

2018

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Barry Sullivan*

“The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.”¹

“The lawyer . . . is a member of a learned profession — of a skill group that has the temerity to make a profession of tendering advice to others. It is his responsibility to acquaint himself not only with what the learned have thought, and with the historical trends of his time, but also with the long-term interests of all whom he serves and the appropriate means of securing such interests To no one else can clients and members of the public reasonably be expected to look for that enlargement and correction of perspective, that critical and inclusive view of reality, that is based on the disciplined exercise of skills which the layman is not given the opportunity to acquire.”²

* Copyright © 2018 Barry Sullivan. Cooney & Conway Chair in Advocacy and Professor of Law, Loyola University Chicago School of Law. The author is grateful to Michael Kaufman, Alfred S. Konefsky, Steven Ramirez, and Winnifred Fallers Sullivan, for thoughtful comments on an earlier draft of this article, and to Jeffrey Gordon, Helaina Metcalf, and Tara Russo, for expert research assistance. The author is also grateful to Loyola University Chicago Reference Librarian Julienne Grant for additional research assistance, and to the Cooney & Conway Chair Fund and the Loyola Faculty Research Fund for financial support.

¹ *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

² Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203, 211 (1943).

INTRODUCTION

Most of the time most Americans take for granted the desirability of most kinds of “diversity” in higher education. Unlike universities in some other countries — where university admission may depend entirely on the results of a single set of school leaving examinations — American colleges and universities typically do not attempt to fill their classes by admitting the largest possible number of the highest scorers on a standardized exam, but choose to consider a variety of factors in deciding who should be admitted to study. That has been the case for many years, and it remains the case today, notwithstanding the pressures put on colleges and universities by the various rankings regimens (which typically emphasize the grades and test scores of entering students in determining the relative standing of institutions) and the weight attributed to those rankings by prospective students. Moreover, the vast majority of Americans seemingly recognize the desirability of such multi-factored approaches to college and university admissions. The desirability — and, indeed, the necessity — of such approaches is rooted in the peculiar nature of the contemporary American university: the university orchestra may need three new violinists and a percussionist, the football team may be desperate for a new quarterback or a competent placekicker, the women’s soccer team may need two powerful fullbacks, and the viability of the classics department may depend on admitting more students with a high level of competence and interest in Latin and Greek. Similarly, university officials may be concerned about gender diversity or think that more students with more than average intellectual curiosity are needed. They may think that more conservative voices would improve the quality of campus dialogue. They may be influenced by the need to enroll students who can afford to attend or they may be mindful of the university’s need for alumni support. But most important, perhaps, is the fact that our particular system of university education depends on active student learning and a rigorous exchange of ideas in the classroom — something that works best with a broad diversity of perspectives. When such needs are properly explained, most are generally accepted, if not always with universal approval or enthusiasm.³

³ Among these various factors, the most difficult to defend, except on the most mercenary of grounds, may be the preferences that stem from a college or university’s need for funding. That is particularly the case, as Justice Thomas has suggested, with so-called “legacy” preferences. See *Grutter v. Bollinger*, 539 U.S. 306, 367-68 (2003) (Thomas, J., concurring in part and dissenting in part) (“[T]here is much to be said for the view that the use of tests and other measures to ‘predict’ academic performance is a poor substitute for a

To the extent that “diversity” is taken to encompass racial and ethnic diversity, however, that already fragile consensus gives way to doubt and disagreement. That is not surprising. After all, Americans have traditionally viewed higher education, not simply as a good in itself, but also as an important engine of social mobility, opening doors that otherwise would have stayed shut. Indeed, our concern with that purely instrumental value of education sometimes causes us to minimize its most essential value, namely, the learning that actually goes on in the classroom. In any event, we know that the stakes are

system that gives every applicant a chance to prove he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to ‘merit.’ For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called ‘legacy’ preference to give children of alumni an advantage in admissions. This, and other, exceptions to a ‘true’ meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation’s universities. The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures.”). As indicated both by Justice Thomas’s expressed suspicion with respect to the predictive value of tests and other customary forms of measurement, and by his obviously deliberate use of quotation marks in the foregoing passage, the meaning and significance of “merit” and “true” meritocracy is, within certain bounds, far from self-evident. In the final analysis, it may be difficult to define merit except in terms of the relative contributions that university officials expect that students with particular backgrounds and experiences will make to a particular community of learners, and that is the kind of academic judgment that is normally thought to rest within the ken of university officials, rather than the courts. *See, e.g.,* *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (“When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (“Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.”). In any event, given the acute resource needs faced by many colleges and universities at the present time, the temptation for university administrators to consider such matters in the context of ostensibly unrelated decision-making processes may be easily understood. On the other hand, succumbing to that temptation is not easily justified. *See* MICHAEL MITCHELL ET AL., *CTR. ON BUDGET & POLICY PRIORITIES, FUNDING DOWN, TUITION UP: STATE CUTS TO HIGHER EDUCATION THREATEN QUALITY AND AFFORDABILITY AT PUBLIC COLLEGES 1* (2016), <https://www.cbpp.org/sites/default/files/atoms/files/5-19-16sfp.pdf>; Kim Clark, *Some Small Private Colleges Are Facing a “Death Spiral,”* TIME: MONEY (Mar. 4, 2015), <http://time.com/money/3731250/sweet-briar-private-college-death-spiral>; Jon Marcus, *The Looming Decline of the Public Research University*, WASH. MONTHLY (Sept./Oct. 2017), <http://washingtonmonthly.com/magazine/septemberoctober-2017/the-looming-decline-of-the-public-research-university>.

high. In addition, the morally repellent causes with which consciousness of race and ethnicity have traditionally been associated — slavery, segregation, institutional racism, quotas, and other forms of overt discrimination against members of various racial and ethnic groups — have made us, and our law, understandably skeptical of measures that require acknowledgments of race or ethnicity.⁴ Not surprisingly, we are often beguiled by the simplicity of Justice Harlan's dictum in *Plessy v. Ferguson*⁵ — that “[o]ur Constitution is color-blind,”⁶ and we are inclined to take those words as a literal guide to action, without regard to what Justice Harlan might actually have meant by them or how well, taken literally, their alluring simplicity will map the complexity of our present circumstances. On the other hand, we recognize that acknowledgments of difference are necessary if invidious discrimination is to be prevented in the present and the effects of past discrimination remedied. In our more sober moments, we know that a fundamentalist understanding of Justice Harlan's dictum cannot carry us through. We know, as Judge Wisdom has said, that our Constitution must be “both color blind and color conscious.”⁷

⁴ See, e.g., Mark H. Grunewald, *Quotas, Politics, and Judicial Statesmanship: The Civil Rights Act of 1991 and Powell's Bakke*, 49 WASH. & LEE L. REV. 53, 57-59 (1992) (discussing the rhetorical power of the word “quota”). More recently, we have become increasingly aware of the pernicious effects of implicit bias. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 966 (2006) (“[A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans.”); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971 (2006) (“[I]mplicit bias as measured by the [Implicit Association Test] has proven to be extremely widespread. Most people tend to prefer white to African-American, young to old, and heterosexual to gay. Strikingly, members of traditionally disadvantaged groups tend to show the same set of preferences.”).

⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁶ *Id.* at 559.

⁷ *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in judgment) (“[A]s an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”). In recent times, the “strict scrutiny” standard of review, requiring the demonstration of a “compelling” state interest and a means “narrowly tailored” to achieve that interest, has provided the jurisprudential framework for implementing Justice Harlan's dictum. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (Powell, J.) (articulating the “strict scrutiny” or “most exacting judicial examination” standard of judicial review). As Stephen Siegel has shown, however, “[s]trict scrutiny did not appear in [Fourteenth Amendment] equal protection racial discrimination cases until 1978. In that year, Justice Powell, who was not speaking for the Court, employed strict scrutiny

In fact, we know that we cannot succeed at being “color-blind” unless we are “color-conscious.” In addition, we recognize, as Justice Harlan also observed in *Plessy*, that “[t]he destinies of the two races, in this country, are indissolubly linked together”⁸ Indeed, we are a nation of many races and ethnicities, and the destinies of all our people are linked together within our democratic institutions — which ultimately depend on “trustful talk among strangers.”⁹

It is not surprising, then, that questions concerning the purpose and value of racial and ethnic diversity in higher education have been the subject of substantial public discussion, academic scholarship, and hard-fought litigation over the half-century since the time when racial and ethnic diversity first became a major concern of colleges and

in casting the deciding vote in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)]. It was not until 1984 that an opinion for the Court employed strict scrutiny in a racial discrimination case.” Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 58 AM. J. LEGAL HIST. 355, 402 (2006) (footnote omitted). “[I]t was not until the Burger and Rehnquist Courts’ attack on affirmative action, in the late 1970s, 1980s, and 1990s, that the Court found in the Equal Protection Clause a firm principle — the ‘colorblind Constitution’ — that proscribed racial classifications even when their purpose and effect was to benefit historically oppressed minorities. Although it was the Burger and Rehnquist Court that turned the Equal Protection Clause from an anti-racial-subordination into an anti-racial-classification provision, it was the Warren Court’s politically ‘cautious’ rhetoric in *McLaughlin v. Florida*, 379 U.S. 184 (1964) and *Loving v. Virginia*, 388 U.S. 1 (1967) that laid the groundwork.” *Id.* at 405 (footnotes omitted); see also Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1474-75 (2004) (“The understanding that anticlassification and antisubordination are competing principles that vindicate different complexes of values and justify different doctrinal regimes is an outgrowth of decades of struggle over *Brown*, and is not itself a ground of the decision or of the earliest debates it prompted.”). Clearly, the Court did not invoke “strict scrutiny” in *Brown v. Board of Education*, 347 U.S. 483 (1954), but the Court did suggest in *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case involving school segregation in the District of Columbia (to which the Fourteenth Amendment did not apply), that “[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions” *Id.* at 499; see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1276 (2007) (noting that the *Bolling* Court used “language that anticipates the modern approach”). In *Korematsu v. United States*, 323 U.S. 214, 216 (1944), of course, Justice Black wrote that “all legal restrictions which curtail the civil rights of a single racial group [are] subject . . . to the most rigid scrutiny,” and Justice Stone had suggested that certain classifications and rights might warrant “a more exacting judicial scrutiny” in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁸ *Plessy*, 163 U.S. at 560.

⁹ DANIELLE S. ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V. BOARD OF EDUCATION* xiii (2004) (“[P]roperly conducted, [such talk] should dissolve any divisions that block it.”).

universities. Nor is it surprising that questions about the legitimacy, legality, and efficacy of various means of achieving such diversity have been the subject of much attention, not only from the academic community and the courts, but also from the general public. Finally, it is not surprising, in these circumstances, that questions of pedagogy and sound educational policy have often seemed to take second seat to other issues.

What may indeed seem surprising, however, is that the Supreme Court has considered the constitutionality of “benign” race-conscious admissions programs in higher education in only five cases since the issue first took hold in the late 1960s.¹⁰ The Court first considered the question in its badly splintered 1978 decision in *Board of Regents v. Bakke*,¹¹ which involved an affirmative action program at the UC Davis medical school. Justice Powell, who announced the judgment of the Court, recognized that, “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination,”¹² but that the ability of a university to determine who should be admitted to study was a central aspect of academic freedom.¹³ As a general matter, therefore, Justice Powell did not think that universities were categorically prohibited from any consideration of race in admissions decisions, but he found that UC Davis’s particular admissions plan, which simply set aside a specific number of seats for minority applicants, was unconstitutional. For a race-conscious admissions plan to pass muster, Justice Powell emphasized, each applicant must be considered individually and race may be considered only as a “plus factor” in the overall decision.¹⁴ Although no other Justice joined Justice Powell on both points — that race-conscious university admissions plans are not categorically unconstitutional, but the UC Davis plan was unconstitutional — his opinion came to be widely accepted as standing for the holding of the

¹⁰ See *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198 (2016); *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹¹ *Bakke*, 438 U.S. 265. The Court granted certiorari to address the constitutionality of a law school admissions plan in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), but that case eventually became moot because the plaintiff, who had sought admission to the University of Washington Law School, had been granted admission to the law school as interlocutory relief and was close to graduation by the time that a decision was about to be rendered by the Supreme Court. *Id.* at 319-20.

¹² See *id.* at 291 (Powell, J.).

¹³ See *id.* at 312-13 (Powell, J.).

¹⁴ *Id.* at 316-18.

case. The Court later decided a number of cases in which it virtually precluded any consideration of race, as a practical matter, in a variety of other contexts,¹⁵ but it did not expressly repudiate Justice Powell's analysis, insofar as higher education was concerned; nor did it revisit the subject for the next twenty-five years. In 1996, however, the Fifth Circuit held in *Hopwood v. Texas*¹⁶ that Justice Powell's opinion in *Bakke* was neither a binding precedent nor a correct statement of the law¹⁷ — a development that set the stage for further consideration of the issue by the Supreme Court.

The Supreme Court finally revisited the issue in 2003, when it decided two cases involving race-conscious admissions programs at the University of Michigan: *Grutter v. Bollinger*¹⁸ and *Gratz v. Bollinger*.¹⁹ Following Justice Powell's approach in *Bakke*, the *Grutter*

¹⁵ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 (1989) (invalidating municipal contract set-aside program); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-84 (1986) (invalidating collective bargaining provisions requiring race-conscious teacher lay-offs). In *Croson* and *Wygant*, the Court struck down state racial classifications intended to benefit certain minority groups by applying a demanding version of strict scrutiny review. By contrast, in *Fullilove v. Klutznick*, 448 U.S. 448, 473-74, 491-92 (1980), and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-66 (1990), the Court upheld similarly "benign" federal racial classifications under less demanding standards of review. In *Metro Broadcasting*, for example, the Court not only noted that "[a] majority of the Court in *Fullilove* did not apply strict scrutiny," but specifically invoked the test applicable to intermediate scrutiny, holding that such classifications "are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives." *Metro Broadcasting*, 497 U.S. at 564, 565. In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-39 (1995), however, the Court held that the strict scrutiny standard that it applied to the state programs at issue in *Croson* and *Wygant* should also be applied to federal programs. In the lead opinion in *Adarand*, Justice O'Connor emphasized that "strict scrutiny is [not necessarily] 'strict in theory, but fatal in fact,'" *id.* at 237, whereas Justice Scalia observed "government can never have a 'compelling interest' in discriminating on the basis of race to 'make up' for past racial discrimination in the opposite direction." *Id.* at 239. See generally Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 62-66 (2004) (presenting a "thumbnail sketch of the doctrinal history of competing versions of the 'compelling state interest' formula, from *Bakke* in 1978 to *Grutter* in 2003").

¹⁶ 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

¹⁷ See *id.* at 944 ("Justice Powell's view in *Bakke* is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale."); see also *id.* at 945 ("In short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination.").

¹⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁹ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

Court upheld the law school's admissions program, which gave individualized consideration to each applicant, but the Court in *Gratz* struck down the undergraduate admissions program, which automatically awarded a fixed number of points to applicants based on race.²⁰ A decade later, in *Fisher v. University of Texas*,²¹ the Court granted certiorari to consider the constitutionality of another race-conscious undergraduate admissions program.²² It was widely anticipated that the *Fisher* Court would overrule *Grutter*, but that did not happen.²³ The *Fisher* Court vacated the judgment and remanded the case to the Fifth Circuit, whereupon further proceedings were held in that court, followed by a second grant of certiorari and an eventual Supreme Court decision upholding the Texas undergraduate admissions program by a divided vote.²⁴ The complicated history of

²⁰ Compare *Grutter*, 539 U.S. at 334-35 (holding that the Law School's "truly individualized consideration" of applicants, taking race into account in a "flexible, nonmechanical way" satisfied the narrow tailoring requirement), with *Gratz*, 539 U.S. at 271-76 (holding that Michigan's undergraduate admissions program, which provided no "such individualized consideration," but "automatically distribute[d] 20 points to every single applicant from an 'underrepresented minority,'" did not satisfy the narrow tailoring requirement).

²¹ *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411 (2013).

²² See Brief for Petitioner at i, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) ("Question Presented: Whether the University of Texas at Austin's use of race in undergraduate admissions decisions is lawful under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).").

²³ That expectation was based in part on a 2007 decision in which the Court struck down race-conscious student assignment plans that had been adopted by the Seattle, Washington, and Jefferson County, Kentucky, school districts. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007) (plurality opinion). Chief Justice Roberts, in a plurality opinion, would have barred any consideration of race. See *id.* at 746-48. Justice Kennedy, whose vote was necessary to the outcome, specifically rejected that view as an "all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account." *Id.* at 787 (Kennedy, J., concurring in part and concurring in judgment). In *Fisher I*, the Court vacated the decision of the Fifth Circuit, holding that the lower court had not properly applied the strict scrutiny standard since it had applied a "good faith" standard and had accorded a presumption of good faith to the university, thereby essentially shifting the burden to the party challenging the university's position. *Fisher I*, 133 S. Ct. at 2420-22. Justice Kennedy, writing for the Court, reiterated his view that the consideration of race was not categorically precluded, and that deference was due to a university's academic judgment concerning the importance of diversity. *Id.* at 2417-18. Justice Ginsburg dissented and Justices Scalia and Thomas wrote separate concurring opinions essentially adhering to their positions in *Grutter*. *Id.* at 2432-24 (Ginsburg, J., dissenting); see *id.* at 2422 (Scalia, J., concurring); *id.* at 2422-32 (Thomas, J., concurring).

²⁴ *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2207, 2209-10, 2214-15

the *Fisher* case would make an interesting story, but the focus of this Article is on *Grutter*. More specifically, this Article will explore the significance and ramifications of the *Grutter* majority's relative lack of emphasis on the fact that *Grutter* involved legal education — a distinctive form of higher education with a distinctive mission, a distinctive set of concerns, and a distinctive pedagogy.

The *Grutter* Court was required to distinguish several public contract and employment cases in which it had categorically foreclosed any consideration of race. Justice O'Connor did so by observing that "context matters,"²⁵ and that the admissions process in higher education is a special context.²⁶ Since *Grutter* involved access to legal education, she might have taken the notion of context a step further and focused on legal education as a distinctive sector within the more general context of higher education. Interestingly, she did not do so. Simplicity presumably argued in favor of distinguishing all of public higher education from other parts of the public sector, and the Court was already concerned in *Grutter* and *Gratz* with the task of drawing a line between legitimate and illegitimate ways of taking race into account. Although one can readily show the desirability of student diversity throughout higher education, the arguments in favor of diversity in legal education are particularly compelling.

The most important problems that lawyers and judges face normally do not come with self-evident solutions; they are not logical puzzles, but questions of real life that require the application of professional imagination and judgment.²⁷ Among other things, lawyers and judges must be able to understand and appreciate the significance of problems as they appear to persons whose perspectives differ from their own.²⁸ That is not a talent that comes naturally to us, but it is

(2016). In *Fisher II*, the Court, by a 4-3 vote, found that the Fifth Circuit had properly applied the strict scrutiny test on remand.

²⁵ *Grutter*, 539 U.S. at 327.

²⁶ *Id.* at 329.

²⁷ See, e.g., EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 6 (1948) ("[A]mbiguity is inevitable in both statute and constitution as well as with case law. Hence reasoning by example operates with all three."); LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 4-5 (2d ed. 2005) (discussing the centrality of analogy to legal reasoning, but acknowledging the absence of rules "that prescribe how much or what sort of similarity is enough to sustain analogies generally or to sustain a particular analogy").

²⁸ A quarter acre plot may not have the same meaning for someone who comes from a rural area as it does for someone who lives in Chicago; someone who has not been stopped regularly and without apparent reason by the police may have a different view of it than someone who has; someone who lives in a trailer may consider it a home while someone else may consider it a vehicle; and an elderly man may have

something that can be learned and is essential both to 'successful judging and to successful legal practice.²⁹ The practice of law is by nature an adversarial activity in which a lawyer must seek to advance the interests of his or her client. Whether in litigation or transactional practice, however, the effective lawyer is one who is capable not only of understanding and appreciating the values, motivations, and interests of his or her client, but also of understanding and genuinely appreciating the values, motivations, and interests of the other parties to the dispute or transaction. The effective lawyer must also have an accurate, deep, and nuanced understanding of how the other parties' values, motivations, and interests diverge or converge with those of his or her client, and the effective lawyer must be able to counsel and otherwise represent his or her client in accordance with that knowledge.

For those reasons, the cultivation of professional imagination and judgment is (or should be) a central concern of legal education. But professional imagination and judgment are not learned in a lecture hall, imparted from the podium by an omniscient teacher who has fairly considered every aspect and nuance of a problem. To be sure, the cultivation of such qualities demands a great deal from teachers, but what it requires is not individual omniscience. It requires a teacher's careful direction of a respectful dialogue in which students with various backgrounds, experiences, and perspectives are encouraged to bring their various individual resources to bear as they

difficulty appreciating what it means to an adolescent girl to be strip searched in school. See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374 (2009) (stating that a junior high school student's "subjective expectation of privacy against [a strip] search [was] inherent in her account of it as embarrassing"); *Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005) (rejecting petitioner's contention that a dog sniff search during a traffic stop violated his constitutional rights); *California v. Carney*, 471 U.S. 386, 393-94 (1985) (reversing the California Supreme Court's decision that a trailer home is not an automobile for Fourth Amendment purposes); see also Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE•NOVO 133, 143 [hereinafter Bandes, *Empathetic Judging*] ("Unless the Court could understand the perspectives of all the litigants, it risked making its ultimate determination based on skewed and incomplete information.").

²⁹ See Barry Sullivan, *Just Listening: The Equal Hearing Principle and the Moral Life of Judges*, 48 LOY. U. CHI. L.J. 351, 366 (2016) [hereinafter Sullivan, *Just Listening*] ("Successful advocates cannot afford to be blinded by the brilliance of their own arguments, but must always be vigilant as to both the weaknesses of their arguments and the strengths of the best arguments on the other side."); Barry Sullivan, *The Humanity of Advocacy*, 42 LOY. U. CHI. L.J. xxiii, xxv (2010) (stating that the advocate's task is nothing less than "to persuade the court that the world will be a better place, in one way or another, by a little or a lot, if the court accepts the advocate's submission").

work through a set of difficult and contentious problems. Persons from different regions, social backgrounds, and financial resources may have particular insights into those problems. Clearly, women, by virtue of their gender and life experience, often bring special perspectives to law school discussions and raise concerns that might otherwise be overlooked. The same is true of members of racial and ethnic groups. As Justice O'Connor observed in *Grutter*, "[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."³⁰ Indeed, it has become all too clear in recent years that young Black males are likely to share experiences that are not shared by others and are highly relevant to the study of law. By declining to discuss context at a more granular level, however, Justice O'Connor missed the opportunity to probe the distinctive attributes and needs of legal education, which effectively permitted the dissenters in *Grutter* to define legal education and legal practice in a way that not only denied the distinctiveness of legal education and practice, but made racial and ethnic diversity — or, indeed, diversity of any kind — simply irrelevant.

This Article has four parts. First, the Article will consider Justice Powell's seminal opinion in *Bakke* and the Fifth Circuit's challenge to it in *Hopwood*. By taking race to be a relevant category for purposes of considering diversity, Justice Powell implicitly recognized that being perceived as belonging to a particular racial group constitutes a relevant, independent part of one's life experience. The *Hopwood* court simply rejected that possibility. Second, the Article reviews the approach taken by Justice O'Connor in *Grutter* and *Gratz*, which substantially reaffirms Justice Powell's methodology for evaluating race-conscious admissions decisions and speaks to the broad landscape of higher education, without giving special consideration to the distinctiveness of legal education. The Article then discusses the *Grutter* dissents of Justice Scalia and Justice Thomas, which reflect strong views about legal education, lawyering, and judging. In particular, those dissenting opinions do not seem to credit the fundamentally interactive nature of legal education (which gives salience to the diverse life experiences and viewpoints of students) or to the necessary role of judgment and imagination in lawyering and adjudication (which requires an openness to the perspectives of others that legal education should at least begin to habituate). Third, the

³⁰ *Grutter*, 539 U.S. at 333.

Article presents an alternative to the *Grutter* dissenters' views of legal education, lawyering, and judging. That alternative view is one in which professional excellence in lawyering and judging does not depend on "law all the way down," in a narrow sense that obviates the need for individual judgment, but on a capacity for professional imagination and judgment that is capable of comprehending, as fully as possible, the competing demands of contending narratives and realities. Finally, the Article concludes with reflections on the importance of considering diversity in specific contexts.

I. BAKKE AND HOPWOOD

In *Bakke*, the California Supreme Court struck down a UC Davis medical school affirmative action program that set aside sixteen places for minority students in an entering class of one hundred. The California court also held that *any* consideration of race by public university admissions officials would be unconstitutional.³¹ When the case reached the Supreme Court of the United States, the Justices were badly divided and expressed a variety of views concerning race-conscious admissions programs in six separate opinions. The Justices split into two groups: those who believed that race-conscious admissions programs were (or could be) constitutional and those who thought that any consideration of race was unconstitutional, except for specific remedial purposes. While a majority of the Justices upheld the California court's holding that the medical school's specific program was unlawful, a different majority rejected the California court's conclusion that any consideration of race was categorically prohibited.³² Thus, a majority of the Court seemingly left open the

³¹ See *Bakke v. Regents of Univ. of Cal.*, 553 P.2d 1152, 1163, 1171-72 (Cal. 1976). The California Supreme Court reached this result over the dissent of one justice. See *id.* at 1172-92 (Tobriner, J., dissenting).

³² Justice Brennan, writing for himself, Justice White, Justice Marshall, and Justice Blackmun, observed that:

The difficulty of the issue presented — whether government may use race-conscious programs to redress the continuing effects of past discrimination — and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

possibility that universities could endeavor to achieve racial and ethnic diversity in other ways.³³ Justice Powell, who announced the judgment of the Court, explained:

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds [the Medical School's] special admissions program unlawful and directs that [Bakke] be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers the Chief Justice, Mr. Justice Stewart, Mr. Justice Rehnquist and Mr. Justice Stevens concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the [California] court's judgment enjoining [the Medical School] from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun concur in this judgment.³⁴

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 324-25 (1978) (Brennan, J., concurring in part and dissenting in part). As Justice Brennan further noted, the Chief Justice, together with Justices Stewart, Rehnquist, and Stevens, would have held that Bakke's statutory rights were violated, and that he was entitled to prevail for that reason alone. *See id.* at 325. Justice Brennan also noted that Justice Powell had concluded that "although race may be taken into account in university admissions, the particular special admissions program . . . was not shown to be necessary to achieve petitioner's stated goals." *Id.* Thus, "these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke 'is entitled to an order that he be admitted to the University.'" *Id.* On the other hand, as Justice Brennan also wrote, "Mr. Justice Powell agrees that some uses of race in university admissions are permissible and, therefore, joins with [Justices Brennan, White, Marshall, and Blackmun] to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future." *Id.* at 326. In addition to the opinions filed by Justice Powell, Justice Brennan (on behalf of himself, Justice White, Justice Marshall, and Justice Blackmun), and Justice Stevens (on behalf of himself, Chief Justice Burger, Justice Stewart, and Justice Rehnquist), Justices White, Marshall, and Blackmun each filed separate opinions. *Id.* at 379-87 (White, J., concurring in part and dissenting in part); *id.* at 387-402 (Marshall, J., concurring in part and dissenting in part); *id.* at 402-08 (Blackmun, J., concurring in part and dissenting in part); *id.* at 408-21 (Stevens, J., concurring in part and dissenting in part).

³³ *See id.* at 315 (Powell, J.).

³⁴ *Id.* at 271-72. Four Justices — Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens — did not reach the constitutional question because they thought that the admissions program was unlawful under Title VI of the Civil Rights Act of 1964. *See id.* at 421 (Stevens, J., concurring in part and dissenting in part). The Title VI ground had not initially been briefed or argued by the parties, but was the

No Justice concurred in both portions of Justice Powell's opinion. As noted, although Justice Powell thought that UC Davis's quota was unconstitutional, he also thought that a university's perceived need for racial and ethnic diversity could constitute a compelling state interest that would satisfy strict scrutiny if it were implemented by narrowly tailored means.³⁵ An applicant's race could therefore be considered as a "plus factor" in the admissions process, but only if that process ensured that the qualifications of individual students were individually evaluated.³⁶ Justice Powell thought that strict scrutiny should apply to any consideration of race (whether "benign" or not),³⁷ but that strict scrutiny would not necessarily be fatal.³⁸ That conclusion followed, in

subject of supplemental briefs requested by the Court. *Id.* at 281 (Powell, J.). Four other Justices — Justices Brennan, White, Marshall, and Blackmun — thought that the program did not violate Title VI or the Constitution. *See id.* at 325-27 (Brennan, J., concurring in part and dissenting in part). Only Justice Powell concluded that the medical school's specific program was unlawful, while also believing that race-conscious admissions programs were not categorically unconstitutional. Justice Powell recognized that the dizzying array of opinions did nothing to make the Court's holding transparent. For that reason, he delivered an oral summary of the opinions from the bench, but he did not include that summary in his published opinion. *See, e.g.,* JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* 97-104 (1992) (describing Justice Powell's oral summary and explanation).

³⁵ *See Bakke*, 438 U.S. at 312-13 (Powell, J.) (explaining that the attainment of a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education," and that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment"). An early empirical study tested Justice Powell's thesis by asking students at Harvard Law School and the University of Michigan Law School about the influence of diversity on their educational experiences. *See* Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 143, 143-44 (Gary Orfield & Michal Kurlaender eds., 2001). The study concluded that "large majorities [of the students at these two law schools] have experienced powerful educational experiences from interactions with students of other races." *Id.* at 172.

³⁶ *Bakke*, 438 U.S. at 316-18.

³⁷ *See id.* at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."). Four Justices — Justices Brennan, White, Marshall, and Blackmun — thought that benign considerations of race, such as those embodied in university affirmative action programs, should be evaluated under intermediate scrutiny. *See id.* at 355-62 (Brennan, J., concurring in part and dissenting in part). The other four Justices did not reach the issue because they based their decision on statutory grounds, but they thought that "[r]ace cannot be the basis of excluding anyone from participation in a federally funded program." *Id.* at 417-18 (Stevens, J., concurring in part and dissenting in part).

³⁸ In so doing, Justice Powell implicitly rejected Gerald Gunther's suggestion that strict scrutiny necessarily was "'strict' in theory, fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer*

Justice Powell's view, from a proper recognition that the First Amendment protects "the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."³⁹ Justice Powell wrote:

The 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. As the Court noted in *Keyishian [v. Board of Regents]*, 385 U.S. 589, 603 (1967), it is not too much to say that the "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.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," [the University] invokes a countervailing constitutional interest, that of the First Amendment. In this light, [the University] must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), the Court made a similar point with special reference to legal education:

Equal Protection, 86 HARV. L. REV. 1, 8 (1972).

³⁹ *Bakke*, 438 U.S. at 312 (Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). Significantly, Justice Powell served as a trustee of Washington and Lee University for seventeen years. Robert E.R. Huntley, *A Tribute to Lewis F. Powell, Jr.*, 56 WASH. & LEE L. REV. 13, 13 (1999). Huntley, a former president of the University who served during Justice Powell's time as a trustee, wrote in a memorial tribute: "In the 1960s, he was among those on the Board who led affirmation of the faculty's role in academic matters, in the admission of qualified students of all races, and in permitting and encouraging the presentation of diverse viewpoints." *Id.* at 14. But his views of higher education were not uncritical. See Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce 5-6 (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf>.

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Physicians serve a heterogeneous population. An otherwise qualified medical 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.⁴⁰

Justice Powell took a broad view of professional education (including legal education, as indicated by his reference to *Sweatt v. Painter*), recognizing that its purpose is not simply to provide students with information or skills, but to cultivate professional judgment and imagination through exposure to “the ideas and mores of students as diverse as this Nation of many peoples,” so as to prepare them “to render with understanding their vital service to humanity.”⁴¹ For Justice Powell, the key point was that a student’s “particular background — whether it be ethnic, geographic, culturally advantaged or disadvantaged” could be the source of “experience, outlooks, and ideas that enrich” the educational experience of all.⁴² The objective was pedagogical and professional: to help students of medicine or law become more effective physicians and lawyers. In addition, as shown by his specific enumeration of relevant factors, Justice Powell recognized that racial or ethnic identity may be as relevant to “experiences, outlooks, and ideas” as geography or cultural background. Race — like geography or cultural advantage or disadvantage or economic or social status — is an independent source of relevant experience. Thus, Justice Powell thought it constitutionally permissible for “race or ethnic background [to] be deemed a ‘plus’ in a particular applicant’s file”⁴³

⁴⁰ *Bakke*, 438 U.S. at 312-14 (footnotes omitted).

⁴¹ *Id.* at 313, 314.

⁴² *Id.* at 314.

⁴³ *Id.* at 317; see also *Grutter v. Bollinger*, 539 U.S. 244, 333 (2003) (emphasizing the “unique experience of being a racial minority in a society . . .”).

Although no other Justice concurred in both parts of Justice Powell's opinion, the lower courts — perhaps influenced by their need for precedent, the seemingly intractable disagreement among the Justices, and the common-sense appeal of Justice Powell's position — tended to view Justice Powell's opinion as authoritative.⁴⁴ Within the judiciary, that understanding became more fixed as the years passed and the Supreme Court failed to revisit the question. In the larger community, however, the issue remained contentious; it was tailor-made for the culture wars of the late twentieth and early twenty-first centuries. Moreover, the Supreme Court indirectly cast doubt on the stability of *Bakke* when it later applied strict scrutiny in a way that virtually prohibited any consideration of race,⁴⁵ except as a remedy for past discrimination, in other contexts, such as public contracting and employment.⁴⁶ Nonetheless, the lower courts continued to take

⁴⁴ In *Grutter*, Justice O'Connor later wrote, "Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323. One question presented in *Grutter* was whether Justice Powell's opinion was truly "precedential" under *Marks v. United States*, 430 U.S. 188 (1977). However, Justice O'Connor found it unnecessary to answer that question because the *Grutter* majority did not simply rely on the precedent of Justice Powell's opinion, but actually "endorse[d] [his] view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325.

⁴⁵ Two years after its decision in *Bakke*, the Supreme Court, in another badly splintered set of opinions, upheld a federal set-aside program under Congress's spending power. See *Fullilove v. Klutznick*, 448 U.S. 448, 491-92 (1980). Thereafter, the Court consistently invalidated any non-remedial consideration of race in a variety of governmental contexts. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 (1989) (invalidating municipal contract set-aside program); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-84 (1986) (invalidating collective bargaining provisions requiring race-conscious teacher lay-offs); *Karst*, *supra* note 15 (presenting a "thumbnail sketch of the doctrinal history of competing versions of the 'compelling state interest' formula, from *Bakke* in 1978 to *Grutter* in 2003"). The Court initially applied a less demanding standard of review to the federal government's "benign" use of racial classifications, see *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) and *Fullilove v. Klutznick*, 448 U.S. 448, 473-74 (1980), but subsequently decided that a more demanding standard of review should also be applied in reviewing federal legislation. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237-39 (1995).

⁴⁶ See, e.g., *United States v. Paradise*, 480 U.S. 149, 185-86 (1987) (upholding race-conscious promotion policy to remedy long-term, blatant, and continuous discrimination); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 482-83 (1986) (upholding court-ordered minority membership goal for a union that had intentionally discriminated against minorities); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208-09 (1979) (upholding race-conscious employment efforts designed to redress past discrimination if the efforts are temporary and do not violate

seriously Justice Powell's reliance on academic freedom as a First Amendment value and continued to treat his opinion in *Bakke* as authoritative in its own sphere.⁴⁷

That changed in 1996, when the Fifth Circuit decided *Hopwood v. Texas*.⁴⁸ In that case, a three-judge panel, with Judge Wiener specially concurring, struck down a public law school admissions plan, not because it did not comply with the requirements articulated by Justice Powell in *Bakke*, but because the court thought that Justice Powell's opinion was neither a binding precedent nor a correct statement of the law.⁴⁹ The panel majority agreed with the plaintiffs that student body "diversity is not a compelling governmental interest under superseding Supreme Court precedent," and that "only the remedial use of race is compelling."⁵⁰ The court wrote:

We agree . . . that *any consideration* of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests *will never* justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.⁵¹

In reaching these conclusions, the *Hopwood* panel majority relied heavily on the fact that no other Justice had joined Justice Powell's

the rights of white workers).

⁴⁷ See, e.g., *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1199-201 (9th Cir. 2000) (holding that Justice Powell's opinion in *Bakke* was binding authority as to diversity in higher education, notwithstanding seemingly contrary Supreme Court authority in other contexts). *But see Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1247-51 (11th Cir. 2001) (holding that Justice Powell's diversity rationale was not binding precedent).

⁴⁸ 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

⁴⁹ *Id.* at 944. Although Judge Wiener rejected the majority's view "that diversity can never be a compelling governmental interest in a public graduate school," *id.* at 962 (Wiener, J., concurring), he concurred in the judgment because he thought that the Texas plan did not meet the narrow tailoring requirement for strict scrutiny, on the one hand, and could not be justified as necessary to remedy the effects of past discrimination, on the other hand. *Id.* at 962-64.

⁵⁰ *Id.* at 944.

⁵¹ *Id.* (emphasis added).

opinion in its entirety or even mentioned the word “diversity.”⁵² In addition, the panel majority placed great reliance on inferences it drew from the Court’s post-*Bakke*, non-higher-education jurisprudence, principally *Adarand Constructors v. Peña* (which dealt with government contract set-asides), to hold that “the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet . . . strict scrutiny.”⁵³ If Justice Powell’s opinion had ever warranted deference (which the panel majority denied), it no longer did. Moreover, in the panel majority’s view, there was nothing to distinguish diversity in higher education from diversity in any other area of life. The panel made clear that race and context were both irrelevant:

The use of race, in and of itself, to choose students simply achieves a student body *that looks different*. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants. Thus, the Supreme Court has long held that governmental actors cannot justify their decisions solely because of race. *See, e.g., Croson*, 488 U.S. at 496 (plurality opinion); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

Accordingly, we see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge.⁵⁴

On the other hand, Judge Wiener recognized in his concurring opinion that context was critically important:

[I]f I had no choice but to address compelling interest I would do so in the *context* in which the issue is presented, i.e., the constitutionally permissible means of constructing an entering . . . class at a public graduate or professional school.

⁵² *See id.*

⁵³ *Id.* at 944-45, 948. Given the state of the Supreme Court jurisprudence, Judge Wiener found the majority’s approach unpersuasive: “Until further clarification issues from the Supreme Court, defining ‘compelling interest’ (or telling us how to know one when we see one), I perceive no ‘compelling’ reason to rush in where the Supreme Court fears — or at least declines — to tread.” *See id.* at 965 (Wiener, J., concurring).

⁵⁴ *Id.* at 945-46 (emphasis added) (citations omitted).

This unique context, first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the re-districting context; it comprises only the public higher education context and implicates the uneasy marriage of the First and Fourteenth Amendments. Consequently, we play with fire when we assume an easy crossover of Fourteenth Amendment maxims pronounced in cases decided in such other contexts.⁵⁵

The *Hopwood* majority rejected Justice Powell's analysis in *Bakke*. First, the panel held that no consideration could ever be given to race in *any* context, except for remedial purposes. Second, by stating that race is no more relevant than "physical size or blood type," and that the consideration of race achieves nothing other than "a student body that looks different," the Fifth Circuit rejected out-of-hand the possibility (recognized by Justice Powell) that there are some life experiences relevant to professional study that are uniquely accessible to — and perhaps inescapable by — members of a particular race. In other words, the panel rejected the possibility that there are relevant aspects of a person's life experience that correlate with race, but not necessarily with other factors, such as geography, class, cultural advantage, or economic status. We know that to be the case. It has become painfully clear, for example, that young black men are disproportionately hassled by the police, disproportionately know others who have had that experience, and disproportionately fear having that experience themselves.⁵⁶ Similarly, we know that only

⁵⁵ *Id.* at 965 n.21 (Wiener, J., concurring) (citation omitted).

⁵⁶ See CHRISTINE EITH, MATTHEW R. DUROSE & U.S. DEP'T OF JUSTICE, SPECIAL REPORT NJC 234599: CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 1 (Oct. 2011), <https://www.bjs.gov/content/pub/pdf/cpp08.pdf> (reporting that black male drivers are stopped at about the same rate as others, but are three times as likely to be searched incident to stop); see also JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 188-94 (2017) (discussing pretextual police stops in African-American community); ROBERT F. KENNEDY HUMAN RIGHTS GLOB. JUSTICE CLINIC ET AL., EXCESSIVE USE OF FORCE BY THE POLICE AGAINST BLACK AMERICANS IN THE UNITED STATES 4-5 (Feb. 12, 2016), http://rfkhumanrights.org/media/filer_public/7d/84/7d8409c1-588f-4163-b552-1f6428e685db/iachr_thematic_hearing_submission_-_excessive_use_of_force_by_police_against_black_americans.pdf (concluding that African Americans face disproportionate force used by police); Rod K. Brunson & Jody Miller, *Young Black Men and Urban Policing in the United States*, 46 BRITISH J. CRIMINOLOGY 613, 634-37 (2005) (focusing on the disproportionate harassment by police of young black men); Robert D. Crutchfield et al., *Racial Disparities in Early Criminal Justice Involvement*, 1 RACE & SOC. PROBS. 218, 229-31 (2009) (finding that young black men are more likely to have police contacts and arrests); Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 821-22

Hispanic people have the experience of being stopped for “driving while Hispanic.”⁵⁷ We would prefer to live in a world in which these correlations do not exist, but that is not the world in which we do live. Moreover, by asserting that race is no more relevant to the educational experience than “physical size or blood type,” and that race-conscious admissions policies achieve nothing other than “a student body that looks different,” the panel implicitly rejected the validity of Justice Powell’s critical insights about the nature of professional education. Certainly, the court gave no hint of having thought about the ways in which legal education helps to develop “that enlargement and correction of perspective, that critical and inclusive view of reality, that is based on the disciplined exercise of skills which the layman is not given the opportunity to acquire.”⁵⁸

Although the Supreme Court denied review in *Hopwood*, the Fifth Circuit’s decision nonetheless provided a new narrative and gave the issue a new urgency, as university administrators and others wondered about the continued relevance of the always-fragile *Bakke* holding.

II. GRUTTER, GRATZ, AND THE MISSION OF LEGAL EDUCATION

In 2003, the Supreme Court finally revisited the subject of racial and ethnic diversity in higher education admissions. It did so in two cases involving the University of Michigan: *Grutter v. Bollinger*⁵⁹ and *Gratz v. Bollinger*.⁶⁰ As in *Hopwood*, the *Grutter* plaintiffs alleged that the law school’s consideration of race “as a factor” in admissions decisions violated their rights to the equal protection of the laws. In *Grutter*, five

(2007) (concluding that African-Americans and Hispanics were more likely to be stopped). Studies with respect to English and Welsh policing patterns show similar results. See Ben Bowling & Coretta Phillips, *Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search*, 70 MOD. L. REV. 936, 958-61 (2007) (finding that black people in England and Wales are six times more likely to be searched).

⁵⁷ See, e.g., Angela Stuesse et al., *Driving While Latino*, HUFFPOST (Sept. 30, 2016, 11:12 PM), http://www.huffingtonpost.com/entry/driving-while-latino_us_57ed6ce4e4b07f20daa1052f (explaining how section 287(g) of the Immigration and Nationality Act has “created a gauntlet of immigrant policing that stretches across the country and operates through the intensified surveillance of immigrants”); Katherine Webber, *Racial Profiling? Police Stopped Evangelical Pastor “For Looking Like a Drug Dealer,”* CHRISTIAN POST (June 18, 2014), <https://www.christianpost.com/news/racial-profiling-police-stopped-evangelical-hispanic-pastor-for-looking-like-a-drug-dealer-121722> (police allegedly admitted stopping Christian pastor because his appearance fit a profile).

⁵⁸ Lasswell & McDougal, *supra* note 2, at 211.

⁵⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁶⁰ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

members of the Court, speaking through Justice O'Connor,⁶¹ upheld the constitutionality of the law school admissions program, substantially adopting Justice Powell's reasoning in *Bakke* and reaffirming that a public university may have a compelling interest in the racial and ethnic diversity of its student body.⁶² Justice O'Connor emphasized that context matters when courts are asked to evaluate the constitutionality of race-conscious decision-making:

Context matters when reviewing race-based governmental action under the Equal Protection Clause [W]e [have] made clear that strict scrutiny must take "relevant differences" into account." Indeed, . . . that is its "fundamental purpose." Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.⁶³

In other words, Justice O'Connor recognized that race-consciousness in university admissions may present different issues, serve different purposes, and lead to different legal conclusions than would race-consciousness in other contexts. Justice O'Connor went on to conclude that the law school's consideration of race as one factor in an individualized evaluation process satisfied constitutional

⁶¹ Justices Breyer, Ginsburg, Souter, and Stevens joined in Justice O'Connor's opinion in its entirety. Justices Scalia and Thomas technically joined it in part, but essentially dissented, joining Chief Justice Rehnquist and Justice Kennedy. See *Grutter*, 539 U.S. at 347 n.* (Scalia, J., concurring in part and dissenting in part), 374-78 (Thomas, J., concurring in part and dissenting in part).

⁶² In addition to confirming the correctness of Justice Powell's analysis, the Court imposed a "sunset" provision: "We expect that 25 years from now, the use of racial preferences will no longer be necessary. . . ." *Id.* at 343. Justice Ginsburg, in a concurring opinion joined by Justice Breyer, agreed "that race-conscious programs 'must have a logical end point,'" but she pointed out the difficulty of predicting an appropriate end date, given the continued persistence of racial discrimination. See *id.* at 344-46 (Ginsburg, J., concurring).

⁶³ *Id.* at 327 (citations omitted). Justice O'Connor's emphasis on context also permitted her to distinguish other post-*Bakke* cases in which the Court seemed to suggest that "the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Id.* at 328. Building on Justice Powell's understanding of the special nature of higher education, Justice O'Connor held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.* Further, Justice O'Connor explained, "Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Id.*

requirements.⁶⁴ In *Gratz*, which was decided the same day, Chief Justice Rehnquist, writing for himself and five other Justices (including Justice O'Connor),⁶⁵ struck down Michigan's undergraduate admissions program, which simply awarded "bonus points" to minority candidates.⁶⁶ Taken together, the "split double-header" (as Justice Scalia referred to the two decisions)⁶⁷ reaffirms the distinction drawn by Justice Powell between legitimate and illegitimate considerations of race, based on the presence or absence of an

⁶⁴ See *id.* at 334.

⁶⁵ Justices O'Connor, Scalia, Kennedy, and Thomas joined in Chief Justice Rehnquist's opinion in *Gratz*. *Gratz*, 539 U.S. at 247. Justice O'Connor wrote separately to emphasize the factual differences between Michigan's two race-conscious admissions policies. See *id.* at 276-77 (O'Connor, J., concurring). Justice Thomas also wrote separately, expressing the view that any consideration of race is categorically prohibited. See *id.* at 281 (Thomas, J., concurring). Justice Breyer concurred only in the judgment. *Id.* at 281 (Breyer, J., concurring). Justice Stevens thought that the plaintiffs lacked standing to sue. *Id.* at 282 (Stevens, J., dissenting). Although Justice Souter also thought that they lacked standing, he thought that they would lose in any event because the admissions program was constitutional. See *id.* at 291, 296 (Souter, J., dissenting). Justice Ginsburg also dissented. Among other things, she rejected the view that benign and malevolent considerations of race should be evaluated under the same standard of review. See *id.* at 302 (Ginsburg, J., dissenting) (quoting *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966)).

⁶⁶ The unsuccessful applicants also argued that racial diversity is "too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." *Gratz*, 539 U.S. at 268. The *Gratz* Court rejected that argument, relying on its decision in *Grutter* for the proposition that university race-conscious admissions programs will be upheld if the university can show that its "use of race in its . . . admissions program employs 'narrowly tailored measures that further compelling government interests.'" *Id.* at 268-70. But the *Gratz* Court found that the required showing had not been made with respect to the undergraduate admissions program, which "automatically distribute[d] 20 points, or one-fifth of the [100] points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race . . ." *Id.* at 270. The Court rejected the University's argument that the constitutionality of its policy should be upheld because the sheer volume of undergraduate applications made individualized assessments administratively impracticable:

[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

Id. at 275 (citation omitted).

⁶⁷ *Grutter*, 539 U.S. at 348 (Scalia, J., dissenting).

individualized evaluation of applicants. As Justice O'Connor said in her concurring opinion in *Gratz*:

Unlike the law school admissions policy the Court upholds today in [*Grutter*], the procedures employed by the . . . Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant.⁶⁸

Notwithstanding her important insight in *Grutter* concerning the significance of context (which allowed her to distinguish public higher education from other aspects of the public sector), Justice O'Connor opted not to go a step further and consider the specific context involved in *Grutter* at a more granular level. Whereas Justice Powell had discussed the special concerns and demands of professional education, focusing on the task of helping students to develop the qualities of judgment and imagination necessary for effective professional practice, Justice O'Connor did not dwell on the fact that the *Grutter* case involved professional education. She did not discuss the professional work that lawyers and judges do, the kind of educational program that might be appropriate for preparing students to do that work, or the specific contribution that the insights of a diverse student body might make to such an educational program.⁶⁹

⁶⁸ *Gratz*, 539 U.S. at 276-77 (citations omitted).

⁶⁹ Justice O'Connor did acknowledge the Law School's argument about the importance of student interaction: "The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'" *Grutter*, 539 U.S. at 315. But the point remains undeveloped, perhaps because the argument was taken to be a generic argument about education in general, rather than an argument peculiar to legal education. Similarly, Justice O'Connor notes that the Law School's "policy aspires to 'achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.'" *Id.* She also notes that the Law School "recognizes 'many possible bases for diversity admissions,'" but "reaffirm[s] [its] longstanding commitment" to "racial and ethnic diversity," and seeks to enroll "a 'critical mass' of [underrepresented] minority

By painting with a broad brush, Justice O'Connor was able (aided by the Chief Justice's analysis in *Gratz*) to formulate a categorical rule for evaluating race-conscious admissions programs throughout higher education. From the viewpoint of efficient judicial decision-making, that may have been a sensible choice, as it permitted the Court to reach broadly and settle the nettlesome problem of race-consciousness for all of higher education. Moreover, there was much evidence to show that the educational benefits of diversity were felt throughout higher education.⁷⁰ Nonetheless, higher education clearly encompasses a broad and diverse range of institutions, activities, and endeavors,⁷¹ and arguments for the importance of diversity may be stronger — or at least different — in some sectors than in others. By focusing on higher education as a whole, Justice O'Connor may have maximized the reach of *Grutter*, but undercut the force of her insight concerning the centrality of context.

Justice O'Connor could have emphasized the special importance of diversity in preparing men and women for careers as lawyers and judges. She did mention that “underrepresented minority students” are, “[b]y virtue of our Nation’s struggle with racial inequality,” likely “to have [had] experiences of particular importance to the Law

students.” *Id.* at 316 (third alteration in original). According to the Law School, “critical mass” is important because “racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint,’ but rather a variety of viewpoints among minority students.” *Id.* at 319-20. Finally, Justice O'Connor states, “The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.” *Id.* at 328. But such deference is not special to law schools; the Court pays the same deference to similar academic judgments made by other units of higher education, so long as those units implement their judgments in a manner that “provide[s] for a meaningful individualized review of applicants.” *Gratz*, 539 U.S. at 276.

⁷⁰ See Adam D. Galinsky et al., *Maximizing the Gains and Minimizing the Pains of Diversity: A Policy Perspective*, 10 PERSP. ON PSYCHOL. SCI. 742, 743-44 (2015) (describing how personal experiences with diversity increase creativity); see, e.g., Patricia Y. Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 358-59 (2002) (discussing how diversity improved learning and democracy outcomes); Patricia Y. Gurin et al., *How Does Racial/Ethnic Diversity Promote Education?*, 27 W.J. BLACK STUD. 20, 24-30 (2003) (discussing positive outcomes because of diversity and use of studies in litigation).

⁷¹ The point needs little or no explanation, but one cannot help but think in this connection of Gilbert Ryle’s classic illustration of a category mistake: the foreign visitor who comes to Oxford or Cambridge, to see the university, is shown the various colleges, libraries, playing fields, museums, scientific departments, and administrative offices, and then asks, “[b]ut where is the University?,” as if the university were something in addition to its parts. See GILBERT RYLE, *THE CONCEPT OF MIND* 6 (2009); see also STEFAN COLLINI, *WHAT ARE UNIVERSITIES FOR?* 3-19 (2012) (describing the wide variety of “universities”).

School's mission"⁷² — and she noted that “attaining a diverse student body is at the heart of the Law School's proper institutional mission”⁷³ — but she did not elaborate further. She did not call attention to the specific kinds of topics that are discussed in law school classrooms or the importance to those discussions of being able to draw upon a variety of perspectives. And while she emphasized the importance of diversity to citizen formation in a multicultural society — and on the important leadership roles played by elite lawyers and graduates of other divisions of elite institutions⁷⁴ — she made no argument based directly on the demands of the professional work that most lawyers and judges actually do, on how diversity in legal education might relate to that work, or on how diversity might contribute to the way in which lawyers and judges are educated.⁷⁵ While Justice Powell focused on the process whereby professionals are prepared “to render with

⁷² *Grutter*, 539 U.S. at 338.

⁷³ *Id.* at 329.

⁷⁴ In this sense, Justice O'Connor moved beyond the analysis contained in Justice Powell's opinion in *Bakke*, which focused primarily on the educational benefits of diversity in higher education. See, e.g., Karst, *supra* note 15, at 60 (“The *Grutter* opinion . . . takes the Court a step further, justifying affirmative action for a purpose Justice Powell had not mentioned. The inclusion of substantial numbers of minority students in the universities is a matter of compelling importance, the Court says, because the universities are gateways to leadership in American institutions.”).

⁷⁵ In addition, Justice O'Connor's discussion of elite institutions falls far short of covering the field for at least two reasons: achieving diversity is not a concern only of elite colleges and law schools, and, to the extent that diversity is relevant to the training of men and women who will become judges, it is important to recognize that many (perhaps most) judges are not graduates of elite law schools. For example, a recent study shows that few graduates of elite law schools become state supreme court justices, regardless of the method used to select judges in a particular jurisdiction. See, e.g., GREG GOELZHAUSER, CHOOSING STATE SUPREME COURT JUSTICES: MERIT SELECTION AND THE CONSEQUENCES OF INSTITUTIONAL REFORM 80 (2016) (“Substantively, the probability of seating a [state supreme court] justice who attended an elite law school decreases from 18 percent . . . under merit selection to 12 percent . . . under election, a change of -6 percent The probability of seating a justice who attended an elite law school decreases from 22 percent . . . under appointment to 12 percent . . . under election, a change of 10 percent . . .”). The situation in state trial and appellate courts is undoubtedly similar. A review of the published biographies of the judges of the Circuit Court of Cook County, Illinois, for example, shows that only 23 (or 5.99%) of the 384 circuit court judges are graduates of the top 14 law schools as listed in the 2017 US NEWS & WORLD REPORT law school rankings. Of those 23 judges, 5 are graduates of the University of Chicago Law School and 9 are graduates of Northwestern University School of Law, both of which are located in Cook County. See SULLIVAN'S JUDICIAL PROFILES: THE ILLINOIS JUDICIAL DIRECTORY, 2017-18 (2017); see also *Best Law Schools*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Nov. 19, 2017).

understanding their vital service to humanity,”⁷⁶ Justice O’Connor seemed most concerned with the instrumental social value of having some degree of diversity within the ranks of the nation’s “elite,” including the elite bar. Indeed, to the extent that Justice O’Connor focuses on any context more specific than that of higher education generally, it is not so much on professional or legal education, but on elite education. Elite institutions are important, in her view, because they are the training ground for those who are or will become the nation’s elite.

Justice O’Connor’s approach diverges from Justice Powell’s analysis in *Bakke*, where he not only took seriously the professional work that lawyers and physicians actually do, but seemed to suggest that diversity might have special salience in professional education.⁷⁷ Like Justice Powell, Justice O’Connor is interested in what goes on in university classrooms, but more so, perhaps, in what goes on in their placement offices:

These benefits [of diversity] are substantial. As the District Court emphasized, the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” These benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.”

[N]umerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

[In addition,] a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principl[al] mission to provide national security.” . . . At

⁷⁶ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

⁷⁷ *See id.* at 313-14.

present, “the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” . . . We agree that “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.”

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to “sustaining our political and cultural heritage” with a fundamental role in maintaining the fabric of society Effective 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.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity Access to legal education (and thus the legal profession) must be inclusive of 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.⁷⁸

These are wise observations, and none of them is wrong. Promoting upward mobility is a time-honored function of higher education,⁷⁹ and

⁷⁸ *Grutter*, 539 U.S. at 330-33 (third and seventh alterations in original) (citations omitted).

⁷⁹ See, e.g., Alfred S. Konefsky & Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 *BUFF. L. REV.*

a democratic society cannot flourish if members of some groups feel unfairly excluded from the path to leadership and success that runs through elite institutions of higher learning.⁸⁰ But very few students of any race or ethnicity will gain entry to elite universities,⁸¹ and even fewer will gain admission to elite law schools. Fewer still will have the opportunity to become Senators or federal judges. While many national leaders have attended law school, the cultivation of national leaders is not the principal mission of law schools. The main business of law schools is to educate lawyers and judges, and by far the largest number of students who gain admission to any law school will become practicing lawyers in public and private contexts and state court judges. Presumably, a law school's commitment to diversity will help make students more effective leaders and citizens, as Justice O'Connor suggests, but will it contribute to their formation as legal professionals? Will it help make them better lawyers and judges? The answer to that question is clear, but Justice O'Connor's opinion does little, if anything, to answer it. Because she makes little mention of what lawyers and judges do in practice, she draws no connection between the need for diversity in legal education and the actual project of preparing lawyers and judges to do what they will do in practice.

By speaking so little about the immediate context, Justice O'Connor allowed the dissenters to offer their own accounts of legal education and legal practice — accounts that are narrow and mechanical and leave no room for any special argument for diversity based on the demands of the work that lawyers and judges do in our democratic society. In that sense, Justice O'Connor's approach represents a missed opportunity to talk about what it means to be a lawyer, about what it means to be a judge, and about the role of diversity in preparing students for those callings.

659, 663 (2014) (asserting this in the context of legal education).

⁸⁰ See, e.g., Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189, 271 (1996) ("Judge Kiser heard days of testimony and found a great many facts, but he failed to ask why VMI continued to refuse to admit women or why admitting women would destroy VMI — why was this litigation, for VMI, 'nothing short of a life-and-death confrontation?").

⁸¹ For example, Harvard College admits about one in twenty applicants. See Anna Cowenhoven, *Harvard College Admits 2,056 to Class of '21*, HARV. GAZETTE (Mar. 30, 2017), <http://news.harvard.edu/gazette/story/2017/03/2056-applicants-were-invited-today-to-join-harvard-colleges-class-of-2021>. But see EDWARD LUCE, *THE RETREAT OF WESTERN LIBERALISM* 44 (2017) ("About a third of legacy applicants . . . are accepted into Harvard.").

Justice Scalia begins his dissent⁸² by noting his agreement with Chief Justice Rehnquist's dissenting opinion.⁸³ He also endorses Justice Thomas's observation that "the allegedly 'compelling state interest' at issue here is not the incremental 'educational benefit' that emanates from the fabled 'critical mass' of minority students, but rather Michigan's interest in maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities."⁸⁴ According to Justice Scalia, "[i]f that is a compelling state interest, everything is."⁸⁵ From the beginning, then, Justice Scalia focuses on the fact that this is a case about legal education — a subject with which he is familiar and about which he believes that he can write with authority.⁸⁶ Justice Scalia knows legal education, and he knows that legal education has no need for diversity. In his view of legal education, there is no conceivable

⁸² *Grutter*, 539 U.S. at 346 (2003) (Scalia, J., concurring in part and dissenting in part). Like Justice Thomas, see *id.* at 350-51 (Thomas, J., concurring in part and dissenting in part), Justice Scalia concurs in part in the majority's opinion for the reasons stated by Justice Thomas: first, they agree with the majority "insofar as its decision, which approves of only one racial classification, confirms that further use of race in admissions is unlawful," and, second, they agree with the majority insofar as it holds "that racial discrimination in higher education admissions will be illegal in 25 years." *Id.* Of course, they "respectfully dissent from the remainder of the Court's opinion and the judgment . . . because [they] believe that the Law School's current use of race [is unconstitutional]." *Id.* at 351.

⁸³ *Id.* at 346-47 (Scalia, J., concurring in part and dissenting in part). Justice Scalia states: "As [the Chief Justice] demonstrates, the . . . Law School's mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions." *Id.*

⁸⁴ *Id.* at 347.

⁸⁵ *Id.*

⁸⁶ Justice Scalia taught at the University of Virginia Law School from 1967 to 1971 and at the University of Chicago Law School from 1977 to 1982. See JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF ANTONIN SCALIA* 37-38, 65-79 (2009); Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>; see also Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 147 ("As you know, every panel needs an anti-hero, and I fill that role on this one. I have grave doubts about where we are going in affirmative action, and in equal protection generally. I frankly find this area an embarrassment to teach. Here, as in some other fields of constitutional law, it is increasingly difficult to pretend to one's students that the decisions of the Supreme Court are tied together by threads of logic and analysis — as opposed to what seems to be the fact that the decisions of each of the Justices . . . are tied together by threads of social preference and predisposition. Frankly, I don't have it in me to play the game of distinguishing and reconciling the cases in this utterly confused field.").

educational purpose to be served by a race-conscious admissions program.⁸⁷ To put the matter in terms that he has used elsewhere: any contrary understanding is simply the product of a wrong-headed “law-profession culture”⁸⁸ or further evidence of an out-of-touch “professoriate.”⁸⁹ In any event, Justice Scalia’s opinion fairly drips with sarcasm.

In the absence of any sustained narrative by Justice O’Connor concerning the intrinsic purpose of legal education — or how diversity might relate to that purpose in a tangible and immediate way — Justice Scalia proceeds to present his own brief account. Thus, he dismisses the idea that future lawyers and judges could receive any “educational benefit” from being part of a diverse student body: “This is not, of course, an ‘educational benefit’ on which students will be graded on their law school transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding).”⁹⁰ These are “lessons in life,” according to Justice Scalia, “generic lessons in socialization and good citizenship” that “cannot be ‘taught’ in the usual sense” and are learned by “people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. If properly considered an ‘educational benefit’ at all, it is surely not one that is uniquely relevant to law school or uniquely ‘teachable’ in a formal educational setting.”⁹¹

This is a grim view of a dull and dismal place. This is a law school without the thrill of intellectual discovery, the satisfaction of professional development, or the confidence gained through the acquisition of professional judgment and imagination. There is no seminar room in which one student’s insightful intervention has moved the discussion to a new level, altering forever the way in which everyone in the room (including the teacher) will think about stock fraud or fiduciary duties or hate speech or sexual harassment. There is no classroom in which the class is for the moment mesmerized by the intervention of one student who tells what it was actually like when he

⁸⁷ Thus, according to Justice Scalia, the benefits to be achieved through “government discrimination on the basis of race” are not “educational benefit[s].” See *Grutter*, 539 U.S. at 347, 349.

⁸⁸ See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

⁸⁹ See Transcript of Oral Argument at 7, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

⁹⁰ *Grutter*, 539 U.S. at 347.

⁹¹ *Id.* at 347-48.

or a brother or a cousin or a friend was stopped and questioned by the police for no obvious, legitimate reason. This is a law school in which a student's willingness to learn from others ended at puberty, if not in kindergarten.

Justice Scalia's statements seem to suggest that the only "educational benefits" that count are those that end in grades on a transcript or lead to success on the bar exam. On this view, professional formation ought not to be a concern for either the law student or the law school.⁹² It is surprising, to say the least, that these are the observations of a distinguished judge and former law teacher. The first observation — concerning the lack of educational value of anything that cannot be tested — sounds more like that of an incurious student who sees no point in learning anything that will not be on the final exam, while the second seems to suggest that post-primary education consists exclusively of learning technical skills and taking on technical information.⁹³ But that is an impoverished view of legal education that necessarily follows from an impoverished view of lawyering and judging.

Similarly, Justice Thomas observes that, "The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti."⁹⁴ The "faddish slogan" is "diversity,"⁹⁵ which, according to Justice Thomas, is nothing but an "aesthetic" concern:

⁹² If these were appropriate measurements, it would be difficult to justify experiential learning as a part of legal education. Simulations and clinical experiences obviously cannot be graded in the same way as doctrinal classes, and the bar examiners have not yet devised a method for testing the relevant skills on the bar exam.

⁹³ Justice Scalia's account of legal education might profitably be compared to the view of education taken by Philip Jackson, who wrote: "This brings us to what might be called education's bottom line, which is the conclusion that education, au fond, is a moral enterprise. It is so because it aims at improvement. It seeks to make everyone it touches, teachers as well as students, better than they are now. Viewed globally, it tries to leave the world a better place. Its task is endless for the simple reason that each new generation of humans needs to be educated. But it is also endless because each new generation is free to build on, to 'rectify and expand,' as Dewey might put it, the accomplishments of generations past." PHILIP W. JACKSON, *WHAT IS EDUCATION?* 92-93 (2012). *But see* Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 119-20 (2001) (discussing the need for professional formation as part of legal education).

⁹⁴ *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part). Justice Thomas saw that "slogan" as a gesture of paternalism: "Like [Frederick] Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators." *Id.* If that were all that were at stake, Justice

“[D]iversity,” for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one’s skin constitutionally irrelevant to the Law School’s mission, I refer to the Law School’s interest as an “aesthetic.” That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.⁹⁶

Like the Fifth Circuit in *Hopwood*, Justice Thomas submits that the only significance of ethnic and racial diversity is aesthetic — taking diversity into account results in nothing other than a class that “looks different.” Or, as the *Hopwood* court put it, race is no more relevant than “physical size or blood type.” But that seems to ignore what preparation for law practice requires, as well as what goes on in law school classrooms at their best — an educational process driven by the candid but respectful exchange of ideas by persons of various perspectives about some of the most difficult, important, and potentially divisive issues that face our society. It also ignores the fact that persons of different races may have substantially different experiences because of race, regardless of other variables such as wealth, educational level, or social class,⁹⁷ and the further fact that such experiences are not only relevant, but central, to the study of law. Given the importance of law, lawyers, and judges in our society, the “assembling of a law school class” is not quite as “trivial” an exercise as Justice Thomas suggests.⁹⁸

Thomas’s point would have some traction; but more is at stake, namely, the mix of experiences, perspectives, and voices necessary to providing an optimal educational experience for all students. *See id.* at 329-33.

⁹⁵ *Id.* at 350.

⁹⁶ *Id.* at 354 n.3; *see also id.* at 355 (“The Law School’s argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields *educational benefits*, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the *educational benefits* that are the end, or allegedly compelling state interest, not ‘diversity.’” (first emphasis added)).

⁹⁷ *See, e.g.,* Scott Horsley, *Obama Walks Fine Line on Race and Policing*, NPR (July 13, 2016), <http://www.npr.org/2016/07/13/485855670/obama-talks-about-race-and-police-again> (discussing the significance of race, noting that President Obama’s words on the subject of race and the police are not simply the words of an experienced policymaker, but those of “a man who could say, as Dallas Police Chief David Brown did this week, ‘I’ve been black a long time.’”).

⁹⁸ *Grutter*, 539 U.S. at 357 (Thomas, J., concurring in part and concurring in judgment). Justice Thomas laments the fact that “the entire [student selection]

Justice Thomas thinks that Michigan has no compelling interest in having a law school at all, let alone an elite law school, and certainly not a diverse, elite law school.⁹⁹ Whatever “marginal improvements in legal education” might result from diversity, Justice Thomas suggests, those improvements “do not qualify as a compelling state interest.”¹⁰⁰ Moreover, according to Justice Thomas, the crux of the problem is that the University of Michigan wants to have an “aesthetic” student body without sacrificing its status as an elite educational institution: “The Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system — it cannot have it both ways.”¹⁰¹ But that suggestion is wide of the mark. The majority rightly refuses to accept the legitimacy or necessity of that choice because the university believes that the very excellence of professional education depends on diversity.

process is poisoned by numerous exceptions to ‘merit,’” including so-called “legacy” preferences, which give an advantage in the admissions process to children of alumni. *Id.* at 368. In that regard, he questions the motives of “the elites” who have supported the University of Michigan: “Were this Court to have the courage to forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly become less popular — a possibility not lost, I am certain, on the elites” *Id.* at 368 n.10.

⁹⁹ See *id.* at 357-58. Indeed, Justice Thomas contends that the majority did not “define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination.” *Id.* at 354. Further, “[a] close reading of the Court’s opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a ‘compelling interest in securing the educational benefits of a diverse student body.’ No serious effort is made to explain how these benefits fit with the state interests the Court has recognized (or rejected) as compelling . . . or to place any theoretical constraints on an enterprising court’s desire to discover still more justifications for racial discrimination.” *Id.* at 356 (citation omitted). He later contrasts the deference that the *Grutter* majority gives to Michigan’s judgments about the “educational benefits of a diverse student body” with the Court’s alleged disregard for the Virginia Military Institute’s analogous judgments in *United States v. Virginia*, 518 U.S. 515 (1996). He writes: “Apparently where the status quo being defended is that of the elite establishment — here the Law School — rather than a less fashionable Southern military institution, the Court will defer without serious inquiry and without regard to the applicable legal standard.” *Grutter*, 539 U.S. at 366 (Thomas, J., concurring in part and dissenting in part).

¹⁰⁰ *Grutter*, 539 U.S. at 357.

¹⁰¹ *Id.* at 361; see also *id.* at 355-56 (“The Law School adamantly disclaims any race-neutral alternative that would reduce ‘academic selectivity,’ which would in turn ‘require the Law School to become a very different institution, and to sacrifice a core part of its academic mission.’ . . . [T]he Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status.”) (citation omitted).

But Justice Thomas's quarrel is as much with Justice Powell's opinion in *Bakke* as with the majority's opinion in *Grutter*:

Justice Powell's opinion in *Bakke* and the Court's decision today rest on the fundamentally flawed proposition that racial discrimination can be contextualized so that a goal, such as classroom aesthetics, can be compelling in one context but not in another. This "we know it when we see it" approach to evaluating state interests is not capable of judicial application. Today, the Court insists on radically expanding the range of permissible uses of race to something as trivial (by comparison) as the assembling of a law school class.¹⁰²

The Scalia and Thomas dissents simply refuse to take seriously the possibility that racial or ethnic diversity has anything to contribute to the professional formation of lawyers and judges. Indeed, they refuse to take seriously the possibility that diversity of any kind has anything to contribute to any aspect of university education. Once Justice Scalia pronounces that any lesson to be learned from diversity is one that should have been learned in kindergarten and Justice Thomas asserts that it is a mere "aesthetic," like the shape and size of the desks and tables in the classroom, the game is up. There is no point in going further.

III. IMAGINATION AND JUDGMENT: WHAT LAWYERS AND JUDGES DO

As Justice O'Connor pointed out in *Grutter*, there is abundant social science evidence to substantiate the importance of diversity in higher education.¹⁰³ That is not surprising. Perhaps the greatest challenge we face, as Carlos Nino has said, is "the difficulty each of us has in representing vividly the situations and interests of people very different from ourselves."¹⁰⁴ To do so requires the most intense and

¹⁰² *Id.* at 357.

¹⁰³ *Id.* at 330.

¹⁰⁴ OWEN FISS, PILLARS OF JUSTICE: LAWYERS AND THE LIBERAL TRADITION 142 (2017) (quoting Carlos Nino); see also Michael Kaufman, *Social Justice and the American Law School Today: Since We Are Made for Love*, 40 SEATTLE U. L. REV. 1187, 1222 (2017) ("Diverse individuals in a group create a higher level of collective intelligence than groups comprised even of higher achieving individuals A diverse learning environment also builds the critical cognitive capacity to take another person's perspective. The ability to appreciate, understand, and respect the thoughts, feelings, and intentions of people who seem to be different is particularly challenging. But the pattern of confronting and overcoming the challenge of accommodating different perspectives is the key to learning. The experience enables the student to embrace rather than to fear difference." (footnotes omitted)). Some neuroscience research

concentrated act of imagination. Indeed, “understanding one another involves [nothing less than] thinking of oneself as another.”¹⁰⁵ This moral imperative is also a necessity of social and political life. The need to understand those whose “situations and interests” are different from our own is particularly acute in a democratic society because democracy depends on trust among strangers and on a common recognition that, whatever our differences may be, “[w]e are all awash in each other’s lives.”¹⁰⁶ No less important, of course, is the need to appreciate the limitations of our own perspectives.¹⁰⁷

If one of the purposes of higher education is to help develop individuals as human beings and citizens, it follows that institutions of

among college-age students suggests that the ability to learn actually grows by virtue of encounters with diverse perspectives. See, e.g., Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RES. 4 (2010), <http://journals.sagepub.com/doi/pdf/10.3102/0034654309352495> (describing cognitive growth as a result of diversity experiences).

¹⁰⁵ TED COHEN, THINKING OF OTHERS: ON THE TALENT FOR METAPHOR 17 (2008); see also *id.* at 63 (“[B]eing human requires knowing what it is to be human, and that requires the intimate recognition of other human beings.”).

¹⁰⁶ ALLEN, *supra* note 9, at xxii. As Danielle Allen has pointed out, “the hard [and often unacknowledged] truth of democracy is that some citizens are always giving things up for others. Only vigorous forms of citizenship can give a polity the resources to deal with the inevitable problem of sacrifice.” *Id.* at 29. Those resources are found not just in structures of government, but also in the character and the practices of the people. The stability of a democratic society therefore depends on its ability “to develop criteria for distinguishing legitimate from illegitimate forms of sacrifice, and also to outline a form of citizenship that helps citizens generate trust enough among themselves to manage sacrifice.” *Id.*; see also William Cronon, “Only Connect. . .”: *The Goals of a Liberal Education*, 67 AM. SCHOLAR 73, 78 (Autumn 1998) (“Education for human freedom is also education for human community. The two cannot exist without each other. Each of the qualities I have described is a craft or a skill or a way of being in the world that frees us to act with greater knowledge or power. But each of these qualities also makes us ever more aware of the connections we have with other people and the rest of creation, and so they remind us of the obligations we have to use our knowledge and power responsibly. If I am right that all these qualities are finally about connecting, then we need to confront one further paradox about liberal education. In the act of making us free, it also binds us to the communities that gave us our freedom in the first place In the end, it turns out that liberty is not about thinking or saying or doing whatever we want. It is about exercising our freedom in such a way as to make a difference in the world and make a difference for more than just ourselves.”).

¹⁰⁷ See, e.g., Thomas S. Morawetz, *The Epistemology of Judging: Wittgenstein and Deliberative Practices*, 3 CANADIAN J.L. & JURIS. 35, 57 (1990) (“The issue is rather that the ways in which persons fit psychological, economic, political, social experiences together, the ways in which they make sense of their own lives and the lives of others, differ significantly and . . . hard questions of decision making fall prey to that diversity.”).

higher education should be concerned with maximizing their students' exposure to a variety of perspectives, and with making sure that those perspectives are thoroughly investigated, critically examined, and rigorously discussed.¹⁰⁸ In that sense, diversity is critical to the life of the modern American university. But diversity is particularly important to the professional education of lawyers and judges, and that is because of the nature of law and what lawyers and judges do. Because of the work that they do, judges are constantly challenged to understand and appreciate aspects of human life quite different from their own, and legal education is challenged to provide them with a basis for doing so.

To be sure, we yearn for a world in which law is certain and transparent and unencumbered by the need for interpretation. While that is not our world, it seems to give us comfort to think that it is. In judicial confirmation hearings, for example, Supreme Court nominees are regularly expected to affirm, as if they were reciting from the catechism, that judging involves "law all the way down" or that the judge's role is nothing more than "calling balls and strikes."¹⁰⁹ In a weak sense, judging does involve "law all the way down," but only if one means that notwithstanding the inherent indeterminacy of law and the consequent need for the exercise of judgment in legal decision making, the solutions to legal problems must be drawn from the recognized sources of law, using recognized methodologies of

¹⁰⁸ Legal education must also include tools for interpreting a wide variety of information, including social science data. See Konefsky & Sullivan, *supra* note 79, at 706-08; see also Bandes, *Empathetic Judging*, *supra* note 28, at 145-46 (discussing Justice Kennedy's failure to seek accurate information in *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

¹⁰⁹ See, e.g., *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 8, 103 (2010) (Testimony of Elena Kagan); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 203 (2005) (Testimony of John G. Roberts, Jr.). Judge Richard Posner has said that no "knowledgeable" person could possibly believe that. RICHARD A. POSNER, *HOW JUDGES THINK* 78 (2008); see also LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* 37 (1989) (suggesting that the judge's role may be "like the third of those three kinds of baseball umpires that Hadley Cantril humorously spoke of in an early work on social psychology: the first is the umpire who says: 'There's balls and there's strikes and I calls 'em as they are'; the second says: 'There's balls and there's strikes and I calls 'em as I sees 'em'; but the third says: 'There's balls and there's strikes and they ain't nothin' till I calls 'em.'"); Susan A. Bandes, *Empathy and Article III: Judge Weinstein, Cases and Controversies*, 64 DEPAUL L. REV. 317, 323 (2015) ("[J]udicial candidates and judges have little incentive to acknowledge that they have interpretive leeway, and that this leeway permits value judgments.").

interpretation and legal reasoning, and that they must be amenable to professional evaluation and criticism.¹¹⁰ But that is not what the Senators and nominees typically mean to say when they talk about “law all the way down.” What they actually mean to affirm is that the law is certain, and that absolutely correct answers to legal questions can be found through reason and logic. On this view, there is no need for interpretation, and the character, life experience, judgment, and imagination of the judge are irrelevant to the process of adjudication.

But we have been told that the resolution of constitutional questions entails more than that since the earliest days of the Republic, when Chief Justice John Marshall wrote that, “The judgment is so much influenced by the wishes, the affections, and the general theories of those by whom any political proposition is decided, that a contrariety of opinion on . . . great constitutional question[s] ought to excite no surprise.”¹¹¹ And we have since been reminded of that truth by many distinguished judges. Justice Frankfurter, who had a markedly more circumscribed view of the judicial function, wrote that, “Since the litigation that comes before the Supreme Court is so largely entangled in public issues, the general outlook and juristic philosophy of the Justices inevitably influence their views and in doubtful cases will determine them.”¹¹² Justice Jackson emphasized that “the most

¹¹⁰ See, e.g., JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* 97 (1985) (“It is not a defect but a merit of our system that judges are acknowledged to have discretion, that legal questions are seen as open and difficult, that juries can decide within a wide range It is the aim of our law not to obliterate individual judicial judgments . . . but to structure and discipline them, to render them public and accountable.”); Morawetz, *supra* note 107, at 59 (explaining how judges “are constrained individually by a particular way of addressing and understanding interpretive questions and they are constrained collectively by the fact that the shared practice embraces a limited range of ways of proceeding,” and that “[t]his limitation is mutually understood and recognized”).

¹¹¹ 2 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON, COMMANDER IN CHIEF OF THE AMERICAN FORCES, DURING THE WAR WHICH ESTABLISHED THE INDEPENDENCE OF HIS COUNTRY, AND FIRST PRESIDENT OF THE UNITED STATES* 205 (1835). Marshall also offered an account of the “wishes, affections, and general theories” that influenced his judgment: “I had grown up at a time when a love of union and resistance to the claims of Great Britain were the inseparable inmates of the same bosom I carried them with me into the army where I found myself associated with brave men from different states who were risking life and everything valuable in a common cause believed by all to be most precious; and where I was confirmed in the habit of considering America as my country, and [C]ongress as my government.” JOHN MARSHALL, *AUTOBIOGRAPHICAL SKETCH* 9-10 (John Stokes Adams ed., 1937) (footnote omitted).

¹¹² FELIX FRANKFURTER, *OF LAW AND LIFE AND OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956-1963*, at 59 (Philip B. Kurland ed., 1965); see also *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (“And there comes a point where this

important part of a Judge's work is the exercise of judgment,"¹¹³ and Judge Learned Hand has said that "everything turns upon the spirit in which [the judge] approaches the questions before him."¹¹⁴ More to the point, perhaps, Justice O'Connor has written that Justice Thurgood Marshall "imparted not only his legal acumen but also his life experiences, constantly pushing and prodding [his colleagues] to respond not only to the persuasiveness of legal argument but also to the power of moral truth."¹¹⁵ Properly understood, judging requires that the judge "risk having a profound encounter with other people, their ideas, and their problems."¹¹⁶

As Professor Bandes and others have pointed out, *Safford Unified School District No. 1 v. Redding*¹¹⁷ illustrates the importance of a Justice's individual perspective and insight. In *Safford*, a middle-school student who was strip-searched at school alleged that her constitutional rights had been violated:

To resolve the Fourth Amendment issue, the Court needed to determine how intrusive the search was, how important the government interest was, and whether the government adopted a reasonable means of addressing its concern [I]t needed to focus on how [the search] was experienced by the [student] and on how it would be experienced by others in her place [I]t needed to put itself in the place of school administrators. Unless the Court could understand the perspectives of all the litigants, it risked making its determination based on skewed and incomplete information.¹¹⁸

At oral argument, the Justices spent much time attempting to understand the school's viewpoint, but measurably less time trying to understand the case from the student's perspective. While Justice Breyer struggled with understanding the student's perspective, wondering whether the girl's situation was similar to his own experience as a young boy having to change clothes in a school locker room, Justice Ginsburg pointed out that the experience recounted by

Court should not be ignorant as judges of what we know as men.").

¹¹³ EUGENE GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 59 (1958).

¹¹⁴ Learned Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12 (1930).

¹¹⁵ Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

¹¹⁶ Sullivan, *Just Listening*, *supra* note 29, at 412.

¹¹⁷ *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009).

¹¹⁸ Bandes, *Empathetic Judging*, *supra* note 28, at 143.

Justice Breyer was nothing like the situation encountered by “a thirteen-year-old girl forced to strip to her underwear and shake out her bra and underpants in front of school officials who suspected her of concealing prescription ibuprofen.”¹¹⁹ As Professor Bandes notes, “The resulting opinion reflects the Court’s effort to educate itself on [the student’s] perspective. It acknowledges her subjective experience . . . as ‘embarrassing, frightening, and humiliating.’”¹²⁰ The Court’s “fuller understanding” of the student’s perspective did not dictate the result, but it “allowed a more accurate balancing of interests.”¹²¹

As *Safford* suggests, life experience is not irrelevant to judging, and, at least in multi-member courts, the possibility of meaningful dialogue among judges may help them grasp the reality of situations far removed from their own experiences.¹²² If judges are to perform their professional work at all, they must be willing and able to imagine the “situations and interests” of others, which “requires the openness and humility to admit that other perspectives are worthy of respect.”¹²³ That is difficult for all of us. “For judges,” Professor Bandes notes, “these are acute problems, because judges are encouraged to believe in their own omniscience. It is a real occupational hazard — the lack of reminders that their perspective is partial; that they have blind spots and prejudices.”¹²⁴

¹¹⁹ *Id.* at 143-44.

¹²⁰ *Id.* at 144.

¹²¹ *Id.*

¹²² Whether the conditions necessary for such a dialogue are normally present is another question. See generally Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379 (2017) (discussing how interruptions may prevent effective dialogue between Justices); Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12*, 2015 UTAH L. REV. 1005 (discussing recent changes in the conduct of oral argument in the Supreme Court and its effectiveness).

¹²³ Susan A. Bandes, *Compassion and the Rule of Law*, 13 INT’L J.L. CONTEXT 184, 194 (2017) [hereinafter Bandes, *Compassion*] (“People do not begin with abstract principles. They begin with moral intuitions that grow from their own experience and take shape within their own social worlds, and those intuitions prove pretty unshakeable For people to re-examine their moral intuitions, or to try to expand their moral universe, usually requires interchange with others who hold different perspectives.” (citations omitted)).

¹²⁴ *Id.* at 192; see *Laird v. Tatum*, 409 U.S. 824, 835-36 (1972) (memorandum opinion of Rehnquist, J.) (pointing out that judges in our system come to the bench relatively late in life and often have firmly held views about many legal issues).

The ability to imagine the depth and reality of the “situations and interests” of others, and to appreciate the limitations of one’s own perspective, is an essential vocational requirement for judges. But the same is true for lawyers, as Professors Lasswell and McDougal reminded us three-quarters of a century ago: “To no one else can clients and . . . the public reasonably be expected to look for that enlargement and correction of perspective, that critical and inclusive view of reality, that is based on the disciplined exercise of [professional] skills . . .”¹²⁵ To be an effective advocate, for example, one cannot believe without proof everything that one is told by one’s client. On the other hand, a lawyer must not dismiss out-of-hand a client’s assertion that his confession was induced by torture simply because that possibility seems inconceivable¹²⁶ to the lawyer or inconsistent with her own experience with the police.¹²⁷ In other words, lawyers must become habituated to thinking that what might seem inconceivable in the context of their own lives might not be inconceivable — but actually possible or even probable — in the lives of their clients. Ideally, that process of habituation begins in law school.

There are important parallels between what we hope goes on during argument and in the conference room of a multi-member court, on the one hand, and what should go on in a law school classroom, on the other. In both venues, we hope that there is a genuine exchange of views that results in real learning and the development of new insights — which generally come from exposure to people whose ideas and experiences are different from our own. When a law school classroom works as it should, students will learn as much from each other as from the instructor. The instructor will guide the discussion, to be sure, but a large part of the instructor’s role is to encourage students (who often appear reluctant to contribute) to share their unique insights with their colleagues and to build on each other’s insights. Diversity of every kind is important to that enterprise.

Fifty years ago, there was little diversity of background among students in American law schools. White males dominated most

¹²⁵ Lasswell & McDougal, *supra* note 2, at 211.

¹²⁶ See NORMAN MALCOLM, LUDWIG WITTGENSTEIN: A MEMOIR 39 (1958) (quoting a letter from Wittgenstein in which he recalled “a heated discussion [about the alleged British plot to assassinate Hitler] in which [Malcolm] made a remark about [its being inconceivable because it was contrary to the British] ‘national character’ that shocked [Wittgenstein] by its primitiveness”).

¹²⁷ See *People v. Wilson*, 506 N.E.2d 571, 572-77 (Ill. 1987) (reversing conviction due to confession induced by police torture).

aspects of American life, and, not surprisingly, young white males filled most of the seats in American law schools. There were few women, few members of minority groups, and few mature students.¹²⁸ Apart from men returning from military service, few had much experience of life. That is no longer the case. Can there be any doubt that classroom discussion has been enriched — and the quality of legal education substantially enhanced — by the inclusion of these additional voices?

Clearly, mature students who have worked in financial services have much to contribute to business law classes; journalists may have special insights into First Amendment issues; and police officers and orthopedic surgeons and architects and state legislators all make contributions to classroom discussion that would not have been made before law schools began to accept mature students in substantial numbers. Likewise, it is not difficult to imagine that students from urban and rural areas and small towns may have unique perspectives on a variety of legal issues. Students from modest financial circumstances or chronically depressed communities may have important insights into the regulation of payday loans and credit card debt and the availability of consumer class action relief. Nor is it difficult to imagine the ways in which the interventions of women and members of minority groups may enrich classroom discussion. Members of a constitutional law class may appear quite taken by Justice Harlan's seemingly prophetic dissent in *Plessy v. Ferguson*,¹²⁹ for example, when an Asian-American student raises her hand and asks that the class consider the way in which Justice Harlan discusses the Chinese, which then leads other students to want to discuss the Justice's observation that whites would remain the "dominant race." Similarly, the discussion of "undue burden" in *Whole Woman's Health v. Hellerstedt*¹³⁰ may well take a different turn when an African-American obstetrician in the class can be encouraged to speak from her own professional experience, and some gay students may have important interventions to make in a discussion of *stare decisis* and countervailing claims of justice in connection with the class's consideration of *Bowers v. Hardwick*¹³¹ and *Lawrence v. Texas*.¹³² In

¹²⁸ See, e.g., JOAN A. LOWY, PAT SCHROEDER: A WOMAN OF THE HOUSE 22-24 (2003) (describing sexism at Harvard Law School when Congresswoman Patricia Schroeder enrolled in 1961).

¹²⁹ 163 U.S. 537, 552 (1896).

¹³⁰ 136 S. Ct. 2292 (2016).

¹³¹ 478 U.S. 186 (1986).

¹³² 539 U.S. 558 (2003).

other words, there are some subjects relevant to the study of law about which women and members of minority groups may have unique perspectives. As Justice O'Connor noted in *Grutter*, minority students should not be expected to speak as representatives of a particular group because there is no single viewpoint that can be attached to any particular group, and it would be both erroneous and harmful to think that there is.¹³³ However, it is also true, as Justice O'Connor also observed in *Grutter*, that an individual's views are likely to be affected by "one's own, unique experience of being a racial minority in society,"¹³⁴ and the same is certainly true of being a woman in a particular society. Women can talk from first-hand experience (whether it be personal to them or to others they know personally) about such matters as sexual harassment and rape,¹³⁵ while others can talk about the perils of "driving while Hispanic"¹³⁶ and the experiences that young black men often have of being hassled by the police. But each of those students may have important insights to offer in connection with discussions throughout the law school curriculum, regardless of the subject matter. The larger point is that law school classrooms can do what they need to do only by nurturing a wide variety of viewpoints and encouraging many voices to be heard.

All of a law school's students benefit from the inclusion of many voices. The matters discussed in law school, after all, are not merely the stuff of good citizenship or personal development for law students (although they are that, of course, just as they are for students in other disciplines); they are the very stuff of professional knowledge and formation and are essential to the development of the "professional imagination" that is necessary both to the practice of law and to the task of judging in a democratic society. They provide a necessary foundation, as Justice Powell put it, for "render[ing] . . . [a] vital service to humanity."¹³⁷

¹³³ See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). Indeed, that fact lies at the heart of the argument supporting the need for a "critical mass." See *id.*

¹³⁴ *Id.*

¹³⁵ See, e.g., Lynn K. Hall, *What Happens When a Rape Goes Unreported*, N.Y. TIMES (Feb. 4, 2017), https://www.nytimes.com/2017/02/04/opinion/sunday/what-happens-when-a-rape-goes-unreported.html?_r=0 (showing how a rape victim can provide a unique perspective and cause other victims to come forward).

¹³⁶ See, e.g., Stuesse et al., *supra* note 57 (describing the experience of an undocumented woman driving without a license).

¹³⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

CONCLUSION

Legal education is a distinctive form of higher education with a distinctive mission, a distinctive set of concerns, and a distinctive pedagogy. While strong arguments can be made for racial and ethnic diversity throughout higher education, based on concerns for individual human development and the cultivation of good citizens, distinctive arguments can be made for diversity in professional education, as Justice Powell recognized in *Bakke*. Special arguments can be made for legal education, based on the nature of the professional work that lawyers and judges do and on what appropriate training for that work ought to entail. Lawyers and judges must be able to appreciate the limitations of their own perspectives¹³⁸ and understand “the situations and interests of people very different from ourselves.”¹³⁹ By failing to emphasize the distinctive arguments that were available in *Grutter*, Justice O’Connor left the dissenters in that case free to define legal practice and legal education in their own terms — which made diversity of any kind irrelevant.

Perhaps Justice O’Connor should have taken more seriously her own insight into the importance of context, and perhaps we should do so in the future. The *Grutter* majority affirmed the approach taken by Justice Powell in *Bakke*, but that precedent continues to be unstable, as demonstrated by the Court’s having granted certiorari twice in *Fisher*. Given the continued apparent fragility of the relevant jurisprudence, it might make sense for future litigants and courts to focus on context at a more granular level and dig more deeply in every case to ensure that the First Amendment values at the heart of *Bakke* continue to be given appropriate effect.

¹³⁸ See Bandes, *Compassion*, *supra* note 123, at 194.

¹³⁹ FISS, *supra* note 104, at 142 (quoting Carlos Nino).