. See *infra* Part II and especially notes 55–58 and accompanying text.

⁵ SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* 16 (2003) (explaining how diversity has become a “mantra” in educational circles (internal quotation marks omitted)); see also *infra* Part VI.B.

⁶ 438 U.S. 265, 314 (1978) (stating that “the interest of diversity is compelling in the context of a university’s admissions program”).

Article reveals, has been and still is subject to continuous contestation and development. Analyzing the numerous amicus curiae briefs filed before the Supreme Court in the cases challenging higher-education affirmative action, the Article explores the evolving meaning of the diversity rationale. It uncovers how remedial interests, which were rejected in *Bakke*, as well as other egalitarian and democratic values, found their way back into the conversation over affirmative action through the different interpretations of diversity in the briefs and by the Court.

This Article then reveals that convictions about the value of diversity are dynamic and have shifted over time. It shows how, through ongoing conflict over affirmative action, the constitutional understanding of diversity has drifted away from notions of equal citizenship and racial equity towards market-driven interests that focus on preparing students for a diverse and global workforce. These interests celebrate differences, but are divorced from the history of state-enforced hierarchies that affirmative action was originally set to dismantle. Thus, the meaning assigned to diversity has most notably existed along a spectrum. One end of the spectrum vindicates *egalitarian values* that include both retrospective, remedial ideals, and prospective interests in equal citizenship; the other end is what I call the *utilitarian conception* of diversity, invoking pedagogical and other functional benefits, and most dominantly relying on the *business case* for diversity,⁷ aiming to benefit the professional training of students and foster the economy. The transformation from an egalitarian understanding of diversity to a utilitarian one might have garnered much-needed support for the practice of affirmative action, but at a cost: that of neglecting the history of discrimination and obscuring the persistence of racial inequality when defining the mission of higher education. These costs, I suggest, are evident in the recent wave of student activism.

Debates about affirmative action are debates about equal opportunity and how it should be structured as a matter of legal doctrine and educational policy. In other words, because affirmative action is one of the few institutional reactions to racial inequality, important questions of law and equality are at stake in how the courts and universities describe their commitment to affirmative measures. Critical scholarship that started appearing after *Bakke* warned that a diversity rationale (as opposed to remedial and distributive rationales) is far from being a viable means of ensuring affirmative action, and that it is actually “a serious distraction in the ongoing efforts to achieve racial justice.”⁸ This Article aligns somewhat with

⁷ See *infra* note 43.

⁸ Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003). For a more detailed survey of the critical scholarship on diversity sparked by *Bakke*, see *infra* notes 73–76, as well as notes

this critical tradition, but departs from it in significant ways. It draws predominantly on *democratic constitutionalism* scholarship and employs the understanding that formal law-making and adjudication are platforms for democratic deliberation, through which changes in legal and constitutional understandings of citizens and officials take place.⁹ Investigating the amicus briefs, this Article explores how changes in professional and judicial understandings of diversity were forged through the interaction between university officials and social movements inside and outside of courtrooms.

While the Court has settled some questions of law, on which the scholarship on diversity has centered,¹⁰ this Article recognizes that non-judicial actors also had a significant impact on shaping the value of diversity. Thus, instead of treating diversity as a term with fixed meaning determined by the Court, I turn to the amicus briefs—focusing especially on those filed by university officials, higher education organizations, and students—to uncover how convictions about the value of diversity in higher education have shifted over the years. This untold history of diversity’s constitutional meaning allows for a more nuanced critique—not of a theoretical conception of diversity, but of what it has come to mean over time and the role it has

262–66 and accompanying text.

⁹ See *infra* notes 82–86 and accompanying text.

¹⁰ Doctrinal analyses have dominated the legal scholarship on diversity in the realm of higher education. To name but a few examples, see Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381–82, 84 (1998) (discussing the “compelling interest” test and its implications to the diversity rationale). See generally Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745 (1996) (discussing the importance of diversity in light of the jurisprudence that followed *Bakke*). For more recent examples, see generally Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113 (2012) (discussing Fourteenth Amendment doctrine in the then forthcoming *Fisher I* decision). Despite the article’s title, it does not include a discussion concerning the meaning of diversity, but discusses doctrinal alternatives that would allow universities to continue pursuing their educational benefits. Kimberly Jenkins Robinson, Comment, *Fisher’s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185 (2016) (considering how universities can advance diversity post-*Fisher II*). Other scholars broaden their doctrinal investigation and focus on normative questions—namely, when a state should seek to promote diversity. For comprehensive normative accounts, see generally PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* (2003) and LEVINSON, *supra* note 5.

For a survey of the critical scholarship and its focus on jurisprudence, see *infra* notes 73–76, 262–67 and accompanying text. The critiques of diversity are, of course, not limited to the legal literature. For an incredibly extensive account of diversity discourse, see generally ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* (2015) (investigating the symbolic politics of diversity and showing how the shift to diversity legitimates and delegitimizes racial hierarchies). Despite Berrey’s deep understanding of the ambiguity of diversity, she treats legal doctrine as an external and fixed factor that influences the organizational culture of diversity. Thus, even when acknowledging the ambiguous nature of diversity, both the doctrinal and critical literatures on diversity have failed to account for its evolving constitutional meaning. This Article seeks to fill this gap and to provide an account of the interaction between judicial and non-judicial actors that has shaped the value of diversity over time.

played in both promoting and inhibiting equality. And thus, instead of overthrowing the diversity framework as a whole or seeking to supplement it with external rationales, like many critical legal scholars have proposed,¹¹ I suggest what can and should be done under existing law of affirmative action.

In *Bakke* and subsequent cases, the Court imposed constraints on the rationales that can justify affirmative action in the realm of higher education, rejecting explicit remedial rationales while allowing the use of race-conscious measures to promote educational benefits that result from student-body diversity.¹² Scholars have mainly focused on these restrictions,¹³ but for the argument this Article lays out, they serve only as a point of departure. The Article *first* uncovers that although the Court's jurisprudence restricted these rationales, the value of diversity was re-negotiated and unsettled by other actors, and the debate over rationales for affirmative action was re-opened through a backdoor. Analyzing the amicus briefs filed to the Court in *Gratz v. Bollinger*¹⁴ and *Grutter v. Bollinger*¹⁵ (together "the Michigan cases") by universities and other amici, I show that both prospective and retrospective egalitarian interests were not eliminated from the debate over affirmative action, but were reinfused into a more covert conversation over the value of diversity. Both the litigants and most of the amici formally complied with the Court's restrictions and did not openly invoke an interest in rectifying the wrongs of the past, yet their interpretations of diversity were informed by remedial and other egalitarian and democratic values.

Second, the Article analyzes the conversation that evolved in this space of meaning-making over the years. By comparing the content of the amicus briefs filed in *Grutter* and *Gratz* (2003) with those filed in *Fisher v. University of Texas at Austin (Fisher I)* (2013)¹⁶ and *Fisher II* (2016),¹⁷ I show how constitutional understandings of diversity shifted from remedial and distributive notions about the role of higher education towards utilitarian, mostly market-driven, concerns. Despite the expansive interpretation adopted by the Court in *Grutter*, which included both instrumental and

¹¹ See, e.g., Bell, *supra* note 8, at 1622 (listing four reasons why diversity is actually a way for universities to continue admitting children of wealth and privilege); see also Richard Delgado, *Why Universities Are Morally Obligated to Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action*, 68 U. COLO. L. REV. 1165, 1166 (1997) (arguing that diversity must be supplemented with a remedial rationale for affirmative action); Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1810 (2000) (explaining why diversity is dangerous when understood as the only rationale for affirmative action).

¹² See *infra* Part II and particularly *infra* notes 54–58. *Bakke* was a plurality opinion, but it was later affirmed in *Grutter* and more recently in *Fisher I* and *Fisher II*.

¹³ See *infra* notes 72–76 and accompanying text.

¹⁴ 539 U.S. 244 (2003).

¹⁵ 539 U.S. 306 (2003).

¹⁶ 570 U.S. 297 (2013).

¹⁷ 136 S. Ct. 2198 (2016).

egalitarian, as well as democratic interests in fighting social exclusion,¹⁸ for the amici in the *Fisher* litigation, diversity was mostly a utilitarian, market-oriented interest, divorced from any remedial aspirations or from more prospective ideals of distribution and equal citizenship. Their business case for diversity was decoupled from egalitarian values and committed to the economic well-being and success of students preparing to enter the heterogeneous workforce.

Third, the Article employs this historical account to explore the question of when diversity claims promote equality and when they restrict it, and to develop a better understanding of the tradeoffs in arguing about diversity in one way or another. The Article explores the reasons for and benefits of adopting a utilitarian approach to diversity and proceeds to critically examine this development. I argue that, over time, diversity was *resignified* to legitimate the persistence of racial hierarchies.¹⁹ The dynamic of resignification is a way in which prior standards of critique and reform are adopted in a diluted and modified way that can help the system gain legitimacy without disrupting its overall practices and structure.²⁰ This concept is central to comprehending what is at stake in abandoning the egalitarian interpretation of diversity in the struggle for racial justice.

Diversity is possibly the most dominant form of public discourse about race on campus today. The way we talk and think about diversity in courts and on campus affects the way that we and our institutions approach questions of racial justice. Amicus briefs are, to a large degree, strategic, and surely they do not represent the only conversation about race that is taking place in universities. However, amicus briefs both reflect and shape convictions about the value of diversity.²¹ The utilitarian framework that is revealed in the *Fisher I* briefs conceptualizes diversity in ahistorical and instrumental terms, providing a way to talk about race in symbolic and indirect terms of identity and culture, without bringing up racism or inequality. And thus, I argue, it works to obscure their existence and legitimizes their persistence by making them invisible and irrelevant to the project of affirmative action, as well as to the mission of higher education. In other words, the popular utilitarian framework steers the public language and imagination away from identifying past and present racial injustices, as well as their relevance to the mission of higher education.

¹⁸ See *infra* Part III.B.

¹⁹ See Nancy Fraser, *Feminism, Capitalism, and the Cunning of History*, in FORTUNES OF FEMINISM: FROM STATE-MANAGED CAPITALISM TO NEOLIBERAL CRISIS 219 (2013) (discussing the process of resignification in the context of second-wave feminism which shifted attention away from redistribution and toward recognition). For a broad discussion on resignification, see *infra* Part VI.B.

²⁰ Fraser, *supra* note 19, at 218.

²¹ See *infra* Part VI.B and particularly *infra* notes 278–79 and accompanying text.

While these costs might sound theoretical or abstract, the Article suggests that we might already be witnessing some of the implications of the all-utilitarian approach to questions of race in the recent wave of student activism. Thus, the Article turns to explore the relationship between the takeover of the utilitarian conception of diversity and student demands on campus. In recent years, students all over the United States have been mobilizing around demands for renaming buildings on campus, adopting trigger warnings, and establishing safe spaces.²² Of course, each of these demands should be debated on its own merits and in context, and the Article does not take a stand in this nuanced discussion, but proposes that the costs of adopting a market-driven and identity-centered approach to questions of racial justice are evident in these demands. This movement can be understood as a form of backlash to the utilitarian paradigm that has been controlling the conversation on race in the past decade, and aspiring to get their institutions to acknowledge the wrongs of the past and to commit, once again, to rectifying them. However, the demands resulting from this backlash appear to be confined to similar symbolic conceptions of race as identity and culture rather than as a category of power, and thus risk sustaining racial stratification in the effort to resist it.

This Article shows that diversity is fundamentally and historically ambiguous, and can accommodate conservative as well as progressive ideals about race and inequality. In the past decade, diversity has come to embody mostly market-driven commitments. This shift risks undermining the long-term struggle for racial equality by diverting our institutional attention away from the ways in which race still shapes educational opportunities to the impact of diversity on economic success, making us morally numb to the hierarchical status quo. It is imperative, I suggest, to reinfuse the concept of diversity with egalitarian ideals, honestly acknowledging the persistence of racial inequality and holding universities accountable for their part in sustaining it. Thus, instead of rejecting this body of law, I suggest that universities and others who invoke diversity claims in courts or in schools should do so with attention to both the advantages of utilitarian diversity that make it popular even among many conservatives, and its cost of undermining the struggle for racial equality, and try to strike a balance between the two approaches. One, relatively feasible way of doing so is to return to past interpretations of diversity that embraced both utilitarian and egalitarian values.

In the past decade of affirmative action case law—from *Parents Involved in Community Schools v. Seattle School District No. 1*, through *Fisher I*, to *Schuette v. Coalition to Defend Affirmative Action*—the Court has imposed growing constraints

²² See *infra* Part VI.C.

on affirmative action policies and on diversity efforts.²³ In contrast, in the recent *Fisher II* decision, Justice Kennedy, writing for the majority, determined that, in defining student body diversity, considerable deference is owed to the universities.²⁴ This deference, I argue, has reopened the space for constitutional meaning-making. This space, I suggest, should be used by universities and advocates as an opportunity to re-infuse diversity with egalitarian values, which have been lost over time, but remain very relevant today. More concretely, as race-conscious affirmative action policies are continually challenged,²⁵ and with diversity being the only permissible rationale to license such policies in the near future, universities should frame their interest in diversity so that it reflects their commitment not only to the success of their students in the workforce, but also to equal citizenship.

The Article proceeds in seven parts: Part I introduces the taxonomy of egalitarian, utilitarian, and democratic conceptions of diversity, which is used in the following parts to identify the historical transformations in the meaning of diversity. Part II describes the constraints on affirmative action practice and discourse that the Court posed in *Bakke*. Part III explores how, despite these constraints, questions about the role of affirmative action in higher education were not settled by the Court, but were constantly forged in an ongoing conversation over the value of diversity. Part IV shows how judicial and professional understandings of diversity have, over time, drifted away from retrospective and prospective egalitarian logics towards pedagogical and market-oriented, utilitarian interests. Part V analyzes the most recent affirmative action case, *Fisher II*, and conceives of this decision as a re-opened space for constitutional meaning-making as well as an opportunity to infuse diversity with old and new commitments. Part VI draws on this account of diversity's transformation to consider the stakes in arguing about diversity in one way or another. It explores how the dominant utilitarian approach to diversity takes part in shaping the public discussion about racial justice and probes possible implications it might have had on recent student activism. Part VII concludes by asking how diversity might be enhanced, and teases

²³ *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1630, 1635 (2014); *Fisher I*, 133 S. Ct. 2411, 2415, 2419–21 (2013); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729–32 (2007). For a brief discussion of the constraints imposed by these cases, see *infra* Part V.B and particularly *infra* notes 236–39.

²⁴ 136 S. Ct. 2198, 2214 (2016) (finding that “[t]he University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner’s application was narrowly tailored”).

²⁵ Two lawsuits challenging race-conscious admissions policies are currently pending: Complaint & Demand for Jury Trial at 43, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 1:14-cv-14176-DJC (D. Mass. Nov. 17, 2014) (alleging that Harvard discriminates against Asian-Americans in admissions); Complaint & Demand for Jury Trial at 2, 21–22, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14-cv-00954 (M.D.N.C. Nov. 17, 2014) (challenging the University of North Carolina at Chapel Hill’s (“UNC-Chapel Hill”) admissions policy by claiming that race-neutral alternatives are available to UNC-Chapel Hill).

out possible lessons for how universities and other advocates of affirmative action could invoke diversity claims in a way that boosts equality more than it discourages it.

I. A PRELIMINARY TAXONOMY: EGALITARIAN, UTILITARIAN, AND DEMOCRATIC

Between 1978 and 2016 five major Supreme Court cases had grappled with the value of diversity in higher education: *Bakke* in 1978, the Michigan cases challenging the undergraduate and law school's admissions policies in 2003, and the twice-reviewed *Fisher* case finally decided in 2016. While some commitment to diversity can be traced more than a century back,²⁶ diversity only began to factor into higher education law and policy significantly after Justice Powell introduced it as the primary justification for affirmative action in *Bakke*.²⁷ Each of the cases that followed *Bakke* produced more than seventy amicus briefs expressing different perceptions about the value of diversity.

Looking at diversity over this period of time, the Article reveals that its meaning was never fixed, but dynamic and constantly renegotiated. More concretely, the Article uncovers two main historical transformations in the meaning of diversity: the first took place between *Bakke* and the Michigan cases, and the second took place between the Michigan cases and the *Fisher I* litigation. In order to identify these shifts, the Article adopts a taxonomy that contrasts an *egalitarian* understanding of diversity with a *utilitarian* understanding. I focus on these two poles of interpretation not only because of their dominancy, but also because they enable me to capture the significant changes in the meaning of diversity. However, I recognize a third strand of interests in diversity, which I call the *democratic* meaning of diversity. This understanding articulates a national commitment to cultural pluralism as a democratic imperative. While this dimension has stayed somewhat more constant over the years, its connection to egalitarian ideals faded between the Michigan cases and *Fisher*. This taxonomy allows me to characterize the values that litigants, amici, and courts attributed to diversity, and to recognize when one set of values prevailed over the other.

The proposed taxonomy adopts a traditional division from the philosophical literature between egalitarian and utilitarian rationales for and against affirmative action. Egalitarian arguments are those which aim to promote or maintain a certain conception of equality (such as substantive or

²⁶ DAVID B. OPPENHEIMER, ARCHIBALD COX AND THE DIVERSITY JUSTIFICATION FOR AFFIRMATIVE ACTION 10, 16 (2017), <https://ssrn.com/abstract=2913310> (tracing Harvard's commitment to diversity all the way back to the beginning of the twentieth century); see also *infra* Part II and particularly *infra* notes 60–62 and accompanying text.

²⁷ See *infra* Part II and particularly *infra* notes 58, 71–72 and accompanying text.

formal, remedial or distributive, and so on).²⁸ Utilitarian arguments are varied as well, but are basically concerned with maximizing the welfare of the majority. Utilitarian aspirations are not simply instrumental or functional, but they seek to promote some kind social utility above all.²⁹ Although this is a generalized and abstract formulation of these two strands as “ideal types,”³⁰ it emphasizes that while the former focuses on equality as a value inherent in diversity, for the latter diversity is a pure means to achieve other social goods that might align with, or be indifferent or even in opposition to, equality. In what follows, a more nuanced and detailed taxonomy is presented, developed by drawing on both the theoretical literature and the actual arguments that appear in the amicus briefs and judicial opinions. In Parts II, III and IV of the Article, the taxonomy is grounded in examples, as it is used to classify the dominant strands of values attributed to diversity along a spectrum of meanings, and to identify when one strand prevails.

The egalitarian rationale for diversity can be divided into two main groups of values: remedial and distributive. The *remedial* diversity framework appeals to notions of corrective justice. It is mostly backward-looking, aspiring to diversity as part of the historical struggle to redress the persistent effects of past discrimination. It aims to create a society in which members of historically disadvantaged groups enjoy the opportunities and status they would have had in life had they not been affected by the wrongs of the past, and in that sense it provides a kind of social remedy. Originally, remedial rationales for affirmative action had compensatory elements.³¹ In its current formulation as an interest in diversity, the aspiration to ameliorate the unequal status quo caused by discrimination and segregation is motivated

²⁸ See MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 116–32 (1991) (explaining how egalitarian arguments are used in the affirmative action debate).

²⁹ See, e.g., *id.* at 95–132 (reviewing the different moral arguments for and against affirmative action developed in the literature); Buchan T.A. Love, *Justifying Affirmative Action*, 7 AUCKLAND U.L. REV. 491, 492, 495 (1993) (categorizing the justifications for affirmative action into three main groups: “Equality of Opportunity,” “Distributive Justice,” and “Utilitarian Justifications,” the first two of which are egalitarian in nature and classified according to whether they aim to achieve equality of opportunity or of outcome).

³⁰ Max Weber developed the analytical tool of “ideal types,” which serves to measure and identify the social phenomena in relation to a pure theoretical form of social construct. It is meant to stress certain common elements of a phenomenon. See Max Weber, “Objectivity” in *Social Science and Social Policy*, in MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES 90 (Edward A. Shils & Henry A. Finch eds., trans., 1949); see also Sung Ho Kim, *Max Weber*, STANFORD ENCYCLOPEDIA OF PHIL. (Nov. 27, 2017), <https://plato.stanford.edu/entries/weber/>.

³¹ See, e.g., ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 137–41 (2010) (reviewing the compensatory rationale and explaining that “[i]n this model, if a person has suffered from wrongdoing, she is entitled to compensation from the wrongdoer, to the extent of the damages the wrong inflicted on her”).

mostly by a sense of collective or institutional responsibility towards historically disadvantaged groups.³²

The *distributive* diversity framework is forward-looking and focused on whether all people have a fair share of benefits, opportunities and status.³³ It is rooted in the commitment to creating a society in which no group is systematically excluded from educational opportunities and positions of leadership.³⁴ Under this justification, a diverse student body is a value in itself, as it embodies a more just distribution of those opportunities. In some cases, this rationale is tied to the democratic understanding of diversity—promoting a substantive vision of American democracy, under which all citizens are equals who enjoy equal opportunities and participation—on which I will elaborate later in this Part.³⁵ For both egalitarian frameworks the main beneficiaries are disadvantaged groups (rather than the majority group, individuals, the society, or the market), and race is not a proxy for some other characteristic, but a central category of hierarchy and power.³⁶ In some instances, the two frameworks appear as complementary to one another, and in others they appear as independent interests in diversity.

The anti-stereotyping strand of interest in diversity is also worth mentioning. It aims to eliminate racial stereotypes and overcome racial divisiveness and isolation by increasing classroom diversity.³⁷ Diversity here is valued for its potential to fight prejudice and bias by refuting stereotypes and stigmas. When pursued for its own sake or as part of a larger struggle against discrimination, it should be understood as espousing an egalitarian goal.³⁸ However, it is often the case that breaking down racial stereotypes and overcoming social divisiveness are pursued only with the utilitarian and market-driven motivations to promote a more efficient work environment and a better learning process. As Ralph Richard Banks and Richard Ford extensively point out “[i]f people accept the eradication of unconscious bias

³² See *infra* Part III.A.1 and particularly *infra* notes 106–20 and accompanying text.

³³ See *infra* Part III.A.1 and particularly *infra* notes 121–25 and accompanying text.

³⁴ The distributive rationale aims to eliminate group hierarchies and can thus be understood as espousing antisubordination values. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004) (explaining the distinction between an antisubordination and an anticlassification conception of equal protection).

³⁵ See *infra* Part III.A.1 and particularly *infra* notes 126–31 and accompanying text.

³⁶ See *infra* Part III.A.1 and particularly *infra* notes 107–35 and accompanying text.

³⁷ See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 106 (2010) (tracing the origins of the anti-stereotyping principle to the civil rights movement: “The civil rights movement had long argued that stereotyping perpetuated racial subordination by curtailing the opportunities of racial minorities and helping to justify the rigid racial stratification of American society”); see also *infra* Part III.A.1 and particularly *infra* notes 101–05 and accompanying text.

³⁸ ANDERSON, *supra* note 31, at 144.

as the goal of racial reform . . . they would be likely to push the theory in directions that siphon energy away from problems of substantive inequality and that may be undesirable in their own right.”³⁹ Thus, in order to classify the anti-stereotyping argument for diversity in one way or another, they must be read in context and with attention to the value they are meant to uphold.

The utilitarian strand stresses the functional benefits that diversity affords society, individuals, or the economy.⁴⁰ Rather than disadvantaged groups, the utilitarian vision targets beneficiaries with different characteristics that would contribute to the diversity of the institution. It too can be divided into two dominant groups of arguments according to the type of good it aims to promote. The first is *pedagogical*, and the second is what I call the *business case* for diversity.⁴¹ The *pedagogical* strand is focused on the benefits of diversity to the educational process of all students. It is meant to promote the exchange of ideas and to foster a stimulating learning environment.⁴² The *business case* for diversity treats diversity as a means to achieve greater economic prosperity and efficiency at the levels of both society and the individual.⁴³ It aims to prepare students for success in the diverse contemporary workforce. An increasingly global economy, it assumes, requires leaders and workers trained in a diverse environment.⁴⁴ While distinct from one another, for both the educational and the market-oriented interests in diversity, race is a proxy for other elements, such as culture, identity, or ideas that would contribute to the diversity of the institution. While the two strands were initially independent rationales, the Article shows that by the time of *Fisher*, the pedagogical arguments for diversity were mostly subjected to “greater” concerns about the market and the economic well-being of graduates.⁴⁵ Naturally these arguments are forward-looking and bear little or no relationship to the history of racial discrimination.

³⁹ Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1059 (2009); *see also id.* (further explaining that “[t]he unconscious bias discourse, for example, could lead either to the expanded use of diversity training, or the broad imposition of a norm of instrumentally rational decision making. Neither would further the cause of racial justice”).

⁴⁰ *See* ROSENFELD, *supra* note 28, at 94–115.

⁴¹ Another utilitarian interest invoked by the United States in *Fisher I* is the interest in well-functioning public institutions. *See infra* notes 197–205 and accompanying text.

⁴² *See infra* Part II and particularly *infra* notes 63–67 and accompanying text.

⁴³ The business case for diversity is commonly used to describe justifications made by corporations to engage in diversity efforts for reasons of economic efficiency. I import this term to the realm of higher education and use it to describe market-based rationales for diversity, focused mainly on professional training of students and on fostering an effective workforce. For a discussion of the business case in the corporate context, *see generally* Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589 (2006).

⁴⁴ *See infra* Part IV.A.1 and particularly *infra* notes 180–88.

⁴⁵ *See infra* notes 186–88 and accompanying text.

A third dimension of diversity that does not necessarily fit neither to the egalitarian pole nor to the utilitarian one, is its *democratic* understanding that articulates a national ideology of cultural pluralism. Duncan Kennedy explains that as a culturally pluralist society, we should deliberately structure institutions in a diverse way.⁴⁶ This vision was best articulated by John Dewey in *Democracy and Education*: “democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience.”⁴⁷ Diversity, according to this view, is a manifestation of the democratic way of life. It is a national-democratic commitment to cultural pluralism and “more numerous and more varied points of contact” and “a greater diversity of stimuli to which an individual has to respond.”⁴⁸ This vision of diversity is about pluralism as a democratic identity; it is an assertion about who we are as a nation. It is thus somewhat distinct from both egalitarian and utilitarian strands of diversity. However, both in theory and in the practice that is revealed by the amicus briefs,⁴⁹ this deep commitment to democracy often overlaps with egalitarian commitments. As Amy Gutman explains in her book *Democratic Education*: “[t]he principles of nonrepression and nondiscrimination simultaneously support deliberative freedom and communal self-determination,” which are, according to Gutman, the foundation of democracy.⁵⁰ “[A]ll citizens,” she continues, “must be educated so to have a chance to share in self-consciously shaping the structure of their society.”⁵¹

The proposed taxonomy represents a spectrum of meanings, according to which I classify the values and interests attributed to diversity. The egalitarian and utilitarian understandings of diversity mark the opposite ends of the spectrum, and the democratic dimension is external to this spectrum, but often it is aligned with the egalitarian pole. The three poles of meanings attributed to diversity—egalitarian, utilitarian, and democratic—are neither completely distinct in theory nor are they always opposed in practice.⁵² The

⁴⁶ Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 713–14.

⁴⁷ JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 101 (1916).

⁴⁸ *Id.*

⁴⁹ See Part III.A.1 and particularly *infra* notes 126–31 and accompanying text.

⁵⁰ AMY GUTMANN, *DEMOCRATIC EDUCATION* 46 (1987).

⁵¹ *Id.*

⁵² For a theoretical discussion of equality as a utilitarian value, see Amartya Sen, *Equality of What?*, in 1 TANNER LECTURE ON HUMAN VALUES 198–99 (Sterling M. McMurrin ed., 2011) (1980) (explaining that “[u]tilitarian equality is the equality that can be derived from the utilitarian concept of goodness applied to problems of distribution. . . . The utilitarian objective is to maximize the sum-total of utility irrespective of distribution, but that requires the *equality* of the *marginal* utility of everyone — marginal utility being the incremental utility each person would get from an additional unit of cake. According to one interpretation, this equality of marginal utility embodies equal treatment of everyone’s interests” (footnotes omitted) (citing John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls’ Theory*, 69 AM. POL. SCI. REV. 594 (1975)).

egalitarian values of diversity were often instrumentalized to serve the “greater” benefits of maximizing social welfare, and more specifically of the economic prosperity of both the individual and of society. Furthermore, the arguments in the amicus briefs are often entangled with one another and in some cases can be categorized as both utilitarian and egalitarian. Analyzing numerous briefs, I am often able to distinguish one from the other, relying on rhetoric and nuanced context. However, like other attempts at discourse analysis, the proposed sociohistorical account of diversity that follows acknowledges this complexity and aims to reflect it in the process of conveying the major transformations in the meaning of diversity that have occurred over time.

II. *BAKKE*'S CONSTRAINTS AND THE DIVERSITY FRAMEWORK

In 1978, the Supreme Court in *Bakke* invalidated the University of California Davis Medical School's admissions program that set aside sixteen places for minority students out of a class of one hundred.⁵³ Disqualifying Davis's specific program, Justice Powell, in a plurality opinion, actually approved the use of race in admissions if necessary to promote a “compelling state interest.”⁵⁴ Applying strict scrutiny, Justice Powell questioned what State interests were sufficiently compelling. He admitted that “[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.”⁵⁵ However, Justice Powell distinguished between the legitimate narrow interest in “redress[ing] the wrongs worked by specific instances of racial discrimination” and the illegitimate goal of “remedying of the effects of ‘societal discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past.”⁵⁶ The interest in remedying past discrimination was thus sufficiently compelling only if a university could identify specific instances of institutional discrimination, but not to rectify broader social discrimination. In so doing, Justice Powell narrowed the remedial logic to an extent it was no longer feasible to use in the realm of higher education.⁵⁷

Powell instead offered the diversity rationale. “[T]he attainment of a diverse student body,” he held, is “of paramount importance” to the

⁵³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁵⁴ *Id.* at 287–320 (plurality opinion).

⁵⁵ *Id.* at 307.

⁵⁶ *Id.*

⁵⁷ Richard A. Posner, *The Bakke Case and the Future of “Affirmative Action,”* 67 CALIF. L. REV. 171, 178–80 (1979) (asserting that according to Justice Powell, remedial measures can only be based on legislative findings of past unlawful discrimination).

University's mission and "compelling in the context of a university's admissions program."⁵⁸ Turning to the diversity rationale, Justice Powell relied on Harvard College's admissions program, as described in an amicus brief filed by Harvard University, Stanford University, Columbia University, and the University of Pennsylvania.⁵⁹ David Oppenheimer recently revealed that the diversity rationale embraced by Justice Powell in *Bakke*, was actually born in an amicus brief submitted by Harvard in a 1974 case that was dismissed by the court and forgotten.⁶⁰ Furthermore, even though prior to *Bakke*, diversity generally did not serve as a justification for affirmative action,⁶¹ the roots of Harvard's commitment to diversity, Oppenheimer shows, can be traced back to the mid-19th century.⁶² However, it was only following *Bakke* that diversity came to play the lead role in the struggle over affirmative action. Justice Powell situated diversity as the preeminent justification for upholding race-conscious admissions policies, confining the legal debate and the popular discourse to the interest in diversity.

As Pamela Karlan observed, Justice Powell conceptualized diversity as a *pedagogical value* in the educational process itself.⁶³ He focused on the "educational benefits that flow from an ethnically diverse student body,"⁶⁴ and explained that "the right to select those students who will contribute the most to the 'robust exchange of ideas'" is important to the academic freedom of a university.⁶⁵ Justice Powell added that "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."⁶⁶ Justice Powell's interest in diversity, as John Jeffries observed, was about improving the educational experience of all students, rather than helping a specific group.⁶⁷

Above all, Justice Powell emphasized the pedagogical utility of diversity, but his interpretation of diversity also encompassed an interest in training

58 *Bakke*, 438 U.S. at 311, 313–14 (plurality opinion).

59 Justice Powell attached Harvard's program as an appendix to his opinion. *See id.* app. at 321–24.

60 *See* OPPENHEIMER, *supra* note 26 at 1, 8 (explaining that the case *DeFumis v. Odegaard*, 416 U.S. 312 (1974) was dismissed as moot).

61 *Id.* at 1–14.

62 *Id.* at 28–34.

63 Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1624 (2007) ("Justice Powell's articulation, grounded as it was in earlier cases involving academic freedom and autonomy, involved a largely intrinsic perspective in the sense that academic diversity was valuable to the university's distinctive mission of promoting the robust exchange of ideas and the advancement of knowledge."). For a similar reading of *Bakke*, see Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 59–60 (2003).

64 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978) (plurality opinion).

65 *Id.* at 312–13.

66 *Id.* at 312.

67 John C. Jeffries, Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1, 7.

leaders and professionals. “[T]he ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples,”⁶⁸ he stated. This statement could be attributed to a democratic vision of society, yet Justice Powell did not follow this direction. Instead, he seemed more interested in the pedagogical and somewhat market oriented utilitarian interest in diversity, as he asserted that a “student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”⁶⁹ Finally, he underlined that diversity “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁷⁰

Justice Powell’s opinion struck a compromise between the forces for and against affirmative action: it was permitted but restricted. Even though it was not a majority opinion, it was widely viewed as stating the law and ended up shaping the conversation over affirmative action.⁷¹ Sanford Levinson explained how the Court sometimes establishes “law talk,” so that lawyers and non-lawyers adopt certain arguments and not others, and in *Bakke*, it was as if the Court ordered: stop talking about rectification of past social injustice and start talking about diversity.⁷² Critics of diversity draw a complete contrast between the rejected, backward-looking remedial interests in affirmative action and the new diversity justification. Paul Mishkin criticized it on its “exclusive reliance upon the justification of academic diversity,”⁷³

68 *Bakke*, 438 U.S. at 313 (plurality opinion) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

69 *Id.* at 314.

70 *Id.* at 315.

71 See *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (explaining that Justice Powell’s opinion in *Bakke* had “served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies”); see also Antonin Scalia, Commentary, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race”*, 1979 WASH. U.L.Q. 147, 148 (“Justice Powell’s opinion, which we must work with as the law of the land, strikes me as an excellent compromise between two committees of the American Bar Association on some insignificant legislative proposal. But it is thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution.”). Nonetheless, the authority of *Bakke* as the law of the land was challenged by the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), in which the majority struck down a race-conscious admissions scheme and asserted that *Bakke* did not have the legal force that most lawyers had attributed to it.

72 See LEVINSON, *supra* note 5, at 16.

73 Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 921 (1983). Mishkin drafted the primary brief for the University in *Bakke* and argued that racial classifications in the context of affirmative action should be immune from strict scrutiny.

and Ronald Dworkin wrote that diversity “does not supply a sound intellectual foundation for the compromise the public found so attractive.”⁷⁴ Charles R. Lawrence added that “Powell’s restriction on backward-looking affirmative action incorporates the big lie into affirmative action doctrine,” explaining that the focus on diversity and the rejection of egalitarian rationales pushed us to believe that the nation has overcome its racism.⁷⁵ Others have claimed that by adopting diversity, affirmative action disconnected from its moral grounds, and that post-*Bakke*, minorities have to rely on the school’s interest in the benefits of diversity.⁷⁶

Focusing on legal doctrine, these critics describe the dispute over the justifications for affirmative action in binary and fixed terms: on the one hand, the lost remedial interest disqualified by Justice Powell, and on the other hand, the legitimate yet flawed interest in diversity. This Article resists this binary contrast. Instead, by investigating the briefs and amicus briefs filed to the Court in subsequent cases challenging higher education affirmative action, it shows that the meaning of diversity has been subject to continuous contestation and development. It accounts for the overlooked conversation between social movements, university officials, and courts that have shaped the meaning of diversity and the way it was invoked to allow or restrict affirmative action over time. By doing so, the Article uncovers that the debate over the competing defenses of affirmative action was actually not settled by the Court in *Bakke* or thereafter, but transformed into an internal and more covert negotiation over the value and significance of diversity.

⁷⁴ Ronald Dworkin, *The Bakke Decision: Did It Decide Anything?*, N.Y. REV. BOOKS, (Aug. 17, 1978), <http://www.nybooks.com/articles/1978/08/17/the-bakke-decision-did-it-decide-anything/> (“[T]he argumentative base of his opinion is weak. It does not supply a sound intellectual foundation for the compromise the public found so attractive. The compromise is appealing politically, but it does not follow that it reflects any important difference in principle, which is what a constitutional, as distinct from a political, settlement requires.”).

⁷⁵ Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 768 (1997); *see also id.* at 767 (“I call this ‘the Big Lie.’ Despite overwhelming evidence of continuing racial discrimination, the Court tells us our nation has overcome its racism.” (footnotes omitted) (citing *Board Hopes to Destroy ‘Intractable’ Racism: U.S. Must Upgrade Its Worst Schools, Open Marketplace*, ARIZ. REPUBLIC, July 15, 1997, at A3; then citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989) (Marshall, J., dissenting)).

⁷⁶ Derrick A. Bell, Jr., *Introduction: Awakening after Bakke*, 14 HARV. C.R.-C.L. L. REV. 1, 5 (1979) (“Where past intentional discrimination is not proved, post-*Bakke* minorities must rely on the interest of schools in exercising their discretion to admit a small number of minority students whose numbers will be dictated by the school’s interest in diversity, rather than on either the magnitude of past racial wrongs or on the minority students’ potential for future achievement.”).

III. THE DEBATE OVER JUSTIFICATIONS CONTINUES IN *GRUTTER* AND *GRATZ*

Several cases dealing with affirmative action in other spheres were decided by the Supreme Court in the decades following the *Bakke* decision,⁷⁷ yet it was only a quarter of a century later in *Gratz v. Bollinger*⁷⁸ and *Grutter v. Bollinger*⁷⁹ (together the “Michigan cases”) that a challenge to higher education race-conscious admissions policies reached the Supreme Court.⁸⁰ The Michigan cases sparked widespread public mobilization for and against affirmative action and generated numerous amicus briefs. The amicus briefs touched many aspects of the debate; some did not directly deal with the justification question, but almost all presented their own interpretation of the value of diversity. It was the first time that the interest in attaining student body diversity was debated on a national scale, and therefore is the focus of this inquiry.

The doctrinal analysis that has dominated the legal and popular scholarship on this body of law has mostly neglected to address this robust intervention.⁸¹ In contrast, drawing on *democratic constitutionalism* (also known

⁷⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (overruling *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), and imposing “strict scrutiny” on racial classification imposed by the federal government); *Metro Broad., Inc. v. Fed. Comm’n Comm’n*, 497 U.S. 547, 552 (1990) (upholding a federal policy of racial preferences in broadcasting); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 511 (1989) (declaring unconstitutional an ordinance that gave preference to minority-owned firms in awarding municipal construction contracts).

⁷⁸ 539 U.S. 244, 251 (2003).

⁷⁹ 539 U.S. 306, 311 (2003).

⁸⁰ In 1996, the Fifth Circuit invalidated the University of Texas at Austin’s race-conscious admissions policy. The University appealed the decision to the United States Supreme Court, which declined to review the case. *See Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (explaining that that the University had discontinued and was no longer defending the specific admissions policy that had been at issue in the lawsuit), *cert. denied*, 518 U.S. 1033, 1034 (1996).

⁸¹ An exception is an analysis by Brown-Nagin of the mass mobilization surrounding the Michigan cases that manifested in the form of briefs and amicus briefs. Yet, the focus of her inquiry is not diversity, but rather the relationship between social movements and juridical law. In doing so, even Brown-Nagin’s account assumes a binary distinction between diversity and other egalitarian rationales. Furthermore, the conclusions she draws regarding the tension between social movements and the law overlooks the evolving meaning of diversity that this article uncovers. *See Tomiko Brown-Nagin, Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1502 (2005) (“[S]cholars [who conceive of litigation as an instrument of social reform] minimize the differences between the form and substance of legal processes and concepts, and the form and purposes of participatory democratic action. In fact, there are profound differences between most forms and tactics of lawyering and social movement activity.”); *see also* David B. Wilkins, *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*, 117 HARV. L. REV. 1548, 1553–54 (2004) (examining the market-based arguments for diversity made by the business sector and its manifestation in the legal profession).

as popular constitutionalism) literature,⁸² the Article focuses exactly on the interaction between members of the polity and the Court that revealed itself in the form of an influx of amicus brief submissions. The Article employs the idea that constitutional understandings are created not just through formal law-making, but also emerge in interactions between citizens, officials, and courts.⁸³ As Larry Kramer recognizes, democratic constitutionalism scholarship calls for a much-needed step away from the entrenched juristic tradition.⁸⁴ In order to understand how constitutional norms develop, we must examine the ongoing engagement of other members of the polity in the process of constitutional interpretation.⁸⁵ Exploring this interaction between judicial and non-judicial actors in the context of affirmative action, this Article uncovers the evolving meaning of diversity. It shows that diversity's constitutional value was not only defined through Court opinions,⁸⁶ but was also transformed and infused with new meanings

⁸² LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 172 (2004) (making a normative claim regarding the rule of popular constitutionalism as a desirable methodology of constitutional interpretation, and arguing that the Court's interpretation should be reflecting the popular will); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 6–10 (2001) (contrasting the notion of judicial supremacy with the idea of popular constitutionalism); 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 Court, 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); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 960 (2004) [hereinafter Kramer, *Popular Constitutionalism*] (describing the “new discourse” among legal scholars to interpret the Constitution to appeal to democratic citizens).

⁸³ See Siegel, *supra* note 82, at 1329 (using the term “constitutional culture” to describe how interactions between citizens and officials produce new constitutional meaning).

⁸⁴ Kramer, *Popular Constitutionalism*, *supra* note 82, at 959–60, 965–66. Reviewing this body of literature, Kramer explains that after *Brown*, constitutional scholars on both sides of the aisle came to accept the judiciary as the authoritative interpreter of the Constitution and started debating over the question of interpretative methodology. This, he argues, led the literature to focus on courts and neglect external influences that shape constitutional law. The scholarly movement of democratic constitutionalism, Kramer recognizes, is a much-needed step away from this tradition.

⁸⁵ *Id.* at 993.

⁸⁶ There are many other theories that embrace the idea of a dynamic “living constitutionalism.” However, these theories tend to focus on the Court's interpretation of the Constitution, evolving from one decision to another. Democratic constitutionalism takes the idea of a living constitution one step further and accounts for the complex ways in which changes in constitutional meaning take place through the interaction between judicial and extra-judicial actors. For a key theory of living constitutionalism, see generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

through the public conversation that revolved around these cases. In what follows, I uncover this conversation through a textual analysis of the numerous amicus briefs that were filed by different actors: university officials, student organizations, public interest groups, veterans, the United States Government, and others. But first, the facts of the cases.

The University of Michigan (for this section: “U-M” or the “University”) first adopted race-conscious affirmative admission measures in the 1960s. In 1991 Lee Bollinger, then the president of the University, set in motion steps to reframe the University’s affirmative measures in terms of diversity so that they would align with Justice Powell’s opinion in *Bakke*.⁸⁷ At the undergraduate level preference points were automatically allocated to applicants of disadvantaged minority groups.⁸⁸ In contrast, the law school had in place an individualized holistic review process, under which race was only one of many factors that may contribute to diversity.⁸⁹ In 1997, plaintiffs represented by the Center for Individual Rights (“CIR”) challenged the University’s admissions policies both at the undergraduate level and at the law school.⁹⁰ The litigation climaxed in two Supreme Court cases, *Gratz* and *Grutter*, which were heard in conjunction and decided in 2003.⁹¹

By the time the cases reached the Supreme Court, social mobilization around them was unprecedented in content and in scope, and produced seventy-one amicus briefs in support of the university and sixteen in support of the petitioners.⁹²

A. *The Emergence of the Egalitarian Diversity Framework in the Briefs*

In *Bakke*, Justice Powell rejected the goal of remedying the effects of societal discrimination, while allowing limited use of race in admission decisions to promote the benefits of diversity to the educational process.⁹³

⁸⁷ Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, in EDUCATION LAW STORIES 83, 86–87 (Michael A. Olivas & Ronna Greff Schneider eds., 2007) (“In 1991 . . . Dean Lee Bollinger . . . appointed a faculty committee to devise an affirmative action policy consistent with Justice Powell’s *Bakke* opinion. . . . The policy asserted that diversity would improve learning for all students. . . . To achieve this, the law school sought to enroll ‘a “critical mass” of minority students.’” (footnote omitted) (quoting *Grutter v. Bollinger*, 137 F.Supp.2d 821, 828 (E.D. Mich. 2001), *rev’d* 288 F.3d 732 (6th Cir.) (en banc), *aff’d* 539 U.S. 306 (2003))).

⁸⁸ 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))).

⁸⁹ *Id.*

⁹⁰ *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306.

⁹¹ *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306.

⁹² For a complete list of amicus briefs submitted in both *Grutter* and *Gratz*, see *Grutter and Gratz: Amicus Briefs*, UNIVERSITY OF MICHIGAN ADMISSIONS LAWSUITS, <https://diversity.umich.edu/admissions/legal/amicus.html> (last visited Feb. 4, 2017).

⁹³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310–12 (1978) (plurality opinion).

Following the University of Michigan's defense, the vast majority of the amici in the two cases seemingly complied with the constraints set by *Bakke* and did not openly invoke direct remedial rationales. However, a careful analysis of the amicus briefs reveals that their interpretation of diversity, in contrast to Justice Powell's, was infused with egalitarian interests. *Bakke* was both criticized and praised for rejecting the remedial logic and settling the debate over justifications for affirmative action. Yet, as I demonstrate below, the debate over the rationales for affirmative action was not over, but rather transformed into an internal and more covert conversation over the value of diversity. *Bakke* closed the main door for egalitarian arguments for affirmative action. But, by resisting the narrow pedagogical interpretation of diversity and infusing it with prospective and retrospective egalitarian values, the proponents of affirmative action opened a window through which the conversation could continue. In other words, if diversity was introduced as a form of compromise that allowed affirmative action to continue but mystified its egalitarian aspirations,⁹⁴ the *Grutter* amici curiae reappropriated it to include remedial as well as distributive egalitarian values.

Many of the amicus briefs filed in the Michigan cases cited *Bakke* and encompassed similar utilitarian and pedagogical understandings of diversity, aspiring to achieve educational benefits and greater goods for society at large. However, at the same time, the briefs were deeply rooted in the history of racial discrimination. Distinct not only from *Bakke*, but also from the contemporary, market-driven, ahistorical interpretation of diversity, the Michigan amici viewed diversity as a concept that vindicates a deep concern for the persistence of racial inequality. Studying the briefs, I identify that the Michigan amici attributed three types of egalitarian interpretations to diversity, each focused on a different kind of interest: (1) anti-stereotyping interests, (2) retrospective remedial interests, and (3) prospective distributive interests, entangled, in large part, with a democratic vision of society. Of course, not all of these interests can be found in each brief, and the balance between the utilitarian defense of diversity and the equality-based defense varies. Nevertheless, those three strands of egalitarian meaning were present and salient in the interpretation of diversity at the time of the Michigan cases. First, I consider the defense of the University of Michigan that served as a point of reference for many of the amici. Then, with a focus on the academic amici, I analyze amicus briefs filed in support of the University. Finally, I supplement this account through analysis of the way diversity is reflected in the briefs submitted by the petitioners and their supporters.

⁹⁴ 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.").

1. *Proponents' Briefs and the Egalitarian Interests in Diversity*

The University of Michigan asked the Court to reaffirm Justice Powell's opinion in *Bakke*. Formally complying with the constraints set in Powell's opinion, the University defended its race-conscious affirmative action policies solely in terms of diversity, cautious not to admit it had any direct interest in prohibited racial balancing or any remedial motivations.⁹⁵ This approach led U-M to recognize the same utilitarian, mostly pedagogical, benefits of diversity that were emphasized by Justice Powell.⁹⁶ Even with such a literal and cautious approach, diversity for U-M was not based solely on the utilitarian—pedagogical and to a lesser extent market-driven—rationales that it was in *Bakke*. For U-M, the interest in diversity was deeply connected to the history of race discrimination and the persistence of racial hierarchies. When claiming that Powell's opinion in *Bakke* is not only a binding precedent but also legally “justified,” 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.”⁹⁷ Similarly, when explaining that race-conscious measures to promote diversity have “durational limits,” the University turned to remedial logic and argued that the disparities in academic preparation that make race-neutral alternatives impossible today are “rooted in centuries of racial discrimination” and that these disparities “will eventually be eliminated.”⁹⁸ The University further claimed that the goal of diversity:

simply acknowledges the elephant in the room—that despite the recent advent of formal equality under the law and indisputable progress in race

⁹⁵ See Brief for Respondents at 12, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Brief for Respondents, *Grutter*] (arguing that *Bakke* is a “settled precedent,” that it “has been relied upon by universities for decades . . . and has become an important part of our national culture. It is also clearly correct”).

⁹⁶ *Id.* at 21–22 (“[P]reparing students for work and citizenship in our diverse society is exceedingly difficult in racially homogenous classrooms . . . [R]acially integrated education improves the quality of education for all children’ . . . and . . . ‘is beneficial to both’ white and minority students.” (quoting H.R. Rep. No. 92-576, at 10 (1971); then quoting S. Rep. No. 92-61, at 7 (1971))). In oral arguments, the University’s attorney also claimed that “our leaders need to be trained . . . with exposure to the viewpoints, to the prospectives [sic], to the experiences of individuals from diverse backgrounds.” Transcript of Oral Argument at 32–33, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-214).

⁹⁷ Brief for Respondents, *Grutter*, *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*] (“Racial and ethnic diversity is educationally important because, notwithstanding decades of progress, there remain significant differences in our lives and perceptions that are undeniably linked to the realities of race. Continuing patterns of residential segregation, for example, mean that ‘the daily events and experiences that make up most Americans’ lives take place in strikingly homogenous settings.” (quoting Joint Appendix at 1968, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447))).

⁹⁸ Brief for Respondents, *Grutter*, *supra* note 95, at 33.

relations (in part because of the growing racial diversity in institutions like the Law School), America remains both highly segregated by race and profoundly and constantly aware of its significance in our society.⁹⁹

The connection between the utilitarian push for diversity and the egalitarian interpretations of it only deepened in the vast majority of amicus briefs submitted in support of the University. The coalition of amici was mainly composed of representatives of university officials, student organizations, K-12 organizations, civil rights organizations, retired military generals, and businesses and professional organizations. Academic amici and other supporters followed the lead of the University of Michigan. Many of them defended the efforts to promote diversity by pointing to the role and prerogative of institutions of higher education as they prepare students to be productive and successful members of society and of the ever-expanding global workforce.¹⁰⁰ But, even though many recognized the utilitarian—pedagogical and market-driven—benefits that flow from diversity, their interpretation of diversity was deeply entangled with notions of racial justice, equality, and democracy. With the exception of business amici, the supporters' interpretation of diversity was rooted in and expressed three kinds of egalitarian values.

a. *Anti-Stereotyping Interests*

The first—yet least common—of the egalitarian interests to show up in the briefs was the interest in breaking down racial stereotypes. A few of the academic amici claimed that classroom diversity has the potential to eliminate racial stereotypes and overcome racial divisiveness. Few of the amici emphasized the advantages of eliminating stereotypical assumptions both to the educational experience and to the multicultural work

⁹⁹ *Id.* at 23 (further explaining that “[m]any white Americans underestimate those realities because, of course, ‘[t]o be born white is to be free from confronting one’s race on a daily, personal, interaction-by-interaction basis.’ By contrast, ‘[t]o be born black is to know an unchangeable fact about oneself that matters every day’” (alterations in original) (quoting T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1066 (1991))).

¹⁰⁰ *See, e.g.*, Brief of Amici Curiae Columbia Univ. et al. in Support of Respondents at 3, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Columbia Brief, *Grutter*] (“Anyone learns better in an environment that includes other students who bring a different background and perspective to the same experience or material. . . . This will provide the ferment and creative excitement that is itself part of a good education and will prepare them to participate in a world which promises to be very different from that any of us have experienced.” (quoting Nannerl O. Keohane, *The Mission of the Research University*, in *THE RESEARCH UNIVERSITY IN A TIME OF DISCONTENT* 164 (Jonathan R. Cole et al. eds., 1994))); Brief of Amici Curiae Am. Council on Educ. & 53 Other Higher Educ. Orgs. in Support of Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-214) [hereinafter ACE Brief, *Grutter*] (“Diversity is basic to higher education’s main purposes: to enable students to lead ‘the examined life’; to ready them to maintain the robust democracy in which we live; and to prepare them to function in the national and global economy.”).

environment.¹⁰¹ However, the majority of amici who invoked the anti-stereotyping interests understood it as an egalitarian value. Some of them did not find a need to further justify the interest to overcome stereotypes as they found it a good in itself,¹⁰² and for others it was part of the overall fight against prejudice and bias that lead to discrimination.¹⁰³ The American Federation of Labor, for example, argued that “[a]mong the most clearly documented educational benefits of the diverse student body . . . is the reduction of stereotypes and prejudices that lead to discrimination.”¹⁰⁴ Similarly, an amicus brief filed by thirty-eight private colleges and universities connected anti-stereotyping to discrimination, and to a national commitment of cultural pluralism:

[i]t is very much a part of our educational mission to expose our students to differences in race, gender and class . . . to teach them to recognize and overcome bias, prejudice and discrimination, so that they may understand that our diversity creates our richness and strength as a nation and as a people.¹⁰⁵

¹⁰¹ See, e.g., Brief of Harvard Univ. et al. as Amici Curiae Supporting Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter Harvard Brief, *Grutter*] (“Amici’s admissions policies have served compelling pedagogical interests by contributing to a diverse and inclusive educational experience, teaching students to view issues from multiple perspectives, and helping to break down prejudices and stereotypical assumptions. The policies prepare students to work productively in a multiracial environment after they graduate, and the policies meet the demands of business and the professions by preparing a generation of public and private leaders for an increasingly pluralistic national and global economy.”).

¹⁰² See, e.g., Brief of the Am. Educ. Research Ass’n et al. as Amici Curiae in Support of Respondents at 20, *Grutter*, 539 U.S. 306 (No. 02-241) (“[S]tudent body diversity overwhelmingly leads to positive outcomes and helps dispel the racial stereotyping that has plagued American society throughout its history.”); ACE Brief, *Grutter*, *supra* note 100, at 25, *Grutter*, 539 U.S. 306 (No. 02-241) (“[T]he educational value of diversity derives not from a false assumption that all members of one race think alike or that race is a proxy for viewpoint. Rather, diversity enables students to discover the falsity of such stereotyped, malignant assumptions.”); Brief of Amici Curiae Nat’l Asian Pac. Am. Legal Consortium et al. in Support of Respondents at 10 n.4, *Grutter*, 539 U.S. 306 (No. 02-241) (explaining that diversity is “necessary to avoid precisely the sort of stereotyping that Petitioners decry.”).

¹⁰³ See, e.g., Brief Amici Curiae the Am. Jewish Comm. et al. in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241) (“Our nation’s history has been marred by centuries of racial and ethnic prejudices and wrongdoings. As Jews, who have often been the victims of such prejudices, we value the importance of equality. . . . In that spirit, and in recognition of the value of a diverse campus community, [the Central Conference of American Rabbis] supports the carefully crafted programs at issue here.”).

¹⁰⁴ Brief Amicus Curiae of Am. Fed’n of Labor & Congress of Indus. Orgs. in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241); see also *id.* (“White, African-American and Hispanic students schooled with diverse peers are more likely to work in integrated workplaces. Thus, the challenged admissions policies further the compelling governmental interest in equal employment opportunity.”).

¹⁰⁵ Brief of Carnegie Mellon Univ. et al. as Amicus Curiae in Support of Respondents at 14–15, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter CMU Brief, *Grutter*].

b. Retrospective Egalitarian Framework: Remedial Interests

More salient was the backward-looking remedial interest in attaining student body diversity. The most explicit link between remedial interests and diversity was made in an amicus brief by The Lawyers' Committee for Civil Rights, who argued that "[t]he Thirteenth Amendment and the 1866 Civil Rights Act provide a compelling remedial interest and inform a diversity interest."¹⁰⁶ They explained that "given not only the complex and torturous history of race in this nation, but the contemporary social, political, cultural, and economic realities it has shaped, race is not simply a matter of skin color or features."¹⁰⁷ Careful not to explicitly advocate for the rejected separate remedial defense of affirmative action, many amici interpreted diversity to include a version of these remedial values. To name but one example of many,¹⁰⁸ the National School Boards Association argued that "[r]acial and ethnic gaps in educational opportunity and achievement persist across the nation. Closing these gaps is a compelling national priority that may necessitate race-conscious policies, including efforts to promote diversity or prevent racial isolation."¹⁰⁹

Academic amici were even more cautious not to openly invoke explicit remedial justification for taking race-based measures. Through their interpretation of diversity, however, they vindicated clear interests in fighting the persistent effects of past discrimination and situated their current pursuit of diversity in relation to the history of state-sanctioned discrimination and the struggle to end it.¹¹⁰ The United Negro College Fund simply stated:

¹⁰⁶ Brief of Amici Curiae the Lawyers' Comm. for Civil Rights Under Law et al. in Support of Respondents at 5 n.3, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

¹⁰⁷ *Id.* at 28.

¹⁰⁸ For non-academic briefs, *see, e.g.*, Brief Amicus Curiae Black Women Lawyers Ass'n of Greater Chi., Inc., in Support of Respondents at 29, *Grutter*, 539 U.S. 306 (No. 02-241) ("[W]hen will this use of race to achieve diversity end? . . . 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. We will have reached that day when research reflects that there is no economic disparity in America based upon race for individuals similarly situated."); Brief Amici Curiae of Veterans of the S. Civil Rights Movement & Family Members of Murdered Civil Rights Activists in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241) ("[E]fforts to promote . . . diversity . . . [are] needed so America can continue its progress toward becoming a society in which all have a fair opportunity to participate." (alteration in original)).

¹⁰⁹ Brief of Amici Curiae Nat'l Sch. Bds. Ass'n et al. in Support of Respondents at 20, *Grutter*, 539 U.S. 306 (No. 02-241) (footnotes omitted) (citing Dear Colleague Letter from Secretary Richard Riley, U.S. Department of Education, (Jan. 19, 2001); then citing No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2002); and then citing *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 742-53 (2d Cir. 2000)).

¹¹⁰ *See, e.g.*, Brief of Howard Univ. as Amicus Curiae in Support of Respondents at 39-40, *Grutter*, 539 U.S. 306 (No. 02-241) ("The fact that the University gives considerable weight to race and ethnicity in the admissions process in order to achieve diversity and ameliorate the effects of discrimination is both necessary, if it is to be a real factor, and unsurprising given the profound and

“[t]he racial exclusion, segregation, and discrimination that, for centuries, permeated all aspects of the Nation’s educational system . . . are significant to understanding the compelling nature of the governmental interest in admitting a diverse student body and the benefits to both individuals and society of ensuring educational opportunity for all”¹¹¹

Similarly, Amherst and twenty-seven fellow prestigious colleges emphasized the close relationship between their contemporary efforts to promote student diversity and “the commitment to broadly include students from groups which had been systematically disadvantaged and effectively excluded” The Colleges claimed that “[t]he interest in educating students from all reaches of American society . . . has deep roots, and cannot be dismissed as late-twentieth century social engineering.”¹¹² After describing their long history of employing diversity efforts, a group of elite universities, including Harvard, Yale, and Brown, stated that it was against this “historical backdrop that selective universities ultimately developed their admissions policies with respect to African-Americans and other minority groups that have been subject to targeted exclusion from many of the benefits of American life.”¹¹³ The academic coalition not only tied their interest in diversity to the saliency of past discrimination, but also directly pointed to the remedial potential of attaining diversity. As the American Law Deans Association explained: “[r]acial diversity eliminates racial identifiability; racial identifiability is important evidence of segregation and discrimination”¹¹⁴

The Student Intervenors Coalition¹¹⁵ defended U-M’s policy by arguing

intergenerational effects of two hundred and fifty years of slavery, followed by a century of Jim Crow, followed by slow progress in the face of continuing discrimination.”); Harvard Brief, *Grutter*, *supra* note 101, at 29 (“[T]he interest in a racially diverse student body might gradually become decoupled from policies that give favorable consideration to minority race and ethnicity.”). Even in briefs that followed Justice Powell’s opinion more rigidly or focused not on diversity itself but on the deference that should be given to the university, the unique and unparalleled commitment to racial and ethnic representation, to the representation of “minority groups” or “disadvantaged groups,” was exceptional. *See, e.g.*, Columbia Brief, *Grutter*, *supra* note 100, at 4 (“[O]ne factor amongst the multitude it considers in its admissions process should be the race and ethnic background of otherwise underrepresented minorities.”); Brief of Amici Curiae Mass. Inst. of Tech. et al. in Support of Respondents at 24, *Grutter*, 539 U.S. 306 (No. 02-241) (“We must not pretend that racial discrimination against minorities is no longer an issue in the United States.”).

¹¹¹ Brief for the United Negro Coll. Fund & Kappa Alpha Psi as Amici Curiae in Support of Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241).

¹¹² Brief of Amherst et al. Amici Curiae, Supporting Respondents at 19, *Grutter*, 539 U.S. 306 (No. 02-241).

¹¹³ Harvard Brief, *Grutter*, *supra* note 101, at 10.

¹¹⁴ Brief of Am. Law Deans Ass’n as Amicus Curiae in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241).

¹¹⁵ Brief for Respondents Kimberly James et al., *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter Kimberly James Brief, *Grutter*] (filed on behalf of three groups: United for Equality and Affirmative Action (“UEAA”), Law Students for Affirmative Action (“LSAA”), and the Coalition to Defend Affirmative Action and Integration and Fight for Equality By Any Means Necessary (“BAMN”).

that traditional admission criteria were discriminatory, and that affirmative action was required “to undo some portion of the odious impact that its two main admissions criteria would otherwise have on the fairness of its admissions process as well as the diversity of its student body.”¹¹⁶ Promoting this argument, it treated diversity as a defective but necessary compromise that had to be upheld.¹¹⁷ The Student Coalition recognized that diversity “obscured affirmative action’s fundamental nature as a means of achieving integration and equality,”¹¹⁸ but at the same time realized that it is the only way the Court “can sanction the right of universities to continue equalizing educational opportunity, can make universities more accountable to the public, and can provide much needed protection of the gains towards integration this society has made.”¹¹⁹ The Student Coalition, as well as other student intervenors, embraced a remedial interpretation of diversity, while accepting that such compromise might narrow the historical aspiration to rectifying the wrongs of the past. By acknowledging the indirect and limited nature of the diversity compromise and yet recognizing its potential to eliminate racial discrimination, they charged the diversity interest with remedial values.¹²⁰

c. Prospective Egalitarian Framework: Distributive Interests and the Democratic Understanding of Diversity

The predominance of forward-looking interests in diversity in the briefs filed in the Michigan cases is not surprising. In *Bakke*, diversity was framed as a future-oriented interest,¹²¹ and this was considered to be a major element of its persuasive force.¹²² It is only natural that the briefs trying to convince the Court to affirm *Bakke* have followed this line. However, it is surprising

¹¹⁶ *Id.* at 19.

¹¹⁷ *Id.* at 17 (“To most Americans, uniting the nation on the basis of Justice Powell’s conception of diversity merged easily with the aspirations inspired by *Brown* to unite the nation on the basis of integration. . . . [P]rogress toward an integrated nation could continue, slowed down, on the indirect paths Justice Powell had sanctioned even if not on the direct road to freedom. Even with all its limitations, . . . Justice Powell’s decision has met the test of history.”).

¹¹⁸ *Id.* at 30.

¹¹⁹ *Id.* at 30–31.

¹²⁰ See Brief of Amici Curiae on Behalf of a Comm. of Concerned Black Graduates of ABA Accredited Law Schs.: Vicky L. Beasley et al. in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241) (“Programs that promote diversity serve a compelling state interest because they correct the systematic ways in which the traditional admissions criteria afford racial preferences”); see also Brief on Behalf of Hillary Browne et al. as Amici Curiae in Support of Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241) (“Diversity is a compelling governmental interest because it furthers the goal of societal integration articulated in *Brown* and provides students who lived in racial isolation prior to entering college with the opportunity to interact with students of different races.”).

¹²¹ See *supra* Part II and particularly *supra* notes 63–69.

¹²² See LEVINSON, *supra* note 5 (suggesting that diversity should be valued for its ability to transform the future, rather than as a way to remedy the past).

that while for Justice Powell most of these forward-looking interests in diversity were utilitarian and emphasized its pedagogical benefits, the Michigan amici presented an additional forward-looking interpretation, an egalitarian one. For the Michigan amici, the utilitarian interests were present, but not exclusive; instead, they were strongly tied to the distributive value of diversity and its potential to promote equal citizenship and a pluralistic vision of American democracy. For instance, the Harvard brief stated that:

[H]ighly selective universities have long defined as one of their central missions the training of the nation's business, government, academic, and professional leaders. By creating a broadly diverse class, amici's admissions policies help to assure that their graduates are well prepared to succeed in an increasingly complex and multi-racial society. The policies *also* 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.¹²³

This excerpt shows that, for elite universities at the time of the Michigan cases, utilitarian interests in diversity were entangled with *distributive* values—concerned with just distribution of opportunity and status, as well as with democratic values—committed to cultural pluralism. A group of state universities have also emphasized the distributive value of diversity: “ensur[ing] that the full range of opportunities [it provides] are accessible to all segments of an increasingly diverse society’ and ‘[e]nhancing opportunities for enrolling, retaining, and graduating students from underrepresented groups.”¹²⁴ These arguments can also be associated with the principle of anti-subordination, as they reflect an interest in making sure that no group is systematically excluded from positions of civic leadership.¹²⁵ For other academic amici, those distributive benefits were part of a *democratic* vision of diversity. “By breaking down barriers,” the American Council on

¹²³ Harvard Brief, *Grutter*, *supra* note 101, at 3, 12 (emphasis added); see also CMU Brief, *Grutter*, *supra* note 105, at 7 (“Equal opportunity for citizens of all races does not require indifference to race; instead, it requires appreciation and mutual respect that can only be achieved through productive and robust interaction.”); Brief of Amici Curiae Judith Areen et al. in Support of Appellants’ Appeal for Reversal of the District Court Order at 19–20, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447) [hereinafter Law School Deans Brief, *Grutter*] (“[E]ven under the Court’s strict scrutiny analysis, judges could distinguish between a race-conscious ‘No Trespassing’ sign and a race-conscious ‘welcome mat.’” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995))).

¹²⁴ Brief of the Univ. of Pittsburgh et al. as Amici Curiae in Support of Respondents at 1, *Grutter*, 539 U.S. 306 (No. 02-241).

¹²⁵ For a discussion of the antisubordination and anticlassification principles, and their manifestation in equal protection jurisprudence, see Siegel, *supra* note 34, at 1472–73, explaining that the anticlassification principle “embraces a particular conception of equality, one that is committed to individuals rather than to groups,” and prohibits all identity-based classifications, regardless of their goal. By contrast, the antisubordination principle is based on “the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.” *Id.*

Education (“ACE”) argued, “diversity advances a chief purpose of higher education . . . because ‘[a] democracy is more than a form of government; it is primarily a mode of associated living.’”¹²⁶ Diversity, they added, is necessary “to prepare students for citizenship. An educated citizenry is the predicate of a thriving democracy.”¹²⁷ Finally, the ACE brief asserts that “[t]he Founders saw higher education as essential to train the nation’s leaders who, John Adams held, should be recruited not from among ‘the rich or the poor, the highborn or the low-born, the industrious or the idle; but all those who have received a liberal education.’”¹²⁸ This brief and others articulated a national commitment to cultural pluralism as the democratic way of life.¹²⁹ The democratic meaning attributed to diversity could have been categorized as an independent interpretation of diversity, but a close reading reveals that it actually entailed a vision of equal citizenship. According to this vision, students are “democratic equals”¹³⁰ and no group is excluded from educational opportunities and future leadership positions.¹³¹

The distributive and democratic interests in diversity were dominant not only among academic amici, but also among other groups of the Michigan amici. Non-academic amici, such as governmental officials and civil rights organizations, also considered diversity a tool to “create a pipeline of racially diverse leaders” and foster “the fuller participation of previously dispossessed segments of our society.”¹³² A group of congressmen argued the benefits of diversity include “the enhanced economic, social and political participation of racial minorities” and explained “[i]n a democratic system, a group of

¹²⁶ ACE Brief, *Grutter*, *supra* note 100, at 20–21 (quoting JOHN DEWEY, DEMOCRACY AND EDUCATION 101 (1916)).

¹²⁷ *Id.* at 17–18.

¹²⁸ *Id.* at 21 (quoting John Adams, in THE JOHN ADAMS PAPERS 182 (Frank Donovan ed., 1965)).

¹²⁹ See e.g., Brief Amicus Curiae of the Sch. of Law of the Univ. of N.C. Supporting Respondent at 7, *Grutter*, 539 U.S. 306 (No. 02-241) (“The State of North Carolina knows, in short, that its future statewide leadership cohort *should be*, and inevitably *will be*, racially and ethnically diverse.”).

¹³⁰ Brief of Amici Curiae Judith Areen et al. in Support of Respondents at 10, *Grutter*, 539 U.S. 306 (No. 02-241) (“[I]ntegrated education advantages all students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as *democratic equals*.” (emphasis added)).

¹³¹ Harvard Brief, *Grutter*, *supra* note 101, at 3–4 (arguing that it is “legitimate for universities to concern themselves with ‘ensur[ing] that [they] are open to all individuals and that student bodies are educationally diverse and broadly representative of the public.’” (quoting Brief of the United States as Amicus Curiae Supporting Petitioners at 13, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516))); see also Brief of Am. Law Deans Ass’n as Amicus Curiae in Support of Respondents at 12, *Grutter*, 539 U.S. 306 (No. 02-241) (“Failure to educate a leadership class among disadvantaged minority populations would be a permanent threat to equality and social stability.”).

¹³² Brief for the NAACP Legal Def. & Educ. Fund, Inc. & the ACLU as Amici Curiae in Support of Respondents at 6, *Grutter*, 539 U.S. 306 (No. 02-241); see also Brief of King Cty. Bar Ass’n as Amicus Curiae in Support of Respondents at 10–11, *Grutter*, 539 U.S. 306 (No. 02-241) (“The Coalition’s mission is to increase ethnic diversity in the legal profession so that our courtrooms and law offices better reflect the communities they serve.”).

citizens must be able to obtain their government's assistance in preserving access to the 'transactions and endeavors that constitute life in a free society.'"¹³³ Another group of congressmen tied diversity to the ideal of equal representation and explained that "[t]he Constitution also breathes life into this principle of equality and the importance of diversity in its framework for a democratic system of government. Our country was founded on the principles of democracy and representational government."¹³⁴ While there is no doubt that these interests have utilitarian benefits, the Michigan amici focused on ideals of equal participation and representation, which they valued independently, regardless of their social function and potential benefits.

Finally, in a very influential brief by a group of retired military officers, it was claimed that "a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principal mission to provide national security."¹³⁵ First, as Douglas Laycock argues, it is important to notice that this brief argues not that military officers need to be educated in a diverse classroom, but the much broader and seemingly democratic claim that the officer corps in itself needs to be racially diverse.¹³⁶ This brief is hard to classify. On the one hand, it makes functional claims for the necessity of diversity for the military effectiveness and ability to fight. These could be classified as utilitarian, but they seem to also entail a vision about a military in a democratic society. At the very least, as the brief itself notes, an "indivisible link existed between military efficiency and equal opportunity."¹³⁷ Diversity, it asserted, is "critical to both the operational efficiency of the military and to the creation of the more just and equal environment."¹³⁸ For the retired generals, the utilitarian benefits of diversity were deeply connected to its egalitarian value.

The only amicus briefs not dominated by the egalitarian interpretations of diversity were those of the business amici. For them, diversity was a business interest. Classroom diversity, they argued, is necessary for effectively training students for the increasingly heterogeneous and global workforce.¹³⁹ Educational diversity, they added, is a step in promoting the

¹³³ Brief of John Conyers, Jr., Member of Congress et al. as Amici Curiae in Support of Respondents at 4, *Grutter*, 539 U.S. 306 (No. 02-241) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

¹³⁴ Brief of Representative Richard A. Gephardt et al. as Amici Curiae Supporting Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241.)

¹³⁵ Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 5, 10–13, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter *The Military Brief*].

¹³⁶ Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1772 (2004).

¹³⁷ *The Military Brief*, *supra* note 135, at 11.

¹³⁸ *Id.* at 17.

¹³⁹ Brief for Amici Curiae 65 Leading Am. Buss. in Support of Respondents at 5, *Grutter*, 539 U.S. 306

business interest in a workforce that reflects the nation's diversity.¹⁴⁰ But even these naturally utilitarian amici, in some briefs, recognized the persistency of past and present racial discrimination and attributed significance to the promotion of diversity and inclusion of racial and ethnic minorities.¹⁴¹

Thus, although some amici emphasized utilitarian interests, the dominant interpretation of diversity at the time of the Michigan cases vindicated egalitarian values. The amici supporting race-conscious affirmative action understood diversity to be deeply connected to the struggle for racial equality: fighting racial stereotypes, remedying the effects of past discrimination, and working for a more just distribution of civic opportunities.

2. *Opponents' Briefs Mirror the Egalitarian Interpretation*

For the plaintiffs and their public interest counsel—the Center for Individual Rights (“CIR”)—as well as for amici opponents of affirmative action, the question of whether diversity is a compelling interest was still open.¹⁴² They argued that “diversity is simply too indefinite, ill-defined, and lacking in objective, ascertainable standards to be fitted to narrowly-tailored measures.”¹⁴³ However, some of the opponents' amicus briefs either accepted diversity as a compelling interest or were willing to accept it for purposes of the discussion.¹⁴⁴ In so doing, these briefs serve as a mirror to

(No. 02-241) [hereinafter 65 Businesses Brief, *Grutter*] (“Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints.”); Brief of Gen. Motors Corp. as Amicus Curiae in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter General Motors Brief, *Grutter*] (“[O]nly a well educated, diverse work force, . . . can maintain America's competitiveness in the increasingly diverse and interconnected world economy.”).

¹⁴⁰ See Brief of Amici Curiae Media Cos. in Support of Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02-241) (“From a purely business perspective, a diverse workforce is essential to amici's success. . . . The communities served by the media increasingly reflect multiple racial and ethnic backgrounds. Individuals in these communities are likely to choose a broadcast station or newspaper where the programming reflects the diversity of the community.”).

¹⁴¹ See 65 Businesses Brief, *Grutter*, *supra* note 139, at 8 (“Whatever methodology is employed to select those who will be afforded the opportunity to obtain the best education and training available in America today, that methodology must operate in such a way that students of all races, cultures and ethnic backgrounds are in fact meaningfully included.”); see also General Motors Brief, *Grutter*, *supra* note 139, at 8–9 (“[A]n individual can only experience racial or ethnic discrimination based on his or her race or ethnicity; and endeavoring to include in a law school class individuals who have actually experienced the kind of racial or ethnic discrimination being discussed in class requires consideration of race in admissions.”).

¹⁴² Brief for the Petitioner at 34, *Grutter*, 539 U.S. 306 (No. 02-241) (arguing that diversity as an educational benefit is distinct and inapplicable to the Court's compelling interest analysis).

¹⁴³ *Id.* at 17.

¹⁴⁴ See, e.g., Brief of the State of Fla. & the Honorable John Ellis “Jeb” Bush, Governor, as Amici Curiae

claims made by the University of Michigan and its supporters. They raised questions regarding the value of diversity and challenged the claim that the diversity rationale is distinct from remedial motives.¹⁴⁵

The Bush Administration submitted an amicus brief objecting to the University's use of race in its admissions programs. The Administration acknowledged the legitimacy of diversity as a compelling interest, yet argued that there are ample race-neutral alternatives to achieve it.¹⁴⁶ The interest in diversity it identified was thoroughly connected to ideals of equality. The brief opened with the following statement: “[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,” and questioned if the chosen policies are really necessary “to ensure that minorities have access to and are represented in institutions of higher learning.”¹⁴⁷ It appears that, to the United States government, diversity was first and foremost an interest in equal access and participation of previously excluded groups. Other opposition amici made similar claims and reiterated the connections between diversity and equality.¹⁴⁸ Thus, despite their objection to race-conscious affirmative action, several opponents attributed egalitarian values to diversity. In part, these are surely strategic claims that aim to blur the distinctiveness of diversity and undermine its legitimacy, yet they also reflect that the interest in diversity was, at the time, deeply connected to ideals of equality.

B. Justice O'Connor's Opinion: Diversity, Democracy, and Equal Opportunity

The Michigan cases affirmed the use of race in higher education admissions policies and were celebrated by proponents of affirmative action.¹⁴⁹ Even though the Court invalidated the undergraduate admissions

in Support of Petitioners at 20, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter Florida Brief, *Grutter*] (“Even assuming that the diversity that the University of Michigan is attempting to achieve constitutes a compelling state interest, its race-conscious admissions policies are not narrowly tailored to accomplish that interest.”).

¹⁴⁵ *Id.* at 21–22 (“The justification for diversity based solely upon a public policy argument, without a showing that it is necessary to correct past discrimination, is insufficient to meet the compelling interest requirements.” (emphasis altered)).

¹⁴⁶ Brief for the United States as Amicus Curiae Supporting Petitioner at 13–18, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter United States Brief, *Grutter*] (arguing that “[n]o segment of society should be denied an opportunity to obtain access to government services and public institutions,” but offering a list of race-neutral alternatives to achieving diversity).

¹⁴⁷ *Id.* at 8, 19.

¹⁴⁸ See, e.g., Florida Brief, *Grutter*, supra note 144, at 2 (“Florida has provided alternative but race-neutral means of admission to those students who are striving for excellence, but who may have been disadvantaged by a lack of educational opportunities.”).

¹⁴⁹ See Linda Greenhouse, *The Supreme Court: Affirmative Action; Justices Back Affirmative Action by 5 to 4, but*

policy in *Gratz*,¹⁵⁰ in both cases diversity was found to be a compelling state interest that can justify some uses of race classifications. In *Gratz*, the majority of the Court decided that the University's admissions policy was not narrowly tailored to achieve educational diversity, but that for the reasons set forth in *Grutter*, diversity is a compelling state interest.¹⁵¹ In *Grutter*, the Court upheld the law school's holistic admissions policy and affirmed that it has "a compelling interest in attaining a diverse student body."¹⁵²

The interpretative framework set by the amici in the Michigan cases was reflected in the Court's opinion in *Grutter*, as the Court appears to have identified at least three goals that diversity promotes:

The *first* goal is the utilitarian pedagogical and market-driven objective of preparing students for the workforce. Citing the amicus brief filed by the American Educational Research Association, the Court noted that, "diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" ¹⁵³ The "skills needed in today's increasingly global marketplace," the Court emphasized, "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."¹⁵⁴ This can clearly be identified as a forward-looking utilitarian interest in the professional success of all students and the wellbeing of society at large.

Second, the Court acknowledged *anti-stereotyping* benefits of diversity and explained that it "promotes 'cross-racial understanding'" and helps to "break down racial stereotypes,"¹⁵⁵ but for Justice O'Connor, these benefits were "important and laudable," not only in themselves, but also because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"¹⁵⁶ It is unclear if such benefits can independently

Wider Vote Bans a Racial Point System, N.Y. TIMES (June 24, 2003), <https://www.nytimes.com/2003/06/24/us/supreme-court-affirmative-action-justices-back-affirmative-action-5-4-but-wider.html> (last visited Apr. 11, 2018) ("The rulings today came as an enormous relief to the civil rights community, as well as to public and private colleges and universities around the country, dozens of which had joined briefs supporting Michigan.").

¹⁵⁰ In *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003), by a 6–3 decision, Chief Justice Rehnquist, writing for the majority, held that the University's policy "which automatically distributes 20 points . . . needed to guarantee admissions, to every single 'underrepresented minority' applica[tion], solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program."

¹⁵¹ *Id.* at 268, 275; *Grutter*, 539 U.S. at 325 ("[W]e endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

¹⁵² *Grutter*, 539 U.S. at 328.

¹⁵³ *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)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (quoting Appendix to Petition for Certiorari at 246a, 244a, *Grutter*, 539 U.S. 306 (No. 02-241)).

justify the use of race-based measures, but it is apparent that for the *Grutter* Court, race was more than just another element of difference that could contribute to the utilitarian benefits of diversity.

The *third* and most dominant objective the Court attributes to diversity is the prospective value in sustaining the American democracy.¹⁵⁷ This conception of democracy was committed to cultural pluralism as a national ideology, but it was also inseparably entangled with an egalitarian vision of society and its institutions. Diversity, the Court observed, is necessary to sustain “our political and cultural heritage,”¹⁵⁸ because “[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.”¹⁵⁹ More practically, in explaining the interest in diversity, the Court referred to the United States amicus brief and asserted 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.”¹⁶⁰ Furthermore, the Court charged that the interest in diversity is the interest in ensuring that the “path to leadership” is “visibly open to talented and qualified individuals of every race and ethnicity.”¹⁶¹ “All members of our heterogeneous society,” the Court stated, “must have confidence in the openness and integrity of the educational institutions that provide this training,” which is necessary in order to cultivate leaders with “legitimacy in the eyes of the citizenry.”¹⁶²

It seems that *Grutter* establishes equal opportunity as a central justification for diversity, but its focus on legitimacy creates some ambiguity. It is possible that legitimacy can be assured without actual diversity, but with the mere appearance of openness. But it seems more plausible to infer that *Grutter* asserts an interest in the openness of institutions of civil participation as an independent and democratic social good advanced by diversity.¹⁶³ As Pamela Karlan recognized—by relying on amicus briefs that explicitly invoke the rejected “interest in reducing the historic deficit of traditionally disfavored minorities,” “*Grutter* marks a significant expansion of the concept

¹⁵⁷ Post, *supra* note 63, at 60–61.

¹⁵⁸ *Grutter*, 539 U.S. at 331.

¹⁵⁹ *Id.* at 332 (emphasis added).

¹⁶⁰ *Id.* at 331–32 (quoting United States Brief, *Grutter*, *supra* note 146, at 13).

¹⁶¹ *Id.* at 332.

¹⁶² *Id.* at 332. In other parts of the opinion, Justice O’Connor acknowledges the wrongs of past discrimination without recognizing the interest in remedying past discrimination. See, e.g., *id.* at 337–38 (“With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”).

¹⁶³ For an interesting discussion, see Post, *supra* note 63, at 60–61.

of diversity as a compelling interest.”¹⁶⁴ Similarly, Reva Siegel identified that “*Grutter* transforms the diversity rationale in the course of adopting it, expanding the concept of diversity so that it explicitly embraces *antisubordination* values . . . [by which] no group is excluded from participating in public life and thus relegated to an outsider, or second-class status”¹⁶⁵ Influenced, so it appears, by the prospective egalitarian interpretations suggested in the amicus briefs, the *Grutter* Court considered diversity to be an interest in ensuring that no group is systematically excluded from higher education and from positions of influence in society. The Court’s interest in diversity was thus not a merely utilitarian interest in the benefits of civic participation, training leaders, and maintaining legitimacy, but an interest in *equal opportunity* to participate and to lead—an interest in *equal citizenship*.¹⁶⁶

In other words, for the *Grutter* Court, diversity was a forward-looking democratic value in the equal *distribution* of educational opportunities. Jack Greenberg argues that the Court’s eye was “on the condition of society and what affirmative action can do to help fix it, not what caused the condition.”¹⁶⁷ But did it also embody the backward-looking remedial interpretation of diversity that was eminent in the amicus briefs? The answer to that is less clear, but appears to be positive in two ways. First, by embracing an antisubordination perspective and emphasizing the role of higher education in promoting the “[e]ffective participation by members of all racial and ethnic groups,”¹⁶⁸ the Court seems to have recognized the persistence of racial inequality, as well as the existing asymmetry between opportunities available to minority groups and those available for the majority groups, and the need to fight it. Second, by insisting on the temporality of the need to take diversity efforts and expecting that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today,”¹⁶⁹ the Court seemed to vindicate some form of remedial perspective. Whatever is wrong with the current situation of students’ attainment will be fixed in time by taking measures to diversify the schools. Thus, the time-limitation requirement, Robert Post explains, only makes sense if the justification for diversity is quasi-remedial.¹⁷⁰ *Grutter*, then, contains this tension between a strong prospective orientation, and

¹⁶⁴ See Karlan, *supra* note 63, at 1626 (referring to Justice O’Connor’s strong reliance on arguments presented by amicus briefs that explicitly adopted some of the egalitarian justifications for affirmative action previously rejected by Justice Powell in *Bakke*).

¹⁶⁵ See Siegel, *supra* note 34, at 1538–39.

¹⁶⁶ For a similar interpretation of *Grutter*, see Jack M. Balkin, Plessy, Brown and *Grutter*: *A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1719 (2005) (“[T]he Court argues that affirmative action is necessary for *individuals* to secure equal opportunity. . . .”).

¹⁶⁷ Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1621 (2003).

¹⁶⁸ *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

¹⁶⁹ *Id.* at 343.

¹⁷⁰ Post, *supra* note 63, at 67 n.306.

recognition of the unique disadvantage of racial minorities in entering institutions of higher education.

Despite this strong egalitarian interpretation of diversity set forth by the *Grutter* Court, in the following years the conversation about diversity continued and its meaning was narrowed dramatically to utilitarian values, primarily concerned with educational and economic benefits.

IV. DIVERSITY'S TRANSFORMATION IN *FISHER I*

The admissions policy at the University of Texas at Austin (“UT”) is an outcome of years of litigation. After UT’s race-conscious admissions policy was banned in 1996,¹⁷¹ the Texas legislature adopted the “top ten percent plan.” Under this program, the top ten percent of the graduating classes of each high school in the state were automatically admitted to UT. Taking into account the segregation in the public school system, this plan was meant to promote racial and ethnic diversity.¹⁷² Following the *Grutter* decision, UT implemented an additional individualistic admissions plan, under which the university considered, among many other factors, the race of applicants not admitted through the percentage plan in order to increase diversity.¹⁷³ In *Fisher I*, the Petitioner argued that UT’s consideration of race in reviewing individual applicants was unconstitutional because the university had a race-neutral alternative.¹⁷⁴ The Fifth Circuit upheld the policy.¹⁷⁵

A. *The Takeover of Utilitarian Diversity in the Briefs*

Fewer than ten years separated the Michigan cases from the *Fisher* litigation, but the meaning of diversity seems to have changed immensely during that time. *Part III* of this Article demonstrates that the *Grutter* Court adopted a more robust interpretation of diversity that included egalitarian perspectives. But the *Fisher* amici—comprised of seventy-three amici curiae in support of UT and seventeen in support of the Petitioner—turned in a different direction.¹⁷⁶ Closely analyzing these briefs, I find that the amici in *Fisher I* mostly pursued the business case for diversity.

For the amici in *Fisher I*, diversity was a utilitarian value, mostly divorced from ideals of equality and racial justice. And thus, in the 2010s, diversity was no longer interconnected with remedial and distributive ideals, but

¹⁷¹ Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

¹⁷² *Fisher I*, 133 S. Ct. 2411, 2416 (2013).

¹⁷³ *Id.*

¹⁷⁴ Brief for Petitioner at 20–21, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345).

¹⁷⁵ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013).

¹⁷⁶ For a complete list of amicus briefs submitted in both cases, see *Fisher vs. UT Austin: U.S. Supreme Court (2011)*, UNIV. OF TEX. AT AUSTIN, OFFICE OF THE VICE PRESIDENT FOR LEGAL AFFAIRS, <https://legal.utexas.edu/scotus-2011> (last visited Apr. 11, 2018).

instead its interpretation reflected pedagogical and mostly economic utility, such as preparing students to succeed in a heterogeneous society and building a more effective workforce. The egalitarian and democratic aspects of diversity did not disappear completely, but they were scarcer and mostly subjugated to utilitarian goals, such as professional training or the economic wellbeing of society. The interest in ensuring that “the path to leadership be visibly open to talented and qualified individuals,” as articulated by Justice O’Connor in *Grutter*,¹⁷⁷ was, naturally, often cited in the briefs. However, these references were mostly instrumentalized for promoting external interests, such as the unity of society or productivity of the market rather than equality in itself.

1. *Proponents’ Briefs and the Utilitarian Interests in Diversity*

In its brief, UT declared that the objectives of the program are the educational benefits flowing from a diverse student body. This kind of diversity, UT made clear, is composed not just of race but of a far broader array of qualifications and characteristics, “including geographic diversity, socioeconomic diversity, cultural diversity, and so on.”¹⁷⁸ UT stated that diversity is in the “[n]ation’s paramount interest in educating its future leaders in an environment that best prepares them for the society and workforce they will encounter.”¹⁷⁹ The interest in diversity, the University explained, “includes an ‘academic environment’ in which there is ‘a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.’”¹⁸⁰ While these arguments seem to have a democratic dimension committed to cultural pluralism, it is important to notice that these are not normative arguments about who should our leaders be or how diverse should the society be, but functional arguments concerned with the utilitarian interest of training students in an environment that best prepares them for life in the diverse society and workforce. UT’s brief was not devoid of references to equality,¹⁸¹ but these notions were scarce and mostly subject to utilitarian benefits. For example, when asked to explain why the policy favors African-Americans and Hispanics, UT argued that “[b]y virtue of our Nation’s struggle with racial inequality,” such students are likely to have experiences of particular importance.¹⁸² UT

¹⁷⁷ *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

¹⁷⁸ Brief for Respondents at 25, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345).

¹⁷⁹ *Id.* at 3.

¹⁸⁰ *Id.* at 39 (emphasis added) (citation omitted).

¹⁸¹ *Id.* at 40 (mentioning for the first and last time UT’s responsibility “in ensuring that ‘the path to leadership be visibly open’” (quoting *Grutter*, 539 U.S. 332)).

¹⁸² *Id.* at 44 (citing *Grutter*, 539 U.S. at 338) (arguing that UT’s diversity policies comply with Supreme

added that “[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”¹⁸³ Thus, race and the struggle for equality were a kind of commodity for UT; they mattered, but as another element of identity that comprises diversity for the purpose of promoting utilitarian benefits.

The majority of academic amici was even less (and some hardly at all) interested in the egalitarian interpretation of diversity, as they were focused on its utilitarian benefits. Diversity, for these amici, was composed of both pedagogical and market-driven interests, yet it seems that the educational mission itself has changed and became more focused on professional training rather than on the educational process in itself. State universities, the Ivy League schools, 37 liberal arts colleges, and other universities argued that their goal—as institutions of higher education—is to prepare the leaders of tomorrow for the ever-growing multicultural world, and that classroom diversity is necessary in achieving this task.¹⁸⁴ The American Council on Education, for example, claimed that “a purpose of higher education is to equip professionals and business leaders to interact with diverse customers, clients, co-workers, and business partners,”¹⁸⁵ and that this need to prepare students for “[t]he ever-thickening web of economic, political, and social ties

Court precedent).

¹⁸³ *Id.* (citing *Grutter*, 539 U.S. at 333).

¹⁸⁴ See, e.g., Amherst Brief, *Fisher I*, *supra* note 2, at 29 (“The inescapable realities of increased diversity in the country and growing global interconnectedness have led *amici* colleges to incorporate the understanding of diversity in many fields of study. Put simply, students need to learn how to work with, market to, and buy from people from diverse backgrounds and cultures.”); Brief of Brown University et al. in Support of Respondents at 6, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brown Brief, *Fisher I*] (“Diversity encourages students to question their assumptions, to understand that wisdom and contributions to society may be found where not expected, and to gain an appreciation of the complexity of the modern world. In these ways, diversity bolsters the unique role of higher education in ‘preparing students for work and citizenship’ and training ‘our Nation’s leaders’ for success in a heterogeneous society.” (quoting *Grutter*, 539 U.S. at 331, 332)); Brief Amici Curiae of Fordham Univ. et al. in Support of Respondents at 5, *Fisher I*, 133 S. Ct. 2411 (No. 11-345) (quoting the University of San Francisco’s “mission . . . to advance a ‘diversity of perspectives, experiences and traditions as essential components of a quality education in our global context.’”); Brief of Leading Public Research Univs. et al. as Amici Curiae in Support of Respondents at 14, *Fisher I*, 133 S. Ct. 2411 (No. 11-345) [hereinafter Brief for Leading Public Research Univs., *Fisher I*] (quoting the University of Kansas’ “vision of diversity” for a learning environment which “provides our students valuable experiences that will help them prosper after graduation in an increasingly global and multicultural world.”); Brief for the Howard Univ. Sch. of Law Civil Rights Clinic as Amicus Curiae in Support of Respondents at 26, *Fisher I*, 133 S. Ct. 2411 (No. 11-345) (“[D]iversity provides students a wider range of perspectives as to the material they study in their classes and better prepares them for the world they will encounter upon graduation.”).

¹⁸⁵ Brief of Amici Curiae American Council on Educ. and 39 Other Higher Educ. Orgs. in Support of Respondents at 10, *Fisher I*, 133 S. Ct. 2411 (No. 11-345) [hereinafter ACE Brief, *Fisher I*].

between nations” makes diversity even more compelling today.¹⁸⁶ Moreover, Dean Martha Minow of Harvard Law School and Dean Robert Post of Yale Law School focused on the pedagogical value of diversity and the atmosphere of speculation it cultivates, as well as its market-oriented benefits. They emphasized the importance of diversity for “preparing students for the practice of law in today’s increasingly globalized and heterogeneous economic world.”¹⁸⁷ Diversity, it was explained, benefits not only individuals but “society as well, for it fosters the development of citizens and leaders who are creative, collaborative, and able to navigate deftly in dynamic, diverse environments.”¹⁸⁸ These examples—invoking conceptions of citizenship and leadership—seem to entail pluralistic and democratic interests in diversity. However, as we can see, they are largely instrumentalized to achieve other social functions, rather than embody any egalitarian ideal of remedy or distribution. Furthermore, many academic amici added lengthy explanations—in part grounded in social science—about how all “students benefit from a robust exchange of ideas and exposure to different cultures,”¹⁸⁹ emphasizing the benefits of diversity to the majority group.

Some universities tried to explicitly distance their interest in diversity from remedial aspirations and positioned their efforts as completely utilitarian. A brief submitted by a number of elite universities, including Stanford, Harvard, and Yale, explained:

The compelling governmental interest in diversity in higher education is quite different from remedying generalized discrimination. The issue here is whether, in assessing diversity, a university may take into account the need (a) to foster conditions for providing the most stimulating learning environment possible and (b) to train effectively citizens and leaders for a heterogeneous society.¹⁹⁰

Citing *Grutter*, some academic amici did call for the removal of barriers and opening pathways to leadership, but this democratic objective was mostly meant to serve superior pedagogical or economic utilities, such as

¹⁸⁶ *Id.* at 8.

¹⁸⁷ Brief of Dean Robert Post and Dean Martha Minow as Amici Curiae in Support of Respondents at 8, *Fisher I*, 133 S. Ct. 2411 (No. 11-345) [hereinafter Brief of Dean Robert Post and Dean Martha Minow, *Fisher I*]; see also Brief for the N.Y. State Bar Ass’n at 3, *Fisher I*, 133 S. Ct. 2411 (No. 11-345) (“To remain effective the legal profession must reflect the changing demographics of the United States’ population.” (emphasis altered)).

¹⁸⁸ Brown Brief, *Fisher I*, *supra* note 184, at 9.

¹⁸⁹ See, e.g., Brief of Dean Robert Post and Dean Martha Minow, *Fisher I*, *supra* note 187, at 13 (arguing that diversity “will enrich the educational experience of all” through the clash of perspectives); Brief for Leading Public Research Univs., *Fisher I*, *supra* note 184, at 6 (“Current research continues to show that student bodies diverse in a multitude of ways lead to improved learning outcomes for all students and benefit the entire educational community.”).

¹⁹⁰ Brown Brief, *Fisher I*, *supra* note 184, at 27.

promoting learning outcomes and preparing students for life and work in an increasingly diverse society.¹⁹¹ In other words, they were interested in the social utility that a diverse citizenry can produce, rather than in the egalitarian value of a diverse citizenry itself. Among the benefits of diversity, several academic amici also mentioned overcoming stereotypes and promoting cross-racial understanding. These benefits, however, had almost no intrinsic egalitarian value, and were meant to allow collaboration and thus serve the greater good of society.¹⁹² Similarly, when the saliency of race was acknowledged or past discrimination mentioned, it was mostly to explain how racial diversity, like any other cultural difference, identity, and personal background, can contribute to the diversity of viewpoints and experiences.¹⁹³

¹⁹¹ Brief for California Institute of Technology et al. as Amici Curiae in Support of Respondents at 11–12, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“All students benefit as ‘productive inquiry best takes place when individuals can explore and share their experience and thoughts as equal members of our community, uninhibited by prejudice or discrimination.’” (quoting Univ. of Rochester, *Statement of Educational Philosophy*, <http://www.rochester.edu/diversity/philosophy> (last visited Aug. 9, 2012))); ACE Brief, *Fisher I*, *supra* note 185, at 16 (“Removal of barriers is thus the essence of American higher education, necessary both for personal growth and the continued growth of the Nation[.] . . . because such a society produces ‘more numerous and more varied points of contact’ and ‘a greater diversity of stimuli to which an individual has to respond.’ Inculcating not only ‘an ability’ but also ‘an inclination’ ‘to serve mankind, one’s country, friends and family’” (quoting JOHN DEWEY, *DEMOCRACY AND EDUCATION* 101 (Free Press 1966) (1916); then quoting BENJAMIN FRANKLIN, *PROPOSALS RELATING TO THE EDUCATION OF YOUTH IN PENNSYLVANIA* 30 (William Pepper ed., Univ. of Pa. Press 1931) (1749))); Brief of Amicus Curiae Soc’y of Am. Law Teachers as Amicus Curiae in Support of Respondents at 12, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Soc’y of Am. Law Teachers Brief, *Fisher I*] (“the ‘path to leadership be visibly open to talented and qualified individuals of every race and ethnicity . . . so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.’” (alteration in original) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 308, 332–33 (2003))). These examples sounds completely democratic and even egalitarian, yet in the following sentence the amici continue to argue that “[i]f American businesses are to achieve a highly qualified and diverse workforce with individuals who have been exposed to different perspectives, individuals of various races and ethnicities must be granted access to higher education.” Soc’y of Am. Law Teachers, *Fisher I*, *supra* at 12.

¹⁹² See e.g., Brief of the Am. Educ. Research Ass’n et al. as Amici Curiae in Support of Respondents at 2–3, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“[S]tudent body diversity leads to important educational benefits. Among these benefits are improvements in intergroup contact and increased cross-racial interaction among students; reductions in prejudice; improvements in cognitive abilities, critical thinking skills, and self-confidence; greater civic engagement; and the enhancement of skills needed for professional development and leadership.”); Brief of Appalachian State Univ. et al. as Amicus Curiae in Support of Respondents at 8, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“Higher levels of cross-racial interactions on a campus . . . ‘better prepare[] students for an increasingly diverse workforce and society.’” (alteration in original) (quoting *Grutter*, 539 U.S. at 331)).

¹⁹³ Brief for Amicus Curiae Ass’n of Am. Law Schools in Support of Respondents at 24, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“It remains inescapably true that members of racial minorities often possess experiences and perspectives not shared by their white peers. . . . Token minority representation will not produce the kind of learning environment that fosters an excellent legal education.”); Brown Brief, *Fisher I*, *supra* note 184 at 11 (“To say that race continues to matter is to acknowledge forthrightly that, for many reasons—including the frustrating persistence of segregated schools and communities—race continues to shape the backgrounds, perspectives, and

The most prominent exception to this trend of utilitarian diversity was an amicus brief submitted by a group of constitutional scholars,¹⁹⁴ explaining that *Grutter's* interpretation of diversity allows “forward-looking measures that call for the sensitive use of race to foster equality in education.”¹⁹⁵ It is in light of this exception that we can see what the vast majority academic amici were “missing.” Thus, at the time of *Fisher I*, the connection between diversity and equality had been loosened and the utilitarian benefits that flow from diversity were portrayed as the superior mission of higher education. The history of racism was ignored and the persistence of racial hierarchies was mystified, as race became just one of many elements of applicants’ identity that can promote robust discussions and enhance the level of training.

This strong trend away from the egalitarian approach for diversity was only amplified by *non-academic public* amici. The United States asserted that diversity is absolutely necessary for military and federal agencies to fulfill their missions.¹⁹⁶ Building a diverse force is nothing less than a strategic imperative,¹⁹⁷ and a diverse officer corps is essential for officers’ ability to lead the enlisted ranks.¹⁹⁸ “[T]o be effective,” the United States added, “we have to look like America. We have to understand and reflect the communities we serve.”¹⁹⁹ These interests, “including military readiness, [and] national security,” the brief added, “will be more readily achieved if the pathways to professional success are visibly open to all segments of American society.”²⁰⁰ These interests, the brief continues, are “not simply a matter of civic responsibility; it is a pressing necessity in an era of intense competition in the global economy and ever-evolving worldwide national-security threats.”²⁰¹ Thus, while this brief vindicates a pluralistic vision of America, unlike the

experiences of many in our society, including Amici’s students.”).

194 Brief Amici Curiae of Constitutional Law Scholars & Constitutional Accountability Ctr. in Support of Respondents at 21, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345).

195 *Id.* at 20–21 (“*Grutter* recognized that it is constitutionally permissible to take race into account to ensure that ‘the path to leadership be visibly open’ . . . [and] *Grutter* held that the government may enact forward-looking measures that call for the sensitive use of race to foster equality in education.” (quoting *Grutter*, 539 U.S. at 332, 333)).

196 Brief for the United States as Amicus Curiae Supporting Respondents at 10, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter United States Brief, *Fisher I*].

197 *Id.* (quoting DEP’T OF DEF., DIVERSITY AND INCLUSION STRATEGIC PLAN—2012 TO 2017 3 (2012), http://diversity.defense.gov/Portals/51/Documents/DoD_Diversity_Strategic_Plan_%20final_as%20of%2019%20Apr%2012%5B1%5D.pdf).

198 *Id.*

199 *Id.* at 15 (quoting Robert S. Mueller, III, Director, FBI, Speech at the National Conference of the Historically Black Colleges and Universities: FBI Diversity Employment in a New Age of Global Terror (Sept. 17, 2002), (transcript available at <https://archives.fbi.gov/archives/news/speeches/fbi-diversity-employment-in-a-new-age-of-global-terror>) (last visited Apr. 11, 2018)).

200 *Id.* at 10.

201 *Id.* at 5–6.

strong connection between democracy and equality that was evident in *Grutter*, in *Fisher I* the democratic dimension was linked and even secondary to utilitarian interests. For the United States at the time of *Fisher I*, the interest in diversity was no longer an interest in “[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,”²⁰² as it was at the time of *Grutter*. Instead, diversity was now an interest in a well-functioning military and administration, and equality was a byproduct, but not a goal. Thirty-seven former high-ranking officers and civilian leaders of the military added that a diverse officer corps is crucial for the effectiveness of the military because it is more likely to carry cultural sensitivity and foreign language skills to succeed in today’s wars.²⁰³ Other public amici, such as a group of congressmen, several states, and a number of senators held a similar interpretation of diversity.²⁰⁴

Aside from a few limited exceptions that articulated the connections between diversity and equality,²⁰⁵ the vast majority of amici curiae supporting UT’s race-conscious admissions policy held a utilitarian—pedagogical and mostly market-oriented—interpretation of diversity. Civil society organizations, student organizations, affinity groups, and businesses emphasized repeatedly that educational diversity is a utilitarian value, meant to improve the quality of education²⁰⁶ and to prepare graduates to be better

²⁰² United States Brief, *Grutter*, supra note 146, at 19.

²⁰³ Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 9–10, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345).

²⁰⁴ See e.g., Brief for the States of New York et al. as Amici Curiae in Support of Respondents at 2, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“[D]iverse educational community enriches the learning environment for all students and better prepares them to excel in a heterogeneous world.”).

²⁰⁵ See, e.g., Brief of Amici Curiae Coal. of Bar Ass’ns of Color in Support of Respondents at 9–12, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (articulating both a strong utilitarian interpretation of diversity, emphasizing how diversity benefits all sectors of legal profession, and an egalitarian one, and explaining how diversity and representation in the legal profession promotes fairness and access to positions of public leadership); Brief of the Advancement Project as Amicus Curiae in Support of Respondents & Urging Affirmance at 3, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“UT’s quest for a racially diverse student body is justified, in part, because it represents an attempt by UT to come to terms with its own history of purposeful discrimination and the history of purposeful discrimination by the state of Texas.”); Brief Amici Curiae on Behalf of the Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (“BAMN”) et al. in Support of the Respondents Urging Affirmance at 5–6, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (presenting an independent egalitarian defense for race-conscious affirmative action not tied to an interest in equality or diversity).

²⁰⁶ For further examples, see Brief of Amicus Curiae Former Student Body Presidents of Univ. of Tex. at Austin in Support of Respondents at 22, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“[D]iversity, including diversity of race, socioeconomic class, and national origin, translated into a broad range of opinions that made classes ‘worth attending.’”); Brief of Amicus Curiae Teach For America, Inc. in Support of Respondents at 4–5, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“History and research show that students from all backgrounds are best served when their classrooms and schools are led by a diverse staff of teachers and principals. Yet without a diverse

and more effective members of society, as workers or leaders.²⁰⁷ This interest could also be understood as invested in promoting minorities, but the amici only rarely referred to minorities as beneficiaries of diversity policies, as they emphasized instead the benefits of an effective workforce and of the quality of education for *all*. Furthermore, some amici even made clear that the benefit of diversity “extends beyond simply developing minority leaders” or other egalitarian interests, to the positive effects on the society at large.²⁰⁸ They portrayed diversity as an interest in training students to successfully fit in the workforce and promote the economic well-being of the state and the nation.²⁰⁹ Equality might be a means to achieving these goals, or their byproduct, but it was no longer a goal in itself.

2. *Opponents’ Briefs Mirror the Utilitarian Interpretation*

The Petitioner in *Fisher I* and several of her supporters did not challenge the diversity rationale, but argued that UT’s goal in considering race was not promoting diversity, but rather the unconstitutional interest in racial balancing.²¹⁰ By doing so, they explained what they considered to be the legitimate interest in diversity: “an inward-facing concept of diversity focused on enhancing the university experience,”²¹¹ educational dialogue and exchange of ideas “by keeping minority students from feeling ‘isolated or like spokespersons for their race.’”²¹² This claim was, of course, a strategic

pipeline of graduates from the nation’s leading colleges and universities, our schools will struggle to recruit the heterogeneous cadre of leaders they badly need.”); Brief for Amici Curiae Fortune-100 and Other Leading American Buss. in Support of Respondents at 2, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“For amici to succeed in their businesses, they must be able to hire highly trained employees of all races, religions, cultures and economic backgrounds. It also is critical to amici that all of their university-trained employees have the opportunity to share ideas, experiences, viewpoints and approaches with a broadly diverse student body. To amici, this is a business and economic imperative.”).

²⁰⁷ See, e.g., Brief of Former Student Body Presidents, *supra* note 206, at 20 (“These educational benefits include, among other things, creating an environment in which a ‘robust exchange of ideas’ can occur by promoting cross-racial understanding, breaking down racial stereotypes, reducing isolation that can result in a lack of participation by minorities, better learning outcomes, and better preparation of students to enter a diverse workforce and society in today’s increasingly global marketplace.”).

²⁰⁸ Brief of Distinguished Alumni of the Univ. of Tex. at Austin as Amici Curiae in Support of Respondents at 2, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345).

²⁰⁹ See, e.g., Brief for Amici Curiae Small Bus. Owners and Ass’ns in Support of Respondents at 3–4, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (“The ability of small businesses to adapt quickly to changing market conditions – including changes in the demographic make-up and global nature of the market – has proven a necessary component of their success. This distinctive feature of small business, however, requires continuing access to a workforce ‘trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”).

²¹⁰ Brief for Petitioner at 19, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345).

²¹¹ *Id.* at 26.

²¹² *Id.* at 27 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003)); see also Brief for Amici Curiae

argument trying to narrow the interest of diversity. However, it also indicates that, at the time of *Fisher I*, opponents of race-conscious affirmative action acknowledged diversity to be a compelling interest, but only as long as it is meant to promote the quality of education.

B. *Fisher I and the Missing Egalitarian Interpretation*

The Supreme Court reversed the Fifth Circuit on the application of strict scrutiny standard of review, demanding a closer judicial review on race-conscious admissions programs. The Court held that UT must demonstrate “that available, workable race-neutral alternatives do not suffice” before it turns to considering the applicant’s race.²¹³ Without saying much else, the Court remanded the case for review.

The Court did not provide any new vision of diversity. Instead it followed both *Bakke* and *Grutter*. Restating *Bakke*, the Court distinguished diversity from forbidden racial balancing,²¹⁴ and held that the interest in the educational benefits that flow from a diverse student body serves different values, “including enhanced classroom dialogue and the lessening of racial isolation and stereotypes.”²¹⁵ The interest in diversity, the Court said, citing *Bakke* and *Grutter*, is not just an interest in simple ethnic diversity, but “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”²¹⁶ While not attributing any new values to diversity, the Court also did not refer to all of the interests previously recognized by the Court. Most notably, Justice O’Connor’s egalitarian interpretation of diversity as an interest in ensuring that the “path to leadership” is “visibly open to talented and qualified individuals of every race and ethnicity”²¹⁷ was missing from the opinion.²¹⁸

The diversity rationale was not challenged in this case, and therefore at no point was the Court required to provide an account of diversity. However, the partial way it described the benefits of diversity, confined to utilitarian educational benefits, indicates that the Court at the time of *Fisher I*, perhaps following the amicus briefs, was less receptive to an egalitarian understanding of diversity.

Current and Former Fed. Civil Rights Officials in Support of Petitioner at 17, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978); then citing *Grutter*, 539 U.S. at 330–31).

²¹³ *Fisher I*, 133 S. Ct. at 2420.

²¹⁴ *Id.* at 2419.

²¹⁵ *Id.* at 2418.

²¹⁶ *Id.* (internal quotation marks omitted) (citing *Bakke*, 438 U.S. at 315).

²¹⁷ *Grutter*, 539 U.S. at 332.

²¹⁸ See *Fisher I*, 133 S. Ct. 2411.

V. FISHER II: A RE-OPENED SPACE?

After the Supreme Court remanded the case in *Fisher I* in July 2014, the Fifth Circuit, applying a stricter standard of scrutiny, affirmed UT's race-conscious admissions policy once again.²¹⁹ The petitioner, Abigail Fisher, claimed that the University had not articulated its compelling interest with sufficient clarity and that the consideration of race was not narrowly tailored because the University had in place a 'top ten percent plan,' a successful race-neutral alternative.²²⁰

A. *More of the Same Market-Driven Diversity in the Fisher II Briefs*

Once again, UT had to defend its consideration of race as part of a holistic policy. In so doing, it articulated essentially the same utilitarian diversity interest in promoting "learning outcomes," arguing that it "better prepare[s] students for an increasingly diverse work force, for civic responsibility in a diverse society, and for entry into professions, where they will need to deal with people of different races, cultures, languages, and backgrounds."²²¹ UT argued that the use of race as part of the holistic review is narrowly tailored, despite the relative success of the 'top ten percent plan,' and emphasized the individualized, rather than group, elements that constitute diversity—overcoming adversity, socioeconomic factors or special circumstances, such as race.²²² With this focus, UT diverged from its brief in *Fisher I* and did not even cite *Grutter's* interest "in ensuring that the path to leadership be visibly open to talented and qualified individuals."²²³

Social mobilization around UT's admissions policy did not quiet down in *Fisher II*. Sixty-eight amici curiae briefs were submitted in support of UT and fourteen in support of the petitioner.²²⁴ Many amici, however, filed the exact same briefs they had filed in *Fisher I*. Others made only minor changes, and in any case, they did not articulate any new interpretation of diversity.

²¹⁹ *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014).

²²⁰ *Grutter*, 539 U.S. at 644, 654.

²²¹ Brief for Respondents at 26, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

²²² *See id.* at 33–34 ("Just as overcoming adversity may distinguish an applicant, minority or otherwise, so too may showing an ability to cross racial lines and maneuver outside one's 'bubble' . . . Seeking diversity within diversity underscores that it is *not* 'all about race' . . . every student brings 'a lot of other diversity pieces with them,' like 'geographic diversity . . . socioeconomic diversity . . . the type of school [a student] came from, . . . [the type of community he grew up in] rural, inner city, suburban . . . [his] background growing up . . .'" (quoting Joint Appendix at 257a, 360a, 363a, *Fisher II*, 136 S. Ct. 2198 (No. 14-981))).

²²³ Brief for Respondents at 40, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (quoting *Grutter*, 539 U.S. at 322).

²²⁴ For a complete list of amicus briefs submitted in both cases, see Office of the Vice President for Legal Affairs, *U.S. Supreme Court (2011)*, UNIV. OF TEX. AT AUSTIN <https://legal.utexas.edu/scotus-2011> (last visited Feb. 4, 2017).

Thus, in the interest of brevity and in an effort to avoid an unnecessary repetition, this Article does not provide a detailed description of the amicus briefs filed in *Fisher II*. In short, with a few exceptions of amicus briefs that emphasized both utilitarian benefits and the remedial or distributive potential of race-conscious affirmative action,²²⁵ the vast majority of amici supporting UT's admissions policy followed the same utilitarian interpretation of diversity that was dominant in the *Fisher I* briefs.²²⁶ Even though some amicus briefs cited *Grutter* and did mention the interest in ensuring "that the path to leadership be visibly open" or other egalitarian claims, these briefs usually ascribed to other utilitarian pedagogical and mostly market-driven interests.²²⁷

B. Deference as Space for Meaning-Making in *Fisher II*

On June 23, 2016, the Court announced its decision in *Fisher II*,²²⁸ allowing race-conscious affirmative action to continue. Justice Kennedy—

²²⁵ See, e.g., Brief of Constitutional Law Scholars & Constitutional Accountability Ctr. as Amici Curiae in Support of Respondents at 5, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) (arguing that affirmative action aligns with the original meaning of the 14th Amendment, which aims to ensure equality of opportunity to all persons regardless of race); Brief of Amici Curiae Professors Cedric Merlin Powell et al. in Support of Respondents at 2–4, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) (arguing that "the notion that the Constitution is colorblind has no basis in the original intent of the Fourteenth Amendment or *Brown*").

²²⁶ See, e.g., Brief of Amici Curiae Am. Council on Educ. et al. in Support of Respondents at 5, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) ("The nation's colleges and universities seek student body diversity in pursuit of educational excellence. They must prepare students who will have to navigate a nation more diverse, and a world more interconnected, than ever before."); Brief of Soc'y of Am. Law Teachers as Amicus Curiae Supporting Respondents at 13–14, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) ("Studies have indicated that diversity in classroom conversations better prepares students to deal with global clients and colleagues"); Brief of Amicus Curiae The Univ. of N.C. at Chapel Hill in Support of Respondents at 2, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) ("[A] diverse campus better prepares its students for participation in a diverse society and global economy."); Brief of Cal. Inst. of Tech. et al. as Amici Curiae in Support of Respondents at 10, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) ("In addition to promoting better learning outcomes, a diverse university community better prepares students for success in our increasingly diverse, increasingly global society.")

²²⁷ See Brief for the N.Y. State Bar Ass'n as Amicus Curiae in Support of Respondents at 3–18, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) (arguing that in order "[t]o remain effective, the legal profession must reflect the changing demographics of the United States' population."); Brief of Brown Univ. et al. in Support of Respondents at 12–14, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) (citing *Grutter's* different rationales and explaining that institutions' interest in diversity is derived from their educational mission to "develop active and engaged citizens equipped to handle the problems of a rapidly evolving world"); Brief of Leading Public Research Univs. et al. as Amicus Curiae in Support of Respondents at 14, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) ("The university aims to further the causes of democracy and justice by opening pathways to leadership for members of traditionally underrepresented minority groups. Developing a vibrantly diverse campus not only creates opportunities for members to advocate for their own communities, but is also critical for multicultural understanding and collaboration in a deeply interconnected world.")

²²⁸ 136 S. Ct. 2198, 2207 (2016).

who had been a long-time skeptic of race conscious affirmative action — delivered the opinion of the Court and affirmed that “the educational benefits that flow from student body diversity” are a compelling state interest.²²⁹

Fisher II boiled down to two major questions: (1) what kinds of diversity are compelling? (2) And how much diversity is enough diversity?²³⁰ Justice Kennedy provided hints and guidelines. On the first question he held that diversity should not be assembled according to a single metric, such as class rank, that captures some elements of diversity and misses others.²³¹ More generally, Kennedy added that diversity takes many forms and has many dimensions,²³² and listed all the interests in diversity that UT identified in its brief.²³³ With respect to the second question, Kennedy asserted that “[a] university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.”²³⁴ But Kennedy did not provide any binding answer to these questions. Instead, he took a step back and determined that only the universities themselves can answer those questions:

Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.²³⁵

As Richard T. Ford recognized, this was a big shift in the Court’s, and in Justice Kennedy’s, approach to affirmative action.²³⁶ Over the past decade,

²²⁹ *Id.* at 2210 (quoting *Fisher I*, 133 S. Ct. 2411, 2419 (2013)).

²³⁰ Richard Thompson Ford narrows it down only to the second question of “how much diversity is enough?” I read the case as also raising the question of what kinds of diversity should be valued. See Richard T. Ford, *Did the Supreme Court Just Admit Affirmative Action is About Racial Justice?*, VOX (July 5, 2016, 12:02 PM), <http://www.vox.com/2016/7/5/12085412/-supreme-court-affirmative-action-decision-racial-justice-fisher-abigail-diversity>.

²³¹ *Fisher II*, 136 S. Ct. at 2213–14 (“Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. . . . Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court’s cases have defined it.”).

²³² *Id.* at 2210 (“As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions”)

²³³ *Id.* at 2211 (articulating Texas’s goals of “the destruction of stereotypes,” the “promot[ion of] cross-racial understanding,” the “preparation of a student body” “for an increasingly diverse workforce and society,” the “cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry,” and providing “an ‘academic environment’ that offers a ‘robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.’”) (internal quotation marks omitted) (quoting Supplemental Joint Appendix at 1a, 23a, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981)).

²³⁴ *Id.* at 2211.

²³⁵ *Id.* at 2214 (emphasis added).

²³⁶ Ford, *supra* note 230 (“[*Fisher II*] marks a turning point in the long controversy surrounding race-conscious admissions policies and perhaps an important shift in the orientation of the Supreme

the Court had minimized its willingness to allow the use of race as an affirmative measure: in 2007, in a case called *Parents Involved in Community Schools v. Seattle School District No. 1*,²³⁷ the Court invalidated voluntary high school integration efforts that made use of racial criteria. Add to that the ruling in *Fisher I*, which seemed to suggest that the majority of Justices had real doubts about the constitutionality of the use of race in admissions programs.²³⁸ And most recently in *Schuette v. Coalition to Defend Affirmative Action* (2014),²³⁹ the Court affirmed a state ban on the use of race in affirmative action efforts in higher education and other realms. In contrast to these cases, which posed direct and indirect constraints on affirmative action in higher education and on the vocabulary for public discourse about diversity, in *Fisher II*, the Court took a step back and invited universities to define their own interest in diversity.

In its final section, the Article employs this historical account of diversity's transformation in order to start exploring the stakes in framing diversity in one way or another, inviting universities and others to consider these tradeoffs in making claims about diversity.

VI. DIVERSITY – WHAT HAS GONE WRONG?

A. *Why Has the Utilitarian Conception of Diversity Prevailed? Or, Did Diversity Go Wrong?*

The following sections of the Article suggest that the transformation of diversity as a legal justification—from an egalitarian understanding to a dominant utilitarian conception—impoverishes the public discourse on racial justice and risks the long-term struggle for racial equality. Yet, before discussing the price of adopting the business case for diversity and abandoning the egalitarian one, it seems necessary to situate this transformation in a historical context and ask why the utilitarian conception has prevailed. This allows us to discuss the tradeoffs entailed in adopting such an approach and to then consider any normative implications it might

Court as well. Justice Kennedy, long the pivotal swing vote on the Court and a skeptic of affirmative action, voted to uphold UT's policy.”)

²³⁷ 551 U.S. 701, 707 (2007) (“Parents of students denied assignment to particular schools under these plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection. The Court Appeals below upheld the plans. We granted certiorari, and now reverse.”)

²³⁸ *Fisher I*, 133 S. Ct. 2411, 2419–20 (2013) (requiring that reviewing courts independently explore whether the university could have obtained its objective of diversity with race-neutral alternatives).

²³⁹ 134 S. Ct. 1623, 1638 (2014) (“This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. . . . Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters’ reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.”)

have.

Trying to understand what has caused the transformation in the meaning of diversity between the Michigan cases and the *Fisher* litigation, it appears impossible to reach one conclusive answer. Instead, in what follows, I explore three explanations that could have played a role in the take-over of utilitarian diversity: a political account of why certain characteristics of the utilitarian conception might have made it attractive grounds for broad political agreement; a narrow strategic explanation concerned with the changing makeup and ideology of the Court; and a brief overview of the much broader shift towards a neo-liberal paradigm. These explanations are not mutually exclusive.

1. *Utilitarian Diversity and Political Compromise*

Diversity, in its current formulation, is at the heart of a political consensus. Opponents of affirmative action no longer challenge the compelling nature of diversity, and the debate now centers on how diversity ought to be achieved. The utilitarian conception of diversity seems to have contributed, to say the least, to the formation and success of this political compromise. Utilitarian diversity is consensual exactly because it does not entail moral commitments to remedial or distributive values, which not all segments of society share.²⁴⁰ Furthermore, utilitarian interests avoid much of the critique and controversy that was pointed at the remedial justification for affirmative action. It builds upon forward-looking pedagogical needs for multiplicity of intellectual perspectives and on market-driven interests, rather than on redressing historical events that, over time, some argue, have lost their claim on how institutions of higher education ought to be structured.²⁴¹ Similarly, because utilitarian interests do not rely on notions of group disadvantages, but on the positive plurality of ideas and experiences of students from all segments of society, they avoid stereotyping, which is often associated with the remedial and distributive conceptions. In other words, it offers a nonstigmatizing justification to give preference to members of targeted groups: they contribute valuable features to classroom discussion

²⁴⁰ See ROSENFELD, *supra* note 28, at 94 (“Thus, if one seeks to justify affirmative action in favor of a group as leading to the maximization of welfare, it becomes unnecessary to confront the arguments against such policy in the context of compensatory justice—namely, that because not all individual members of the group have experienced first-order discrimination, compensatory justice does not justify group-based preferential treatment. Similarly, in the context of distributive justice, by focusing exclusively on welfare maximization, the utilitarian need not be concerned by the fact that preferential treatment in favor of a particular group tends to favor its most qualified members at the expense of its least qualified ones.”).

²⁴¹ See ANDERSON, *supra* note 31, at 141 (“[The diversity model] is future-oriented, locating the point of affirmative action in continuing institutional needs for epistemic diversity rather than in receding events that, over time, lose their claim on how current institutions should be structured.”).

and by that advance the university's mission.²⁴² Another clear advantage of the utilitarian case for diversity is that it associates racial preferences with improving the educational conditions for all students and the society at large, rather than helping a favored group.²⁴³ In doing so, utilitarian diversity portrays affirmative action as an educational policy that benefits everyone and therefore avoids the "innocent white" objection.²⁴⁴

These rhetorical, symbolic, and actual advantages of the utilitarian conception of diversity make diversity an attractive ground for vast political consensus. It aims to advance broadly shared interests that potentially benefit everyone, while dodging the major objections remedial and distributive values raise. Proponents of affirmative action have surely taken these advantages into consideration in structuring their arguments before the Court. Nonetheless, these advantages fail to fully explain why the embrace of utilitarian interests involved the retreat from egalitarian values, especially after the *Grutter* decision that articulated both utilitarian and egalitarian conceptions of diversity. The two explanations below add some historical context that starts to provide an answer to this question.

2. *Utilitarian Diversity and the Court*

At least in part, the turn to utilitarian diversity in the *Fisher* litigation was a strategic reaction to the shift in the composition of the Court: while in the Michigan cases the swing vote on the bench was Justice O'Connor, at the time of *Fisher*, it was Justice Kennedy, who by then dissented in *Grutter*,²⁴⁵ and rejected the use of race in K-12 admissions policies.²⁴⁶ Advocates of affirmative action must have taken this into consideration when framing their interest in diversity, strategically aiming to a less receptive Justice whose vote was likely to decide the case.

²⁴² *Id.*

²⁴³ See Jeffries, *supra* note 67, at 7 ("Most important, diversity put the justification for racial preferences squarely on improving the educational experience of all students, rather than on helping a favored few.").

²⁴⁴ For an account of the "innocent white" objection see David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 805–07 (1991); see also Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96–97 (1986) (presenting the advantages of diversity as a forward-looking utilitarian value that remedies the "sins of discrimination past").

²⁴⁵ See *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting) (arguing that the Court did not apply strict scrutiny, thereby undermining "both the test and its own controlling precedents").

²⁴⁶ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("In my view the state-mandated racial classifications at issue, officials labels proclaiming the race of all persons in a broad class of citizens—elementary school students in one case, high school students in another—are unconstitutional as the cases now come to us.").

More broadly, in those years the Court had grown more conservative. Kenji Yoshino suggests that the Court suffered from a “pluralism anxiety”—a fear arising from the influx of immigrants or newly visible groups of people—leading to growing limitations on equal protection jurisprudence as part of a larger shift from equality- to liberty-based rights.²⁴⁷ Nancy Leong argues that as a result of this shift towards conservatism and the reluctance of the Court to accept race-based preferences on remedial grounds, “advocates of race-conscious policies in both employment and education increasingly relied on the interest in diversity as their most promising legal strategy.”²⁴⁸ Adding to this account, I suggest that these growing conservative trends lead proponents of affirmative action to eventually adopt the utilitarian conception of diversity and abandon its egalitarian interpretations.

3. *Utilitarian Diversity, Neoliberalism and Corporate Diversity*

The utilitarian shift that this Article describes might also reflect a much larger shift to a market-driven paradigm. Scholars have investigated the takeover of neoliberal and market-driven ideologies in a variety of domains,²⁴⁹ and commentators have described the rise of such ideologies and their manifestation in colleges and universities. They explained how institutions of higher education have been increasingly operating according to business principles and motivations,²⁵⁰ and denounce the prosperity of career-oriented education at the expense of the humanities.²⁵¹ Dave Hill and Ravi Kumar explain that “[t]he restructuring of the schooling and education systems across the world is part of the ideological and policy offensive by neoliberal capital.”²⁵² In the shadow of an overall turn to a neoliberal paradigm, it is easier to understand the growing dominance of market-driven

²⁴⁷ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747–48, 751–54 (2011).

²⁴⁸ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2163 (2013).

²⁴⁹ For an extensive survey, see generally David Harvey, *A BRIEF HISTORY OF NEOLIBERALISM* (2015) (describing the neoliberal turn in the United States from the 1970s to the 2000s).

²⁵⁰ See generally LAWRENCE BUSCH, *KNOWLEDGE FOR SALE: THE NEOLIBERAL TAKEOVER OF HIGHER EDUCATION* (2017) (explaining how the focus of higher education shifted to competition, metrics, consumer demand, and return on investment).

²⁵¹ See e.g., HENRY GIROUX, *NEOLIBERALISM’S WAR ON HIGHER EDUCATION* (2014) (describing how market-driven ideology and practice have radically reshaped the nature of higher education, and calling for an intervention to save universities as democratic sites of critical learning); Heidi Tworek, *The Real Reason the Humanities are ‘in Crisis,’* ATLANTIC (Dec. 18, 2013), <https://www.theatlantic.com/education/archive/2013/12/the-real-reason-the-humanities-are-in-crisis/282441/> (arguing that most of the decline in enrollment in the humanities happened in 1970 to 1985 due to women enrolling in career-oriented majors, but that those majors did not substantially affect the employment outcomes of women graduates, indicating that the gender wage gap was not due to and cannot be fixed by a difference in the practicality of career choice).

²⁵² Dave Hill & Ravi Kumar, *Introduction: Neoliberal Capitalism and Education*, in *GLOBAL NEOLIBERALISM AND EDUCATION AND ITS CONSEQUENCES* 1, 1 (Dave Hill & Ravi Kumar eds., 2009).

arguments in the realm of higher education. In such times, when higher education is being privatized and commodified, it is not surprising that the rhetoric we find in educational missions of universities or in the briefs referring to the goals of higher education, increasingly builds on market-logic and is deeply invested in economic and other measurable interests.

Relatedly, scholars describe how in the 1980s and, especially, the 1990s, the business case for diversity in the workplace flourished and gradually took the place of more traditional affirmative action.²⁵³ This shift in the corporate arena emerged before, and infiltrated the educational realm and influenced it. As Ben Gose explains, “universities are following the lead of the corporate world, where chief diversity officers have been in vogue since the 1990s.”²⁵⁴ The spillover of the business case for diversity from the corporate arena to higher education, along the broader neoliberal trends taking over higher education provide some historical context to the shift in the meaning of diversity and help understand why recently the utilitarian conception has come to dominate.

Neither one of these explanations provides a conclusive answer to the question of why the utilitarian conception of diversity has prevailed or why the shift was so extreme and broad. Still, together these explanations contribute to our understanding as they situate this process in a political and historical context. These explanations also suggest that adopting a utilitarian approach to diversity had clear political, strategic, and actual benefits. Thus, it seems safe to assume that the described shift contributed to the survival of affirmative action on campus and in courts. Taking those clear benefits into account, this Article proceeds to discuss the possible costs of adopting such a total utilitarian conception of diversity. This Article has no interest in finding anyone at historical fault. Instead, in what follows, it explores the tradeoffs encompassed in this shift. In its final part, the Article builds on this investigation to suggest that a more balanced approach to diversity should be restored.

B. Diversity Resigned: from an Egalitarian Ideal to a Diluted Utilitarian Interest

The Article opened with this inquiry: when do diversity claims promote equality and when do they inhibit it?

²⁵³ See, e.g., Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCI. 960, 961, 971 (1998) (providing a historical account of affirmative action in the workplace and describing how equal opportunity measures were recast as diversity initiatives); David B. Oppenheimer, *The Disappearance of Voluntary Affirmative Action from the US Workplace*, 24 J. POVERTY & SOC. JUST. 37, 44–46 (2016) (describing the transformation from affirmative action to diversity management in the workplace and highlighting its potential cost on racial minorities and women).

²⁵⁴ Ben Gose, *The Rise of the Chief Diversity Officer*, CHRON. HIGH. EDUC. (Sept. 29, 2006), <https://www.chronicle.com/article/The-Rise-of-the-Chief/7327>.

Many scholars have recognized the value of diversity as a rationale for affirmative action. Some, like many of the amici, tried to explain how diversity in itself can be a positive good to our workforce, educational mission, or democracy.²⁵⁵ Duncan Kennedy even argues for an expansion of our current commitment to cultural diversity, aiming to comply with the democratic principle of representation.²⁵⁶ Others have valued diversity for its consensual status²⁵⁷ and argued that despite its disadvantages, diversity serves as a useful political compromise that allows universities to continue practicing affirmative action.²⁵⁸ Kathleen M. Sullivan, former dean of Stanford Law School, urged courts to stop seeing affirmative action as a penalty of the past and invited them to embrace diversity as a prospective rationale that serves present and future benefits of institutions. “[B]y turning to such forward-looking justification,” she explained, “the Court might more effectively quiet protests about windfalls to nonvictims and injustice to innocents than it has by treating affirmative action as penance for past sins.”²⁵⁹ Reva Siegel suggested that those Justices who embraced the diversity rationale were motivated by concerns about social cohesion, trying to avoid the threats that a more direct rationale for affirmative action might pose.²⁶⁰ While one does not have to embrace all these values, it is impossible to ignore the strength of the diversity rationale and the major role it has played in the survival of affirmative action.

Critics, on the other hand, warned that diversity, as opposed to the abandoned remedial rationale, is far from a viable means of ensuring affirmative action.²⁶¹ Derrick Bell argued that diversity is actually “a serious distraction in the ongoing efforts to achieve racial justice.”²⁶² Richard T. Ford added that “a central function of ‘diversity’ is to finesse, if not obscure

²⁵⁵ See, e.g., RICHARD D. BUCHER & PATRICIA L. BUCHER, *DIVERSITY CONSCIOUSNESS: OPENING OUR MINDS TO PEOPLE, CULTURES, AND OPPORTUNITIES* (2004) (describing how diverse schools and workplaces allow us to communicate and collaborate more successfully); LEVINSON, *supra* note 5, at 1–54. For an account of *Grutter* and the potential benefits of diversity for democracy, see Post, *supra* note 63, at 60–64.

²⁵⁶ Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 712–721 (1990).

²⁵⁷ See SCHUCK, *supra* note 10, at 12 (“In the pantheon of unquestioned goods, diversity is right up there with progress, motherhood, and apple pie.”); Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 578 (2000) (“[I]t is becoming ever more difficult to find anyone who is willing to say, in public, that institutional or social homogeneity is a positive good and diversity a substantive harm.”).

²⁵⁸ See Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1707–08 (1997) (suggesting that diversity, a rationale for affirmative action, has become “a popular alternative to the remediation of socioeconomic disadvantage”).

²⁵⁹ Sullivan, *supra* note 244, at 97.

²⁶⁰ Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1294 (2011).

²⁶¹ See *supra* notes 73–76.

²⁶² Bell, *supra* note 8, at 1622.

the salience of contemporary racism,”²⁶³ as it “enables courts and policymakers to avoid addressing directly the barriers of race and class.”²⁶⁴ Kenneth Nunn added that diversity “allows people of color to be used for the purposes of the educational institution and ultimately for the benefit of white students and their educational needs.”²⁶⁵ Others tie diversity to the concept of identity politics and argue that it would “fumble American society’s extraordinary opportunities to build an economy and a civic culture.”²⁶⁶

So, does diversity promote equality or inhibit it? Drawing on the historical account of diversity’s transformation, I argue that neither side has a full understanding of what is at stake in making diversity claims and that the answer is more complex. Parts III and IV of this Article show how understandings about diversity shifted from notions about rectifying past injustice and distribution towards utilitarian interests and market benefits. But should this account matter when evaluating the relationship between diversity and equality? I argue that it does, in two significant ways. First, neither the praises of diversity nor its critiques are fully accurate as long as they hold the interest in diversity to have a fixed value. In other words, the social function of diversity changes with its constitutional meaning, through debates and over time. This means that the diversity compromise today might have different costs and benefits than it did at the time of *Bakke*. Second, in evaluating the stakes of making diversity claims today, I argue that one needs to understand not only the current popular understanding of it, but also the transformation that charged it with values over time.

²⁶³ RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 52 (2005); see also Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics in LEFT LEGALISM/LEFT CRITIQUE* 46–47 (Wendy Brown & Janet Halley eds., 2002) (arguing that *Bakke* changed the racial landscape on American college campuses and that “[t]he Powell opinion silently institutionalized an ethnicity model of race that emphasizes cultural difference over status hierarchy. In the ethnicity paradigm, the position of blacks is analogous to that of, say, Italian Americans: both have distinctive cultural backgrounds and therefore may contribute a unique perspective to the university environment.”); Malamud, *supra* note 258, at 1708–09 (arguing that educational institutions’ efforts to promote diversity through affirmative action programs “generates a nonuniform set of institutional expectations for the diverse and nondiverse candidates who are selected. The White candidates are there to do their jobs The diverse candidates must do their jobs, be role models, and teach the rest of the workforce how the world looks from their diverse perspectives. They can never be at peace in the same way as those whose right to be on the job is socially constructed as based on their pure individual merit.”).

²⁶⁴ See Bell, *supra* note 8, at 1622; see also WALTER BENN MICHAELS, THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY 19–20 (2006) (arguing that the American obsession with racial diversity masks the “real problem” of socioeconomic inequality).

²⁶⁵ Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 723 (2008).

²⁶⁶ See Jim Sleeper, *What NY Times Op-Ed Writer Mark Lilla Gets Wrong About ‘Identity Liberalism,’* ALTERNET, (Nov. 21, 2016, 8:44 AM), <https://www.alternet.org/election-2016/what-ny-times-op-ed-writer-mark-lilla-gets-wrong-about-identity-liberalism>. For a more comprehensive discussion, see JIM SLEEPER, LIBERAL RACISM: HOW FIXATING ON RACE SUBVERTS THE AMERICAN DREAM (1997).

Let me clarify the second point. In her book from 2012, *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis*, Nancy Fraser explains how the second-wave feminist critique of gender injustice, which was meant to expose the structural limitations on women's equality, was narrowed down to "identity politics."²⁶⁷ This allowed neo-liberal capitalism to rely on feminist ideals for legitimation, without changing the practices or structures that are responsible for women's continuous economic subordination.²⁶⁸ In doing so, she develops the concept of *resignification* by which prior strands of critique or reformative ideals are taken up in a diluted and narrow way that can help the system gain legitimacy without disrupting its overall practices and structure.²⁶⁹ These ideals, she explains, are being resignified and thereby enriched with a higher moral significance that legitimates the status quo.²⁷⁰

Diversity, I argue, was resignified—neither by opponents of affirmative action, nor by its proponents, but in the interaction between the two that took place around the *Fisher* litigation. Diversity, as the Article shows, was not adopted as an egalitarian rationale, but rather as a political compromise that emphasized its educational benefits but left its definition at least somewhat open-ended.²⁷¹ Social movements, university officials, and finally the *Grutter*'s Court infused diversity with prospective and retrospective egalitarian aspirations that reiterated diversity as a standard of critique for racial disparities and as an ideal for social reform. For a long time, diversity embodied a connection to the history of state-enforced hierarchies as well as a commitment to egalitarian social change.²⁷² Yet, these convictions shifted. When social mobilization around the *Fisher* litigation spiked, diversity became a market-based interest celebrating different cultures and backgrounds. However, it was decoupled both from the history of race discrimination and from aspirations to dismantle its persistence.²⁷³ Diversity became an ever more popular goal of social reform and a desirable moral standard for racial justice—aspired to by universities,²⁷⁴ and advocated for

²⁶⁷ See Fraser, *supra* note 19, at 219.

²⁶⁸ *Id.* at 219–20.

²⁶⁹ *Id.* at 217–23. In developing the concept, Fraser builds on LUC BOLTANSKI & EVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM* 3–4 (Gregory Elliott trans., 2005), which explains how capitalism remakes itself, in part by co-opting strands of critique directed against it.

²⁷⁰ See Fraser, *supra* note 19, at 220–21.

²⁷¹ See *supra* Part II.

²⁷² See *supra* Part III.

²⁷³ See *supra* Part IV.A.

²⁷⁴ See, e.g., *Mission Statement*, COLUM. UNIV., <http://home.columbia.edu/content/mission-statement> (last visited April 30, 2018) ("It seeks to attract a diverse and international faculty and student body, to support research and teaching on global issues, and to create academic relationships with many countries and regions."); *Mission Statement*, UCLA, <http://www.studentaffairs.ucla.edu/Mission-Statement> (last visited Feb. 4, 2017) ("In all of our pursuits, we strive at once for excellence and

by every sector in society.²⁷⁵ Yet at the same time, diversity was divested from its remedial and distributive goals, aspiring instead to train students for the global workforce and foster the economy. This process, in which the ideal became consensual and simultaneously diluted from its reformist redistributive goals, works to legitimate the hierarchal status quo and immunizes those who embrace it—institutions and citizens—from critique, and thus risk stalling a more structural racial reform.

Amicus briefs are in large part, strategic, and surely they do not represent the only conversation about race that is taking place in universities, where many are committed to ideals of racial equality.²⁷⁶ Thus, I do not resist the notion that *doubletalk* regarding diversity efforts exists. However, the amicus briefs, despite their highly strategic nature provide a crack, if not a window through which to witness the dynamics of popular constitutionalism and the evolving meaning of diversity.²⁷⁷ Furthermore, even if amicus briefs are a strategic, it seems that overtime *the face has been growing to fit the mask*. Diversity, and in recent years utilitarian diversity, is arguably the predominant form of public discourse about race. Indeed, university mission statements as well as diversity reports have drifted from egalitarian and remedial commitments to a utilitarian celebration of diversity in tandem with the amicus briefs.²⁷⁸ And

diversity, recognizing that openness and inclusion produce true quality.”); *Diversity & Inclusion*, AMHERST C., <https://www.amherst.edu/amherst-story/diversity> (last visited Feb. 4, 2017) (“We believe that a great intellectual community should look like the world.”).

²⁷⁵ This became evident from the diversity of amici who supported UT in the *Fisher* litigation, including States, local governments, the federal government, veterans, civil society organizations, business, students, and universities. For a detailed account, see *supra* Part IV.A.1.

²⁷⁶ See LEVINSON, *supra* note 5, at 46 (quoting a letter from Jack Balkin) (“I understand ‘diversity’ to be a code word for representation in enjoyment of social goods by major ethnic groups who have some claim to past mistreatment.”).

²⁷⁷ The history of diversity itself reveals that amici did not always make strategic arguments. While the *Bakke* Court focused on the instrumental benefits of diversity to the educational process, the *Grutter* amici diverged from the Court’s interpretation and insisted on an egalitarian understanding of diversity. See *supra* Part III.A.1. Furthermore, scholars of popular constitutionalism traditionally turn to amicus briefs to learn about popular and professional understandings of the Constitution. See, e.g., Brown-Nagin, *supra* note 81, at 1439 (“The affirmative action cases are excellent texts to consider from a social movement perspective because they featured a group of intervenors in *Grutter* who styled themselves a ‘mass movement’ for social justice.”); Siegel, *supra* note 82, at 1395 n.220 (analyzing amicus briefs to learn about the interaction between feminist movement and the courts in the question of abortion).

²⁷⁸ For examples of contemporary interpretations of diversity in university documents, see “Diversity & Inclusion” section of *It’s Your Yale*, YALE, <http://your.yale.edu/community/diversity-inclusion> (last visited Feb. 4, 2017) (“A diverse workforce and inclusive environment increases productivity, creates new ideas, performs on a higher level, and enhances Yale’s ability to continue to excel in an increasingly complex, competitive and diverse world.”); Letter and Memo from Christina H. Paxon, President, Brown Univ., to Members of the Brown Cmty. (Feb. 1, 2016), <http://brown.edu/web/documents/diversity/actionplan/diap-full.pdf> (explaining that diversity is essential to prepare “students to thrive and lead in the complex and changing settings they’ll encounter after they graduate”); see also *supra* notes 221–26 (detailing the interpretation of diversity

thus, the Article argues that the way we talk and think about diversity in courts and on campus affects the way we think about racial justice generally. In other words, the vocabulary for public discourse about racial justice shapes the conversation, frames commitments, and can affect the way we act. The resignified diversity framework, I suggest, does this in two significant ways.

First, the public vocabulary regarding race is gradually confined to terms of culture and identity, rather than a category of power hierarchies. Race, under the utilitarian discursive regime, became mostly a marker for students' culture, or background, which can contribute, like a type of *commodity*, to the "robust exchange of ideas" and the training of students. Nancy Leong calls this phenomenon "racial capitalism," by which she means "commodification of racial identity, thereby degrading that identity by reducing it to another thing to be bought and sold."²⁷⁹ This process can be further understood according to Neil Gotanda's typology of race.²⁸⁰ Gotanda distinguished between status-race, formal-race, historical-race, and culture-race. Status-race means "the traditional notion of race as an indicator of social status."²⁸¹ The opposite notion is formal-race, which has no connection to any other attribute except skin color. Historical race does not apply any essential meaning to race, but it "embodies past and continuing racial subordination."²⁸² And culture-race refers to the culture and community of the racial group.²⁸³ The utilitarian diversity framework, I suggest, works to limit understandings of race to "culture-race," and it attributes value to the other types of race only to the extent that they inform this cultural conception, which is instrumental to fostering the marked-based celebration of diversity.²⁸⁴

put forward by the University of Texas in its *Fisher II* briefing, and how this differed from even the *Fisher I* and *Grutter* conceptions.)

In contrast, many of the materials dated to the 1980s, 1990s, and early 2000s saw the interest in diversity as part of their commitment to social justice and equality. See, e.g., RECRUITMENT AND RETENTION OF MINORITY GROUP MEMBERS ON THE FACULTY AT YALE 1 (1989) ("The full and successful participation of all segments of the nation's population in all aspects of our society's life is urgently needed. The urgency has special force for the nation's schools and universities as they provide the foundation for such participation. . . . The fullest development of our human resources as well as equity and social justice demand that we at Yale address this issue."); VISITING COMMITTEE ON DIVERSITY, DIVERSITY, PLURALISM, AND COMMUNITY AT BROWN 13 (2000) ("[t]he commitment to diversity involves not only accepting and recognizing difference, but also challenging the inequities in power . . ." (quoting Johnella E. Butler)).

²⁷⁹ See Leong, *supra* note 248, at 2152.

²⁸⁰ Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 3 (1991).

²⁸¹ *Id.* at 4.

²⁸² *Id.*

²⁸³ *Id.* at 4–5.

²⁸⁴ In some ways, this process is parallel to the color-blind turn in antidiscrimination law, which was divested from antsubordination and group-based understandings of race to individual ones. Resisting this shift, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) ("It is from this perspective—one of a proscription against status-harm—that

Second, under the utilitarian paradigm, diversity and its egalitarian meaning are not goods in themselves, but instruments serving greater goods of professional success and economic prosperity. The *instrumentalization* of diversity, and its egalitarian interpretation, diminishes the value of diversity as well as equality and lessens the institutional and public committed to it. More specifically, this prospective functionalist approach to diversity blurs connections to the history of discrimination and sheds any commitment to amending its effects. Past as well as present racial disparities become irrelevant to the mission of higher education. Arguing for the compelling interest in diversity, universities often referred to their educational mission. While at the time of the Michigan cases this mission included both egalitarian, democratic, and utilitarian aspirations,²⁸⁵ at the time of *Fisher I* it was mostly confined to the training of students and equipping “professionals and business leaders to interact with diverse customers, clients, co-workers, and business partners.”²⁸⁶ Under this vision, the role of higher education is deprived of previous commitments to foster equality or remedy past injustices, and instead, universities are conceptualized as training and networking *career centers* in which students are both the commodity from which diversity is ‘made’ as well as its beneficiaries or clients.

Race still shapes educational opportunity. However, the utilitarian paradigm, I suggest, limits the public vocabulary and imagination from recognizing this. It fails to identify past and present forms of racial inequality and their relevance to the mission of higher education, and therefore, absolves universities from taking a role in fighting systematic inequality and at the same time immunizes them from being held accountable for it. In disregarding this systemic inequality, the utilitarian paradigm might gain popular support for adopting ‘diversity measures,’ but it simultaneously risks impeding the long-term struggle for racial justice, making us blind and numb to the ongoing racial stratification. While these costs might sound abstract or focused on far future concerns, in what follows I suggest that we might already be witnessing some of this impact in the realm of student activism.

C. *Renaming Buildings and Institutions, Safe Spaces, and Trigger Warnings*

In recent years, students all over the United States have been mobilizing around demands for renaming buildings or other structures on campus,

discriminatory state action should be viewed.”).

²⁸⁵ See *supra* Part III.A.I (exploring how many amici in *Grutter* viewed diversity); see also *supra* note 269 (explaining how the shift to a more utilitarian view of diversity evolved through a comparison to the evolution of capitalist ideology).

²⁸⁶ Brief of Amici Curiae American Council on Educ. et al. in Support of Respondents at 6, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

trigger warnings, and safe spaces. The Article does not presume to provide a comprehensive account of this movement, nor does it take a stand in this nuanced debate for or against any of these demands.²⁸⁷ Instead, it proposes that the recent rise in such demands sparks important questions about the implications of the ahistorical and market-driven paradigm that has controlled the conversation of race on campus over the last decade, and can help us better understand its cost.

Controversies over university building names and symbols began at the University of Texas in 2010, where a building named after a Ku Klux Klan member was renamed.²⁸⁸ Since then, and mostly since 2014, following students' protests, buildings associated with white supremacists and slave owners at institutions such as Duke, Georgetown, and University of Oregon were renamed. In 2015, Princeton students challenged the name of the university's Woodrow Wilson School on the basis of Wilson's views on race, but the demand was denied.²⁸⁹ Stanford initiated a study relating to the use of the name of Junípero Serra, a Catholic missionary who colonized California for Spain in the 18th century and whose history among Native Americans is controversial.²⁹⁰ Harvard Law School decided to alter the symbol on its shield that was designed after a crest of a slaveholder,²⁹¹ and at Yale, after a two year deliberation, it was decided to rename Calhoun College, named after John C. Calhoun, the American vice president who defended slavery.²⁹² The issue of renaming has gathered a great deal of public

²⁸⁷ For popular commentary on this debate, see for example, RaeAnn Pickett, *Trigger Warnings and Safe Spaces Are Necessary*, TIME (Aug. 31, 2016), <http://time.com/4471806/trigger-warnings-safe-spaces/> (arguing that safe spaces and trigger warnings provide an environment where students are able to feel secure enough to learn); Rajshree Agarwal, *Afraid to Speak Up: In the Era of Trigger Warnings, a Tenured Professor Stays Silent*, WASH. POST (Oct. 4, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/10/04/afraid-to-speak-up-in-the-era-of-trigger-warnings-a-tenured-professor-stays-silent/?utm_term=.14d45ec75d63 (discussing how safe spaces and trigger warning might create "a culture of fear" silencing opposing viewpoints in higher education). For a survey of the renaming controversy, see Sewell Chan, *Historical Figures, Campus Controversies*, N.Y. TIMES (Jan. 29, 2016), <https://www.nytimes.com/interactive/2016/01/29/education/college-symbol-controversies.html>.

²⁸⁸ *Board Votes to Change Name of UT Dorm Named for Klan Member*, CNN (July 15, 2010), <http://www.cnn.com/2010/US/07/15/texas.klan.dorm/index.html>; CTR. FOR ECON. & POLICY RESEARCH, LETTER OF THE COMMITTEE TO ESTABLISH PRINCIPLES ON RENAMING 8 (2016).

²⁸⁹ Ellen Brait, *Princeton Students Demand Removal of Woodrow Wilson's Name from Buildings*, GUARDIAN (Nov. 23, 2015, 8:35 AM), <https://www.theguardian.com/education/2015/nov/23/princeton-woodrow-wilson-racism-students-remove-name>.

²⁹⁰ Scott Jaschik, *Stanford to Set Principles for Renaming Buildings*, INSIDE HIGHER ED (Mar. 7, 2016), <https://www.insidehighered.com/quicktakes/2016/03/07/stanford-set-principles-renaming-buildings>.

²⁹¹ *Harvard Corporation Agrees to Retire HLS Shield*, HARV. L. TODAY (Mar. 14, 2016), <http://today.law.harvard.edu/harvard-corporation-agrees-to-retire-hls-shield/>.

²⁹² Shortly after Yale's report establishing the Principles on Renaming was issued in 2016, another committee was appointed to make a recommendation with respect to renaming Calhoun College. See Peter Salovey, *Update on Calhoun Advisory Process* (Jan. 9, 2017), <https://messages.yale.edu/>

attention, and has been debated by scholars and in the popular media.²⁹³

During roughly the same period of time, universities across the country have been wrestling with student requests for what are known as *trigger warnings*. Trigger warnings are explicit alerts for students that the material they are about to encounter in a classroom can potentially be distressing.²⁹⁴ Some asserted that these warnings should be confined to materials that can potentially cause symptoms of post-traumatic stress disorder in victims of rape or in war veterans, while others advocated for trigger warning in other potentially upsetting settings.²⁹⁵ Similarly, *safe spaces* are places where students can avoid distressing subjects and confrontations.²⁹⁶ The demand for safe spaces originally came from women and LGBTQ groups trying to create spaces free of harassment for all lesbian, gay, bisexual, and transgender students.²⁹⁷ The term has been expanded to refer to a space for other individuals who feel marginalized.²⁹⁸ These requests are often accompanied by discussions about racial insensitivities, cultural appropriation, and microaggressions towards students of color. Public discourse and further mobilization around these issues came to a head in August 2016 after the University of Chicago's dean of students sent a welcome letter to freshmen students, stating that the school does "not support so-called 'trigger warnings,' [it does] not cancel invited speakers because their topics might prove controversial, and [it does] not condone the creation

messages/University/univmsgs/detail/147063. And in February 2017 it was finally decided to change the name of Calhoun College and rename it after Grace Murray Hopper. See Peter Salovey, *Official University Messages*, YALE UNIVERSITY (Feb. 10, 2017, 4:24 PM), <https://messages.yale.edu/messages/University/univmsgs/detail/149000> (last updated Feb. 11, 2017, 2:01 PM).

- ²⁹³ For an overview of the recent controversies over renaming, see CTR. FOR ECON. & POLICY RESEARCH, *supra* note 288. See also Valerie Strauss, *Why Names Matter: The Fight at Clemson Over Iconic University Building Named After Racist Governor*, WASH. POST (Feb. 26, 2015), https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/26/why-names-matter-the-fight-at-clemson-over-iconic-university-building-named-after-racist-governor/?noredirect=on&utm_term=.d16d8e7ef9a0 (reporting on the debate between students and the board of trustees over changing the name of a Clemson University campus building). For a review of the controversies in the international context, see Sewell Chan, *Historical Figures, Campus Controversies*, N.Y. TIMES (Jan. 26, 2016), <https://www.nytimes.com/interactive/2016/01/29/education/college-symbol-controversies.html> (summarizing the success of student activism on college campuses in changing names, statues, and other symbols of historical figures).
- ²⁹⁴ For the origins of trigger warnings in feminist and disability thought, see Angela M. Carter, *Teaching with Trauma: Trigger Warnings, Feminism, and Disability Pedagogy*, 35 DISABILITY STUD. Q. 1, 5 (2015).
- ²⁹⁵ For a survey of the 2013 debate over trigger warnings, see Amanda Marcotte, *The Year of the Trigger Warning*, SLATE (Dec. 30, 2013, 10:42 AM), http://www.slate.com/blogs/xx_factor/2013/12/30/trigger_warnings_from_the_feminist_blogsphere_to_shonda_rhimes_in_2013.html.
- ²⁹⁶ Pickett, *supra* note 287.
- ²⁹⁷ MOIRA RACHEL KENNEDY, MAPPING GAY L.A.: THE INTERSECTION OF PLACE AND POLITICS 24 (2001).
- ²⁹⁸ Teddy Amenabar, *The New Language of Protest*, WASH. POST (May 19, 2016), <http://www.washingtonpost.com/sf/style/2016/05/19/what-college-students-mean-when-they-ask-for-safe-spaces-and-trigger-warnings/>.

of intellectual ‘safe spaces’ where individuals can retreat from ideas and perspectives at odds with their own.”²⁹⁹

Of course, each of these demands must be contextualized, discussed and decided on its own merits. I do not take a stand in this debate, but instead propose that the *costs* of adopting a utilitarian approach to questions of racial justice are evident in these demands in two, somewhat contradictory ways. First, the movement can be understood as a backlash to the utilitarian paradigm that has been controlling the conversation on race in the past decade in courts (briefs and opinions) and on campuses—contesting its indirect and ahistorical nature, and aspiring to get intuitions to recognize past injustices as well as to commit, once again, to rectifying them. Second, the demands students are making appear to be limited by similar conceptions of race—confined to symbolic notions of identity and culture—and thus risk reproducing them.

The current wave of student activism seems to be contesting the dominant approach to questions of race on campus. Students are resisting their institutions, which they feel fundamentally misunderstand their experience of race as a category of power that is very present in their lives. As a Yale senior Aaron Lewis explained, the 2015 protest at Yale was really “about a mismatch between the Yale we find in admissions brochures and the Yale we experience every day. They’re about real experiences with racism on this campus that have gone unacknowledged for far too long.”³⁰⁰ Similarly, students resist the ongoing erasure of the history of racial oppression in higher education, and aspire to get their universities to acknowledge, in some way, the wrongs of the past.³⁰¹ As *The Stanford Daily* reported, “[s]upporters of the resolution argue that removing Serra’s name from buildings is a step toward correcting the erasure of history.”³⁰² Similarly, in support of retiring the controversial slaveholder’s symbol from the school’s shield, Harvard students said it was “a symbol of exclusion—a reminder of an exclusionary past that should have no place in an inclusive present,” and that it leads students of color “to question whether they are accepted as equal members of the Law School community, particularly in

²⁹⁹ Letter from John Ellison, Dean of Students, The College of Univ. of Chi., to the Incoming Student Class of 2020 (Aug. 26, 2016).

³⁰⁰ Aaron Z. Lewis, *What’s Really Going on at Yale*, MEDIUM, Nov. 8, 2015, <https://medium.com/@aaronzlewis/what-s-really-going-on-at-yale-6bdbbeeb57a6#.t0q31knkt>.

³⁰¹ See, e.g., CTR. FOR ECONS. & POLICY RESEARCH, *supra* note 288, at 7 (“Many students focused attention on the relationship between a namesake’s beliefs and the University’s professed values of community and inclusiveness. . . . Some students said that the Calhoun name was emblematic of a more general phenomenon of racial oppression and injustice at Yale.”).

³⁰² Sarah Wishingrad, *Resolution to Rename Buildings Named After Father Junipero Serra Gains Support, Faces Backlash*, STAN. DAILY (Mar. 4, 2016), <http://www.stanforddaily.com/resolution-to-rename-buildings-named-after-father-junipero-serra-gains-support-faces-backlash/>.

the face of what they experience as other slights.”³⁰³ Black Justice League members at Princeton noted that “they had often felt excluded and continually if subtly called on to justify their presence at one of the nation’s top schools. . . . [a]nd for some students, Wilson’s name and image around campus feel like constant reminders that they are not entirely welcome.”³⁰⁴ An ahistorical understanding of race, it seems, does not reflect the students’ lived experiences, and utilitarian motivations are no longer adequate to reflect their aspirations for racial justice. Thus, by uncovering what has been neglected, recent activism highlights the costs of embracing an all-utilitarian approach to questions of race: institutions that aspire for greater student diversity, but are somewhat detached from both the history and the current reality of race in America.

However, the demands that resulted in this backlash, I suggest, are confined by the very same utilitarian regime and its attendant convictions about race. And thus, the costs of the utilitarian approach become evident not only in what universities have been missing, but also in the demands that define this movement. The recent demands are centered on symbolic notions of race as identity, asking mainly for cultural recognition rather than for redistribution.³⁰⁵ In this respect, the movement’s imagination seems to be limited by the dominant conceptualization of race as a marker of identity and culture rather than as a category of power hierarchies. The focus on symbolic demands for cultural recognition I suggest, risks contributing to the ongoing diversion of institutional attention from the status quo of racial stratification on and off campus. Furthermore, the demands are often framed in a manner that does not challenge systematic racism or inequality, but as requests for removal of or protection from obstacles to learning and training.³⁰⁶ “You have to do something to . . . make sure that everybody can be educated,” as one student activist said while articulating her support of trigger warnings.³⁰⁷ The relatively narrow scope of student demands, their inward-facing direction, and their utilitarian framing seem to be constrained by the notion of universities as professional training centers, and reflecting their inability to conceptualize higher education as a site of social change.

³⁰³ BRUCE H. MANN ET AL., RECOMMENDATION TO THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE ON THE SHIELD APPROVED FOR THE LAW SCHOOL 8 (Mar. 3, 2016), <https://hls.harvard.edu/content/uploads/2016/03/Shield-Committee-Report.pdf>.

³⁰⁴ Andy Newman, *At Princeton, Woodrow Wilson, a Heralded Alum, Is Recast as an Intolerant One*, N.Y. TIMES (Nov. 22, 2015), https://www.nytimes.com/2015/11/23/nyregion/at-princeton-addressing-a-racist-legacy-and-seeking-to-remove-woodrow-wilsons-name.html?_r=0.

³⁰⁵ Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age*, 212 NEW LEFT REV. 68, 70–72 (1995) (distinguishing claims for cultural and group recognition from claims for redistribution while discussing the possible tradeoff between the two).

³⁰⁶ See e.g., Kate Manne, *Why I Use Trigger Warnings*, N.Y. TIMES (Sept. 19, 2015), http://www.nytimes.com/2015/09/20/opinion/sunday/why-i-use-trigger-warnings.html?_r=0 (“Under conditions such as these, it’s impossible to think straight.”).

³⁰⁷ Amenabar, *supra* note 298 (quoting Sasha Gilthorpe).

Similarly, while the appeal for renaming is clearly haunted by historical racial oppression, and demands to stop ignoring it, it risks taking part in the ongoing erasure of the past. In many instances the demands for renaming resulted in an establishment of a committee and sparked a time-limited conversation about the specific request. Thus, the demands have been successful in provoking discussions about the history of racism in the short term, but might compromise the ability of universities to engage in such conversations and struggles in the long term as they eliminate the very relics that sparked these conversations in the first place.

In an op-ed from November 2016, Mark Lilla voiced a harsh critique of diversity-discourse and of recent students' demands, characterizing both as forms of identity politics:

[T]he fixation on diversity in our schools and in the press has produced a generation of liberals and progressives narcissistically unaware of conditions outside their self-defined groups, and indifferent to the task of reaching out to Americans in every walk of life. . . . By the time they reach college many assume that diversity discourse exhausts political discourse, and have shockingly little to say about such perennial questions as class, war, the economy and the common good. . . . We need a post-identity liberalism, and it should draw from the past successes of pre-identity liberalism. Such a liberalism would concentrate on . . . the issues that affect a vast majority of them.³⁰⁸

While at first reading, this critique might sound similar to the argument laid out in this Article, it is distinct and even opposed to it. First and foremost, nowhere does this Article present an argument against identity politics as a whole. In contrast, I assume that racial justice requires a richer paradigm that includes both cultural recognition and material redistribution, rather than trading one for the other. I recognize that the focus only on one type of demand might weaken the likelihood of attaining the other.³⁰⁹ Second, unlike Lilla, I do not prioritize issues of class and war over race because I recognize, again unlike Lilla, that the recent activism is working against deep and systemic racial inequality. Instead, my concern is about the students' choice to present limited demands—in nature and in scope. Furthermore, in contrast to Lilla, who echoes Walter Benn Michaels³¹⁰ and argues that race problems serve as a distraction from the real problem of class inequality, this

³⁰⁸ Mark Lilla, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 20, 2016), <http://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html>.

³⁰⁹ See Fraser, *supra* note 305, at 74 (“People who are subject to both cultural injustice and economic injustice need both recognition and redistribution.”); see also Fraser, *supra* note 19, at 4 (“[I]nstead of arriving at a broader, richer paradigm that could encompass both redistribution and recognition, second-wave feminists effectively traded one truncated paradigm for another.”). For a fierce critique on Lilla’s op-ed, see Katherine Franke, *Making White Supremacy Respectable. Again.*, BLARB (Nov. 21, 2016), <http://blog.lareviewofbooks.org/essays/making-white-supremacy-respectable/> (arguing that Lilla’s position “is a liberalism of white supremacy” and addressing in turn several facets of Lilla’s argument).

³¹⁰ See BENN MICHAELS, *supra* note 264, at 19–20.

Article points to the ways in which the two problems are still entangled today. Lastly, I do not believe that the solution is to “concentrate on the issues that affect a vast majority.” Mainly because fighting racial inequality might never be a top priority for the majority. If anything, the history of diversity’s transformation teaches that we should focus more on race, not only as an element of identity, but also as a category of power.

Universities, student movements, and others who are committed to racial justice are facing a real dilemma: how to get the majority and courts to adopt measures to fight inequality without compromising the struggle itself. This Article is meant to shed light on the dominant way of doing so today—through diversity claims. I described a rather worrisome development, by which the current understanding of diversity as a utilitarian value might endanger the struggle for racial justice more than it promotes it. There is nothing wrong with expressing the utilitarian benefits of diversity, which are both real and persuasive, yet it is when this indirect approach dominates the conversation about race that our institutions risk losing sight of long-term racial progress, as well as the ability to honestly talk and act against the status quo of racial hierarchies. I have also showed that in the past, diversity played a more robust role in unsettling racial hierarchies, but *can it do so in the future?*

VII. CONCLUSION: DIVERSITY’S FUTURE

Diversity discourse is fundamentally and historically ambiguous and can accommodate conservative as well as progressive ideals about race and inequality. It does not necessarily embody egalitarian commitments, but rather represents an ongoing struggle that can tilt either toward egalitarian or utilitarian values. In the past decade the market-driven approach to diversity has become so dominant that it risks undermining the long-term struggle for racial equality. It is now the time, I suggest, to tilt diversity back and reinfuse it with egalitarian ideals.

How? Past critiques of diversity urged advocates and the Court to overthrow the diversity framework as a whole and return to the pre-*Bakke* reality of remedial ideals.³¹¹ This Article, in contrast, is more realistic and somewhat more optimistic. Instead of dismissing this entire successful body of law, it suggests that much can be done under existing equal protection law and within the diversity framework. More concretely, when making diversity claims on campus and in court, universities and other advocates of affirmative action should not automatically embrace a purely utilitarian and market-driven approach to diversity. Rather, they should attempt to strike a balance between acknowledging the utilitarian benefits of diversity that make it popular and easy to live with even for conservatives and the egalitarian

³¹¹ See *supra* note 11 and accompanying text.

perspective that is at the core of racial justice. One way of doing that is to return to the Michigan briefs and to Justice O'Connor's interpretation of diversity in *Grutter*, which embraced both utilitarian and democratic values of equal citizenship, and insisted that diversity also embodies an interest in ensuring that no group is excluded from participating in public life.

This is a time of great uncertainty in America, and no one knows what the composition of the Court will be under President Trump, but it seems safe to assume that it will not become more progressive in the foreseeable future. What we do have is the most recent decision in *Fisher II*, in which Justice Kennedy—who was and is once again the swing Justice on equal protection cases—affirmed the diversity framework. Adopting the diversity framework, the *Fisher II* majority did not further constrain its meaning, but instead it held that in defining student-body diversity, “[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”³¹² This deference should be understood as an opportunity to reshape the meaning of diversity and infuse it with new-old meanings. While remedial interpretations of diversity might strike outside what is central to the identity of a university and be too far reaching for Justice Kennedy, *Grutter*'s forward-looking commitment to equal citizenship as a democratic ideal can be considered part of an “educational mission” and enjoy the deference of the court. With more challenges to affirmative action in the pipeline,³¹³ universities must embrace the diversity framework, and with it this timely opportunity to reinfuse it with egalitarian meanings that could change the conversation about race in courts and on campuses.

³¹² *Fisher II*, 136 S. Ct. 2198, 2214 (2016).

³¹³ See e.g., *Students for Fair Admissions v. President & Fellows of Harv. Coll.*, 308 F.R.D. 39 (D. Mass. 2015); *Students for Fair Admissions v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017).