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Volume 35  
Issue 3 *Symposium: Post-Grutter: What Does  
Diversity Mean in Legal Education and Beyond?*

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Article 1

4-20-2008

## Democracy and Diversity

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### Recommended Citation

John Payton *Democracy and Diversity*, 35 Pepp. L. Rev. Iss. 3 (2008)  
Available at: <https://digitalcommons.pepperdine.edu/plr/vol35/iss3/1>

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# Democracy and Diversity

John Payton\*

Why does racial diversity in the legal profession, the largest and most powerful profession in the country, matter? The answer to that deceptively simple question requires a hard look at our society and our law schools. More than that, however, it requires a hard look at our democracy.

We are, after all, a democracy. And our democracy makes extraordinary use of lawyers<sup>1</sup>—more than any other country in the world.<sup>2</sup> So, why does racial diversity in our legal profession matter? I believe it matters with respect to our ability to function as a full democracy. In fact, diversity in our legal profession is essential to our ability to function as a full democracy. So, the stakes in this discussion about diversity in the legal profession are nothing less than the health of our democracy.

I am going to start in our legal past. We were once a profession that sought to be all White, just as we were once a democracy that sought to be all White. There were Black people for sure, but they were outside of democracy. There were a small number of Black lawyers for sure, but they were kept outside of the organized profession.<sup>3</sup> Today's relative diversity is a very recent development. I am going to begin by looking at our non-diverse past—I will use a different term in just a few minutes—and see how that lack of diversity impacted our democracy.

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\* Copyright © 2008 by John Payton. The author was a senior partner at WilmerHale when he was lead counsel for the University of Michigan in the two cases that challenged the use of race as a factor in the admissions process to achieve a diverse student body at the University's main undergraduate college and at its law school. The first was *Gratz v. Bollinger*, which the author tried in the district court and argued in the Sixth Circuit and the United States Supreme Court. The second was *Grutter v. Bollinger*, which the author also tried in the district court and argued in the Sixth Circuit. On March 1, Mr. Payton became the Director-Counsel and President of the NAACP Legal Defense and Educational Fund.

1. The United States has over one million active, licensed lawyers. See American Bar Association, ABA Market Research Department, *National Lawyer Population by State*, [http://www.abanet.org/marketresearch/2007\\_Natl\\_Lawyer\\_FINALonepage.pdf](http://www.abanet.org/marketresearch/2007_Natl_Lawyer_FINALonepage.pdf) (last visited Jan. 31, 2008).

2. Frank B. Cross, *The First Thing We Do, Let's Kill all the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 646 (1992).

3. See J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944, at 541-44 (1993).

Let me turn my initial question upside down. Did it matter in the past that the institutions of the legal profession were restricted to White lawyers; that those White lawyers were trained in law schools that were only for White law students; that in their careers those White lawyers were only faced with opposing White lawyers; that in their professional organizations they discussed their profession and other issues only with other White lawyers? Did that matter? Did it have consequences?

So let's start. The American Bar Association (ABA) was founded in 1878 as part of the Progressive Movement.<sup>4</sup> At its founding, it formally excluded all Black lawyers<sup>5</sup>—or at least it thought it had.

In 1912 the ABA learned, to its horror, that it had unknowingly admitted three Black lawyers to its ranks.<sup>6</sup> One was William Lewis, a Harvard Law School graduate, who was then an Assistant Attorney General of the United States.<sup>7</sup> There were, from time to time, Black students at Harvard and some other schools,<sup>8</sup> but usually one or so at a time<sup>9</sup>—so few that it did not occur to the ABA that a Harvard Law graduate could be a Black person. But William Lewis was.

This was a crisis. The head of the ABA's membership committee commented that the admission of Black lawyers raised "a question of keeping pure the Anglo-Saxon race."<sup>10</sup> You don't have to read between the lines. The ABA thought of itself as an Anglo-Saxon organization. There were two issues. First, what to do with the three Black members now that the ABA knew they were Black. And, second, what about the future? A resolution was introduced to throw them out.<sup>11</sup> Moorfield Story, a past President of the ABA and the then-President of the recently founded National Association for the Advancement of Colored People (NAACP), objected.<sup>12</sup> They worked out the following compromise:

Whereas, Three persons of the colored race were elected to membership in this Association without knowledge upon the part of those electing them that they were of that race, and are now members of the Association.

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4. *Id.* at 541.

5. *Id.* at 541-42.

6. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 65 (1976).

7. SMITH, JR., *supra* note 3, at 541-42.

8. *See generally* AUERBACH, *supra* note 6 at 33-65.

9. *See id.*

10. *Id.* at 66.

11. *Id.* at 65.

12. *Id.* at 65-66.

Resolved, that as it has never been contemplated that members of the colored race should become members of this Association, the several local councils are directed that, if at any time any of them shall recommend a person of the colored race for membership, they shall accompany the recommendation with a statement of the fact that he is of such race.<sup>13</sup>

The three would stay in—actually it was two since one had resigned under pressure—but henceforth there would be a complete bar on Black or colored members. So, these and no more.

The legal profession and the ABA reflected their times. A hundred years ago, Black people were a majority of the population in several Southern states and constituted a significant percentage of the population in the others.<sup>14</sup> Despite the Fourteenth and Fifteenth Amendments, however, their political and economic realities were bleak. They were disenfranchised as voters,<sup>15</sup> excluded as jurors,<sup>16</sup> held no significant political office in any Southern state, and were relegated to second and third class roles in the economy.<sup>17</sup> They were, in short, excluded from participation in their government, the hallmark of democracy.

This was White Supremacy. And that is the different term I said I would use instead of non-diverse. White Supremacy was implemented by law, force, and intimidation. The superiority of White people was proclaimed, though never demonstrated. In fact, to avoid the possibility of evidence contrary to White superiority, the opportunities for Black and White people to compete together were extremely limited to preclude the possibility that reality could undermine it. To that end, an important requirement of White Supremacy was racially segregated schools and the relegation of Black children to inferior segregated schools.

Today many people reduce this scheme to the word “segregation”—a term that today carries little of its original meaning—and, even then, limit the reach of the term to schools or housing patterns. This is, in part, because

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13. SMITH, JR., *supra* note 3, at 543 (quoting 35 REP. A.B.A. 12-13 (1912)).

14. See U.S. Department of the Interior, Census Bureau, *Statistics of the Population of the United States at the Tenth Census*, at 3 (1880), available at [http://www2.census.gov/prod2/decennial/documents/1880a\\_v1-01.pdf](http://www2.census.gov/prod2/decennial/documents/1880a_v1-01.pdf). In 1880, Blacks made up 61% of the population of South Carolina, 57% of Mississippi, 52% of Louisiana, nearly 50% of Alabama, and 47% of Georgia. *Id.*

15. JOHN HOPE FRANKLIN & ALFRED A. MOSS, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 288 (2000).

16. *Id.* at 354.

17. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 57-68 (spec. ed. 1994).

those appear to be the only current analogous circumstances. But this historical scheme was much more. It began with African Americans being denied the vote and virtually any participation in the political process.<sup>18</sup> The segregation that reinforced that exclusion was comprehensive: buses, restaurants, theaters, schools, parks, swimming pools, hotels, stores, restrooms, even drinking fountains—were segregated so that African Americans were consigned to inferior facilities.<sup>19</sup> In many instances, they were denied facilities outright.<sup>20</sup> Entire job categories were reserved for White employees.<sup>21</sup> Entire job categories were reserved for African Americans.<sup>22</sup> Interracial marriage was a crime in a large number of states.<sup>23</sup>

Democracy, at its core, requires that all of the people be included in “we the people.”<sup>24</sup> For that inclusive democracy to function, it is essential that we see each other as peers. This does not mean that everyone must be the same. But it does mean that, beyond economic or educational circumstances, there is the respect of a peer. There must be an understanding that our differences enrich our collective perspective. Democracy depends on this sense of the people being peers in a shared enterprise to function constructively. White Supremacy sought to destroy any possibility of a Black-White community of peers after slavery and Reconstruction.

By the turn of the last century, White Supremacy had been inserted into our national ethos. William Dunning was one of the founders of the American Historical Association and one of its first Presidents.<sup>25</sup> He taught for years at Columbia University and dominated the field of Reconstruction.<sup>26</sup> His views were mainstream for over fifty years. He wrote several books on Reconstruction. Originally published in 1897, the 1904 edition of his book, *Essays on the Civil War and Reconstruction*, contained an essay entitled *The Undoing of Reconstruction*.<sup>27</sup> The essay recounts with

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18. *Id.* at 102 (only allowing people to vote whose grandfathers voted in the period prior to Reconstruction when only Whites were enfranchised).

19. See Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 1019-23, 1026 (2005) (book review).

20. *Id.*

21. See *id.*

22. *Id.*

23. See generally *Loving v. Virginia*, 388 U.S. 1 (1967) (holding bans on interracial marriages unconstitutional).

24. U.S. CONST. pmbl.

25. Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 523 n.12 (1989).

26. *Id.*

27. WILLIAM ARCHIBALD DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION* 353 (1907).

remarkable candor the violence and terror and subterfuge that was used to undermine Reconstruction. Dunning concludes as follows:

[T]he ultimate root of the trouble in the South had been, not the institution of slavery, but the coexistence in one society of two races so distinct in characteristics as to render coalescence impossible; that slavery had been a *modus vivendi* through which social life was possible; and that, after its disappearance, its place must be taken by some set of conditions which, if more humane and beneficent in accidents, must in essence express the same fact of racial inequality. The progress in the acceptance of this idea in the North has measured the progress in the South of the undoing of reconstruction.<sup>28</sup>

*Brown v. Board of Education*, as we all know, began the long process of unraveling what Dunning just described as, literally, a substitute for slavery and the accompanying justification for limiting rights and democracy.<sup>29</sup> Obviously, much more than *Brown* was needed to address the full crisis of democracy, including the 1964 Civil Rights Act,<sup>30</sup> the 1965 Voting Rights Act,<sup>31</sup> and the 1968 Fair Housing Act<sup>32</sup>—and the resources and political will to effectuate those and other laws. But *Brown* started the ball rolling.

When *Brown* was decided, virtually all of our powerful and prominent legal institutions were White: from the courts, to the ABA, to the Justice Department, to just about all of our law schools and their faculties. So, I am going to use *Brown* as a window through which we can look into an aggressively non-diverse legal profession.

Here is the question I will use to take that look: How did legal academia react to *Brown* right after it was decided? How was it received by law schools and law reviews? Law schools, after all, were and are one of the intellectual centers of our country. This is especially true with respect to issues of law, issues of justice, and issues of democracy. So, how did a non-diverse legal academia respond to perhaps the most significant decision on race the Supreme Court has ever decided?

Some of you may not appreciate the role of law journals fifty years ago, for it was quite different from today. Law journals were the place where

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28. *Id.* at 384-85

29. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

30. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

31. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

32. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968).

legal disagreements were aired; where new ideas were introduced; where synthesis was attempted. Law professors, law students, judges, and lawyers actually read law reviews. I know that may be a little startling to some of you, but it is true. The individual publications—the books—would be mailed out to subscribers and would be read and discussed. Lawyers would cite them in briefs; courts would cite them in opinions. You could expect that a major decision of the Supreme Court would be the subject of comments and articles, and that the articles would be responded to in later editions of the journal.

So, how did major law journals treat *Brown*?<sup>33</sup> Let's take a look. In *Columbia Law Review*, volume 54 in 1954,<sup>34</sup> there is no article or comment or any mention at all of *Brown*. Too soon to expect that? I looked at volume 55 in 1955.<sup>35</sup> No article, no comment, no mention. Same for 1956.<sup>36</sup> Same in 1957.<sup>37</sup> I looked at the *Yale Law Journal*, volume 63 in 1954-55.<sup>38</sup> There is no article on *Brown*. There is no comment on *Brown*. There is a case note on the *Supreme Court's Equity Discretion: The Decrees in the Segregation Cases*<sup>39</sup>—a procedural discussion only.<sup>40</sup> In fact, in its first footnote, the piece refers the reader to an article in the *Pittsburgh Law Review* for an analysis of the decision in *Brown*.<sup>41</sup> I'll bet that had never happened before and has never happened since—the *Yale Law Journal* deferring to another law review for analysis of a major Supreme Court decision. What about the next volume of the *Yale Law Journal*, volume 64 for 1955-56?<sup>42</sup> No article. No comment. There is instead something of a follow-up to the comment I just referred to: *Legal Sanctions to Enforce Desegregation in the Public Schools*.<sup>43</sup> There was no article in *New York*

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33. This section examines how disinterested legal academics responded to *Brown*. There were, in fact, pieces published by individuals, such as Louis H. Pollak and Charles Black, who were legal academics; but they were all also *Brown* partisans who contributed to the litigation of the case. See KLUGER, *supra* note 17, at 725; see also Louis H. Pollak, *Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment*, 67 YALE L.J. 304 (1957); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

34. 54 COLUM. L. REV. iii, iii-x (1954).

35. 55 COLUM. L. REV. iii, iii-ix (1955).

36. 56 COLUM. L. REV. iii, iii-vii (1956).

37. 57 COLUM. L. REV. iii, iii-viii (1957). There is an article that relates to exhaustion principles and equitable abstention in the school desegregation context, but it does not address the holding of *Brown* in much detail. Note, *Effect of School Assignment Laws on Federal Adjudication of Integration Controversies*, 57 COLUM. L. REV. 537, 538 (1957).

38. 64 YALE L.J. iii, iii-vi (1954).

39. Note, *Supreme Court Equity Discretion: The Decrees in the Segregation Cases*, 64 YALE L.J. 124 (1954).

40. *Id.*

41. *Id.* at 124 n.1.

42. 65 YALE L.J. iii, iii-ix (1955).

43. Comment, *Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt*

*Law Journal*, whose first volume was published in 1955.<sup>44</sup> *Stanford Law Review*? No article or comment in volume 7 in 1954-55,<sup>45</sup> or in volume 8 in 1955-56.<sup>46</sup> Same story for the *University of Chicago Law Review*.<sup>47</sup>

Volume 103 of the *Pennsylvania Law Review*, published in 1954, included an article by John Roche, a historian, entitled *Plessy v. Ferguson, Requiescat in Pace*.<sup>48</sup> This was when lawyers actually knew some Latin. It describes the reality of White Supremacy that produced *Plessy*.<sup>49</sup> He details the denial of virtually all rights to African Americans, as well as the violence and oppression that accompanied that White Supremacy<sup>50</sup>—much of the ground I covered previously. He also comments on the NAACP's legal strategy to crack this White Supremacy that culminates in *Brown*.<sup>51</sup> It is a good article, but there is no article or comment in the volume by a lawyer, law professor, or law student, on *Brown*.<sup>52</sup> In the next two volumes in 1955 and 1956, there is nothing on *Brown*.<sup>53</sup>

Now, there are some other law reviews that published articles on *Brown*—I just referred to the article in the *Pittsburgh Law Review*,<sup>54</sup> and there is an article in the *NYU Law Review*<sup>55</sup>—but, it is quite remarkable that Columbia, Yale, Stanford, and Chicago were virtually silent on *Brown*. What does this mean? I think it reflects the deep skepticism about *Brown* within the intellectual circles that included law reviews. I think it reflects a denial of just what *Brown* signified.

Finally, what about the *Harvard Law Review*? In 1954, the *Harvard Law Review* included *Brown* in its *Supreme Court Term*.<sup>56</sup> But the coverage consisted of five pages and had no real analysis.<sup>57</sup> There was no separate

*Power and the Civil Rights Acts*, 65 *Yale L.J.* 630 (1955).

44. 1 *N.Y.L. SCH. L. REV.* iii, iii-vii (1955).

45. 7 *STAN. L. REV.* iii, iii-vii (1954).

46. 8 *STAN. L. REV.* iii, iii-vii (1955).

47. 22 *U. CHI. L. REV.* iii, iii-vi (1954).

48. 103 *U. PA. L. REV.* 44 (1954).

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

50. Roche, *supra* note 49, at 55.

51. *Id.* at 50-51.

52. *Supra* note 48, at i-iv.

53. 104 *U. PA. L. REV.* i, i-vi (1955); 105 *U. PA. L. REV.* i, i-v (1956).

54. Ernst Borinksi, *A Legal and Sociological Analysis of the Segregation Decision of May 17, 1954*, 15 *U. PITT. L. REV.* 622 (1954).

55. Edmond Cahn, *Jurisprudence*, 30 *N.Y.U. L. REV.* 150 (1955).

56. Albert M. Sacks, *The Supreme Court, 1953 Term—Forward*, 68 *HARV. L. REV.* 96, 96-100 (1954).

57. *Id.*



article or comment. In later volumes, however, there are two very significant articles by two very prominent authors. These articles were in 1955 and 1959. In volume 69, in 1955, there is an article by Alexander Bickel, "The Original Understanding and the Segregation Decision," which focuses on the intent of the Framers of the Fourteenth Amendment and is quite critical of *Brown*.<sup>58</sup> In volume 73, published in 1959, Herbert Wechsler published his extremely influential article, "Toward Neutral Principles of Constitutional Law," arguing that *Brown* could not be squared with any set of acceptable neutral principals.<sup>59</sup> Thus, the earlier silence was replaced by skepticism.

Back to the question: what does this mean? Herbert Wechsler wrote his seminal article in 1959.<sup>60</sup> It was taken from a lecture he gave at Harvard Law School.<sup>61</sup> He did not set a trend, but he certainly articulated a general concern, which he wrote down. Wechsler's article is about the need for courts to use neutral principles in their judicial process.<sup>62</sup> There is no argument there. He spends much of his article going over that concept. To make his point, he focuses at the end of his article on three landmark cases involving race: *Smith v. Allright*,<sup>63</sup> which struck down the White Primary; *Shelley v. Kraemer*,<sup>64</sup> which struck down the use of racially restrictive covenants that were designed to prevent Black people from living in proximity to White people; and *Brown*.<sup>65</sup>

The following is Herbert Wechsler explaining his difficulty identifying a neutral principle underlying these three cases:

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved. I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt that he must carry but also in the benefits he is denied. In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that

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58. 69 HARV. L. REV. 1 (1955).

59. 73 HARV. L. REV. 1 (1959).

60. *Id.*

61. *Id.*

62. *Id.*

63. 321 U.S. 649 (1944).

64. 334 U.S. 1 (1948).

65. 347 U.S. 483 (1954).

we had to go to Union Station to lunch together during the recess.<sup>66</sup>

The Charles Houston whom Wechsler refers to was pivotal in all three cases, and he is viewed as the architect of the legal strategy that ends up in *Brown*.<sup>67</sup> In fact, he was the original counsel in the case that became *Bolling v. Sharpe*,<sup>68</sup> but he became ill and died in 1950 before it was litigated.<sup>69</sup> Thurgood Marshall was Houston's student when he, Houston, was the Vice Dean at Howard Law School and took over for him as Special Counsel to the NAACP.

The reason Wechsler said that the problem was not state-enforced segregation was, as he explained in his oral history later, because "the segregationist principle operates evenly on both sides of the excluded division."<sup>70</sup>

Read Wechsler again. He begins by "assuming equal facilities," and then he goes on to an example of total exclusion: "In the days when I was joined with Charles H. Houston in litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess."<sup>71</sup>

That is just startling. "He did not suffer more than I"—this was White Supremacy.<sup>72</sup> The whole point was to make Houston suffer more than Wechsler. And, actually, how did Wechsler suffer anyway? He was clerking at the Supreme Court when Houston had a case there.<sup>73</sup> He could go to the White-only cafeteria in the U.S. Capitol anytime he wanted. But to have lunch with Houston, he had to go somewhere else. This was an inconvenience to Wechsler, but it was a humiliation to Houston.

Wechsler's views on this reflect a denial of the reality of White Supremacy—the reality I reviewed a few paragraphs ago.<sup>74</sup> In the period prior to *Brown*, virtually every aspect of social, economic, and political life

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66. Wechsler, *supra* note 59, at 34.

67. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 3 (1983).

68. 347 U.S. 497 (1954).

69. MCNEIL, *supra* note 68, at 211.

70. Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 865 (1993).

71. Wechsler, *supra* note 59, at 34.

72. *Id.*

73. Silber & Miller, *supra* note 71, at 854.

74. See *supra* notes 9-27 and accompanying text.

in the United States was designed and operated to enforce a policy of White Supremacy; a policy that was never supposed to operate evenly on both sides, to use Wechsler's phrase. The White-only cafeteria at the United States Capitol that Wechsler references cannot be understood unless the context of White Supremacy and domination is understood;<sup>75</sup> neither can Jim Crow, or segregated schools, or all of the rest.

Professor Wechsler, by the few sentences I read, and his reference to Charles Houston, should have known better than what he said. He was not just lost in an ivory tower. The Washington D.C. that he and Charles Houston worked in during the 1930s was a brutally segregated city.<sup>76</sup> And, if that point was lost in nostalgia, the aftermath of *Brown* should have been sobering: massive resistance, open defiance, and public displays by the Ku Klux Klan.<sup>77</sup> And in 1955, the entire country was riveted by the hideous spectacle of the murder of Emmett Till, the refusal of an all-White Mississippi jury to convict the White men accused of the murder, and the 1956 publication in *Look Magazine* of the murderers' lurid story of the murder that they could then, freely and with impunity, proudly admit to.<sup>78</sup>

But it was more than these realities that Wechsler could not grasp. Throughout the line of cases that the NAACP brought, up to and including *Brown*, the arguments were clearly intended to invoke concepts and requirements of democracy. The three cases that Wechsler had so much trouble with were clearly about democracy. This is what Charles Houston told the Supreme Court in *Hurd v. Hodge*, the companion case to *Shelley v. Kraemer*,<sup>79</sup> about the racial restrictions in that case. But his remarks could easily apply to all three: "They are incompatible with the foundations of our republic and their judicial approbation may well imperil our form of government and our unity and strength as a nation."<sup>80</sup>

Wechsler's search for a neutral principle to make sense of these three cases never considered a democracy principle. For him, they were about something far less. For Houston, for Marshall, and for the other NAACP lawyers, they were always about much more—the requirements of democracy. How democracy would operate as the neutral principle that animates these cases is pretty straightforward to me, but it is clearly a topic

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75. See Silber & Miller, *supra* note 71.

76. KLUGER, *supra* note 17, at 107.

77. Molly O'Brien, *Discriminatory Effects: Desegregation Litigation in Higher Education in Georgia*, 8 WM. & MARY BILL RTS. J. 1, 18-19 (1999).

78. William Bradford Huie, *The Shocking Story of Approved Killing in Mississippi*, LOOK MAG., (Jan. 24, 1956), reprinted in 1 REPORTING CIVIL RIGHTS: AMERICAN JOURNALISM 1941-1963, 232 (Clayborne Carson et al. eds., 2003).

79. 334 U.S. 1 (1948).

80. Brief for the Petitioners at 8, *Hurd v. Hodge*, 334 U.S. 24 (1948).

for another paper. My point today is that Wechsler could not see even this possibility.

Wechsler could not break away from the severe limitations of his own background. His legal education was non-diverse. His legal career was non-diverse. His tenure as a law professor at Columbia, at least up to 1959 when he wrote this article, was non-diverse.

Law and lawyers play important roles in almost all aspects of our society's political, economic, and even social realities. It matters how those lawyers came to their understandings of reality. That has been acknowledged in Supreme Court cases for actually a very long time,<sup>81</sup> though its full significance has only been appreciated recently.<sup>82</sup>

In 1950, the Supreme Court decided *Sweatt v. Painter*, the case in which the Court found unconstitutional the University of Texas Law School's exclusion of Black students.<sup>83</sup> This was another of the NAACP's cases in the progression to *Brown*. In its unanimous opinion, the Court made the following statement:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.<sup>84</sup>

In *Bakke*, twenty-eight years later, Justice Powell would use language that clearly echoed *Sweatt*.<sup>85</sup> “[I]t is not too much to say,” wrote Justice Powell, “that the ‘nation’s future depends on leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>86</sup>

Justice Powell went to Harvard Law School in the early 1930s—the same time that Herbert Wechsler went to Columbia Law School.<sup>87</sup> Neither benefited from a racially diverse education, though Powell’s background in

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81. See *infra* notes 79-80 and accompanying text.

82. See *infra* notes 99-104 and accompanying text.

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

84. *Id.* at 634.

85. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)).

86. *Id.* at 313.

87. See *ENCYCLOPEDIA OF THE U.S. SUPREME COURT VOLUME II* 730-31 (Thomas T. Lewis & Richard L. Wilson eds., Salem Press, Inc. 2001).

Virginia would have made him much more personally aware of the realities of White Supremacy. In any event, by 1978, our sensibilities had changed dramatically. Most colleges and universities were experimenting with racial and ethnic diversity, and most were reporting very positive results.<sup>88</sup> More importantly, the 1964 Civil Rights Act<sup>89</sup> and the 1965 Voting Rights Act<sup>90</sup> had begun a democratic transformation of the country and its view of itself.

Why does racial diversity matter to the legal profession? Let's ask the question another way. Do you think that if Herbert Wechsler had gone to a law school with a diverse student body, or had been on a diverse faculty when he was writing his articles, or had practiced in a diverse environment, he would still not appreciate the realities of White Supremacy or the missing requirements of democracy? Would that have changed the topics he discussed or the way in which he approached the topics he chose? Would feedback from diverse colleagues have affected his understanding?

My point about democracy and peers earlier—that for inclusive democracy to function, it is essential that we see each other as peers<sup>91</sup>—applies here as well. Faculty are peers, as are students. Peers influence each other.

Why does this all matter? Certainly it matters to the Black lawyers excluded from the ABA, and it matters to the Black students excluded from law schools. But there are even larger issues here as well. Remember our main question: Why does racial diversity matter to the legal profession? In 1912, did it affect the ABA that all of its members—except for the three Black lawyers it did not know about—were White males? The 1912 Resolution of the ABA referred only to “he,” and that was not an accident.<sup>92</sup> Did these exclusions affect the positions that the ABA took? Did they affect the issues it considered? The discussion those issues received? Of course they did.

The editors of the law journals after *Brown* were affected by their backgrounds and their realities. My point is not that they were racists, but that they were limited by their education and their peers. What the Court in *Sweatt*,<sup>93</sup> *Brown*,<sup>94</sup> *Bakke*<sup>95</sup> and *Grutter*<sup>96</sup> recognized as crucial to a complete education as lawyers and citizens, they all lacked. That failure had

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88. See generally Brief of Columbia Univ., et al. as Amici Curiae, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188007.

89. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

90. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

91. See *supra* page 106.

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

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

94. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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

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

profound consequences for them. In hindsight, perhaps it should not be so surprising that the virtually all-White law journals at virtually all-White law schools had a perspective that distorted reality and its possibilities. Our crippled democracy did not include Black people, and they did not see democracy as a principle that could easily animate *Smith*,<sup>97</sup> *Shelley*<sup>98</sup> and *Brown*.<sup>99</sup> Even Progressives were comfortable being all White.

*Brown* ended the accommodation that the Progressives had made with racial oppression.<sup>100</sup> I think it also eventually ended the paralysis that intellectuals like Herbert Wechsler had in coming to grips with the reality of racial injustice and its anti-democratic roots. My point is that the lack of diversity has consequences and those consequences matter to our democracy. In our past, we can see how it undermined our democracy.

In her opinion in *Grutter*, Justice O'Connor reviewed Justice Powell's opinion in *Bakke* in detail.<sup>101</sup> She devoted almost three pages to Justice Powell's opinion.<sup>102</sup> She also used the quote I mentioned before,<sup>103</sup> but she changed the lead in. She dropped the, "It is not too much to say," and rewrote it so that it reads like this: "Justice Powell emphasized that 'nothing less than the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.'"<sup>104</sup>

In saying "nothing less than the nation's future," Justice O'Connor deferred to Michigan's educational judgment that "diversity is essential to its educational mission."<sup>105</sup> She placed this in the context of the "overriding importance of preparing students for work and citizenship . . . as pivotal to . . . maintaining the fabric of society."<sup>106</sup>

Justice O'Connor then said this: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."<sup>107</sup> Then, in case the point was missed, she restated it using the word legitimacy: "In order to

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97. *Smith v. Allright*, 321 U.S. 649 (1944).

98. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

99. *Brown*, 347 U.S. at 483.

100. *See supra* note 29 and accompanying text.

101. *Grutter*, 539 U.S. at 323-25.

102. *Id.*

103. *See supra* note 86 and accompanying text.

104. 539 U.S. at 324.

105. *Id.* at 328.

106. *Id.* at 331.

107. *Id.* at 332.

cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>108</sup> All of this sounds very reminiscent of Charles Houston’s argument that I quoted from in *Hurd v. Hodge*, with his warning that judicial “approbation” of White Supremacy “may well imperil our form of government and our unity and strength as a nation.”<sup>109</sup>

Those are democracy principles. Powerful democracy principles. Almost anyone today looking back at the panoply of cases that attacked White Supremacy—the White Primary cases, the school cases, the residential segregation cases, the voting cases, and the more recent educational diversity cases—can easily see the clear connection of those cases to the essential aspects of democracy.

This was not true fifty years ago. Then, law students may have thought the results in those cases were acceptable, but they could not identify a unifying principle that justified the results. Democracies depend on people seeing each other as peers, that is, people who know and respect each other. Diverse democracies depend on diverse people who know and respect each other.

This is why racial diversity in the legal profession matters. It matters to the legitimacy and health of our democracy.

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108. *Id.*

109. Brief for Petitioners at 8, *Hurd v. Hodge*, 334 U.S. 24 (1948) (Nos. 290, 291).