DUNWODY DISTINGUISHED LECTURE IN LAW*

INTERPRETING THE SUPREME COURT: FINDING MEANING IN THE JUSTICES' PERSONAL EXPERIENCES

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Abstract

At his 2004 confirmation hearing, Chief Justice John G. Roberts Jr. famously compared the role of a Supreme Court Justice to that of a baseball umpire and promised "to remember that it's my job to call balls and strikes." Roberts likely intended this to mean that he would serve as a neutral arbiter of the law, who simply applies the existing rules to reach the correct outcome. But in judging, as in baseball, that is not as easy as it sounds, especially when one of the primary criteria on which the Court relies to choose its cases is whether the lower courts are divided on the legal question presented by a case. In the absence of a clear right or wrong answer, the Justices often have to operate in a gray area, and this is where their life experiences may play a role, because two people may—based on their own unique life experiences—see the same things very differently. To be sure, life experiences may not always be determinative, particularly when the Justices are dealing with more technical areas of the law. And even Justices who share similar life experiences may nonetheless view an issue very differently, as is the case with Justices Clarence Thomas and Sonia Sotomayor when it comes to affirmative action. The key is to look at a Justice's entire life experience collectively because that is what the Justice will rely on to make decisions and that is what will inform how she sees the tough questions that the Court decides.

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INTRODUCTION

I would like to talk today about how and when the Justices' personal experiences may affect their work on the Supreme Court. I am going to start with a discussion of how we think about the role of a Supreme Court Justice and then look at some examples of cases in which the Justices' life experiences may have influenced their decisions. Finally, I will conclude with a brief discussion of the significance of that influence.

I. SUPREME COURT JUSTICES: UMPIRES OF THE LAW

Virtually every recent Supreme Court confirmation hearing has its memorable moment or notable quotation. For the 2010 confirmation hearing of Justice Elena Kagan, that notable quotation was her response to a question from Senator Lindsey Graham (a Republican from South Carolina) about where she was on Christmas Day 2009, when a Nigerian man tried to blow up an airliner by detonating a bomb in his underwear.[1] "Like all Jews," she told Senator Graham, "I was probably at a Chinese restaurant."[2] During the 2006 confirmation hearing for Justice Samuel Alito, the memorable moment occurred when his wife broke down in tears and left the hearing room while Justice Alito was responding to sympathetic questions (also from Senator Graham) intended to push back against efforts by Democrats to portray him as hostile to the rights of women and minorities.[3]

Although Justice Kagan's quip was a lighter moment, and Justice Alito's hearing provided us with an emotional moment, other moments offer genuine insight into the nominee's thinking or the nature of judging. In particular, the line that may stand out the most in recent years came during the 2005 confirmation hearing of Chief Justice John Roberts. During his opening statement to the Senate Judiciary Committee, Chief Justice Roberts compared the role of a Supreme Court Justice to that of a

1. *See* Manu Raju, *Kagan: I Spent Christmas at Chinese Restaurant*, POLITICO (June 29, 2010), http://www.politico.com/blogs/politicolive/0610/Kagan_I_spent_Christmas_at_Chinese_restaurant.html.

2. *Id.*

3. *See* Associated Press, *Emotions Run High in Alito Hearing's 3rd Day*, NBCNEWS (Jan. 11, 2006), http://www.nbcnews.com/id/10802815/ns/us_news-the_changing_court/t/emotions-run-high-alito-hearings-rd-day.

baseball umpire and promised to "remember that it's my job to call balls and strikes."[4]

That comparison is not necessarily a new one. But it is an appealing metaphor: the idea of a Supreme Court Justice as a neutral arbiter of the law who simply applies the existing rules to reach the correct outcome.[5] In fact, it proved so appealing that senators supporting Justice Alito's confirmation referred to the idea of judges as umpires approvingly.[6] The metaphor resurfaced again during the 2009 confirmation hearing of Justice Sonia Sotomayor when Senator Jeff Sessions of Alabama (a Republican who would vote "no" on her nomination)[7] warned that he would not support "an individual nominated by any President who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court."[8] "Such an approach to judging," he continued, "means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other."[9]

Senator Sessions was responding, of course, to remarks that Justice Sotomayor made long before her nomination to succeed Justice David Souter on the Supreme Court but which nonetheless played a central role in her confirmation hearing. In a 2001 speech at Berkeley, Justice Sotomayor questioned the proposition—sometimes attributed to Justice Sandra Day O'Connor—that "a wise old man and wise old woman will reach the same conclusion in deciding cases."[10] Instead, she suggested, "I would hope that a wise Latina woman with the richness of her

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4. *Roberts: "My Job Is to Call Balls and Strikes and Not to Pitch or Bat,"* CNN (Sept. 12, 2005, 4:58 PM), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/ (transcript of Chief Justice Roberts's confirmation hearing).

5. *Id.* ("Umpires don't make the rules; they apply them.").

6. *See, e.g.*, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9–10 (2006) (statement of Sen. Hatch) ("Applying a proper judicial standard to Judge Alito's record means putting aside the scorecards and looking at how he does what judges are supposed to do, namely, settle legal disputes by applying already established law."); *id.* at 14 (statement of Sen. Grassley) ("Like Chief Justice Roberts, it appears that Judge Alito tries to act like an umpire, calling the balls and strikes, rather than advocating a particular outcome.").

7. *U.S. Senate Role Call Votes 111th Congress—1st Session*, U.S. SENATE (Aug. 6, 2009, 3:03 PM), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00262.

8. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Sen. Sessions).

9. *Id.*

10. Sonia Sotomayor, *Lecture: 'A Latina Judge's Voice,'* N.Y. TIMES (May 14, 2009), http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html.

experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[11] She also acknowledged that because "[p]ersonal experiences affect the facts that judges choose to see," there are likely to be some differences in how she judges "based on [her] gender and [her] Latina heritage."[12]

That leaves us with two fairly diametrically opposed visions of the role of a Supreme Court Justice, but there might not be quite so much distance between the two after all. Being an umpire calling balls and strikes is not as mechanical as you might think. There is, of course, an official definition of the strike zone:

> [T]hat area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the knee cap. The Strike Zone shall be determined from the batter's stance as the batter is prepared to swing at a pitched ball.[13]

One writer has suggested that this rule may be "[s]traightforward" but "certainly not easy for an umpire."[14] How, he asks, are umpires "supposed to determine that mid-point between belt and top of shoulder, not when the batter takes his stance, but when he is 'prepared to swing at a pitched ball?'"[15]

There is a good argument to be made that the same is true for judging, especially at the Supreme Court. Remember that the Court has almost complete control over its docket; it gets to pick and choose the roughly seventy-five cases in which it hears oral arguments each year.[16] With thousands of petitions for certiorari to review annually, one of the primary criteria that the Court uses to select its cases is whether there is a division among the lower courts of appeals on the legal question presented by the case.[17] That works well as a governing principle because it targets a problem that the Supreme Court was intended to resolve: to make sure that the law is the same throughout the country.[18]

But let's think a little bit more about the meaning of a circuit split. It means that federal appellate judges—themselves very smart people—

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11. *Id.*

12. *Id.*

13. John Walsh, *Strike Zone: Fact v. Fiction*, HARDBALL TIMES (July 11, 2007), http://www.hardballtimes.com/strike-zone-fact-vs-fiction/.

14. *Id.*

15. *Id.*

16. *See* ROBERT A. CARP, RONALD STIDHAM & KENNETH L. MANNING, JUDICIAL PROCESS IN AMERICA 342 (9th ed. 2014).

17. *Id.* at 343.

18. *See* Ryan Stephenson, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 GEO. L.J. 271, 273 (2013).

have reached different conclusions about the same legal issue, which in turn suggests that the Supreme Court's consideration of the issue cannot simply be a mechanical exercise of applying existing law. As Donald Ayer, who served as Deputy Solicitor General in the Reagan Administration, observed:

> Where, as is typical, substantial numbers of thoughtful judges have differed after giving it their best shot, real uncertainty exists as to what the law is.
>
> Here's the rub: In nearly all the high court's cases, doubt exists not because the half or so of judges who decided the issue are stupid, don't get it or otherwise made some identifiable mistake. Rather, doubts exist because there are substantial persuasive arguments on both sides that cannot be dismissed as invalid or wrong.[19]

Retired Judge H. Lee Sarokin, who served on the U.S. Court of Appeals for the Third Circuit,[20] puts it even more bluntly: "If there were a clear right decision, a computer system could be devised to spew out the correct answer—so 'balls and strikes' it ain't!"[21]

You can see this play out in one of the cases I will talk about today, *Safford Unified School District v. Redding*,[22] involving the constitutionality of strip searches of students at school.[23] In discussing the question of whether the school officials being sued were entitled to qualified immunity, the author of the Court's decision, Justice Souter, made a point of mentioning the extent of the lower courts' division on the issue.[24] The Court concluded that it selected the case precisely because of the different conclusions reached by the lower courts, "with well-reasoned majority and dissenting opinions" in the cases ruling for the school districts.[25]

In the absence of a clear right or wrong answer, the Justices often have to operate in a gray area. That is where their life experiences can and do come into play—not because of bias or favoritism but because two people

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19. Donald B. Ayer, *Why the High Court's Work Goes Beyond 'Balls and Strikes*,*'* WASH. POST (June 21, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/20/AR2010062002365.html.

20. *Federal Judges: Judge H. Lee Sarokin (Retired)*, FED. ARB., http://www.fedarb.com/professionals/lee-sarokin/ (last visited Nov. 23, 2015).

21. Judge H. Lee Sarokin, *Chief Justice Roberts Did Not 'Call Balls and Strikes' in His Health Care Decision*, HUFFINGTON POST (July 9, 2012, 3:00 PM), http://www.huffingtonpost.com/judge-h-lee-sarokin/john-roberts-obamacare-decision_b_1659588.html.

22. 557 U.S. 364, 369 (2009).

23. *Id.* at 369.

24. *Id.* at 378.

25. *Id.* at 379.

may, based on their own unique experiences, see the same thing very differently. In this way, being a Supreme Court Justice may in fact be like being a baseball umpire because, as one long-time major league umpire wrote, "no two umps see the same strike zone. They view the plate from different angles, react differently to pitches, and change their opinion of what a strike is from batter to batter."[26] Chief Justice Roberts therefore may well have been right when he talked about the balls and strikes, but for the opposite reason than he intended: balls and strikes are more subjective, and so is judging.[27]

II. THE INFLUENTIAL ROLE OF LIFE EXPERIENCES

I want to move on now and talk about how the Justices' life experiences may have affected their judging. Many people actually believe that the Justices are in some ways *too* much alike. For example, except for Justice Ruth Bader Ginsburg, all of them graduated from either Harvard Law School or Yale Law School.[28] And even Ginsburg spent two years at Harvard;[29] her degree is from Columbia only because she spent her final year there after her husband got a job in New York, and Harvard would not award her a degree.[30] Regardless of their similar education, they think in very different ways, and it is not hard to find cases in which the Justices' life experiences have likely affected how they see issues before the Court.

A. *Justice Clarence Thomas*

In his memoir, Justice Clarence Thomas describes the city of Savannah, where he spent part of his childhood, as a place that "clung fiercely to racial segregation for as long as it could."[31] In particular, he noted that in 1960 the Ku Klux Klan held a convention there, and "250 of its white-robed members paraded down the city's main street one Saturday afternoon."[32]

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26. Jack Shafer, *How the Court Imitates the World Series: John Roberts' Winning Baseball Analogy*, SLATE (Sept. 13, 2005, 6:44 PM), http://www.slate.com/articles/news_and_politics/press_box/2005/09/how_the_courtimitates_the_world_series.html.

27. *See id.*

28. *Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., http://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 23, 2015); *Samuel Alito Fast Facts*, CNN LIBRARY, http://www.cnn.com/2013/02/03/us/samuel-alito-fast-facts/ (last updated Mar. 26, 2015, 2:37 PM).

29. *Biographies of Current Justices of the Supreme Court*, *supra* note 28.

30. Jeffrey Toobin, *Heavyweight: How Ruth Bader Ginsburg Has Moved the Supreme Court*, NEW YORKER (Mar. 11, 2013), http://www.newyorker.com/magazine/2013/03/11/heavyweight-ruth-bader-ginsburg.

31. CLARENCE THOMAS, MY GRANDFATHER'S SON 21 (2007).

32. *Id.*

Decades later, the Court heard oral arguments in *Virginia v. Black*,[33] which involved a challenge to a state law that made it a crime to burn a cross with the intent to intimidate someone; the law also treated the burning of a cross as prima facie evidence of an intent to intimidate.[34] The lawyers for Virginia—defending the statute—and the United States (which appeared as an amicus in support of Virginia) faced a series of skeptical questions from Justices of all ideological stripes when Justice Thomas, who rarely asks questions at oral arguments, spoke up.[35] Rather than challenging Michael Dreeben, the federal government's top lawyer for criminal cases at the Supreme Court,[36] Justice Thomas expressed concern that Dreeben and the federal government were "actually understating the symbolism . . . and the effect of the . . . burning cross."[37] Later in the oral argument, he lamented that the law's defenders had not "stat[ed] more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society."[38] Speaking in a way that left little doubt that he was relying on his experiences growing up in the South, he emphasized that "there was no other purpose to the cross. There was no communication of a particular message. It was intended to cause fear . . . and to terrorize a population."[39]

In the end, Justice Thomas's views did not sway his colleagues. The other Justices overwhelmingly agreed with the defendants challenging the law, ruling that although a state can ban cross-burning carried out with the intent to intimidate, the Constitution does not allow Virginia to treat any burning of a cross as "prima facie evidence of intent to intimidate."[40] Justice Thomas was the only Justice to dissent entirely from that conclusion.[41] Notably, he began his dissenting opinion with the statement that "[i]n every culture, certain things acquire meaning well beyond what outsiders can comprehend," including cross-burning.[42] The import of his words was again clear: his views of the significance of a burning cross were the product of his experience as an "insider" in the Jim Crow South—an experience that the rest of the Court as "outsiders" could not

33. 538 U.S. 343 (2003).

34. *Id*. at 347–48.

35. Transcript of Oral Argument at 1, 22–23, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107).

36. Lyle Denniston, *Argument Analysis: Taking Ownership of an Internet Rant*, SCOTUSBLOG (Dec. 1, 2014, 2:13 PM), http://www.scotusblog.com/2014/12/argument-analysis-taking-ownership-of-an-internet-rant/.

37. Transcript of Oral Argument, *supra* note 35, at 1.

38. *Id.*

39. *Id.* at 23–24.

40. *Virginia*, 538 U.S. at 348.

41. *Id.* at 388 (Thomas, J., dissenting).

42. *Id.*

understand. In Justice Thomas's view, the ban on cross-burning did not implicate the First Amendment at all because it involved only conduct rather than expression.[43] Emphasizing the "common understanding of the Klan as a terrorist organization,"[44] he repeatedly referred to cross-burning as a symbol of "lawlessness" intended to "instill[] in its victims well-grounded fear of physical violence."[45] In so doing, he effectively dismissed the Court's assertion that "a burning cross is not always intended to intimidate" but can instead be a "statement of ideology."[46]

B. *Justice Ruth Bader Ginsburg*

As a student and then later as an attorney and law professor, Justice Ginsburg regularly experienced the kind of gender discrimination that American women today would find unimaginable.[47] She was born in Brooklyn in 1933, and her father was a Russian–Jewish immigrant who worked as a furrier.[48] Her mother, also the daughter of immigrants, was a good enough student to graduate from high school at the age of fifteen.[49] However, her mother did not go to college; instead, she worked in a garment factory to put her older brother through college.[50] Justice Ginsburg went off to Cornell University, where a school policy requiring all female students to live in the dormitories for supervision resulted in a quota of four men for every woman because dormitory space was limited.[51]

After graduating from Cornell first in her class, Justice Ginsburg eventually joined her husband at Harvard Law School, where she was one of only nine women in her class and was famously "asked by the dean to justify taking a place in the class that otherwise would have gone to a man."[52] Although she then graduated at the top of her law school class, she still had trouble finding a job: Justice Felix Frankfurter refused even to interview her because he did not think it would be appropriate to have a female law clerk,[53] and many of the sign-up sheets at Columbia Law

43. *Id.*
44. *Id.* at 389.
45. *Id.* at 391.
46. *Id.* at 365 (majority opinion).
47. *See* NICHOLA D. GUTGOLD, THE RHETORIC OF SUPREME COURT WOMEN: FROM OBSTACLES TO OPTIONS 48–49 (2012).
48. *Id.* at 47.
49. *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 27 (1993) [hereinafter *Nomination of Ruth Bader Ginsburg*] (statement of Sen. Leahy).
50. *Id.*
51. *Id.* at 134 (statement of J. Ginsburg).
52. *Id.* at 40 (statement of Sen. Feinstein).
53. *Id.* at 10 (statement of Sen. Moynihan).

School for law firm interviews indicated that they were for men only.[54] She eventually found work as a law clerk for a federal district judge; he agreed to hire her at the behest of a Columbia professor, who promised her that a male Harvard graduate would take her place if she did not work out.[55]

Even after she finally obtained a job as a law professor, she still encountered discrimination. When she was expecting her second child, she wore her mother-in-law's larger clothes to hide her pregnancy until after the university renewed her year-to-year contract because she feared that otherwise she might lose her job.[56]

Despite this history, Justice Ginsburg went on to become a pioneer in litigating gender discrimination cases, including some of the landmark cases on women's rights in the Supreme Court.[57] In an interview, she indicated that her life experience had taught her that "[g]eneralizations about the way women or men are . . . cannot guide me reliably in making decisions about particular individuals."[58] This view appears in her opinion for the Court in *United States v. Virginia*,[59] an Equal Protection Clause challenge to the state's exclusion of women from Virginia Military Institute (VMI), a public military college.[60] The Court rejected Virginia's argument that changing VMI's program to accommodate women "would necessarily be 'radical'" and that it would "destroy" the school.[61] The Court emphasized that "time and again" since its decision in *Reed v. Reed*[62]—a 1971 case in which Justice Ginsburg wrote the plaintiff's brief[63]—it "cautioned reviewing courts to take a 'hard look' at generalizations" such as those on which Virginia relied.[64] When states control the "gates to opportunity," the Court said, they "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities'" of men and women.[65]

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54. *Ruth Bader Ginsburg Interview*, ACADEMY OF ACHIEVEMENT (Aug. 17, 2010), http://www.achievement.org/autodoc/page/gin0int-4.

55. Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 161–62 (2002).

56. Beth Saulnier, *Justice Prevails, A Conversation with Ruth Bader Ginsburg '54*, CORNELL ALUMNI MAG. (Nov./Dec. 2013), http://cornellalumnimagazine.com/index.php?option=com_content&task=view&id=1765.

57. *See Nomination of Ruth Bader Ginsburg*, *supra* note 49, at 41 ("[Ginsburg] brought virtually every major sex discrimination case before the Supreme Court in the 1970's.").

58. GUTGOLD, *supra* note 47, at 49.

59. 518 U.S. 515, 530 (1996).

60. *Id.* at 530.

61. *Id.* at 540, 542–43.

62. 404 U.S. 71, 71 (1971).

63. *Id.* at 71.

64. *Virginia*, 518 U.S. at 541.

65. *Id.* at 541 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

The Court acknowledged that most women probably would not want to attend VMI, but it observed that many men probably would not either.[66] The relevant question, it explained, was "not whether 'women—or men—should be forced to attend VMI.'"[67] Instead, the question was whether Virginia "can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."[68] The Court ruled that it cannot.[69]

Thirteen years later, Justice Ginsburg was the only woman on the Court[70] when the Justices heard oral arguments in the case of Savana Redding, a thirteen-year-old who alleged that school officials violated the Constitution when they searched her bra and underpants believing that she brought prescription-strength ibuprofen (equivalent to two Advil) and over-the-counter Aleve to school.[71] The male Justices seemed skeptical that the search rose to the level of a constitutional violation. Justice Stephen Breyer, for example, drew laughs from Justice Thomas when he recounted how, when he was a teenager, "people did sometimes stick things in [his] underwear" while he was changing for gym class.[72] Justice Ginsburg, however, was not amused: she countered that "[i]t wasn't just that they were stripped to their underwear" but that Redding also had to shake out her undergarments away from her body, effectively exposing the area underneath.[73]

A few weeks later, but before the Court issued its opinion, Justice Ginsburg took what one reporter described as the "extraordinary step . . . of discussing the case with a reporter."[74] Observing that perhaps some of her colleagues had not "quite understood" what it was like to be a thirteen-year-old girl, she suggested that "[m]aybe a 13-year-old boy in a locker room doesn't have that same feeling about his body" but that thirteen is a "very sensitive" age for girls.[75]

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66. *Id.* at 542.

67. *Id.* (quoting United States v. Virginia, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting) (denying rehearing en banc)).

68. *Id.*

69. *See id.* at 542–46.

70. *See Members of the Supreme Court of the United States*, SUP. CT. U.S., http://www.supremecourt.gov/about/members.aspx (last visited Nov. 23, 2015).

71. Safford Unified Sch. Dist. v. Redding, 557 U.S. 364, 368 (2009).

72. Transcript of Oral Argument at 58, *Redding*, 557 U.S. 364 (No. 08-479), http://www.supremecourt.gov/oral_argumetns/argument_transcripts/08-479.pdf.

73. *Id.* at 45.

74. Neil A. Lewis, *Debate on Whether Female Judges Decide Differently Arises Anew*, N.Y. TIMES (June 3, 2009), http://www.nytimes.com/2009/06/04/us/politics/04women.html.

75. Joan Biskupic, *Justice Ginsburg: Supreme Court Needs More Women*, USA TODAY (May, 6, 2009, 6:10 AM), http://archive.wusa9.com/news/local/story.aspx?storyid=85414.

When the Court released its decision, it was a near unanimous victory for Redding.[76] In an opinion by Justice Souter, the Court agreed that the search violated the Constitution because there was no reason to believe either that the drugs were dangerous or that they were hidden in her underwear.[77] The Court reasoned that Redding's "subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating."[78] That expectation was reasonable, the Court continued, in light of the "consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."[79] As such (and this is where you really start to see the influence of Justice Ginsburg's comments), there is obviously a difference between the kind of search at issue in this case and other experiences that students may have at school, such as changing for gym:

> Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be.[80]

We may never know (or at least not for many years) what happened during the Justices' private conference and when they circulated the opinions, but based on Justice Ginsburg's comments it seems at least very possible that the case may have ultimately hinged on the fact that there was one member of the Court who *was* once a thirteen-year-old girl.

C. *Additional Examples*

Other examples of how the Justices' life experiences have influenced their decisions are significantly less predictable. One of those is the 2007 case of *Scott v. Harris*,[81] a lawsuit brought by a driver who led police on a high-speed chase that ended when a police officer intentionally struck the driver's car, causing him to crash and leaving him a quadriplegic.[82] At the center of the case was the question of whether the officer's conduct

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76. There were six Justices in the majority and three separately concurring and dissenting in part. *Redding*, 557 U.S. at 376–77.

77. Only Justice Thomas disagreed with this proposition. *Id.* at 382 (Thomas, J., concurring in part and dissenting in part).

78. *Id.* at 374–75 (majority opinion).

79. *Id.* at 375.

80. *Id.* (citation omitted).

81. 550 U.S. 372 (2007).

82. *Id.* at 375–76.

violated the Fourth Amendment.[83] On summary judgment, the trial court—adopting the driver's version of the facts—allowed the driver's case to go forward, and the court of appeals affirmed that ruling.[84]

In an opinion by Justice Antonin Scalia, joined by all but one of the Justices, the Court began by acknowledging that on summary judgment "facts must be viewed in the light most favorable to the nonmoving party."[85] However, the Court cautioned that this is required only when "there is a 'genuine' dispute as to those facts."[86] "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it," the Court explained, "a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[87]

In this case, there was—as the Court's opinion pointed out—an "added wrinkle": a videotape showing the car chase.[88] So although the court of appeals agreed with the driver that the chase posed "little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle,"[89] the Supreme Court disagreed. It insisted that the "videotape tells quite a different story" from the scenario described by the lower court:

> [W]e see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast . . . . Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.[90]

Because the videotape confirmed that "no reasonable jury" could have believed the driver, the Court concluded, "it is quite clear" that the police officer's actions did not violate the Fourth Amendment.[91]

Despite the Court's assertion that "no reasonable jury" could have believed the driver, at least one Justice did: Justice John Paul Stevens, who was nearly thirteen years older than Justice Ginsburg, the next-oldest Justice, and thirty-five years older than Chief Justice Roberts, the Court's

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83. *Id.*
84. *Id.* at 376.
85. *Id.* at 380.
86. *Id.* (quoting FED. R. CIV. P. 56(c)).
87. *Id.*
88. *Id.* at 378.
89. *Id.* (alteration in original) (quoting Harris v. Coweta Cnty., 433 F.3d 807, 815 (2005)).
90. *Id.* at 379–80.
91. *Id.* at 380–81.

youngest member at the time.[92] Arguing in his dissent that the videotape "actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue," Justice Stevens surmised that other members of the Court may have been "unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane."[93] Seemingly suggesting "that the tape doesn't speak for itself" and "that *different* people, with different experiences, can *see different things* in it,"[94] Justice Stevens attributed the discrepancy between his view of the videotape and that of the majority's to generational differences: had other members of the Court

> learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slowpoke in the face of on-coming traffic were routine—they might well have reacted to the video-tape more dispassionately.[95]

In the wake of the Court's decision (and Justice Stevens's dissent) in *Scott v. Harris*, Yale Law Professor Dan Kahan and others conducted an empirical study, showing the videotape of the car chase to over a thousand people to determine whether the videotape does in fact "speak for itself."[96] Like the Supreme Court, their subjects were divided. "A fairly substantial majority," they reported, "did interpret the facts the way the Court did."[97] However, their results also indicated that some groups—"African-Americans, low-income workers, and residents of the Northeast, for example"—generally were more sympathetic to the driver than the Court had been.[98]

Additionally, one recent empirical study of federal appellate judges suggests that judges who have daughters are more likely to vote in a feminist direction in gender-related cases, regardless of whether Democratic or Republican presidents appointed them.[99] The experience of having a daughter may have been the deciding factor in *Nevada Department of Human Resources v. Hibbs*,[100] a 2003 challenge to a

92. *See Biographies of Current Justices of the Supreme Court*, *supra* note 28.

93. *Id.* at 390 n.1 (Stevens, J., dissenting).

94. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838, 848 (2009).

95. *Scott*, 550 U.S. at 390 n.1 (Stevens, J., dissenting).

96. Kahan et al., *supra* note 94, at 848–49.

97. *Id.* at 841.

98. *Id.*

99. *See* Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 49, 52 (2015).

100. 38 U.S. 721 (2003).

provision of the Family and Medical Leave Act (FMLA) that allows eligible employees to take up to twelve weeks of unpaid leave each year for a variety of reasons, including the illness of a spouse, child, or parent.[101] The law also created a private right of action for both equitable relief and money damages.[102] The issue before the Court was whether a state employee could sue the state in federal court for violating the FMLA.[103]

By a vote of six to three, the Court agreed and allowed such lawsuits.[104] The majority explained that Congress wanted to create a system that provided leave for everyone so that "family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and . . . employers could not evade leave obligations simply by hiring men."[105] In so doing, the Court continued, "the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."[106]

Notably, the author of the *Hibbs* opinion was Chief Justice William H. Rehnquist, who once said that "sex discrimination claims carry little weight."[107] Why did a conservative champion of states' rights not only sign on to but also draft an opinion that was so supportive of equality for women that Marty Ginsburg, the late husband of Justice Ginsburg, asked his wife whether she had in fact written it?[108] We may never know for sure, at least until the release of Chief Justice Rehnquist's papers, but Justice Ginsburg attributed the opinion—which she described as a "delightful surprise"—"in part [to] his life experience"[109]: his daughter Janet was a single mother with a demanding job, and Chief Justice Rehnquist pitched in to help her with childcare, which sometimes required him to leave work early so that he could pick his granddaughters up from school.[110]

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101. *Id.* at 724–25.

102. *Id.*

103. *Id.* at 725.

104. *See id.* at 723, 725.

105. *Id.* at 737.

106. *Id.*

107. Angela Nicole Johnson, Note, *Intersectionality, Life Experience & Judicial Decision Making: A New View of Gender at the Supreme Court*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 353, 364 (2014).

108. Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES (July 7, 2009), http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html [hereinafter Bazelon, *Women on the Court*].

109. *Id.*

110. Adam Liptak, *Another Factor Said to Sway Judges to Rule for Women's Rights: A Daughter*, N.Y. TIMES (June 16, 2014), http://www.nytimes.com/2014/06/17/us/judges-with-daughters-more-often-rule-in-favor-of-womens-rights.html.

III. THERE'S MORE TO JUDGING: LIFE EXPERIENCES ARE NOT DETERMINATIVE

So far I have focused on examples of how the Justices' life experiences have likely influenced their judging. Of course, there are lots of technical questions that the Justices decide that are not a product of their life experiences. None of them have any personal experience with bankruptcy, for example.[111] And even in areas where you might expect life experiences to play a role, the Justices' opinions also show that it is dangerous to rely too heavily on factors such as gender or ethnicity to predict how a Justice might rule.

Justices Sandra Day O'Connor and Ginsburg were the first two women to serve on the Court,[112] but they differed ideologically at times: during the twelve terms that they overlapped on the Court, they agreed only a little over half the time.[113] But they did have some shared experiences when it came to their efforts to break into the legal field. Like Justice Ginsburg, Justice O'Connor had trouble finding a job after she graduated near the top of her class at Stanford Law School: law firms in California refused to hire her except as a legal secretary, and she ultimately secured a position as a deputy district attorney only after offering to do the work at first without being paid.[114]

Consequently, it may not be that surprising that the two voted together in ninety percent of gender discrimination cases.[115] But they parted ways in *United States v. Morrison*,[116] a challenge to the constitutionality of a provision of the Violence Against Women Act that allowed civil damages.[117] Justice O'Connor joined the majority in striking down the provision.[118] One commentator speculated, and I think she is right, that there was more to her vote than just gender.[119] Although she is a woman, Justice O'Connor was also a staunch supporter of states' rights who served as an assistant state attorney general, state legislator, and state

111. *See* Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 133 (1997) ("Given the background of the current justices, it is somewhat unlikely that any of them have a personal interest in bankruptcy law."); *see also Biographies of Current Justices of the Supreme Court*, *supra* note 28 (providing updated, short biographies of the Justices).

112. *See Members of the Supreme Court of the United States*, *supra* note 70.

113. *See* Johnson, *supra* note 107, at 365.

114. *See* ANN CAREY MCFEATTERS, SANDRA DAY O'CONNOR: JUSTICE IN THE BALANCE 45, 53 (2005).

115. Johnson, *supra* note 107, at 365.

116. 529 U.S. 598 (2000).

117. *Id.* at 600–02.

118. *Id.*

119. Johnson, *supra* note 107, at 365.

judge before she was appointed to the Court.[120] All of those experiences may well have trumped her gender in that case.[121]

Similarly, although Justices Thomas and Sotomayor in some ways seem to share their experiences as minorities, they have very different views about the constitutionality of affirmative action. If you wanted to summarize their disparate views in just a few words, all you need to do is examine the words they use to describe affirmative action: he refers to it as "racial discrimination,"[122] while she prefers "race-sensitive admissions."[123]

Justice Thomas grew up very poor in Georgia, with his grandparents serving as his primary caretakers for much of his childhood.[124] After a brief stint at seminary, he decided that the priesthood was not for him and transferred to Holy Cross, where there were very few African-American students.[125] The freshman class had only seventeen African-American students the year Justice Thomas arrived at the school.[126] Many of those students did poorly, he reported, as did subsequent classes, with some failing outright.[127] "I couldn't see the point of putting them through an experience for which they were unprepared," Justice Thomas wrote.[128] "Why, I asked, were these gifted young people being sacrificed on the altar of an abstract theory of social justice—and who profited from their failure?"[129]

From Justice Thomas's perspective, things did not improve when he went on to law school at Yale and "realized that those blacks who benefited from [affirmative action] were being judged by a double standard. As much as it stung to be told that I'd done well in the seminary *despite* my race," he said, "it was far worse to feel that I was now at Yale *because* of it."[130] Even after succeeding at Yale Law School, Justice Thomas believed that the stigma associated with affirmative action still made it difficult for him to find a job. "Thomas said he went on interviews with one 'high-priced lawyer' after another who didn't take him seriously because they thought he got special treatment. 'Many asked pointed questions, unsubtly suggesting they

120. *Id.*

121. *See id.* at 365–66.

122. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring).

123. Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1652 (2014) (Sotomayor, J., dissenting).

124. *See* THOMAS, *supra* note 31, at 1–9.

125. *Id.* at 42–50.

126. *Id.* at 54.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 74–75.

doubted I was as smart as my grades indicated.'"[131]

Even a quick reading of Justice Thomas's opinions in two recent affirmative action cases, *Grutter v. Bollinger*[132] and *Fisher v. University of Texas at Austin*,[133] reveals the extent to which his legal views reflect his experiences as a student and then as a lawyer. In *Grutter*, the Court—in an opinion by Justice O'Connor—upheld the University of Michigan Law School's use of race as one factor in its admissions process.[134] The Court explained that the use of race was permissible because it was "narrowly tailored . . . to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[135]

Justice Thomas began his separate opinion with a quote from Frederick Douglass's address on "What the Black Man Wants," which concluded: "[I]f the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury."[136] Continuing that theme, Justice Thomas disputed what he characterized as "the notion that the Law School's discrimination benefits those admitted as a result of it."[137] In his view, the law school's efforts to assemble a diverse class were "only a facade—it is sufficient that the class looks right, even if it does not perform right."[138] As a result, he concluded, "[w]hen blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement."[139] That question "itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination."[140]

Ten years later, the issue of affirmative action was back before the Court in a case brought by a white student, Abigail Fisher, whom the University of Texas at Austin did not admit.[141] She argued that she was

131. Erin Fuchs, *How Clarence Thomas Grew to Hate Affirmative Action*, BUSINESS INSIDER (Oct. 15, 2013, 10:21 AM), http://www.businessinsider.com/how-clarence-thomas-grew-to-hate-affirmative-action-2013-10.

132. 539 U.S. 306 (2003).

133. 133 S. Ct. 2411 (2013).

134. *Grutter*, 539 U.S. at 311, 343.

135. *Id.* at 343.

136. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part) (alteration and omission in original).

137. *Id.* at 371.

138. *Id.* at 372.

139. *Id.* at 373.

140. *Id.*

141. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2415 (2013).

the victim of racial discrimination because the university admitted minority students with less impressive grades and test scores than hers but did not admit her.[142] The Court heard the case in October 2012, but the Court's decision did not come until the end of June 2013.[143] In an opinion by Justice Anthony Kennedy on behalf of all but one of the eight Justices, the Court sent the case back to the U.S. Court of Appeals for the Fifth Circuit for it to take a closer look at whether the use of race is truly necessary for a university to create a diverse student body.[144]

While joining Justice Kennedy's opinion for the Court, Justice Thomas also filed his own concurring opinion, which at twenty pages was seven pages longer than the Court's thirteen-page opinion.[145] Justice Thomas reiterated that, were it up to him, he would overrule the Court's decision in *Grutter* and impose a flat ban on affirmative action in higher education.[146] Justice Thomas repeated the point that he made in *Grutter*: "As should be obvious, there is nothing 'pressing' or 'necessary' about obtaining whatever educational benefits may flow from racial diversity."[147] He also added that although "[t]here can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race," "the injury to those admitted under the University's discriminatory admissions program is even more harmful" because minority students "admitted to the University as a result of racial discrimination are, on average far less prepared than their white and Asian classmates," and the university has not demonstrated that it can close the gap.[148] Again echoing his personal observations in his memoirs, Justice Thomas complained that the use of affirmative action "taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination."[149] For him, that was a particularly significant problem in this case because the university admitted most minority students under a separate admissions program that provided automatic admission to any student in the top ten percent of his class at a Texas high school, "but no one can distinguish those students from the ones whose race played a role in their admission."[150]

142. *See id.* at 2416–17.

143. *Id.* at 2411.

144. *See id.* at 2421–22. Justice Kagan was recused from *Fisher*, presumably because she was involved in the case during her stint as the Solicitor General of the United States. *Id.* at 2422; Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U. L. REV. 1037, 1040 (2013).

145. *Fisher*, 133 S. Ct. at 2422–32 (Thomas, J., concurring).

146. *Id.* at 2421–22 (majority opinion).

147. *Id.* at 2424.

148. *Id*. at 2431.

149. *Id.* at 2432.

150. *Id.*

Like Justice Thomas,[151] Justice Sonia Sotomayor grew up poor but with hard work, ambition, and family support reached the pinnacles of higher education—Princeton and Yale Law School.[152] Also like Justice Thomas, she faced skepticism from whites about whether she had earned her spot at those schools. Justice Sotomayor recounts in her memoir that when Princeton notified her that she was "likely" to be admitted, the school nurse challenged her to explain "how [she] got a 'likely' and the two top-ranking girls in the school only got a 'possible'?"[153] Later, as a law student interviewing for a job as a summer associate, a hiring partner asked her whether she thought affirmative action at law firms was "a disservice to minorities, hiring them without the necessary credentials, knowing you'll have to fire them a few years later?"[154] When she responded that "even someone who got into an institution through affirmative action could prove they were qualified by what they accomplished there," he countered with "that's the problem with affirmative action. You have to wait to see if people are qualified or not. Do you think you would have been admitted to Yale Law School if you were not Puerto Rican?" [155]

Despite the many experiences that they seem to have in common, Justice Sotomayor has taken a very different approach to affirmative action from Justice Thomas in both her public comments and her jurisprudence. In the 1990s, Justice Sotomayor described herself as the "perfect affirmative action baby": although her standardized test scores were lower than those of her Princeton and Yale classmates—low enough that she probably would not have been accepted were she not Puerto Rican—they were not so low "that [she] wasn't able to succeed at those institutions."[156]

In another interview, she compared her views on affirmative action with Justice Thomas's, telling NPR's Nina Totenberg that

151. *See supra* notes 124–30 and accompanying text.

152. *See Biographies of Current Justices of the Supreme Court*, *supra* note 28.

153. SONIA SOTOMAYOR, MY BELOVED WORLD 118–19 (2013).

154. *Id.* at 188.

155. *Id.* at 188–89.

156. Bill Mears, *Sotomayor Says She Was 'Perfect Affirmative Action' Baby*, CNN, http://www.cnn.com/2009/POLITICS/06/11/sotomayor.affirmative.action/ (last updated June 11, 2009, 6:37 PM).

> [a]s much as I know Clarence, admire him and have grown to appreciate him, . . . I have never ever focused on the negative of things. I always look at the positive. And I know one thing: If affirmative action opened the doors for me at Princeton, once I got in, I did the work. I proved myself worthy. So, I don't look at how the door opened.[157]

Justice Sotomayor's memoir describes the experiences of her younger brother, Juan, in similarly positive terms.[158] According to Justice Sotomayor, he "stumbled into a program that put minority kids on a fast track to medical school, essentially free of cost."[159] Although he had not necessarily aspired to become a physician, once admitted to the program he enjoyed it and succeeded.[160] Much like his sister, "[a]ffirmative action may have gotten him into medical school, but it was his own self-discipline, intelligence, and hard work that saw him through, where others like him had failed."[161]

Abigail Fisher's case was Justice Sotomayor's first encounter with affirmative action as a Supreme Court Justice.[162] In a book released in late 2014, author Joan Biskupic pulled the curtain back to reveal that the events leading to the Court's ultimate decision had been far more complicated than the Court's brief opinion suggests and that Justice Sotomayor had been at the center of it all.[163] After the Justices' initial vote on the case, Justice Ginsburg—as the senior Justice in the dissent—assigned the main dissent defending the university's use of race to Justice Sotomayor.[164] When Justice Sotomayor later circulated the draft dissent to the other Justices, reviews were decidedly mixed.[165] Some Justices saw the dissent "as the rare instance when [Justice Sotomayor] was giving voice to her Latina identity in a legal opinion at the Court," but others believed that she had gone too far.[166] They regarded it as "attention-getting" and "were anxious about how Sotomayor's personal defense of

157. Nina Totenberg, *A Justice Deliberates: Sotomayor on Love, Health and Family*, NPR (Jan. 12, 2013, 7:00 AM), http://www.npr.org/2013/01/14/167699633/a-justice-deliberates-sotomayor-on-love-health-and-family.

158. SOTOMAYOR, *supra* note 153, at 191.

159. *Id.*

160. *Id.* at 191–92.

161. *Id.* at 192.

162. *See* Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* Fisher v. University of Texas *Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77, 85 n.39 (2012).

163. *See* JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 205 (2014).

164. *Id.*

165. *Id.* at 205–06.

166. *Id.*

affirmative action and indictment of the majority would ultimately play to the public."[167] In the end, Justice Sotomayor's "fierce defense of affirmative action" never saw the light of day; after weeks if not months of negotiations and multiple drafts, Justice Kennedy circulated a draft that won nearly everyone's approval, including Justice Sotomayor's.[168]

But even if Justice Sotomayor may have pulled her punches in *Fisher*, she declined to do so less than a year later when the Court took on *Schuette v. Coalition to Defend Affirmative Action*,[169] a challenge to an amendment to the Michigan constitution that bans the use of affirmative action by the state's public universities.[170] The case was thus effectively a mirror image to *Fisher*: the question was not whether state universities *can* voluntarily consider race in their admissions process but instead whether voters can *prohibit* them from doing so.[171] In an opinion by Justice Kennedy, six Justices agreed with the state that the voters could.[172] The Court explained that Michigan voters should have the right to determine even tough questions such as whether public universities in Michigan should use affirmative action.[173] A ruling to the contrary, it continued, would be both an "unprecedented restriction" on the voters' ability to exercise their joint right to vote and "demeaning to the democratic process."[174]

Before that day, Justice Sotomayor had never announced a dissenting opinion from the bench.[175] Just a few months before, she told Yale Law School's Linda Greenhouse that the practice of reading a dissent out loud in the courtroom had "become a signal of how fiercely someone believes that the Court is wrong."[176] In a packed courtroom that had gathered to hear oral arguments in a high-profile telecommunications case,[177] Justice Sotomayor announced her dissent and spoke for over ten minutes.[178] The atmosphere in the courtroom was tense, with several Justices appearing

167. *Id.* at 206.

168. *Id.* at 206, 209.

169. 134 S. Ct. 1623 (2014).

170. *Id.* at 1630, 1651.

171. *Id.* at 1630.

172. *Id.* at 1623.

173. *Id.* at 1638.

174. *Id.* at 1637.

175. Christopher Schmidt, *A Look Back—Justice Sotomayor's First Oral Dissent*, ISCOTUSNOW (Oct. 21, 2014), http://blogs.kentlaw.iit.edu/iscotus/justice-sotomayors-first-oral-dissent-2/.

176. Justice Sonia Sotomayor & Linda Greenhouse, *A Conversation with Justice Sotomayor*, 123 YALE L.J.F. 375 (Mar. 24, 2014), http://www.yalelawjournal.org/forum/a-conversation-with-justice-sotomayor.

177. *See* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014).

178. Schmidt, *supra* note 175 (*Aereo* was argued on the same day, April 22, 2014, that Justice Sotomayor read her *Schuette* dissent).

as though they would rather be anywhere but there. Justice Sotomayor argued that the Court's decision "fundamentally misunderstands the nature of the injustice" created by the Michigan amendment.[179] Even if the Michigan amendment had strong support among the state's voters, she continued, it is a bedrock principle of constitutional law that there are limits on what the majority of voters can do—for example, they cannot "change the ground rules of the political process in a manner that makes it more difficult for racial minorities alone to achieve their goals."[180] But that is precisely what the Michigan amendment did, in her view, because the only way to reinstate affirmative action is to amend the state constitution again.

Justice Sotomayor then went on to explain why "race matters" in a description that seems very personal.[181] She wrote that it matters because of the "long history of racial minorities being denied access to the political process"; because of the "persistent racial inequality" that remains today; and because "of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'"[182] Then, in a play on the 2007 statement by Chief Justice Roberts suggesting that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[183] she quipped that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race."[184]

Justice Ginsburg was the only other Justice to join Justice Sotomayor's dissent in *Schuette*.[185] Although Justice Ginsburg never had the experience of being a racial minority, she was one of the few female law professors in the late 1960s and early 1970s.[186] In a 2009 interview, Justice Ginsburg echoed Justice Sotomayor's views in her response to a question about Justice Sotomayor's acknowledgement that she "is a product of affirmative action."[187] "So am I," Justice Ginsburg answered.[188] She explained that in 1972 she became the first female tenured professor at Columbia Law School but only because the Nixon Administration was actively pressing schools to move forward with their affirmative action plans.[189] "I was the woman," Justice Ginsburg insisted.

179. *Schuette*, 134 S. Ct. at 1654.
180. *Id.* at 1670.
181. *Id.* at 1676.
182. *Id.*
183. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
184. *Schuette*, 134 S. Ct. at 1676.
185. *Id.* at 1651.
186. Bazelon, *Women on the Court*, *supra* note 108.
187. *Id.*
188. *Id.*
189. *Id.*

"I never would have gotten that invitation from Columbia without the push from the Nixon administration."[190] Like Justice Sotomayor, Justice Ginsburg acknowledged that "there is a thought that people will point to the affirmative-action baby and say she couldn't have made it if she were judged solely on the merits."[191] But also like Justice Sotomayor, Justice Ginsburg maintained that once through the door, she "was well regarded by [her] colleagues even though they certainly disagreed with many of the positions that [she] was taking."[192]

Religion can be another area where it is dangerous to rely on stereotypes to predict how a Justice might vote. Justice William Brennan was a devout Catholic who faced questions at his confirmation hearing about whether he would follow church doctrine as a Justice, and he told his biographer that "as a private person and not required to make a decision, [he] would never have agreed that abortion is proper."[193] But as a Justice, he was in the majority in *Roe v. Wade*.[194]

Much more recently, the Court issued its decision in *Burwell v. Hobby Lobby*,[195] holding that a closely held corporation owned by a deeply religious family cannot be required to provide its female employees with health insurance that includes access to birth control that they regard as tantamount to abortion.[196] Much was made of the fact that all five Justices in the majority are Catholic, while the Court's three Jewish Justices were in the dissent.[197] Mostly overlooked though was the fact that Justice Sotomayor—the Court's sixth Catholic Justice, although it is not clear how observant she is[198]—parted ways with her fellow Catholics.[199]

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190. *Id.*

191. *Id.*

192. *Id.*

193. Nina Totenberg, *Justice Brennan Gets Another Look*, NPR (Nov. 26, 2010, 3:28 PM), http://www.npr.org/2010/11/26/131567727/justice-brennan-a-liberal-icon-gets-another-look.

194. 410 U.S. 113, 116 (1973).

195. 134 S. Ct. 2751 (2014).

196. *Id.* at 2759.

197. *See, e.g.*, Ronald A. Lindsay, *The Uncomfortable Question: Should We Have Six Catholic Justices on the Supreme Court?*, HUFFINGTON POST (June 30, 2014, 6:03 PM), http://www.huffingtonpost.com/ronald-a-lindsay/supreme-court-catholic-justices_b_5545055.html.

198. *See* Laurie Goodstein, *Sotomayor Would Be Sixth Catholic Justice, but the Pigeonholing Ends There*, N.Y. TIMES (May 30, 2009), http://www.nytimes.com/2009/05/31/us/politics/31catholics.html (quoting a White House spokesperson after Justice Sotomayor's confirmation who indicated that Justice Sotomayor "currently does not belong to a particular parish or church, but she attends church with family and friends for important occasions").

199. *Burwell*, 134 S. Ct. at 2758.

IV. THE DIVERSITY OF LIFE EXPERIENCES TODAY

So this is where we are. As some of the cited examples reflect, you cannot look at one part of a Justice's life experience—whether it is being a woman, being a minority, or following a religion—and assume that it will dictate how the Justice will vote. But at the same time, it is very hard to say that a Justice's life experiences *do not* influence her decisions.[200] The key is to look at a Justice's entire life experience collectively because that is what the Justice will rely on to make decisions and that is what will inform how she sees the tough questions that the Court decides.[201] As Justice Ginsburg herself once explained when asked whether it made a difference to have a woman on the Court: "Yes, women bring a different life experience to the table. . . . That I'm a woman, that's part of it, that I'm Jewish, that's part of it, that I grew up in Brooklyn, N.Y., and I went to summer camp in the Adirondacks, all these things are part of me."[202]

Even if we agree that the Justices' life experiences do influence their decisions—and to borrow a line from *Seinfeld*, "not that there's anything wrong with that"[203]—why does this matter, especially if it is hard to know exactly how or when life experiences will come into play? And, as Justice Sotomayor said in her now-infamous "wise Latina" speech, it cannot be the case that "others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group"—after all, nine white men decided *Brown v. Board of Education*.[204] That is true, but as Justice John Marshall Harlan once said, variety is a good thing when it comes to the Supreme Court because "every judge from a different background brought something distinctive when they talked about a case."[205]

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200. *Cf.* NYU Sch. of Law, *The Forum: Judging and Personality: What Does a Judge's Biography Tell Us?*, YOUTUBE (Apr. 20, 2010), https://www.youtube.com/watch?v=Vcj47pDbJJ4 (stating that a Justice's biography is never determinative of how the Justice will decide a case, but it is certainly influential).

201. *Cf.* Johnson, *supra* note 107, at 355 ("Any experience, whether triggered by gender, race, social background, or an intersection of many causes, is combined with other views held by each individual Justice, including political ideology and mode of constitutional interpretation. . . . [A]s with gender, it is erroneous to focus on a compartmentalized label of 'race' or 'religion' while dismissing the impact of experience. Instead, these characteristics *collectively* work, along with agents of socialization, education, occupation, etc., to shape one's life experiences and inform decision making.").

202. *Id.* at 366.

203. Jonathan Miller, *'Not That There's Anything Wrong With That': The 20th Anniversary of When the Show 'About Nothing' Really Mattered*, HUFFINGTON POST: TV BLOG (Apr. 1, 2013, 12:46 PM), http://www.huffingtonpost.com/jonathanmiller/seinfeld-the-outing_b_2989098.html.

204. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

205. NYU Sch. of Law, *supra* note 200.

In many ways, the current Court is as diverse as it has ever been. But in other ways, diversity is sorely lacking. In its early days, for example, geographic diversity was highly valued as a way to establish and preserve the Court's legitimacy; there were even seats on the Court regarded as "southern" and "New Englanders" seats.[206] But that era is over, and now what passes for diversity is having Justices from different boroughs of New York City—only Staten Island is not yet represented.[207] And although I agree that arguably improvements in transportation and communications have made the United States "smaller" than it was back when the Justices were also riding the circuits when not in Washington, having more Justices from the west matters to people who care about water rights, for example.[208]

When you look at how these Ivy League-educated Justices spent their time before joining the Court, what stands out is how much time so many of them spent as law professors, in the federal government, and as federal judges. Justice Sotomayor has recently suggested that the Court could benefit from having "more lawyers who have practiced criminal defense or civil-rights work and more lawyers who have worked for small law firms,"[209] while others have suggested—particularly those who oppose the Court's decision in *Citizens United v. Federal Election Commission*[210]—that the Court could benefit from having a Justice who has served as a legislator.[211]

Here is where I get a bit cynical. Because no matter how important you think it is to have diversity of all kinds on the Court, the process of confirming Supreme Court nominees has become so polarized that true diversity of life experiences will be hard to come by anytime soon. Justice Ginsburg—confirmed by a vote of ninety-six to three—has often said that she could not be confirmed at all in today's political climate because of her work for groups such as the American Civil Liberties Union,[212] and

206. *See* David M. O'Brien, *Packing the Supreme Court*, 62 VA. Q. REV. 189 (1986), http://www.vqronline.org/essay/packing-supreme-court.

207. *See* James Barron, *A New York Bloc on the Supreme Court*, N.Y. TIMES (May 11, 2010), http://www.nytimes.com/2010/05/12/nyregion/12newyorkers.html.

208. Tim Padgett, *Is the Supreme Court Too Packed with Ivy Leaguers?*, TIME (May 12, 2010), http://content.time.com/time/nation/article/0,8599,1988877,00.html.

209. David Lat, *An Afternoon with Three Supreme Court Justices*, ABOVE THE LAW (Oct. 27, 2014, 5:03 PM), http://abovethelaw.com/2014/10/an-afternoon-with-three-supreme-court-justices/.

210. 558 U.S. 310 (2010).

211. *E.g.*, Timothy P. O'Neill, *"The Stepford Justices": The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701, 702, 733–34 (2007).

212. *E.g.*, Debra Cassens Weiss, *Justice Ginsburg Says ACLU Connections Would Likely Prevent Her Confirmation Today*, A.B.A. J. (Aug. 30, 2011), http://www.abajournal.com/news/article/justice_ginsburg_says_aclu_connections_would_likely_prevent_her_confirmatio/.

Chief Justice Roberts said that neither Justice Ginsburg nor Justice Scalia "would have a chance today."[213] "[T]hat doesn't make any sense," he commented, and it's "bad for the judiciary."[214]

CONCLUSION: A LOOK AHEAD

I would like to close with a look ahead at the upcoming arguments on the constitutionality of state bans on same-sex marriage and whether the Justices' life experiences may inform their decisions there. When the Supreme Court decided *Bowers v. Hardwick*[215] in 1986, the fifth vote for Justice Byron White's opinion came from Justice Lewis Powell, who famously said at the time that he did not know anyone who was gay.[216] (It turned out, however, that one of his clerks was gay.)[217] The current Court's more liberal Justices are far more likely to have relationships with more diverse families—in the past few years, for example, Justices Kagan and Ginsburg have both officiated at same-sex marriage ceremonies.[218] And in light of Justice Kennedy's discussion on the impact of same-sex marriage (or the unavailability thereof) on the children of same-sex couples during the 2013 arguments about the constitutionality of California's Proposition 8,[219] it will be interesting to watch the oral arguments this time around, as well as the opinion that follows, to see whether these personal experiences play a role.

213. Brent Martin, *Chief Justice Roberts: Scalia, Ginsburg Wouldn't Be Confirmed Today (AUDIO)*, NEB. RADIO NETWORK (Sept. 19, 2014), http://nebraskaradionetwork.com/2014/09/19/chief-justice-roberts-scalia-ginsburg-wouldnt-be-confirmed-today-audio/.

214. *Id.*

215. 478 U.S. 186 (1986).

216. *Id.* at 187; Emily Bazelon, *Why Advancing Gay Rights Is All About Good Timing*, SLATE (Oct. 19, 2012, 5:56 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/10/the_supreme_court_s_terrible_decision_in_bowers_v_hardwick_was_a_product.html [hereinafter Bazelon, *Advancing Gay Rights*].

217. Bazelon, *Advancing Gay Rights*, *supra* note 216.

218. Jessica Gresko, *Gay, Straight Couples Says 'I Do' to Justice Kennedy's Words*, ASSOCIATED PRESS (Aug. 25, 2015, 12:45 PM), http://bigstory.ap.org/article/e91cba9d4a2f47aba36085bf0c64cb12/these-words-justice-anthony-kennedy-i-thee-wed.

219. *See* Transcript of Oral Argument at 21, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).