

JUDICIAL REVIEW AND NONGENERALIZABLE CASES

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I. INTRODUCTION

Recognizing that the “life of the law” is experience, not logic, legal academics are increasingly turning their attention to judicial bias and other limits on judicial factfinding.¹ For Judge Richard Posner, “The first thing the courts have to learn is how little they know.”² And for Cass Sunstein, “Far more progress might be made through an empirically informed constitutional law” than through a jurisprudence that is “indifferent” to factual questions.³

When it comes to the Supreme Court, difficulties in sorting out the underlying facts of a dispute come at a high price. The Supreme Court speaks very rarely about the meaning of the Constitution. So when it does speak, the Justices must be careful to avoid grounding a far-ranging decision on incorrect factual suppositions. For example, had the Court’s views on abortion rights turned on the reasons why women seek abortions, the Justices could not simply look to the plaintiff in *Roe v. Wade*⁴ (who, at different times, offered radically different explanations for why she wanted an abortion⁵). Likewise, when reviewing the independent counsel statute in 1988, the Court ought not to have assumed that Alexis Morrison’s investigation of

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1. For an inventory of some of this scholarship, see Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779-80 (2001).

2. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 18 (1998).

3. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 255 (1999).

4. 410 U.S. 113 (1973).

5. At the time of the decision, the plaintiff in *Roe*, Norma Nelson McCorvey, claimed that she was a rape victim. DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 403 (1994). In 1987, she revealed that this claim was a fabrication—a lie intended to make her appear more sympathetic. Lisa Belkin, *Woman Behind the Symbols in Abortion Debate*, N.Y. TIMES, May 9, 1989, at A18.

Ted Olson was a prototypical application of the statute.⁶ For this very reason, several Justices steer clear of laying down hard-and-fast rules, preferring, instead, to speak narrowly and ambiguously about the issue before them.⁷

By offering little concrete guidance about the meaning of the constitutional provision involved, this type of decisionmaking comes at a cost. Lacking the purse and the sword, the Court must find ways to make itself relevant in the constitutional dialogue that takes place between the elected officials and the Court. A Court that speaks rarely, and then incoherently, may well render itself inconsequential in any dialogue. Elected officials need not reckon with such a Court; instead, the political branches can simply spin Court edicts to suit their preferred policy or constitutional choices.⁸

The question remains: Is it possible for the Court to issue broad pronouncements about the Constitution's meaning while, at the same time, grounding its decisions in the relevant facts? In addressing this issue, we will pay particular attention to the Court's willingness to adjudicate disputes that involve plaintiffs with nongeneralizable claims, that is, idiosyncratic facts that do not shed sufficient light on the competing constitutional values involved. Consider, for example, affirmative action. If the claims of a poor, single mother challenging an affirmative action plan are fundamentally different than those of an upper-middle-class white male, the Court—before issuing a too broad or too narrow ruling—must find a way to educate itself about how affirmative action works. As we explain, recent advances in behavioral economics suggest that human decisionmaking is influenced by various cognitive heuristics that bias the decisions in question. For instance, there is the “availability heuristic,” which is the tendency to judge the probability of an occurrence according to whether

6. Following Lawrence Walsh's Iran-Contra investigation and Kenneth Starr's Whitewater probe, there is little doubt that the Court, in *Morrison v. Olson*, 487 U.S. 654 (1988), committed error by wrongly assuming that Department of Justice policies would confine independent counsel investigations. See *The Future of the Independent Counsel Act: Hearings Before the S. Comm. on Governmental Affairs*, 106th Cong. 243, 251 (1999) (statement of Janet Reno, Attorney General) (arguing that the independent counsel statute subverts Justice Department enforcement of the criminal laws).

7. See SUNSTEIN, *supra* note 3, at xiii (arguing that, with the exception of Justices Scalia, Thomas, and sometimes Chief Justice Rehnquist, today's Court—aware of the costs of “lay[ing] down clear, bright-line rules”—prefers to leave “fundamental questions undecided”).

8. On affirmative action, for example, the political branches manipulated the Supreme Court's indeterminate 1995 decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Supporters and opponents of affirmative action pointed to conflicting language in the opinion to justify their policy preferences. See Neal Devins, *Adarand Constructors, Inc. v. Peña and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 712-18 (1996) (detailing political branch spinning of *Adarand*); Alan J. Meese, *Bakke Betrayed*, 63 LAW & CONTEMP. PROBS. 479, 489-93 (2000) (detailing Clinton administration manipulation of *Bakke*).

an individual has experienced a similar occurrence personally. Moreover, there is the phenomenon of “anchoring”—essentially, the tendency to overvalue first impressions. By generating doctrine in cases that do not present generalizable facts, then, the Court will likely issue decisions that do not reflect a true appreciation of the contending interests at stake.

What, then, is the Court to do? As noted, narrow, incoherent rulings limit the Court’s voice in shaping constitutional values. However, if the Justices exercise great caution before deciding nongeneralizable cases, the Court may fully engage itself in these disputes at a time when the “facts” are better known to it and to the nation. Under this proposal, of course, politicians and lower court judges will (at least initially) have free reign to decide these issues. But when the Supreme Court enters the fray, it will do so at a time when it is better positioned both to speak clearly and to make an informed decision.

This Article proceeds as follows. Part II details limits in judicial factfinding. Attention will be paid both to biases that stand in the way of judges sorting out the facts of a case as well as ways in which the attributes of adjudication inevitably result in judges having a somewhat distorted view of the relevant facts. Part III makes more concrete the claims of Part II. By making use of case studies on affirmative action and church-state separation, Part III calls attention both to the costs of deciding an issue on the basis of a nongeneralizable set of facts and the prevalence of such nongeneralizable cases. Part IV explains why we think the Court ought to embrace delaying strategies in cases involving nongeneralizable facts.

II. ASSESSING JUDICIAL FACTFINDING

Unlike legislatures, which exercise a sort of general jurisdiction, courts are limited to adjudicating particular “cases and controversies.”⁹ In this way, federal court judges are bounded by the factual circumstances of the case immediately before them, especially the plaintiff’s claim of injury.¹⁰ Still, in resolving such disputes, courts

9. U.S. CONST. art. III.

10. In recent years, some scholars have criticized the Supreme Court for unduly limiting its jurisdiction to resolve constitutional questions. See, e.g., David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992); Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994). On the other hand, some scholars see “standing to sue” and other justiciability limits as a necessary means for the Court to protect itself from ideological litigants who seek to shape the path of Supreme Court decisionmaking. See, e.g., MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING* 157-211 (2000).

announce rules that apply beyond the actual litigants and cases before them. A court cannot very well announce “the plaintiff wins” without providing some rationale, and by their nature, rationales apply beyond the case at hand, at least in lower courts.¹¹ In this way, courts act very much like a legislature, announcing rules that apply prospectively in a particular set of cases.

Still, these rules can be strangely fact-dependent.¹² For, as every lawyer knows, “the facts” matter; they matter in the sense that they can be outcome—and thus rule—determinative. Two cases, indistinguishable as a strictly legal matter, can present very different sets of facts—facts that shed different lights on the competing interests involved. The right to terminate a pregnancy looks far different if asserted by a rape victim than if asserted by a woman unhappy with the gender of her soon-to-be-born child.¹³ Similarly, the right to conduct intrastate commerce unmolested by federal regulation looks far different when asserted by the operator of a small chicken slaughterhouse than when asserted by a national steel company.¹⁴

Why, though, do facts matter to the Court’s choice among possible binding principles? The most logical answer as to why facts matter is “sympathy,” that is, a judge’s personal feeling for one of the litigants involved. Correspondingly, even if a judge does not actually feel for a certain litigant, the public might. Knowing this, judges might tailor their decisions to please the public.

Certainly, these factors influence judges, just as they influence everyone else. Yet, we think there is an additional reason why facts

11. See K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 72-73 (1960) (“This rule holds only of redheaded Walpoles in pale magenta Buick cars. And when you find this said of a past case you know that in effect it has been overruled.”). *But see* Edwin Meese III, *The Law of the Constitution*, 61 *TUL. L. REV.* 979, 983 (1987) (contending that a decision binds only the parties in the immediate case and “does not establish a supreme law of the land”).

12. Of course, the application of these rules invariably concerns some type of factfinding. For example, in sorting out whether governmental action that targets gays is subject to strict or rational-basis equal protection review, a court’s view of whether sexual orientation is an immutable characteristic is a legislative fact relevant to the application of a pre-existing standard of review. See Posner, *supra* note 2, at 19-22 (suggesting that this inquiry is relevant to judicial decisionmaking); David L. Faigman, “*Normative Constitutional Fact-Finding*”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 *U. PA. L. REV.* 541, 553 (1991) (describing this type of inquiry as “constitutional-review facts”). Likewise, when applying strict review, the Court must find facts (particular to that case) about whether the governmental program is the least restrictive means available to serve the government’s stated interest.

13. See *supra* note 5 and accompanying text.

14. Compare *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 498-51 (1935) (finding that the activities of a slaughterhouse had an indirect effect on interstate commerce), with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-43 (1937) (finding that the activities of a national steel company had a direct effect on interstate commerce). See also BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 156-64 (1998).

matter, a reason that applies to the most hard-hearted and insulated jurist. By its nature, constitutional adjudication involves the identification and evaluation (we resist the temptation to say “weighing”) of competing constitutional and policy interests. Unlike legislators, who can investigate and evaluate such interests personally—by holding hearings, taking polls, studying their mail, and visiting constituents—judges are confined to “the record” that is generated as the case grinds its way forward. The content of this record, in turn, is largely determined by the parties before the Court. Correspondingly, judges must operate around “real time” constraints; rather than risk a backlog of cases, judges must do what they can with the information that they have.¹⁵ Thus, because the Court very rarely considers cases in which the rule of law is “well-settled,” the Justices’ first impression about the nature and strength of contending interests is determined by the identity, interests, and skill of the parties before the Court. Good decisions require significant information, and the Court gets most of its information from the parties and the case that happen to bring the issue to the Justices first.¹⁶

Litigants are well aware of this phenomenon and invest significant resources in identifying sympathetic plaintiffs. In particular, interest groups often see the courts as an “alternate legislature,”¹⁷ that is, a place to advance their agenda when they are unable to prevail in the political process.¹⁸ More to the point, when interest groups launch a legal challenge, they “are likely to bring not the most representa-

15. For a more detailed analysis of differences between judicial and legislative factfinding, see Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1177-87 (2001).

16. Amicus curiae briefs supplement party filings in most cases before the Court. For a comprehensive overview of recent trends in amicus filings, see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000).

17. Antonin Scalia, *Economic Affairs as Human Affairs*, in ECONOMIC LIBERTIES AND THE JUDICIARY 31, 34 (James A. Dorn & Henry G. Manne eds., 1987). For Scalia, some interest groups see the Supreme Court as a place which “may enact into law only unquestionably good ideas, which, since they are so unquestionably good, must be part of the Constitution.” *Id.*; see also Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 371-72 (1981) (arguing that the courts should not be an alternative legislature because “judicial lawmaking” is inconsistent with the policy and process of our electoral system) (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 19 (2d ed. 1962)).

18. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 80-81 (1991) (arguing that judges and legislatures will both be subject to interest group pressures); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 494-95 (1999) (explaining that some interest groups maximize their interests by appealing to judges rather than the legislature).

tive case but the most extreme case of discrimination, of fraud, of violation of statute, of abuse of discretion, and so on.”¹⁹

Beyond interest group efforts to control the facts of litigation, judicial decisions, in general, are “a chance occurrence, with no guarantee that the litigants are representative of the universe of problems their case purports to present.”²⁰ In particular, because courts almost always play a reactive role, they lack meaningful control of either the facts or legal issues before them.²¹ For example, when Jerry Falwell claimed that he was libeled by a parody in Larry Flynt’s *Hustler* magazine,²² or when Elian Gonzalez contended that immigration laws did not forbid a six-year-old from seeking political asylum,²³ courts had no choice but to issue groundbreaking rulings in cases whose notoriety had very little to do with legal issues. Far more often, of course, courts make landmark rulings in cases where the parties are not well known but the facts are anything but typical—say a soccer mom arrested and handcuffed (with kids in tow) for failing to wear her seatbelt.²⁴

And even if judges can somehow look beyond these “hard facts,” judicial decisionmaking is nevertheless bound by a case’s factual set-

19. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 41 (1977). Put another way, “Lawsuits do not alight like seed pods in courthouses to live out their natural lives. They are strategically initiated and strategically managed, always with an eye to predicting what the relevant court will do.” Kathleen M. Sullivan, *Supreme Court Avoidance*, WASH. POST, Dec. 7, 1997, at C1.

20. HOROWITZ, *supra* note 19, at 41.

21. There are exceptions, of course. Some judges, for example, have asked lawyers to file suits raising a judge-identified set of legal issues. See MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998) (discussing the role of lower federal courts in shaping public policy on prison reform). Moreover, through rulings on motions to intervene as well as the certification of class action lawsuits, judges play some role in defining the facts and issues presented to them. In affirmative action litigation, for example, judges—by ruling on motions to intervene—determine whether the minority beneficiaries of affirmative action plans should be allowed to introduce evidence that neither party would otherwise introduce, including evidence that the government has overtly or covertly discriminated on the basis of race. Finally, courts with the power of discretionary review—most notably the United States Supreme Court—can make use of delaying strategies to control whether and when they will decide a legal question. See *infra* Part IV (arguing that the Supreme Court should overcome limitations in its factfinding capacities through agenda control).

22. See generally RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (1988).

23. See Mary Leonard & Adam Pertman, *Boy’s Scrawl May Initiate New Chapter in U.S. Law*, BOSTON GLOBE, Apr. 21, 2000, at A1.

24. In *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), the Supreme Court empowered police officers to arrest individuals for minor traffic infractions. With that said, the case’s unusual facts seemed to influence Justice Sandra Day O’Connor—who ruled against the police and told Atwater’s attorney at oral argument that “[y]ou’ve got the perfect case.” Tony Mauro & Jonathan Ringel, *Notebook: History Comes to the High Court*, LEGAL TIMES, Dec. 11, 2000, at 18 (quoting Justice O’Connor). And while *Atwater* involved an atypical plaintiff with sympathetic facts, it is often the case that plaintiffs are atypical but unsympathetic. See HOROWITZ, *supra* note 19, at 42-44 (listing some examples).

ting. Specifically, even when challenging the same statute, different plaintiffs have different stories to tell and, as such, advance alternative theories as to why the government's action is improper. Consider, for example, Georgia's anti-sodomy statute. A married couple challenging this statute can argue both that the sanctity of marriage and a broader right to define their sexual relations supports invalidation of the statute. Michael Hardwick, a gay man arrested in his home, cannot talk about the sanctity of marriage but can invoke a right of individuals to define their sexual identity in the privacy of their homes. However, if Michael Hardwick had been arrested in a public park, he could only assert a broad right for individuals to define their sexual relations.

For Justices who believe in a broad right to define one's sexual relations, differences between these three scenarios are irrelevant; that is, the specific factual context will not impact that Justice's thinking.²⁵ Likewise, for Justices who believe that the state has unlimited power to criminalize sodomy (even between married couples in their homes), these factual differences are immaterial. But some Justices will draw lines between these three cases—so that the sequencing of which case comes first may well create a path that binds that Justice when considering another factual scenario. That, of course, is why the ACLU waited five years for the *Bowers v. Hardwick* case.²⁶ It created an opportunity to convince these swing Justices to embrace a broader theory of privacy than they would have if the sex-in-the-park case had come first.²⁷

Of course, as it did in *Bowers*, the Court can limit its decision to the facts at hand.²⁸ Yet, it is often the case that one judicial ruling establishes a path that other cases build upon.²⁹ Interest groups understand this and, as such, invest significant resources both in looking for cases with sympathetic plaintiffs and also in sorting through the

25. See *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (concluding that the due process clause creates a "freedom not to conform").

26. 478 U.S. 186 (1986). It is also why Justice William Brennan initially voted to grant certiorari in *Bowers*, for Brennan "had long wanted the Court to confront the [sodomy] issue and understandably saw *Bowers* as an all-but-perfect case." GARROW, *supra* note 5, at 656. Ironically, Brennan later changed his vote after Justice Harry Blackmun suggested to him that the doctrinal underpinning of *Roe v. Wade* might be challenged in *Bowers*. See *id.* at 656-57.

27. In contrast, had the sex-in-the-park case come first, these Justices may have endorsed a narrow vision of privacy—one that would have spelled doom not just for Michael Hardwick but also for the married couple.

28. In *Bowers*, 478 U.S. at 190, the Court limited its ruling to same-sex sodomy.

29. We are assuming here that stare decisis constrains judicial decisionmaking. For further discussion of the role that stare decisis plays in constitutional decisionmaking, see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

sequence in which legal issues should be presented to the Court.³⁰ Consider, for example, the NAACP's carefully orchestrated attack against school segregation.³¹ Before seeking judicial review of public school segregation, the NAACP launched several lawsuits seeking to force the admission of African Americans into state law schools.³² Specifically, since "most Southern states did not even attempt to maintain a façade of equality in professional educational facilities,"³³ the NAACP was able to cast doubt on the "separate but equal" defense to racial segregation.³⁴

The lesson here is simple: Constitutional rights, in critical respects, are defined by the "fortuitous order of decision"—something that "no sensible theory of constitutional adjudication, interpretive or noninterpretive," supports.³⁵ This state of affairs is especially problematic today. Interest groups are more sophisticated in gaming the system than ever before. Furthermore, the modern Court is especially likely to confront difficult legal questions, that is, issues in which small changes in the facts (or legal arguments) may well affect outcomes. In particular, the thinning of the Court's mandatory docket (so that most cases are heard by way of petitions for certio-

30. By sequencing legal issues this way, interest groups seek to establish a path that courts cannot avoid in subsequent decisionmaking. For general treatments of the costs and benefits of such path-dependent decisionmaking, see STEARNS, *supra* note 10, at 191-97; and Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817-21 (1982).

31. For detailed treatments, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975); and MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987). For a more general treatment of interest group sequencing, see STEPHEN L. WASBY, *RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY* 193-218 (1995).

32. See Alfred H. Kelly, *The School Desegregation Case*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 243, 253 (John A. Garraty ed., 1964) (explaining the beginning of the NAACP's attack on segregated schools).

33. *Id.*

34. *Id.*

35. Easterbrook, *supra* note 30, at 819-20. Easterbrook illustrated this point by exploring hypothetically the implications on the Court's jurisprudence if the Court had decided *Bowers* in 1973 and did not address the abortion question until 1986:

[i]t is a thought experiment worth pursuing, as no one wants a form of constitutional adjudication in which judges always must *increase* their degree of "creativity" and depart still farther from the text—an approach that would be compelled if every case built on the last one and urged "a little more" departure, followed by extrapolation. We must therefore imagine a sequence in which the first case simply asks the Court to confirm the conventional wisdom (in 1973 and before, that sodomy is not a fundamental right) and the second case seeks a departure (in this example, the arrival of the abortion question for the first time in 1986).

Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 366 n.63 (1992). Easterbrook explained that the then-existing precedent implied that there was an absence of a fundamental right of intimate association; therefore, "[t]he abortion case would be simple after the sodomy case: if the Constitution does not protect sexual activities that have few effects on unconsenting parties, it does not protect decisions that affect the welfare of other family members and the potential child." *Id.* at 367.

rari) has allowed the Court more and more opportunities to tackle an ever-growing number of intercircuit conflicts on tough legal questions.³⁶

Closely tied to the problem of interest group efforts to manipulate the Court's docket is the question of what courts do with the information they receive. In particular, because the Court very rarely hears matters about which the rule of law is "well settled,"³⁷ the Justices' first impression about the nature and strength of contending interests is critically important to Court decisionmaking. Furthermore, with an eightfold increase in amicus filings in recent decades, the Justices must develop techniques to sift through and assess the facts pertinent to them.³⁸ For this very reason, an understanding of how judges sort through the information presented by parties and amici is key to understanding a case's outcome and, more generally, the development of law.³⁹ If judicial decisions are "based on the judge's hunches," as Jerome Frank observed, "the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge's hunches makes the law."⁴⁰

Social science suggests that individuals, including judges, will overvalue initial impressions, even those based on imperfect information.⁴¹ More precisely, psychologists have identified various cognitive biases that may cause individuals to misperceive the extent to which an initial impression can form a basis for predictions about the future.⁴² Such biases result from the application of various heuristics employed to make probabilistic judgments.⁴³ For instance, studies show that individuals are prone to assume that very small samples

36. See Easterbrook, *supra* note 30, at 805-06; Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 677 (1990) (noting that the growth in the number of judges sitting on the same court of appeals as well as the number of regional circuits in the 1980s (from eleven to thirteen) has "creat[ed] an intolerable pressure on the Supreme Court by generating more intercircuit conflicts").

37. See Easterbrook, *supra* note 30, at 805-07 (explaining why the Supreme Court almost always hears hard cases, that is, cases in which both sides can present plausible arguments to the Court).

38. See Kearney & Merrill, *supra* note 16, at 751-56 (detailing exponential rise in amicus filings).

39. See generally BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Guthrie et al., *supra* note 1; Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

40. JEROME FRANK, LAW AND THE MODERN MIND 104 (1930).

41. A study of 167 federal magistrates, for example, "suggests that even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment." Guthrie et al., *supra* note 1, at 778, 779. For an overview of pre-1998 law review scholarship on this topic, see Langevoort, *supra* note 39.

42. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3-20 (Daniel Kahneman et al. eds., 1982) (identifying three heuristics and the biases that result from each).

43. See *id.* at 3.

are representative of the characteristics of the larger population.⁴⁴ So, for example, individuals assume that the average height of ten randomly selected individuals will reflect the average height of the population at large.⁴⁵ Further, studies have identified a second and related heuristic—the “availability” heuristic. More precisely, studies show that humans tend to assign probabilities of an occurrence based in part on whether they have personal experience with such an event.⁴⁶ So, for instance, individuals who have recently witnessed an automobile accident will assign a higher probability to such an occurrence than individuals without such an experience.⁴⁷ Availability and representativeness, in other words, operate as default rules which make particularized cost-benefit assessments less necessary and, in this way, serve as shortcuts that reduce the amount of information that a decisionmaker must gather.⁴⁸ Finally, other studies show that individuals will “anchor” their views of an issue or situation on their initial assessment, even if that assessment is based upon less-than-perfect information.⁴⁹ Such anchoring effectively economizes on the amount of information that humans must process, protecting us from “information overload” and improving the quality of decisions.⁵⁰

44. See *id.* at 5-7; Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 105, 105 (1971).

45. See Tversky & Kahneman, *supra* note 42, at 6.

46. See *id.* at 11. Correspondingly, “memory stories” play a large role in an individual’s understanding of facts. Rather than look to the “raw” evidence in reaching a final judgment, “decision makers construct [and rely upon] an intermediate summary representation.” Reid Hastie & Nancy Pennington, *Implications of the Story Model for the Trial Judge’s Behavior*, in FILTERING AND ANALYZING EVIDENCE IN AN AGE OF DIVERSITY 165, 167 (Marilyn T. MacCrimmon & Monique Ouellette eds., 1993). Consider, for example, the O.J. Simpson murder trial. “African Americans know of many more stories (some apocryphal) of police racism and police brutality directed against members of their race than do White Americans.” Reid Hastie & Nancy Pennington, *Explanation-Based Decision Making*, in JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 212, 216 (Terry Conolly et al. eds., 2d ed. 2000). Consequently, African Americans were far more likely than whites to think that the police planted incriminating evidence. *Id.*

47. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 230 (1973); Tversky & Kahneman, *supra* note 42, at 11.

48. See Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1189 (1997) (referring to such heuristics as “second-order decisions” which reduce decision costs).

49. Tversky & Kahneman, *supra* note 42, at 16-18. Relatedly, experts who are personally involved in a topic are more likely to find statistical evidence persuasive than are individuals with little or no preexisting knowledge. For nonexperts, vivid narratives (by creating a memorable and compelling anchor) are especially persuasive. See Elissa Lee & Laura Leets, *Persuasive Storytelling by Hate Groups Online*, 45 AM. BEHAV. SCIENTIST 927, 930-31 (2002); see also Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003).

50. See *infra* note 65 and accompanying text; see also Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-78 (1998) (“While the heuristics are useful on average (which explains how they become adopted), they lead to errors in particular circumstances. This means that someone using such a rule of thumb may be behaving rationally in the sense of economizing on thinking time, but such a per-

Moreover, once anchored, views or opinions are difficult to change, even if substantial information is adduced that tends to undermine the initial impression.⁵¹

The existence of these various heuristics is, of course, a purely psychological phenomenon, external, one might say, to jurisprudence. Still, by itself, the phenomenon would demand attention by lawyers, judges, and legislators seeking to minimize the distortions it might bring to the legal system. Because a judge's understanding of the pertinent facts figures prominently in the standards of review that courts employ,⁵² the shortcuts that judges use to sort through the volumes of information presented to them is critically important to the development of law. Judges, in other words, see the information present in the particular case before them as part of a puzzle that they must sort out in order to resolve that case.⁵³ As such, the science of judging requires judges to employ such information, precedent, and other sources of constitutional meaning to generate and apply a new rule that will itself serve as a paradigm (precedent) for solving ostensibly similar problems in the future.⁵⁴

The problem, of course, is that the heuristics that judges employ can produce systematic errors in judgment.⁵⁵ Operating as shortcuts

son will nonetheless make forecasts that are different from those that emerge from the standard rational-choice model.”).

51. RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 41 (1980) (“[O]nce subjects have made a first pass at a problem, the initial judgment may prove remarkably resistant to further information, alternative modes of reasoning, and even logical or evidentiary challenges.”); Paul Slovic & Sarah Lichtenstein, *Comparison of Bayesian and Regression Approaches to the Study of Information Processing in Judgment*, 6 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 649 (1971).

52. See *supra* note 12; see also William S. Laufer & Steven D. Walt, *The Law and Psychology of Precedent*, in HANDBOOK OF PSYCHOLOGY AND LAW 39, 48-50 (D.K. Kagehiro & W.S. Laufer eds., 1992) (asserting that judges might “anchor” on their first impression as “an exemplar of the population from which it is drawn”).

53. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 35-42 (2d ed. 1970) (describing “[n]ormal science as [p]uzzle-solving”).

54. See *id.* at 23, 38-41 (analogizing scientific paradigms to “judicial decision[s] in the common law” and describing the role of rules in constructing paradigms); Laufer & Walt, *supra* note 52, at 48-50. In this way, of course, judges are different from legislators, who can “solve” the problem without generating any rule whatsoever, that is, by splitting the baby. Indeed, courts pay a high price for acting in this manner, as the Court learned in *Roe* when it announced the trimester framework. See generally BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS (1993) (detailing political fallout following the Court's decision in *Roe*).

55. See Guthrie et al., *supra* note 1, at 780-81 (demonstrating how heuristics result in such systematic errors); see also Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1085 (2000) (“[S]ystematic errors arise from the use of decision-making heuristics that simplify decision-making tasks . . .”). For a contrary argument suggesting that legal scholars employing behavioral economics often misunderstand the social science evidence that lies at the foundation of behavioral economics, see Gregory Mitchell, *Taking*

that reduce decision costs, heuristic devices magnify errors in the baseline data set. Consider, for example, the related phenomenons of availability and anchoring. Since first impressions do not always provide useful exemplars of the characteristics of the population at issue, there is an obvious risk that courts will have the “wrong” first impression. And since courts often generate rules based on first impressions, overreliance on a nonrepresentative anchor will generate the wrong rule. Courts, then, are subject to so-called “availability cascades” in which relatively rare and unimportant events create widespread misperceptions and, with them, snowball effects.⁵⁶ Litigants understand this and, consequently, search out sympathetic plaintiffs to air their grievances. More to the point, by seeing themselves as “availability entrepreneurs,” litigants will present courts with a very selective and polarized set of “facts” from which to make a decision.⁵⁷ Even judges that are highly skilled at analyzing arguments and evidence will have no reliable mechanism to determine which side is “right” or to which side the scale is tipped.⁵⁸ Indeed, the “subtleties of how anchors affect decision making might simply lie beyond the basic intuitions of judges,”⁵⁹ and as such, judges often utilize anchors that *appear* to be relevant but are in fact erroneous.⁶⁰

Making matters worse, even a judge that wishes to change his mind will face other costs of doing so, costs that are unrelated to the biases we have described and instead inherent in what it means to be a judge, at least in our legal culture. To begin with, predictability and certainty in the legal system demand a strong presumption that like cases be treated alike. A Court that made clear that every past decision was constantly “up for grabs” would sow confusion among the public, vastly increase its own docket, and call into question its own competence.⁶¹ Moreover, by signaling that any particular decision might have a very short half-life, the Court could dampen the

Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of the Law, 43 WM. & MARY L. REV. 1907 (2002).

56. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 683 (1999).

57. See *id.* at 687 (explaining that “availability entrepreneurs” will attempt to use their knowledge of availability cascades to “advance their own agendas”).

58. Timur Kuran and Cass Sunstein put it this way: “Judges are subject to the availability heuristic, vulnerable to informational biases, and responsive to reputational incentives. All this leaves them open to the influences of availability cascades.” *Id.* at 765.

59. Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 98 (2000).

60. See Guthrie et al., *supra* note 1, at 787-94 (discussing an empirical study of 167 federal magistrates that demonstrates that judges commit error this way).

61. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921) (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . .”); *cf.* *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992) (“There is a limit to the amount of error that can plausibly be imputed to prior Courts.”).

incentives that litigants—particularly institutional litigants—might have to invest resources in litigation in the first place.⁶²

As described thus far, cognitive biases, when combined with various aspects of judicial culture, would appear to have far-reaching consequences. More precisely, this combination would seem to ensure that, other things being equal, constitutional doctrine will necessarily be hopelessly incoherent. We do not, however, believe that such a pessimistic prediction would be justified. The various biases that we have described do not by themselves produce ill-informed decisions. As noted earlier, these various heuristics often serve laudable purposes. To begin with, they may reduce the costs of decisionmaking by dispensing with the requirement of gathering large amounts of information.⁶³ “It is entirely rational,” as Judge Richard Posner observed, “to rely on anecdotal evidence in the absence of better evidence.”⁶⁴ Put another way, the process by which a decision is made can be perfectly rational given the circumstances *at the time* even if the outcome is apparently irrational in light of *all* information and rationality (which may or may not be available at the time of the decision).

Courts (especially the Supreme Court) therefore should seek to gain an understanding of how these mental shortcuts work. Not only will such an understanding help courts avoid errors caused by inappropriately relying on these devices; such heuristics can also improve the quality of the decisions made, by attenuating the effects of “information overload.”⁶⁵ Thus, when first impressions are the correct ones, these biases reduce the costs and increase the probability of reaching the correct decisions. Contrariwise, cognitive biases only produce mistakes when first impressions are not typical of subsequent ones, that is, when information sets on which decisions are based are heterogenous. Translated to the context of litigation, cognitive biases will lead to inaccurate results whenever the first case that

62. See *infra* note 139 and accompanying text (discussing how stare decisis encourages institutional and other litigants to invest in socially useful information); cf. PAUL H. RUBIN, *BUSINESS FIRMS AND THE COMMON LAW: THE EVOLUTION OF EFFICIENT RULES* 125 (1983) (explaining the importance of stare decisis when applied to business litigants and the administrative process).

63. See *supra* notes 48-50 and accompanying text.

64. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1572 (1998). Likewise, Posner argues that “[l]imited information must not be confused with irrationality.” *Id.* at 1573. With that said, Posner does not argue that decisionmakers should not engage in factfinding in order to improve the data set that grounds their decisionmaking. Quite the contrary, Posner argues that courts would benefit from additional empirical evidence when sorting out legislative facts. See *id.* at 1570-75.

65. Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 127 (1980-81) (“People use a number of simplifying operations, called ‘heuristics,’ to reduce the complexity of information which must be integrated to yield a decision. These simplifying strategies often lead to errors in judgment.”).

presents an issue to the Court is “nongeneralizable,” that is, when it generates a record for decision that does not apprise the Court of the true nature and strength of the contending constitutional values at stake. More precisely, a case is nongeneralizable, and thus likely to produce inaccurate results, if the parties before the Court and the effects on them of any rule the Court might pronounce are not representative of the manner in which the rule will actually operate in the real world with respect to the cases that it will govern. Where, on the other hand, the first case that presents an issue to the Court *is* generalizable, that is, fairly representative of the strength and nature of contending interests, the cognitive biases we have identified will have no effect upon the accuracy of the Court’s decisions.

Any prediction about the extent to which various cognitive biases will affect the accuracy of judicial doctrine must depend upon some appraisal of the likelihood that cases reaching the Court will, in fact, be nongeneralizable. In the next Part, we will begin tackling this issue. Specifically, through case studies on affirmative action and separation of church and state, we will call attention to the costs of overgeneralizing from a limited data set.

III. CASE STUDIES

Courts, as discussed above, are very much bound by the record of the case before them. Unlike legislators, who can personally investigate competing constitutional and policy interests—by holding hearings, taking polls, visiting constituents, and the like—judges almost always look to the record that is generated as a case grinds its way forward. And while policymaking judges may find ways to supplement this record, it is nevertheless true that the content of this record is largely determined by the parties before the court.

How likely is it that the record in one case is generalizable to the broad range of issues that are raised by it? Common sense suggests that this likelihood will depend upon a variety of factors, among them standing doctrine, the wisdom with which the Court selects cases for review, resources available to certain classes of litigants, incentives various potential litigants might face, and the strategies adopted by institutional litigants who are repeat players and presumably understand better than most just how much “the facts matter.” If, for instance, anyone can challenge governmental action, one might expect a wide variety of plaintiffs and a high probability that cases reaching the Court would be nongeneralizable.⁶⁶ Such cases

66. *Cf. Flast v. Cohen*, 392 U.S. 83, 119-20 (1968) (Harlan, J., dissenting) (“The interests [taxpayers] represent, and the rights they espouse, are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population, taxpayers and nontaxpayers alike.”).

will entail what is, in effect, an advisory opinion or, what may be worse, an opinion based upon idiosyncratic facts.⁶⁷

Below, through case studies on affirmative action and separation of church and state, we call attention to the risks of the Court grounding its decisionmaking on a nongeneralizable set of facts. Extrapolating from these case studies, moreover, we argue that there is substantial risk that the facts before the Court will be atypical, not generalizable. Correspondingly, to the extent that “availability entrepreneurs” (many of whom are experienced institutional advocates) succeed in controlling the facts and issues before the Court,⁶⁸ these case studies vividly illustrate the risks of the Court jumping into a dispute without first taking steps to make sure that it has a good grasp of the range of cases that it might confront.

A. *Affirmative Action: The Case of College and University Admissions*

Racial preferences are found in numerous governmental programs and take a variety of forms, the most common of which are “plus systems.”⁶⁹ Under such programs, race or ethnicity is merely one of several factors that a decisionmaker must employ when awarding a government benefit.⁷⁰ Such preferences, it should be noted, are generally not designed to remedy prior discrimination or otherwise achieve some notion of racial justice.⁷¹ Instead, they usually rest upon the

67. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (noting that the Article III case or controversy requirement ensures “that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context *conducive to a realistic appreciation of the consequences of judicial action*” (emphasis added)); see also *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (“[Advisory] opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give.”); Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006 (1924) (“[A]dvisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting. In the attitude of court and counsel, in the vigor of adequate representation of the facts behind legislation (lamentably inadequate even in contested litigation) there is thus a wide gulf of difference, partly rooted in psychologic factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law. Advisory opinions are rendered upon sterilized and mutilated issues.”).

68. See *supra* note 57 and accompanying text.

69. *Grutter v. Bollinger*, 539 U.S. 306, 335-36 (2003).

70. See *id.*

71. In *Grutter v. Bollinger*, the Supreme Court concluded that state colleges and universities have a compelling interest in diversity. *Id.* at 328-33. In so doing, the Court did not consider whether race discrimination contributed to minority underrepresentation at the University of Michigan. See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313-15 (1978) (Powell, J., plurality opinion) (opining that diversity constituted a compelling state interest despite absence of findings of past discrimination).

conclusion that, other things being equal, an individual's minority status will further the objective of the program in question.⁷² For instance, the FCC's practice of awarding a plus to minority applicants for broadcast licenses rested upon the belief that minority voices were underrepresented on the nation's airwaves, and that consumers of broadcasting would benefit from more diverse airwaves.⁷³

"Plus factor" programs, we argue below, will often involve disputes that are "nongeneralizable," that is, cases that produce records that offer a distorted picture of the nature and strength of the competing values at stake. Most notably, we believe that classes of individuals that constitute potential plaintiffs in "plus factor" cases will be notably heterogeneous, even idiosyncratic, with the result that litigation involving such parties will produce records that reflect incomplete information about the operation of the programs in question. For this very reason, we think that Justice Powell committed error in *Regents of the University of California v. Bakke*.⁷⁴ By speaking about the constitutionality of so-called "plus factor" programs without any understanding of the costs and benefits of such programs, Justice Powell transformed the debate over preferences without a sufficient grounding in the facts of affirmative action.⁷⁵

Consider two not-so-hypothetical plaintiffs. One, Allan Bakke, is a white male of German descent and a graduate of a prestigious state university.⁷⁶ Mr. Bakke, who is significantly older than nearly all other applicants, is applying to law school. While his academic credentials are significantly better than those of the favored minorities admitted, they are about average for individuals who are not members of favored minority groups. A second, Cheryl Hopwood, is a white female graduate of a less-than-prestigious public college.⁷⁷ Ms. Hopwood worked her way through college, all the while raising a

72. *Grutter*, 539 U.S. at 530 (finding that diversity confers substantial educational benefits).

73. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979, 980-81 (1978); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552-58, 566 (1990) (sustaining preferences on these grounds). With that said, the FCC claimed that societal discrimination was the cause of minority underrepresentation in broadcasting and, as such, there is a remedial undercurrent running through FCC diversity preferences. See *Neal Devins, Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 153 (1990).

74. 438 U.S. 265 (1978).

75. See *id.* at 312-20.

76. Bakke graduated from the University of Minnesota. See *Americans.net, A Brief History of Civil Rights in the United States of America: The Bakke Case*, at <http://www.africanamericans.com/thebakkecase.htm> (last visited Jan. 16, 2005).

77. See *Hopwood v. Texas*, 861 F. Supp. 551, 564 (W.D. Tex. 1994) (noting that Cheryl Hopwood received an accounting degree from California State University in Sacramento), *rev'd*, 78 F.3d 932 (5th Cir. 1996).

mentally handicapped child and mentoring other children.⁷⁸ She is now twenty-eight years old, older than most applicants to law school.

Assume now that each of these plaintiffs challenges the system of racial preferences in place at the University of Texas Law School in 1992. Under the so-called “Texas plan,” all applicants were assigned a score—the so-called “Texas Index”—based upon their LSAT score and undergraduate grade point average.⁷⁹ Moreover, the plan provided that non-minorities with a Texas Index score of 199 have a better-than-ninety-percent chance of being admitted, while non-minorities with a Texas Index score of 192 are presumptively rejected.⁸⁰ Favored minorities with a Texas Index score of 189—below the presumptive *deny* score for other applicants—are automatically admitted.⁸¹

Assume that Cheryl Hopwood has a Texas Index score of 199, in the range of presumptive admission. Allan Bakke has a score of 197, just outside the range of presumptive admission, but within the range of discretionary admission (“on the bubble”). Texas considers Bakke’s file, finds him indistinguishable from hundreds of other individuals who were on the bubble, and rejects him. Moreover, where Cheryl Hopwood is concerned, the school takes the extraordinary step of adjusting her Texas Index score *downward*, purportedly because her undergraduate degree is from a less-than-prestigious school.⁸²

Because the Texas plan treats individuals differently on account of their race, it must, at a minimum, be justified.⁸³ Assume for the sake of argument that Texas seeks to justify its plan as an attempt to enhance the diversity of the student body so as to provide a more enriching educational experience for all students.⁸⁴ Texas also claims that it wishes to reach out to provide educational opportunities to individuals who are members of racial groups that were once deprived of such opportunities.⁸⁵ More precisely, instead of relying simply upon generalized indicia of academic merit, Texas says, it wants to give “individualized consideration” to every attribute that applicants might possess which bears on the ability of individuals to contribute to the educational process. In a sense, Texas could assert that it is

78. *See id.* (noting that Cheryl Hopwood worked twenty to thirty hours per week in college, was active in Big Brothers and Big Sisters, and was raising a child born with cerebral palsy).

79. *Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir. 1996).

80. *See id.* at 936-37.

81. *Id.*

82. *See id.* at 938; *see also id.* at 935-36 (noting that almost all of the applicants with Texas Index scores in the presumptive admit range were admitted).

83. *See id.* at 940 (applying strict scrutiny analysis to the Texas plan).

84. *Id.* at 944-48.

85. *Id.* at 948-55.

not really considering applicants' race as such but is instead considering race incidentally to a consideration of the whole person.⁸⁶

How might these two plaintiffs respond to the assertion that diversity is an interest of sufficient strength to justify their exclusion because of their race? They could, in the abstract, question whether diversity is an important or compelling interest of the sort that justifies race-based line drawing. Moreover, in arguing that diversity is not a compelling interest, these plaintiffs would be placed in the position of questioning determinations to the contrary by the admitted "experts" on the subject—academics—determinations that would be defended with great vigor by the academy and other interest groups.⁸⁷ These plaintiffs would also have to deal with the assertion that such preferences are not really racial line drawing, but instead merely incidental to the individualized consideration of each applicant.⁸⁸

A straightforward attack on diversity as a compelling interest, then, would certainly be an uphill battle. There is, however, another tack that plaintiffs could take, a tack that does not require them to debate academics about the theoretical benefits of diversity. Such a tack, however, would only be available to Ms. Hopwood, and not Mr. Bakke. To be precise, Ms. Hopwood could ask, "What about me?" If, in fact, diversity really is such an important interest, why did Texas reject me? After all, I am a woman, and women are underrepresented in the legal profession and the Texas Bar. Moreover, I am older than most applicants and diverse for that reason. I have raised a handicapped child and mentored others, all the while pulling almost "straight A's" and working my way through college. Certainly I have a "unique perspective" on family, education, and work—a perspective not likely shared by most applicants. If Texas was really interested in diversity, it would have given *me* individual consideration, consideration that would have resulted in my admission. Instead, what

86. See Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1047-52 (1998).

87. See, e.g., Brief of Amici Curiae the American Association of Law Schools, the American Council on Education, the Law School Admission Council and the Graduate Management Admissions Council in Support of Petitioners at 8-14, *Texas v. Hopwood*, 533 U.S. 929 (2001) (No. 00-1609) (explaining race as a "critical component" in education programs). More significantly, in 2003 Supreme Court decisions upholding affirmative action at the University of Michigan, "[n]inety-one colleges and universities, as well as every major educational association, filed briefs in support of the university." Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 368 (2003). Not one college filed a brief opposing race preferences. "These briefs argued that 'pluralistic, widely representative' colleges provide a more enriching learning environment and better preparation for life in a multiracial world . . ." See *id.* at 368 (citing briefs).

88. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (Powell, J., plurality opinion) (asserting that a properly administered plus system would not constitute intentional discrimination); Sullivan, *supra* note 86, at 1049-52.

“consideration” I did receive merely *downgraded* my application—that is, gave me a “minus” instead of a plus!

To be sure, this story may seem unduly “personal.” Moreover, it would appear calculated to elicit sympathy from the Court hearing Ms. Hopwood’s claim. But, sympathy aside, the story just told would seem to cast significant light upon the strength and nature of interests at stake where Texas’ racial preferences are concerned. To begin with, Ms. Hopwood’s story casts serious doubt on any assertion that the Texas program is somehow “race-neutral” because it involves individual consideration of diversity factors other than race. If the Texas plan is race-neutral, one might ask, why did Ms. Hopwood not receive a “plus” for her own unique characteristics, or at least some meaningful consideration of them?⁸⁹ Moreover, by pursuing diversity inconsistently, the school has called into question its own assertion that such an interest really is compelling in a constitutional sense.⁹⁰ At the very least, the realization that Texas is pursuing racial diversity *simpliciter* would impose upon it a much heavier burden of justification.⁹¹

As noted above, Allan Bakke could not saddle Texas with such a burden. Simply put, he has a different story to tell. He is a white male, who, like many applicants, comes from a prestigious undergraduate university. There is no indication that he has overcome any particular obstacles or that he has any attributes not shared by numerous other individuals in the applicant pool, many of whom have better academic credentials than he. Thus, the failure of Texas to accord Mr. Bakke’s application any special consideration seems per-

89. To be sure, even with such a plus, she may have still been rejected—Texas may have properly downgraded her Texas Index score because her grade point average, adjusted for her college and undergraduate major, overstated her academic potential. Such a downgrade, however, could only be “proper” if Texas also downgraded minority applicants in similar circumstances. See *Hopwood*, 78 F.3d at 939.

90. See Alan J. Meese, *Reinventing Bakke*, 1 GREEN BAG 2d 381, 387-88 (1998); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) (noting that an interest that is not pursued consistently cannot be deemed compelling); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978).

91. One way of meeting this burden is to shift rationales, that is, to argue that race preferences are remedial. To do so, however, raises problems of its own. Even if a state university is willing to admit that it has discriminated in the past, it may not be able to convince a court that it has, in fact, discriminated in the past. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292-93 (1986) (O’Connor, J., concurring in part and concurring in the judgment) (discussing the type of evidence that must be introduced to convince a court about past discrimination). More significantly, because it fears exposing itself to liability, a university may be reluctant to admit that it has discriminated in the past. Thus, there is some risk that the proponents of affirmative action may understate the reasons supporting racial preferences. For this very reason, African-American students at the University of Michigan intervened in *Gratz v. Bollinger*. 539 U.S. 244, 257 (2003). In our view, courts should hear the stories of all affected interests. For this reason, liberalized intervention may be a sensible and appropriate way to overcome some of the problems of anchoring on an incomplete data set.

factly consistent with the assertion that it is pursuing diversity in a consistent, race-neutral fashion.

It would thus appear that, while legally identical, Ms. Hopwood's and Mr. Bakke's claims would produce different records on which Courts would base their decisions. It is difficult to say that the Texas plan has really harmed Allan Bakke: it seems unlikely that he would have been admitted under a race-neutral scheme. Thus, the record produced by his case would suggest that the school had pursued a policy of racial diversity without casting an inordinate burden—indeed, any burden—on non-minorities like the plaintiff. Ms. Hopwood, on the other hand, appears to possess a stronger application. Perhaps more significant, one record suggests that Texas is not really pursuing diversity at all but is instead simply pursuing some strategy of race-based proportional representation. Another will appear perfectly consistent—or at least not inconsistent—with the bona fide pursuit of a diversity strategy. Thus, the type of record the Court will see first, and hence its “anchor” where racial preferences in education are concerned, will depend upon which case the Court hears first. From this anchor, of course, the Court may well generate a rule about whether diversity is not a compelling government interest, a rule that will apply to the case that it did *not* hear. Thus, a generalizable rule will be produced based upon the facts that are not, in fact, generalizable.

This is not to say that different facts will *necessarily* produce different results. It is possible that the Court could reach the same outcome—voiding or approving of preferences—regardless of which case it chooses to hear first. Some Justices may have hard-and-fast views on the permissibility *vel non* of preferences, views that cannot be changed.⁹² Other Justices, however, may be less sure of their views and more likely to take into account the facts of the case.⁹³ Where, as

92. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring in the judgment); *Bakke*, 438 U.S. at 356-79 (Brennan, J., concurring). These views may reflect strong “prior commitments” to particular constitutional values, such as equality before the law. Or, they may reflect personal experience or knowledge with the manner in which certain admissions processes operate. See 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 (1979).

93. Consider, for example, Justice O'Connor. Before deciding to uphold preferences in *Grutter*, her views on the constitutionality of affirmative action were unclear. Notwithstanding the fact that she had sat on the Court for more than two decades and written several opinions on the constitutionality of affirmative action, O'Connor's decisions provided little concrete guidance for how she would rule on the constitutionality of preferences. For example, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), O'Connor's decision for the Court was indeterminate. Although concluding that strict scrutiny review should be utilized in affirmative action cases, O'Connor also sought to “dispel the notion that strict scrutiny [review] is ‘strict in theory, but fatal in fact.’” *Id.* at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)). Compare *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612-31 (1990) (O'Connor, J., dissenting) (arguing

is often the case when racial preferences are concerned, such Justices provide the “swing votes,” cognitive biases and the identity of the first plaintiff who challenges the scheme in question may well carry the day.

Even if the outcome of the Court’s view of a particular program does not depend upon the facts presented, the way the Court explains that outcome might. Consider in this regard the *Bakke* case, where the Court evaluated a quota scheme, a scheme defended on the ground that it was necessary to enhance the diversity of the entering class.⁹⁴ Justice Powell’s opinion announcing the judgment of the Court explicitly held that the quota scheme was unconstitutional.⁹⁵ However, Powell also opined that “diversity” was a compelling state interest and that schools could properly seek to advance this interest by employing a plus system that gave credit to minorities and other diverse applicants for their diversity.⁹⁶ In so doing, he did not rely upon any factual findings about the manner in which such a system actually operated, accepting amici’s assertions at face value.⁹⁷

Imagine now what might have happened if Allan Bakke had instead been Cheryl Hopwood. To be sure, there is no difference between these two plaintiffs that would suggest a different ruling on the validity of quotas. But what about Justice Powell’s advice regarding the validity of a so-called plus system? Would Powell have issued this advice if Cheryl Hopwood had been the plaintiff? Perhaps not. Ms. Hopwood possessed important diversity characteristics. A failure by the University of California at Davis (“Davis”) to recognize and consider those characteristics when comparing her application to those of other *non*-minority applicants may well have given Justice Powell pause as he decided whether to go beyond his condemnation of quotas and endorse a plus system.⁹⁸ More precisely, a failure by Davis to accord Ms. Hopwood any individualized consideration would have called into question any assertion that diversity was a compelling state interest.⁹⁹ Such failure could also have caused Powell skep-

that diversity preferences in broadcasting rested upon an impermissible stereotype), *with Wygant*, 476 U.S. at 288 (O’Connor, J., concurring in part and concurring in the judgment) (refusing to consider whether racial diversity would support consideration of race when hiring high school teachers). For an excellent treatment of “swing Justices” that uses Justice O’Connor as a case study, see Dahlia Lithwick, *A High Court of One: The Role of the “Swing Voter” in the 2002 Term*, in *A YEAR AT THE SUPREME COURT* (Neal Devins & Davison M. Douglas eds., 2004).

94. *Bakke*, 438 U.S. at 311-15.

95. *See id.* at 314-15, 318-20 (Powell, J., plurality opinion).

96. *See id.* at 315-19.

97. *See Meese, supra* note 90, at 384-86 (explaining how amici curiae raised the issue of “plus factor” systems for the first time in the Supreme Court).

98. There is no indication that Davis did, in fact, consider diversity characteristics of non-minorities.

99. *See Meese, supra* note 90, at 387.

ticism about the bona fides of a plus system and may well have led the Justice to adhere to his initial course, to vote to void Davis's quota plan while leaving the validity of a plus system for another day.¹⁰⁰ Thus, any statement about the validity of a plus system would have awaited a controversy in which the question was squarely presented and not simply raised in amicus briefs.¹⁰¹ Such a delay would certainly have altered the discourse in the political branches about the constitutional status of preferences. For instance, politicians could no longer justify such preferences by hiding behind the cover of *Bakke* but would instead be forced to take responsibility for their own interpretation of the Constitution.¹⁰² Nor could individual institutions or their trade associations be able to rely upon *Bakke*.¹⁰³

And what if *Bakke*, instead of involving a challenge to a set-aside, concerned a "plus factor" scheme? Of course, if Alan Bakke were the plaintiff, the Justices would have approved such a scheme.¹⁰⁴ But what if Cheryl Hopwood were the plaintiff? Here, there is every reason to think that the Court would have questioned the legitimacy of a diversity scheme that excluded someone as sympathetic as Cheryl Hopwood. Indeed, it was for this very reason that the right-leaning Center for Individual Rights recruited Cheryl Hopwood to be the lead plaintiff in its challenge to the University of Texas' affirmative action program.¹⁰⁵ In other words, just as *Bakke* was skewed by an unsympathetic plaintiff, future challenges to affirmative action may well

100. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 486-87 (1994) (explaining that Powell initially planned simply to affirm the judgment of the California Supreme Court voiding Davis's quota scheme); BERNARD SCHWARTZ, BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT 79-86 (1988) (showing that Justice Powell's initial draft simply voided the Davis quota system without opining on the validity of a plus system). Is it possible that Powell—rather than defend the legitimacy of plus systems—would have questioned *all* diversity-based justifications for affirmative action?

101. Ironically, Justice Powell followed just such a course in a subsequent antitrust decision. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the Court evaluated a finding that the defendant had terminated the plaintiff pursuant to a price-fixing conspiracy. The United States filed an amicus brief arguing that such conspiracies should be analyzed under the Rule of Reason and not considered unlawful per se, as was the case under current law. In an opinion by Justice Powell, the Court declined to consider the United States' argument on the ground that it was first raised in an amicus brief. See *id.* at 761, n.7.

102. See Nondiscrimination in Federally-Assisted Program; Title VI of the Civil Rights Act of 1964; Policy Interpretation, 44 Fed. Reg. 58509, 58510 (Oct. 10, 1979) (to be codified at 45 C.F.R. pt. 80) (contending that *Bakke* affirmed the legality of racial preferences).

103. See SCHWARTZ, *supra* note 100, at 160-63.

104. In such a case, Justice Powell's dicta about "plus factor" schemes would have become the Court's holding.

105. See Michael S. Greve, *The Demise of Race-Based Admissions Policies*, CHRON. HIGHER EDUC., Mar. 19, 1989, at B6 (Center for Individual Rights (CIR) cofounder describing Hopwood litigation as "an opening salvo" in a "larger strategy"); Jonathan Groner, *Center Ring*, LEGAL TIMES, Dec. 9, 2002, at 1; David Segal, *Putting Affirmative Action on Trial*, WASH. POST, Feb. 20, 1998, at A1 (describing CIR efforts to seek out sympathetic plaintiffs).

involve plaintiffs who are far more diverse than the typical non-minority applicant.

B. Church-State Separation: The Case of School Vouchers

Just as the class of potential plaintiffs can be heterogeneous, different defendants can also tell dramatically different stories. Interest group litigators understand this; they are as determined to find an unsympathetic defendant as they are in locating a sympathetic plaintiff. Consider, for example, the case of school vouchers. Some defendants can tell a compelling story about voucher plans providing an escape route from failing public school systems for disproportionately poor, disproportionately minority students. Other defendants, however, are far less sympathetic; their voucher schemes may seem little more than an economic windfall to religious parents already committed to sending their children to religious schools.¹⁰⁶

Like affirmative action, an understanding of the costs and benefits of voucher programs cannot be based on the examination of any single plan; instead, it requires familiarity with the range of voucher plans employed by school systems. Were the Court to build its voucher doctrine around nongeneralizable cases, it might well commit error. Decisionmaking anchored on the facts of a sympathetic defendant might result in standards of review that discount the risks of a state-funded religious spoils system. But doctrine moored to the facts of an unsympathetic defendant might foreclose *all* voucher schemes, even those that are well designed to serve compelling governmental interests.

As it turns out, Supreme Court decisions on this issue are closely tied to the specific facts before the Court. In 1973, the Court—while not ruling on the constitutionality of a voucher scheme—signaled its skepticism of such programs. Rejecting a New York plan that would provide either a “tuition reimbursement grant” or tax relief to parents who send their children to private schools, the Court found it irrelevant that the “grants are delivered to parents rather than schools.”¹⁰⁷ As we will soon detail, this decision, *Committee for Public Education & Religious Liberty v. Nyquist*, was very much influenced by the fact that Catholic school interests helped shape the New York

106. Of course, whether such programs really are a windfall would depend upon the baseline that one adopts. If one begins with a baseline of state monopoly schools, supported by coercive levies, without regard to the benefits the taxpayer might receive from such programs, then vouchers provide a windfall of sorts to parents who send their children to private schools. If, on the other hand, one assumes a common law baseline, where individuals pay taxes only when necessary to produce collective goods, then vouchers are not a windfall but, instead, simply a method of returning to taxpayers who send their children to private school money they have overpaid.

107. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 781-83 (1973).

law (and, correspondingly, that eighty-five percent of participating schools were church-affiliated).¹⁰⁸

By 2002, however, the Court approved a Cleveland, Ohio, voucher program precisely because parents, not schools, were given vouchers. Concluding that the Cleveland program “confers educational assistance directly to a broad class of individuals defined without reference to religion,”¹⁰⁹ the Court thought it irrelevant that eighty-two percent of the participating schools were religious, principally Catholic.¹¹⁰ In reaching this 5-4 decision in *Zelman v. Simmons-Harris*, the factual background of the case may have been controlling. Unlike the New York plan, religious school interests were not the driving force behind the Cleveland plan. The driving force, instead, was Cleveland’s failing public school system.¹¹¹

Before providing additional details about the New York and Cleveland plans, we readily concede that the Court’s approval of one plan and rejection of the other may also be tied to material differences between the two plans.¹¹² The problem with New York’s “parental choice” program was that the state’s claims about its desire to invest in secular education, not religious indoctrination, did not jibe with the statutory scheme. Most notably, while the Cleveland plan forbade participating schools from making religious-based admission decisions, the New York plan allowed such schools to participate in the program.¹¹³ But even if the two plans were identical, proponents of the Cleveland plan would have a much better story to tell than those backing the New York plan. More to the point, just as Cheryl

108. *Id.* at 768. For additional discussion, see *infra* notes 120-21 and accompanying text.

109. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

110. *Id.* at 657. Likewise, the Court did not take into account the fact that some of the participating schools had a pervasively sectarian character. One school, for example, noted in its informational materials that “total religious instruction is the major focus of the educational program. . . . Lessons learned in formal religious classes are purposefully carried over into all subject areas.” Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 434 (2000) (quoting *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 729 (N.D. Ohio 1999)).

111. *Zelman*, 536 U.S. at 644-45, 647.

112. With that said, *Nyquist* and *Zelman* make use of different standards of review. In his *Zelman* dissent, Justice David Souter contrasts the two rulings. Applauding the *Nyquist* Court’s examination of where state funds wind up, Souter condemns the *Zelman* Court for only asking whether secular schools are eligible to participate in the Cleveland program. *Zelman*, 536 U.S. at 692-93 (Souter, J., dissenting). For Souter, this analysis is simply “rhetorical,” replacing “realism [with] formalism.” *Id.* at 700, 693 (Souter, J., dissenting). Whatever one thinks of Souter’s analysis, we certainly agree that the Court’s reasoning in *Zelman* and *Nyquist* are difficult to square.

113. The New York statute, moreover, also included direct aid to private schools. These schools were overwhelmingly Catholic. This difference, however, supports our argument. Rather than sever this provision, the Court understood the other provisions through the lens of state efforts to favor Catholic school interests.

Hopwood was better positioned than Alan Bakke to call attention to limits in Texas' diversity rationale, defenders of the Cleveland plan were better able to highlight the secular benefits of a voucher scheme.

Assume that New York and Cleveland both adopt the following voucher program:¹¹⁴ Students whose family income is not more than 200% of the federal poverty level are eligible to receive a voucher of up to \$5000. Participating schools cannot charge more than \$5000 nor can they deny admission to students on the basis of religion or race. No restrictions are placed on how the schools may use the money—so that participating schools could make use of state funds to support religious activities. Participating schools, however, cannot advocate or foster hatred on the basis of race, ethnicity, or religion. Assume also that eighty-five percent of participating schools are religious, although that number can fluctuate.¹¹⁵

Because the overwhelming number of schools that benefit from this voucher plan are religious, New York and Cleveland will have to explain why this funding scheme does not impermissibly establish religion. Up to a point, New York and Cleveland will make identical arguments. They will note that secular schools may participate in the program and that the number of secular schools may well increase over time.¹¹⁶ They may also point out that the relevant “program” is not simply the voucher scheme but instead all public financial support for education, including the creation and maintenance of the public schools. If so, then support for sectarian schools would consume only a small portion of the state's overall expenditures on education and thus would not advance religion in any meaningful sense.¹¹⁷ Correspondingly, they will argue that the program “distributes aid to *parents*, who in turn redirect that aid to participating schools through entirely uncoerced decisions.”¹¹⁸ As such, parents are

114. The following program largely mirrors the Cleveland plan that the Supreme Court upheld in *Zelman*. For descriptions of the Cleveland program, see *Zelman*, 536 U.S. at 644-48; and Macedo, *supra* note 110, at 433-38.

115. Indeed, as Milton and Rose Friedman argued, this percentage could depend upon the presence or absence of a voucher scheme. In particular, the Friedmans argued that the existence of a voucher scheme would actually increase the proportion of nonsectarian private schools, because such a scheme would attract profit-maximizing enterprises to a field—private schooling—currently dominated by nonprofit, religious enterprises. See MILTON FRIEDMAN & ROSE D. FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 152-54 (1980) [hereinafter FREE TO CHOOSE].

116. Brief on the Merits at 36, *Zelman* (No. 00-1779) (noting that “the present statistics present only a snapshot in the evolving life of the program”); see also FREE TO CHOOSE, *supra* note 115, at 152-54.

117. See generally Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1364-67 (2002) (explaining how the Court has addressed the issue of religious funding and the Establishment clause).

118. Brief of State Petitioners at 21, *Zelman* (Nos. 00-1751, 00-1777, 00-1779); see also Brief for Appellees-Appellants Nyquist, Levitt and Gallman at 22, *Nyquist* (Nos. 72-694,

free to choose to send their children to a religious school, nonreligious school, or even keep their child in the public school system. Finally, they will call attention to the critical role that religious schools can and do play in providing secular education to students. For example, they will cite statistics demonstrating the “outstanding secular education and citizenship achievements” at religious schools, including comparatively high scores on national achievement tests.¹¹⁹

Notwithstanding similarities in the arguments that New York and Cleveland would make, the factual contexts of the two cases are profoundly different. As already noted, the New York plan was enacted at the behest of powerful religious interests.¹²⁰ Claiming that low-income parents would soon remove their children from nonpublic schools, religious school interests argued both that the state had an independent interest in allowing low-income parents to send their children to nonpublic schools and that the state would face a fiscal crisis if students attending religious schools were to attend public schools.¹²¹

By validating this argument, New York lawmakers did more than save the state some money. They also facilitated religious segregation.¹²² Religious parents already committed to sending their children to a religious school would continue to do so. And even if a significant number of nonadherents were to attend religious school, the New York statute was nonetheless intended to help religious schools maintain enrollment levels.

72-753, 72-791, 72-929) (stating that the program “does not provide for payment of money directly to the schools but merely recognizes the financial burden of parents of nonpublic school children”).

119. Brief for the Hanna Perkins School, et al., Petitioners at 11, *Zelman* (No. 00-1777).

120. Brief for Appellants at 14, *Nyquist* (Nos. 72-691, 72-753, 72-791, 72-929) (noting newspaper coverage of the statute’s enactment made clear that “sectarian pressures play[ed] a significant if not major role” in the bill’s passage); Brief of the Baptist Joint Committee of Public Affairs as Amicus Curiae at 8, *Nyquist* (No. 72-694) (arguing that “[o]nly these religious schools were active in encouraging the legislature to enact the contested legislation”); Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 816-22 (1999) (discussing power of religious interests to obtain state funding).

121. State officials explicitly embraced this argument. A brief filed by the majority leader of the New York State Senate detailed the state fiscal crisis and the difficulties that many communities would face if religious school students were to attend public schools. Brief on Behalf of Appellee Warren M. Anderson at 11-15, *Nyquist* (Nos. 72-601, 72-753, 72-791, 72-929).

122. In *Nyquist*, eighty-five percent of parents eligible to receive tuition support sent their children to Catholic schools. See Brief Amicus Curiae on Behalf of the National Education Association and the Horace Mann League at 16, *Nyquist* (No. 72-694). And while the New York statute allowed religious schools to make religion-based admissions decisions, a statute that forbid such an admissions policy would nevertheless result in a significant amount of religious isolation. In particular, if the beneficiaries of the program were principally parents who already enrolled their children in religious schools, it is almost certainly the case that those schools would maintain their religious identity.

Cleveland would not be saddled with the burdens of defending a plan that smacks of religious favoritism. Its plan could be distinguished from the ostensibly identical New York plan in the following way: “To put it simply, in [New York], religious schools were the *ends*, while here religious schools are part of the *means* toward the goal of broadening [secular] educational opportunities.”¹²³ Specifically, even if eighty-five percent of the participating schools in New York and Cleveland are religious, the impetus for the Cleveland plan was a failing public school system.

Before adopting a voucher scheme in Cleveland, a federal district court judge “declared a ‘crisis of magnitude’ and placed the entire Cleveland school district under state control.”¹²⁴ A state auditor likewise found that Cleveland’s public schools “were in the midst of a ‘crisis that is perhaps unprecedented in the history of American education.’”¹²⁵ The district failed to meet any of the eighteen standards set by the state to guarantee minimal acceptable performance.¹²⁶ More than two-thirds of students dropped or flunked out of high school (and those who did graduate performed less well than their counterparts in other cities).¹²⁷ Making matters worse, the vast majority of children attending Cleveland public schools were from low-income and minority families.¹²⁸ In other words, unlike the *potential* fiscal crisis that prompted New York lawmakers, the Cleveland voucher scheme could easily be portrayed as a needed effort to save overwhelmingly poor, overwhelmingly minority students from one of the “worst performing public schools in the Nation.”¹²⁹

The Cleveland scheme, moreover, was intended to encourage parents to remove their children from failing public schools. In contrast, the beneficiaries of the New York program were parents who had already removed their children from public schools, principally to attend religious schools. Consequently, defenders of the Cleveland plan—unlike their New York counterparts—could argue that their voucher scheme was no more and no less than an effort to provide better educational opportunities for predominantly poor, predominantly minority students. Defenders of the New York plan, in con-

123. Brief on the Merits at 15, *Zelman* (No. 00-1779) (distinguishing *Nyquist* from the Cleveland plan).

124. *Zelman*, 536 U.S. at 644 (citation omitted).

125. *Id.* (quoting JIM PETRO, AUDITOR OF STATE, STATE OF OHIO, CLEVELAND CITY SCHOOL DISTRICT PERFORMANCE AUDIT 2-1 (Mar. 1996)).

126. *Id.*

127. *See id.*

128. *See id.*

129. *Id.*

trast, could not escape the fact that their plan was first and foremost an effort to accommodate religious parents.¹³⁰

One other argument would be available to proponents of the Cleveland plan. The racial composition of private schools participating in the voucher plan is more likely to reflect the overall composition of the Cleveland metropolitan area than are the Cleveland public schools.¹³¹ In particular, because Cleveland's inner-city public schools are overwhelmingly minority, the voucher plan might well facilitate, not subvert, racial integration within the schools.¹³² Defenders of the New York plan could not make this argument. Religious schools, including Catholic schools, are often highly segregated.¹³³ A voucher plan that encouraged parents of private school students to keep those students in private schools would not facilitate racial integration.

To summarize, differences in the stories that New York and Cleveland can tell about their respective voucher schemes might well prove consequential, even determinative, to the Supreme Court. Even if the two plans had identical provisions and even if the same percentage of religious schools were participating in both programs, the records of the two cases would be quite different. Opponents of the New York plan could argue that the plan was intended to strengthen sectarian education, preserve the status quo, and, in so doing, segregate students on religious grounds. Opponents to the Cleveland voucher, in contrast, would have a far more difficult time convincing the Court to adopt a legal rule that would deem vouchers an unconstitutional establishment of religion. Their demand that voucher schemes must include a sizable percentage of nonreligious private schools might appear insensitive to governmental efforts to change the status quo by finding innovative ways to help dispropor-

130. Rather than reinforce religious segregation, the vast majority of students participating in the Cleveland plan would be attending schools of a different faith than their own. Brief for the Hanna Perkins School, et al., Petitioners at 8, *Zelman* (No. 00-1777). Indeed, parents participating in the voucher plan thought the religious affiliation of a school was the least important of five listed factors. Brief of State Petitioners at 11, *Zelman* (Nos. 00-1751, 00-1777, 00-1779).

131. Brief of American Education Reform Council as Amicus Curiae in Support of Petitioners at 9, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) (citations omitted).

132. Opponents of the voucher plan strongly disagreed with this claim. Noting that a disproportionate number of white students were participating in the voucher plan, opponents claimed that the voucher plan exacerbated problems of racial isolation in the Cleveland public schools. See Brief of Amici Curiae National School Boards Association, et al. at 17-18, *Zelman* (Nos. 00-1751, 00-1777, 00-1779) (citing KIM METCALF, IND. CTR. FOR EVALUATION, EVALUATION OF THE CLEVELAND SCHOLARSHIP PROGRAM 1998-2000, TECHNICAL REPORT (2001)).

133. Robert L. Crain & Christine H. Rossell, *Catholic Schools and Racial Segregation*, in PUBLIC VALUES, PRIVATE SCHOOLS 184, 185 (Neal E. Devins ed., 1989). For a competing perspective, see JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982).

tionately poor, disproportionately minority students attending failing schools.¹³⁴

It would thus appear that facts played a large part in the Court's disparate rulings in *Nyquist* and *Zelman*. Although Chief Justice Rehnquist was the only Justice to participate in both cases, the social meaning of school vouchers had undergone a radical transformation by the time of the Cleveland case.¹³⁵ Justice O'Connor, for example, wrapped up her concurring opinion in *Zelman* by suggesting that the "reasoning in the Court's opinion" matched "the realities of the Cleveland educational system."¹³⁶ In other words, just as *Nyquist* may have been skewed by an unsympathetic defendant, *Zelman*, too, may have been impacted by a sympathetic defendant. As in the affirmative action context, the Court's reasoning on the issue of the separation of church and state may be closely tied to the relative sympathies of the parties to the dispute.

IV. CONCLUSION: THE BENEFITS OF DELAYING STRATEGIES

When deciding cases involving nongeneralizable claims, the Supreme Court is apt to base its decision in faulty factual suppositions. As our case studies on affirmative action and school vouchers make clear, these cases involve idiosyncratic facts that do not shed sufficient light on the competing constitutional values involved. For example, by deciding the *Bakke* case in 1978, the Court grounded much of its affirmative action jurisprudence around a plaintiff who shed almost no light on the costs and benefits of diversity-based affirmative action. Likewise, the 1973 *Nyquist* decision was anchored in a set of facts that highlighted the downsides of voucher schemes. At the same time, had the Court built its affirmative action doctrine around Cheryl Hopwood or its voucher doctrine around the failed Cleveland public school system, the Court might have issued rulings that were equally out of step with reality. Indeed, the Court's implicit repudiation of *Nyquist* in its 2002 *Zelman* decision calls attention to the problems of building durable doctrine around nongeneralizable facts.

134. Admittedly, the public school establishment and some of the civil rights establishment opposes vouchers, claiming that the state ought to invest in public education. In *Zelman*, for example, the National School Boards Association and the NAACP Legal Defense Fund both filed briefs opposing the voucher plan. *Zelman*, 536 U.S. at 643.

135. For an overview of the changed meaning of school vouchers from 1980-2000, see Neal Devins, *Social Meaning and School Vouchers*, 42 WM. & MARY L. REV. 919 (2001).

136. *Zelman*, 536 U.S. at 676 (O'Connor, J., concurring). Other Justices may have found differences in the stories that New York and Cleveland could tell to be legally irrelevant. In cases where the Court is divided 5-4, however, the views of one or two Justices may prove dispositive both to the outcome and to the legal reasoning employed by the Court.

What, then, should the Supreme Court do when confronted with nongeneralizable claims? Should the Justices issue narrow fact-specific minimalist decisions? Should they quickly issue more decisive rulings and simply overturn those decisions when the doctrine proves unworkable? Or should they issue decisive rulings but use certiorari denials and other delaying strategies to provide lower federal courts with an opportunity to develop a factual record on the issue?¹³⁷ In sorting out which approach is best, one's view of the Court's institutional role and capacity will prove decisive. For reasons that we will now detail, we think that the Supreme Court ought to make use of delaying strategies when first confronted with nongeneralizable claims.

As noted throughout this Article, judges generate precedent based upon the set of information present in the particular case before them. These precedents, for a variety of reasons, are hard to overrule. As explained in Part II, anchoring and heuristics that decision-makers rely upon make it harder to rethink the factual premises of earlier determinations. Furthermore, even a judge that wishes to change his mind will face other costs of doing so—costs that are unrelated to the biases we have described and instead are inherent in what it means to be a judge, at least in our culture. To begin with, predictability and certainty in the legal system demand a strong presumption that like cases be treated alike. A Court that made clear that every past decision was constantly “up for grabs” would sow confusion among the public, vastly increase its own docket, and call into question its own competence.¹³⁸ Litigants, moreover, would not want to spend significant resources gathering information, filing briefs, and making arguments knowing full well that today's decision might be reversed tomorrow.¹³⁹ Failure to reverse itself, however, will leave the Court subject to increasing criticism for adhering to a rule based on incomplete facts.¹⁴⁰ One would not be surprised if the Court chose instead to take a “middle course,” backtracking slowly, while recharacterizing prior caselaw without formerly overruling it. Such a muddling course raises its own set of problems. While avoiding the ille-

137. Another option would be to use justiciability doctrine to steer clear of the dispute altogether. We will not discuss this option for two reasons. First, a nongeneralizable claim may be clearly justiciable. Second, as we will soon explain, we think that the Supreme Court should play an important and active role in shaping constitutional values.

138. CARDOZO, *supra* note 61, at 149 (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case”); *cf.* *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992) (“There is a limit to the amount of error that can plausibly be imputed to prior Courts.”).

139. But if litigants have an understanding of the phenomenon of anchoring, they may well still invest significant resources in litigation, knowing that first impressions matter, even if courts do not otherwise adhere to something like *stare decisis*.

140. *See Payne v. Tennessee*, 501 U.S. 808, 841-44 (1991) (Souter, J., concurring); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-59 (1977).

gitimacy costs of overturning doctrine, this mangling of stare decisis undermines predictability and certainty in the legal system. By turning stare decisis into a shell game, moreover, this muddling course calls into question the Court's ability to fashion longstanding, predictable rules.

Against this backdrop, the Supreme Court ought not to rely on first impressions in making far-reaching decisions. While lower courts have no choice but to rule on such cases, the Supreme Court must take into account the obvious risk that a "wrong" impression will generate the wrong rule. Moreover, for reasons just detailed, certain aspects of the legal system and judicial culture likely serve to exacerbate the negative consequences of such decisionmaking.

Pointing to inherent limits in judicial capacity, a new breed of judicial minimalists argues that the Court is ill equipped to issue broad and deep rulings that are grounded in facts.¹⁴¹ Instead, these minimalists argue that the Court ought to facilitate democratic deliberation by issuing narrow rulings (some of which may simply be provisional).¹⁴² In our view, however, judicial minimalism throws the baby out with the bath water. While protecting the Court from overly broad rulings grounded in faulty factual suppositions, the issuing of narrow, indeterminate rulings unduly limits the Court's power to shape constitutional values.

Specifically, with little law to follow, elected officials will either ignore the Court or, alternatively, spin indeterminate Supreme Court decisions to serve their own purposes.¹⁴³ Political branch interpretation should not take place in such a vacuum but, instead, should be part of a dialogue between the political branches and the Court, each of which brings different perspectives and expertise to bear on constitutional problems. In particular, courts are more likely than other government actors to "appeal to men's better natures, to call forth their aspirations"¹⁴⁴ and to be a "voice of reason . . . articulating and developing impersonal and durable principles."¹⁴⁵

The logic of our system of checks and balances is that "the effectiveness of the whole depends on [each branch's] involvement with one another . . . even if it often is the sweaty intimacy of creatures

141. See generally Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000).

142. SUNSTEIN, *supra* note 3, at 259.

143. See *supra* note 8 and accompanying text.

144. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (2d ed. 1962).

145. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959); see also Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971 (1999) (reviewing CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999)).

locked in combat.”¹⁴⁶ More to the point, just as the courts need elected government to implement their decisions, the political branches need the courts. By sometimes invoking high-sounding principles when striking down elected-government action, Court rulings upholding governmental decisionmaking have greater force.¹⁴⁷

In sorting out how to approach nongeneralizable cases, the Court must recognize its strengths and its limits. On the one hand, the Court must speak clearly and persuasively if it is to shape the method and context of constitutional discourse undertaken by the political branches. At the same time, a Court that pays no mind to the facts and simply announces broad pronouncements of the Constitution’s meaning will often render unworkable decisions. For reasons we will now detail, we think that there is a mechanism by which the Court can balance inherent limits in judicial factfinding with its needs to speak forcefully on constitutional questions. Specifically, we think that the Court ought to employ a case management approach, using certiorari denials and other “passive virtues” to provide a time lag between governmental action and adjudication.¹⁴⁸

By exercising great caution before deciding nongeneralizable cases, the Court may fully engage itself in these disputes at a time when the “facts” are better known to it and to the nation. Under this proposal, of course, politicians and lower court judges will (at least initially) have free reign to decide these issues. But when the Supreme Court enters the fray, it will do so at a time when it is better positioned both to speak clearly and to make an informed decision. In particular, by allowing several lower court judges to develop facts through adversarial litigation, the Court need not rely on works of advocacy (party and amicus briefs). Moreover, by letting the facts “percolate” this way, the Court is less bound by the arguments made by the parties to a single lawsuit and, consequently, will better appreciate what issues are presented by the case before it. While such a strategy would leave lower courts susceptible to the various biases we have described, it would allow the Supreme Court to avoid them. For, by deferring its own decision until several lower courts have spoken, the Court can assume that any decision it makes is premised upon a relatively full information set—that is, the facts and opinions of the various lower courts that have heard admittedly nongeneraliz-

146. BICKEL, *supra* note 144, at 261.

147. Charles L. Black, Jr. has explained the way that this works: “What a government of limited powers needs, at the beginning and forever, is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. . . . [T]he Court, through its history, has acted as the legitimator of the government.” CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 52 (1960).

148. For the definitive treatment of the “passive virtues,” see BICKEL, *supra* note 144, at 111-98. Needless to say, our proposal is influenced by Bickel’s writings (even though Bickel never considered the question of judicial misperceptions of facts).

able cases. By aggregating the facts and opinions of these various cases, the Court can ensure that its “anchor” better reflects the great variety of plaintiffs and programs.

“How to inform the judicial mind,” Justice Frankfurter once commented, “is one of the most complicated problems” confronting the Supreme Court.¹⁴⁹ When it comes to nongeneralizable cases, this problem is acute. In explaining why this is so, this Article has highlighted limits in judicial factfinding. At the same time, by making use of a modified case management plan, the Court can arm itself with a robust information set. In so doing, it can play a meaningful and constructive role in shaping constitutional values in cases involving nongeneralizable facts.

149. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952-55, at 63 (Leon Friedman ed., 1983) (quoting Justice Frankfurter).

