

A LAWYER LOOKS AT CIVIL DISOBEDIENCE: WHY LEWIS F. POWELL JR. DIVORCED DIVERSITY FROM AFFIRMATIVE ACTION

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*This Article reconstructs Lewis F. Powell Jr.'s thoughts on the civil rights movement by focusing on a series of little-known speeches that he delivered in the 1960s lamenting the practice of civil disobedience endorsed by Martin Luther King Jr. Convinced that the law had done all it could for blacks, Powell took issue with King's "Letter from Birmingham Jail," impugning its invocation of civil disobedience and rejecting its calls for compensatory justice to make up for slavery and Jim Crow. Dismissive of reparations, Powell developed a separate basis for supporting diversity that hinged on distinguishing American pluralism from Soviet totalitarianism. Powell's reasons for defending diversity are worth recovering today, not least because courts continue to misinterpret his landmark opinion in *Regents v. Bakke*, confusing the use of diversity in higher education with the compensatory goals of affirmative action, a project that Powell rejected.*

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INTRODUCTION

On a brisk spring day in April 1966, Richmond attorney Lewis F. Powell Jr. mounted a measured, thoughtful assault on the civil rights movement. Standing before an attentive audience at his alma mater, Washington & Lee University School of Law, Powell unloaded a steady, forty-five minute barrage against the movement's most visible leader, Martin Luther King Jr., for embracing "reckless" tactics, invoking "irrelevant" arguments, and spreading the "heresy" of civil disobedience.¹ According to Powell, civil disobedience was "fundamentally inconsistent with the rule of law," a tactic that anyone "trained in logic" should have "rallied promptly to denounce."²

Powell even mocked King's "Letter from Birmingham Jail," a Pauline epistle that the black leader had penned in an Alabama cell in 1963.³ The letter was part of a string of protest actions that had helped earn the minister international acclaim, including a Nobel Peace Prize in 1964 for declaring that individuals had a "moral responsibility to disobey unjust laws" and that unjust laws were those that did not square with the "law of God."⁴ Powell found such claims baseless. While Powell conceded that some might find the idea of a higher law appealing in the abstract, such notions could never provide the

1. Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 205, 208, 224 n.66 (1966).

2. *Id.* at 205. Whites who resorted to violence and "intimidation" were not representative of the South, argued Powell, but rather a "small and depraved minority." *Id.* at 207.

3. Glenn Eskew refers to the letter as a "Pauline epistle" in GLENN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* 244 (1997).

4. Martin Luther King, Jr., *Letter from Birmingham Jail*, April 16, 1963, in MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 84–85 (1st ed. 1964) [hereinafter King, *Letter from Birmingham Jail*].

“basis for a system of organized society.”⁵ To Powell, King’s argument was “simply a doctrine of anarchy,” and no one who was “intellectually honest” could reasonably claim its use was warranted in the United States, a clear jab at the integrity of the black leader.⁶

Powell’s speech against King at Washington & Lee was no isolated rant. He mounted similar critiques of the black minister throughout the 1960s, even using his position as President of the American Bar Association from 1964 to 1965 to criticize the civil rights movement.⁷ Yet, Powell’s critiques failed to garner much attention during his confirmation hearings and faded almost entirely from view once he joined the Supreme Court in 1972.⁸ From that point onward, most observers tended to view him as a moderate, an individual who sympathized with aspects of the civil rights movement but refrained from writing bold pro-rights opinions in the interest of not alienating more conservative members of the Court.⁹ Powell supporters downplayed his rants against King and

5. Powell, *supra* note 1, at 210.

6. *See id.* at 208. For Powell, the letter “met the needs of intellectuals and theologians for a moral and philosophical justification of conduct which, by all previous standards, was often lawless and indefensible.” *Id.* at 207. Only “reckless extremists” would endorse such a position. *See id.* at 208.

7. *See, e.g.*, Lewis F. Powell, Jr., *Respect for Law and Due Process – the Foundation of a Free Society*, 18 U. FLA. L. REV. 1 (1965); Powell, *supra* note 1, at 208; Lewis F. Powell, Jr., *Civil Disobedience: Prelude to Revolution?*, 40 N.Y. ST. B.J. 172 (1968) [hereinafter Powell, *Prelude to Revolution?*].

8. Powell tried to distance himself from his early critiques of King, arguing in a note to John Jeffries that he was primarily upset with King’s opposition to the Vietnam War, a position that did not fully account for the fact that Powell criticized King long before the civil rights leader came out publicly against Vietnam. *See, e.g.*, Letter from Lewis F. Powell, Jr. to Lewis Powell III & John Jeffries (June 30, 1981) (on file with Washington & Lee Law School Library) (“I’ve kept these papers in the event – after my death – there is criticism of what I said about King *after* he became a Vietnam activist, contributing to disorder.”).

9. *See, e.g.*, Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21, 23 (1979) (“One is tempted to assume that since Justice Powell stands, in one sense, ‘in the middle,’ . . .”); Linda Greenhouse, *Powell: Moderation Amid Divisions*, N.Y. TIMES, June 27, 1987, at 32 (“Justice Powell was the Court’s balancer and compromiser . . .”); Oliver W. Hill, *A Tribute to Lewis F. Powell, Jr.*, 49 WASH. & LEE L. REV. 11, 13 (1992) (“Lewis Powell has steadfastly pursued the twin goals of educational excellence and racial cooperation.”); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 1 (1987) (“Powell’s jurisprudence [was] characterized by a balancing approach that [sought] to accommodate competing claims.”); J. Harvie Wilkinson, III, *Lewis F. Powell, Jr.—A Personal View*, 65 WASH. & LEE L. REV. 3, 8 (2008) (“Justice Powell always sought to soothe feelings and to bridge differences.”).

looked instead to his early rejection of massive resistance to *Brown v. Board of Education* in Virginia in the 1950s as evidence of his moderate credentials, transforming him into an ally, not enemy, of King.¹⁰

Yet, Powell's critiques of King and the Movement¹¹ in the 1960s are worth reconsidering, not least because they provide new insight into one of his biggest contributions to constitutional doctrine: the argument that race can be factored into university admissions for the sake of diversity.¹² This assertion, which Powell made in *Regents of the University of California v. Bakke* in 1978, transformed the way that courts assessed overt racial classifications in the law, even as it changed the way that universities and colleges selected students for their entering classes.¹³ However, Powell's reasons for invoking diversity have been grossly misunderstood.¹⁴ According to most accounts, Powell invoked the language of diversity in order to save affirmative action.¹⁵ However,

10. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 145 (1994).

11. For the sake of simplicity, "Movement" will be used throughout this article to reference the civil rights movement of the 1960s.

12. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–21 (1978); see also John C. Jeffries, Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1, 1–2.

13. Jeffries, *supra* note 12, at 2 (noting that Powell's *Bakke* ruling "determined" the constitutionality of affirmative action in higher education for the remainder of the 20th Century).

14. *Id.* at 6–7.

15. See, e.g., Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1106 (1992) (noting the adoption of diversity rhetoric "to compensate members of groups said to be disadvantaged by historic injustices to their ancestors"); Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1848 (1996) (observing that diversity "has become the preferred euphemism for the déclassé phrase 'affirmative action'"); Mark H. Grunewald, *Quotas, Politics, and Judicial Statesmanship: The Civil Rights Act of 1991 and Powell's Bakke*, 49 WASH. & LEE L. REV. 53, 53 (1992) (describing Powell's *Bakke* opinion as an act of judicial statesmanship); Jeffries, *supra* note 12, at 1 (claiming that Powell "saved" affirmative action); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990) (endorsing a case for affirmative action rooted in challenging white supremacy and racial hierarchy); Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 575–82 (2000) (discussing the Fifth Circuit's rejection of Powell's definition of diversity in lieu of one rooted in affirmative action in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 940 (1997) (arguing that assessments of diversity should incorporate an awareness of past discrimination); Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (arguing that the Supreme Court has tended to view diversity programs as "penance for the specific sins of racism a government, union, or employer has committed in the past"). *But see* Derrick Bell, *Diversity's Distractions*, 103 COLUM.

Powell's writings on the civil rights movement reveal that he actually rejected affirmative action as a matter of principle, refusing to believe that blacks deserved compensation for either present or past discrimination.¹⁶ Further, Powell endorsed diversity in contexts that had little to do with educational quality, suggesting that he did not simply believe diversity served pedagogical goals, a point that he mentioned in *Bakke*.¹⁷

Looked at as a whole, Powell's opinions invoking diversity suggest that he celebrated pluralism not because it furthered racial equality or improved educational quality, but because it advanced the goal of political liberty.¹⁸ In a string of influential opinions, of which *Bakke* was one, Powell cast diversity (racial, cultural, and institutional) as a frontline defense against state "orthodoxy" or totalitarianism.¹⁹ This was a particularly salient argument during Powell's tenure on the Court in the 1970s and 80s due to the Cold War, which pitted the United States against totalitarian regimes like the Soviet Union and China.²⁰ Cold War concerns had long occupied Powell, as this Article shall demonstrate, prompting him to join proponents of religious freedom in endorsing a vision of institutional pluralism that had little to do with correcting past injustice or educating youth, but rather preserving zones of freedom

L. REV. 1622 (2003) (criticizing Powell's diversity rationale for thwarting the cause of racial justice).

16. See *infra* Part I.

17. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

18. See *infra* Parts II & III.

19. See *infra* Part II.

20. Powell's take on the Cold War differed starkly from the liberal notion that integration was part of what Mary L. Dudziak terms a "Cold War imperative." See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988). Instead, Powell's views coincided much more closely with Cold War theorists who described America as pluralist and the U.S.S.R. and China as monocultural. Gregory Smolyne shows how Cold Warriors like George Kennan and John Higham argued that the endorsement of cultural pluralism was a logical, even necessary, counterpoint to totalitarianism. See Gregory Smolyne, *Multicultural Cold War: Liberal Anti-Totalitarianism and National Identity in the United States and Canada, 1935-1971* (Apr. 24, 2007) (unpublished PhD dissertation, Duke University), available at <http://hdl.handle.net/10161/183>, archived at <http://perma.cc/DBF3-HWBY>; see also JOHN HIGHAM, *SEND THESE TO ME: JEWS AND OTHER IMMIGRANTS IN URBAN AMERICA* 196 (1975). Another pivotal work that locates pluralism in the urban North is NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* (1963). See also PHILIP GLEASON, *SPEAKING OF DIVERSITY: LANGUAGE AND ETHNICITY IN TWENTIETH CENTURY AMERICA* (1992).

against an ever-encroaching state.²¹

To further explain Powell's views on diversity, race, and equality, this Article will proceed in three parts. Part I will focus on Powell's critique of the civil rights movement in the 1960s, emphasizing those aspects of his argument that explicitly addressed civil disobedience. Part II will then discuss the manner in which Powell furthered his vision as a Supreme Court Justice, elevating his own version of diversity to the Constitutional plane. Finally, Part III will show how journalists, scholars, and courts have tended to misinterpret Powell's endorsement of diversity in *Bakke*, missing the extent to which he linked it to the compelling state interest of preserving liberty.

I. POWELL CRITIQUES THE MOVEMENT

For almost a decade following *Brown v. Board of Education*, Lewis F. Powell Jr. remained "steadfastly silent" about the civil rights movement.²² He assured locals in Richmond, Virginia, in 1959, for example, that as head of the city's school board he would not openly defy the Supreme Court's ruling in *Brown*, nor would he close public schools.²³ Of course, he also promised that he would do all that he could—within legal bounds—to preserve segregation in the city, a task he assumed as head of Richmond's School Board.²⁴ For example, he sanctioned elaborate "pupil assignment" schemes that directed students to schools based on factors that were only obliquely related to race, even as he constructed new facilities to alleviate overcrowding in single-race schools.²⁵ "[I]t

21. See, e.g., Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1241–50 (2010) (providing an overview of the various ways in which pluralism has been invoked as a defense against totalitarianism); see also Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom,"* 1995 SUP. CT. REV. 393, 425–26; WILLIAM A. GALSTON, LIBERAL PLURALISM (2002) [hereinafter GALSTON, LIBERAL PLURALISM]. See generally William A. Galston, *The Idea of Political Pluralism*, in NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM 95–124 (Henry S. Richardson & Melissa S. Williams eds., 2009) [hereinafter Galston, *The Idea of Political Pluralism*].

22. JEFFRIES, *supra* note 10, at 234.

23. Lewis F. Powell, Jr., Statement on Behalf of the School Board Supporting Construction of the New High Schools Without Delay 4–11 (May 6, 1959) (on file with Washington & Lee Law School Library).

24. *Id.*

25. JEFFRIES, *supra* note 10, at 141.

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is the considered opinion of the Board,” explained Powell in May 1959, “that the new schools would appreciably improve both the short and long range prospect for minimizing the impact of integration.”²⁶ Though Powell conceded that at least some integration would be necessary to survive Supreme Court review, he tended to frame the admission of small numbers of black students to predominantly white schools as tactical efforts aimed at preserving rather than transforming the status quo.²⁷ “We foresee no substantial integration in the elementary schools in Richmond,” assured Powell in 1959.²⁸ Adequate primary school facilities existed to run dual systems, and Richmond was prepared to construct new schools at the high school level to meet black demand.²⁹

Even as some challenged his opposition to massive resistance,³⁰ Powell condoned a course of action that kept black and white students apart. By the time he stepped down from his position as chair of Richmond’s school board in 1960, only 2 of 23,000 black children in Richmond attended school with whites.³¹ While even such negligible numbers of black students in white schools angered hardcore segregationists, Powell cautioned massive resisters to accept token integration lest the federal government intervene further in southern affairs.³² More frustrated were black leaders like Richmond attorney Henry L. Marsh III who claimed that Powell had “simply been [more] ingenious and sophisticated” than his more radical white counterparts in preserving Jim Crow.³³

Even more frustrated were young blacks, including college students in Richmond who gave up on litigation as a means to end segregation late in the winter of 1960, instead entering whites-only eating establishments and demanding to be served.³⁴ Powell remained silent on such protests, even as they escalated to Freedom Rides through Richmond in 1961, to demonstrations in Albany, Georgia in 1962 and, finally, in

26. *Id.* at 9.

27. *See id.* at 4–11.

28. *Id.* at 7.

29. *Id.*

30. *Id.* at 146.

31. *Id.* at 234.

32. Powell, *supra* note 23.

33. JEFFRIES, *supra* note 10, at 234.

34. James Jackson Kilpatrick, Editorial, *The Sitdowns*, RICHMOND NEWS LEADER, Feb. 22, 1960.

1963, to a massive campaign of civil disobedience in Birmingham, Alabama.³⁵ During that campaign, local authorities arrested black minister Martin Luther King Jr. and locked him in the city jail, prompting him to write an extended letter justifying the use of civil disobedience to effect legal reform.³⁶

King's "Letter from Birmingham Jail" garnered national attention when it was published in the *Atlantic Monthly* in August 1963 and then in a longer book by King called *Why We Can't Wait* in 1964.³⁷ The letter provided a sustained defense of civil disobedience, arguing that "one has a moral responsibility to disobey unjust laws," and that unjust laws were those that were "out of harmony" with "the law of God."³⁸ The issue underlying the Birmingham demonstrations arose when a local judge issued a temporary injunction forbidding "marches," "picketing," and "sit-ins" in Birmingham, effectively thwarting the civil rights movement's campaign there.³⁹ Long respectful of legal process, King and his colleagues decided to defy the court, thereby embarking on a "revolutionary shift" in Movement tactics, away from efforts to uphold the "judicial system" and towards concerted—albeit peaceful—law-breaking.⁴⁰ Disappointed with this move, a group of local ministers wrote a letter criticizing King's tactics, arguing that his radical approach was actually thwarting interracial solutions in the region, a critique that King dismissed out of hand.⁴¹ To King, moderates who counseled adherence to legal process were increasingly becoming a roadblock to justice,

35. See CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S, at 31–45, 56–66, 88–89 (1981); RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 114, 487–91, 496 (2006); DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN LEADERSHIP CONFERENCE 127–286 (1986).

36. See generally JONATHAN RIEDER, GOSPEL OF FREEDOM: MARTIN LUTHER KING, JR.'S LETTER FROM BIRMINGHAM JAIL AND THE STRUGGLE THAT CHANGED A NATION (2013) (describing the events leading up to and following the "Letter" and describing the influence of the "Letter" on King and the civil rights movement).

37. KING, *supra* note 4, at 64–84; Martin Luther King, Jr., *The Negro is Your Brother*, ATLANTIC MONTHLY, Aug. 1963, at 78–84; Saunders Redding, *To Lift the Siege of Denial*, N.Y. TIMES, July 26, 1964, at BR1.

38. King, Letter from Birmingham Jail, *supra* note 4.

39. ESKEW, *supra* note 3, at 237–40.

40. *Id.* at 240 ("[A] deliberate violation of the law signaled a revolutionary shift for King, who had always subscribed to the NAACP's view of respecting the judicial system.").

41. KING, *supra* note 4, at 64; see also ESKEW, *supra* note 3, at 243–44.

prompting him to unleash a scathing indictment not just of the Birmingham ministers but white moderates in the South generally.⁴² “I must confess,” lamented King,

that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro’s great stumbling block in his stride toward freedom is not the White Citizen’s Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to “order” than to justice . . . who constantly says: “I agree with you in the goal you seek, but I cannot agree with your methods of direct action”⁴³

It was a blistering critique, but arguably one that King had to make. If, for example, he had adhered to legal process in 1963, the Birmingham campaign would never have drawn the national attention or support for federal legislation that it ultimately did.⁴⁴ Neither would the Movement’s next major campaign, in the forgettable hamlet of Selma, Alabama, where King would again choose to violate an injunction—this time a federal one.⁴⁵ King’s recurring disobedience contributed directly to federal action—both the Civil Rights Act of 1964 and the Voting Rights Act of 1965⁴⁶—which helps to explain his contempt for moderate pleas that the Movement adhere to legal process.⁴⁷

However, if King hoped that his circumvention of the legal process would lead southerners like Powell to side with the Movement, he was wrong. Powell appeared particularly stung by King’s jabs and began to reference “Letter from Birmingham Jail” in a series of increasingly hostile speeches against King and the Movement. His first was at a Law Day address in

42. See King, Letter from Birmingham Jail, *supra* note 4, at 87.

43. *Id.*

44. See ESKEW, *supra* note 3, at 299–331; see also CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 39–69 (2014). See generally TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 (2014).

45. See JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH’S FIGHT FOR CIVIL RIGHTS 238–40 (1993).

46. GARROW, *supra* note 35, at 269, 337–40, 380–81, 438–502.

47. King, Letter from Birmingham Jail, *supra* note 4, at 87–88.

Columbia, South Carolina on May 1, 1964.⁴⁸ Noting recent “disobedience of court orders,” “sit-ins,” “demonstrations,” and “other racial disorders by adults,” Powell announced to an audience of attorneys that, “it is not surprising that crime and delinquency by children within the schools appear to be increasing sharply.”⁴⁹ “[U]nless our cherished system of liberty under law is to become a mockery,” he continued, “the courts—rather than the streets—must be the arbiters of our differences.”⁵⁰

Behind Powell’s endorsement of legal process lay a larger concern, namely that procedural rules provided a check on the unfettered exercise of state power; power that totalitarian countries used to repress their people. This helps explain why Powell raised the question of procedural justice on Law Day, an event created “to dramatize the contrast with Communism’s May Day.”⁵¹ For Powell, the occasion commemorated the stark contrast between America’s “freedom under law” and the “repressive system of Communism”—the latter being a system that, in his mind, placed redistributive ends above procedural means.⁵²

Powell’s interest in Communism stemmed at least as far back as 1958, when he visited the Soviet Union with a delegation from the American Bar Association (ABA).⁵³ During this trip, he became impressed by the strides that the Soviets had made in education, even as he balked at the restrictions imposed by the Soviet state on its people.⁵⁴ “[T]he entire educational system” in the Soviet Union, noted Powell, “is planned and operated with the purpose of thoroughly indoctrinating every child with Marxism; the theme that the Marxist always triumphs is an ever present one, and the inevitability and ‘justness’ of the ‘class struggle’ is taught both directly and indirectly”⁵⁵ Powell found Soviet schools to be

48. Lewis F. Powell, Jr., *Law Day: A Time for Rededication*, Address Before the South Carolina Bar Association 5 (May 1, 1964) (on file with Washington & Lee Law School Library).

49. *Id.*

50. *Id.* at 7.

51. *Id.* at 8.

52. *Id.* at 1–2.

53. Lewis F. Powell, Jr., *Report on Trip to Soviet Union, Soviet Education – A Means Towards World Domination* (Sept. 29, 1958) (on file with Washington & Lee Law School Library).

54. *Id.*

55. *Id.* at 8.

direct evidence that “Communism requires a totalitarian dictatorship,” where the “instrument of power is the small minority” that imposes “its will upon the masses.”⁵⁶

Powell drew a direct link between totalitarianism and civil disobedience at a meeting of the ABA in the summer of 1965.⁵⁷ He began by lamenting “the growing lack of respect for law and for due process” in America, noting that one of the primary causes of civil unrest in the nation was “the growing belief that laws and court orders are to be obeyed, constitutional safeguards honored, and the rights of others respected only so long as they do not interfere with the attainment of goals believed to be just.”⁵⁸ To illustrate, he quoted one of his predecessors, Supreme Court Justice Hugo Black, who held that “[t]hose who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket the streets whenever they choose in order to advance what they think to be a just and noble end, do not [sic] service to those minority groups, their cause or their country.”⁵⁹ Black wrote his opinion in 1965 in response to civil rights demonstrations in Baton Rouge that stemmed directly from King’s endorsement of civil disobedience in 1963.⁶⁰ However, Powell went further than Black in condemning King, arguing that civil disobedience invited totalitarian rule.⁶¹ “The fundamental difference between a totalitarian society, and one in which the individual is afforded freedom of conscience and protected from arbitrary force,” explained Powell, “is that in the latter, ‘means’ *are* of the essence. Under our system, the ‘end,’ however worthy, should never justify resort to unlawful means.”⁶²

It was an almost complete inversion of King’s position, which was that a narrow-minded focus on lawful means almost certainly foreclosed the pursuit of meaningful ends: in this case

56. Lewis F. Powell, Jr., Notes on Panel Program, National School Boards Association Meeting 7 (Apr. 26, 1960) (on file with Washington & Lee Law School Library).

57. Lewis F. Powell, Jr., *State of Law and Order*, 28 TEX. B.J. 587, 589–90 (1965).

58. *Id.* at 587–88.

59. *Id.* at 588 (quoting *Cox v. Louisiana*, 379 U.S. 536, 584 (1965) (Black, J., concurring in part and dissenting in part)).

60. *See Cox*, 379 U.S. at 575–93 (Black, J., concurring in part and dissenting in part).

61. *See Powell*, *supra* note 57, at 590.

62. *Id.*

the eradication of racial inequality in the United States.⁶³ However, Powell declared that the fate of American freedom itself hung in the balance, whether racial inequities were addressed or not.⁶⁴ This was not simply an argument for gradualism, as scholars have tended to maintain,⁶⁵ but the postulation of a very different set of values than the ones King set forth, values that might be said to have placed the preservation of an ordered liberty over the achievement of substantive, or distributive, equality. “Our freedoms can only survive,” concluded Powell, “in an ordered society, where there is genuine respect in action as well as words, for law and orderly processes.”⁶⁶ Powell’s faith in processes reflected an abiding sense that procedural justice alone was important, a concept that respected the dignity of individuals by including them in the political process, regardless of whether that process yielded egalitarian results.⁶⁷

Powell continued his critique of King in a subsequent talk delivered at Washington & Lee University School of Law in April 1966.⁶⁸ During that talk, he again cited “Letter from Birmingham Jail” to show how King should be criticized for spreading the “heresy” of civil disobedience.⁶⁹ “Articulated by Martin Luther King in his much publicized Letter from a Birmingham Jail,” argued Powell, civil disobedience “quickly gained nationwide attention and support outside of the South,” in part by invoking the concept of a “higher law” that was superior to written law.⁷⁰ Of course, southern segregationists had also invoked higher law to justify their resistance to *Brown*.⁷¹ “If the decision to break the law really turns on individual conscience,” quoted Powell, “it is hard to see in law how Dr. King is any better off than former Governor Ross

63. See King, Letter from Birmingham Jail, *supra* note 4.

64. See Powell, *supra* note 57, at 590.

65. JEFFRIES, *supra* note 10, at 156.

66. Powell, *supra* note 57, at 590.

67. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (“[P]rocedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms.”); see also John P. Beal, *Making Connections: Procedural Law and Substantive Justice*, 54 JURIST 113, 113–14 (1994).

68. See Powell, *supra* note 1, at 205–07.

69. *Id.*

70. *Id.* at 207, 209.

71. *Id.* at 209.

Barnett of Mississippi, who also believed deeply in his cause and was willing to go to jail.”⁷² To illustrate, he cited civil rights activist James Farmer’s decision to protest injustice by staging “lie-downs” at the World’s Fair in New York.⁷³ Powell displayed little sympathy for such antics. “If valid breach of peace and trespass laws may be violated at will to protest these age old infirmities of mankind,” he maintained, “rather than seeking to ameliorate them by lawful and democratic processes, there would soon be little left of law and order.”⁷⁴ “Even the ebullient Dr. King,” mocked Powell, “has recognized that his theory is not ‘legal.’”⁷⁵

Powell unleashed his final salvo on King in 1968,⁷⁶ just before the black leader was killed on a motel balcony in Memphis.⁷⁷ He began by lamenting the explosion of riots in American cities, including Watts in 1965, Cleveland in 1966, and Detroit in 1967.⁷⁸ For Powell, 1967 was “a year of crises in which the symptoms of incipient revolution are all too evident.”⁷⁹ The “revolution,” as Powell explained it, was being stoked by “militant leaders” like H. Rap Brown, a Louisiana native who also happened to endorse armed resistance to white oppression.⁸⁰ Brown became notorious for condoning inner city riots with slogans like “burn this town down” and “stop singing and start swinging.”⁸¹ Powell had little patience for such rhetoric, arguing that what had begun as a controlled campaign to dismantle formal segregation had devolved into a much less organized call for violent revolt.⁸² To Powell, Rap Brown was part of a logical, if frightening, progression—heir to the early, seemingly innocuous theories espoused by Martin Luther King Jr.⁸³

72. *Id.* at 210 (quoting Burke Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785 (1965)).

73. *Id.* at 216.

74. *Id.*

75. *Id.* at 215.

76. See Powell, *Prelude to Revolution?*, *supra* note 7.

77. GARROW, *supra* note 35, at 623–24.

78. See *id.* at 173, 179.

79. *Id.* at 173.

80. *Id.* at 174; Earl Caldwell, *Black Militant: Focus on Rap Brown*, N.Y. TIMES, Aug. 13, 1967, at 153.

81. Gene Roberts, *The New S.N.C.C.: Weaker, Fierier*, N.Y. TIMES, Aug. 20, 1967, at 45; *Rap Brown Calls Nation On ‘Eve’ of a Negro Revolt*, N.Y. TIMES, Sept. 11, 1967, at 76.

82. See Powell, *Prelude to Revolution?*, *supra* note 7, at 172–73.

83. *Id.* at 173–76. A shadow of its former self, some estimated that the

As Powell saw it, King was not a moral leader so much as a “prophet of civil disobedience” guilty of planting seeds of unrest by advancing specious theories, among them the notion that some laws were “just” and others “unjust,” and that “each person” could “determine for himself which laws [were] ‘unjust,’” at which point they were “morally bound . . . to violate the ‘unjust’ laws.”⁸⁴ To establish this point, Powell characterized King’s “Letter from Birmingham Jail” as a call for extralegal means of reform that amounted to “heresy.”⁸⁵ “It is paradoxical,” he noted,

[T]hat this threat of rebellion should come at a time of unprecedented progress towards equal rights and opportunities for Negroes. Moreover, as the *New York Times* has stated editorially: American Negroes “are economically the most prosperous large group of nonwhites in the world, enjoying a higher average income than the inhabitants of any nation in Africa, Asia, or Latin America.”⁸⁶

Oddly reluctant to compare blacks to whites in the United States, Powell dismissed African American complaints as illegitimate quibbles over the inevitable inequalities of life, or what he termed the “age old infirmities of mankind.”⁸⁷

Powell’s sense that blacks expected too much stayed with him, even as he won appointment to the Supreme Court of the United States in 1971.⁸⁸ There, he would come to decide a series of cases that touched on racial issues, decisions that many would characterize as compromises lacking a unified

Student Nonviolent Coordinating Committee (SNCC) was down from 300 to 80 permanent staff members and running out of money. Roberts, *supra* note 81, at 45. Brown had joined Carmichael in taking the group down a radically different path from its initial commitment to nonviolence and political process (e.g., voter registration), turning instead to calls for an armed uprising against whites. *Id.*

84. Powell, *Prelude to Revolution?*, *supra* note 7, at 172, 174.

85. *Id.* at 172.

86. *Id.* at 176 n.19 (citing a *New York Times* editorial from July 24, 1967).

87. See Powell, *supra* note 1, at 216.

88. Powell rejected black claims for compensatory justice in a speech to a group of southern businessmen in South Carolina in 1970, arguing that “contrary to the guilt-ridden views of those who talk about reparations for past injustice,” he continued, “a people can fairly be judged only by their record—not that of earlier generations.” Lewis F. Powell, Jr., *The Attack on American Institutions*, Southern Industrial Relations Conference 21 (July 15, 1970) (on file with Washington & Lee Law School Library).

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doctrinal theory.⁸⁹ However, if Powell's opinions on race are read through the lens of his aversion to compensatory justice, then a theory begins to emerge: a faith in pluralism that celebrated racial difference but rejected efforts at forcing racial equality, as the next section shall demonstrate.⁹⁰

II. POWELL ASCENDS TO THE COURT

Less than four months after Martin Luther King Jr. died in Memphis, a panel of experts published a report suggesting that "Negro violence" had become so intense it was likely to impact the presidential election of 1968, benefitting candidates advocating more stringent law enforcement.⁹¹ Though the report's contributors found that most African Americans did not in fact "want to overthrow American society," they nevertheless concluded that the "revolutionary rhetoric of [black] extremists" had stoked "white intransigence," emboldening conservatives to campaign heavily on platforms emphasizing law and order.⁹²

Few sold law and order more deftly than Richard Milhous Nixon, former Vice President under Dwight D. Eisenhower and longtime White House hopeful.⁹³ Three months before King's death, Nixon warned a banquet hall full of Manhattan businessmen that "race conflicts" would likely spark a "war in the streets" that summer.⁹⁴ A recommitment to law and order, continued Nixon, was the best strategy for preventing such conflagrations—not poor people's campaigns, not direct action protest, and certainly not left-wing calls for restructuring American society.⁹⁵ Even a recent federal report on riots, issued by the conservative Kerner Commission, struck Nixon as soft, in part because it blamed "everybody for the riots

89. See, e.g., Kahn, *supra* note 9, at 1.

90. See *infra* Part II.

91. Henry Raymon, *Whites' Reaction to Riots Studied: Panel Finds Conservative Attitudes Stiffening*, N.Y. TIMES, Aug. 29, 1968, at 35.

92. *Id.* Though King's death swelled support for a final civil rights act in 1968, his demise sparked no revolution. DAVID L. CHAPPELL, *WAKING FROM THE DREAM: THE STRUGGLE FOR CIVIL RIGHTS IN THE SHADOW OF MARTIN LUTHER KING, JR.* 16–17 (2014).

93. See generally CONRAD BLACK, *RICHARD M. NIXON: A LIFE IN FULL* (2008).

94. Edward C. Burks, *Nixon Sees Nation 'Torn Apart' and Warns of 'War in Streets Next Summer'*, N.Y. TIMES, Jan. 9, 1968, at 21.

95. TALIE MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 97–98 (2001).

except the perpetrators of the riots.”⁹⁶

However, Nixon did not blame the riots on Martin Luther King Jr. To Nixon, King remained “a great leader” despite his forays into increasingly radical tactics and increasingly revolutionary politics just prior to his death.⁹⁷ More contemptible, fumed Nixon, was the Supreme Court, which had sided with “criminal forces” over “peace forces” by imposing unreasonable requirements on police, suggesting to Nixon that certain Justices had “gone too far and injected social and economic ideas into their opinions.”⁹⁸ To counter such a move, Nixon promised voters he would appoint Justices likely to “interpret the Constitution strictly and fairly.”⁹⁹ Once elected, he tapped Circuit Judges Warren Burger and Harry Blackmun, an Assistant Attorney General from Arizona named William H. Rehnquist, and finally, after two flubbed southern nominations, Lewis F. Powell Jr.¹⁰⁰ Ostensibly committed to strict construction, Powell fit two other criteria that proved useful to the President as well.¹⁰¹ One, he occupied a prominent, widely-respected place in the American legal profession, having served as President of the ABA and in several high-profile federal posts.¹⁰² Two, he hailed from the South, providing Nixon with a means of replacing Alabama Justice Hugo Black and also reaching out to southern voters who had begun to migrate from the Democratic Party to the Republican Party in states like Virginia, North Carolina, and Tennessee.¹⁰³ Such voters had made their presence known in

96. Robert B. Semple, *Nixon Scores Panel for ‘Undue’ Stress on White Racism*, N.Y. TIMES, Mar. 7, 1968, at 1.

97. Paul Hoffman, *National Political, Labor and Religious Leaders Mourn Dr. King*, N.Y. TIMES, Apr. 6, 1968, at 27.

98. Homer Bigart, *Politics: Nixon, Abandoning Silence on Wallace, Attacks Him and LeMay as Hawks*, N.Y. TIMES, Oct. 4, 1968, at 50 (internal quotations omitted); see also Robert B. Semple, Jr., *Nixon Decries ‘Lawless Society’ and Urges Limited Wiretapping*, N.Y. TIMES, May 9, 1968, at 1.

99. Bigart, *supra* note 98, at 50.

100. See KEVIN J. MCMAHON, *NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* (2011).

101. Samuel W. Calhoun is right to question Powell’s adherence to strict construction. Not only did he depart from a strict reading of the Constitution in *Roe v. Wade*, as Calhoun demonstrates, but he also departed from a strict reading of the Constitution in his landmark opinion in *Regents v. Bakke*. See Samuel W. Calhoun, *Justice Lewis F. Powell’s Baffling Vote in Roe v. Wade*, 71 WASH. & LEE L. REV. 925, 928–32 (2014) (arguing that Powell departed from strict construction of the Constitution in the abortion context).

102. See JEFFRIES, *supra* note 10, at 194–204, 211–14.

103. See *id.* at 241; John Darnton, *Lewis F. Powell, Jr.*, N.Y. TIMES, Oct. 22,

the 1968 presidential election and promised to do so again in 1972. They balked at *Brown* but were also reluctant to back Alabama Governor George Wallace, a fiery populist who junked his motto “segregation forever” in exchange for bombastic appeals to “law and order” that even northern voters found appealing—or at least sufficiently so to put him on the ballot in every northern and western state in 1968.¹⁰⁴

As Wallace electrified angry northern crowds, Nixon drew more genteel southerners, like Powell, to his camp.¹⁰⁵ Though Powell joined Wallace in condemning civil disobedience, he also served on the National Advisory Committee on Legal Services to the Poor and thereby endorsed legal representation for the indigent, a concern that struck many as evidence of a sympathetic, perhaps even liberal, streak.¹⁰⁶ However, Powell’s interest in representing the poor coincided less with liberal leanings than with his deep-seated commitment to legal processes, the same commitment that had led him to condemn King for lawlessness.¹⁰⁷ Few recognized the degree to which Powell’s interest in legal services dovetailed with his antipathy for King, conveying a firm rejection of radical political means and even more radical, redistributive ends.¹⁰⁸ Powell believed that the poor deserved representation, but he never indicated that capitalism itself warranted reform.¹⁰⁹

Nixon could not have found a scion of southern order more eloquent, more reasonable, and ultimately more prepared to curb the contours of the civil rights struggle than Powell. Though deeply implicated in Richmond’s circumvention of *Brown*, he fox-trotted through his hearings, transforming the gauntlet of the Senate Judiciary Committee into a Richmond

1971, at 25; MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 15–16, 101 (2006); JOSEPH CRESPIANO, *IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION* 236 (2007). See generally EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2002).

104. Raymon, *supra* note 91; DAN CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (1995); LASSITER, *supra* note 103.

105. JEFFRIES, *supra* note 10, at 222–28.

106. For Powell’s views on indigent defense, see Lewis F. Powell, Jr., *The Response of the Bar*, 51 A.B.A. J. 751 (1965). President Nixon personally called Powell on October 21, 1971. *White House Concedes Nixon Spoke to Powell*, N.Y. TIMES, Nov. 3, 1971, at 22.

107. Powell, *supra* note 106.

108. See JEFFRIES, *supra* note 10, at 197.

109. See *id.*

cotillion.¹¹⁰ Critical to Powell's success was his astute awareness that the civil rights movement had pushed far beyond what most Americans felt was a reasonable horizon of racial reform.¹¹¹ Powell believed that integrating buses and drinking fountains was something most Americans could accept.¹¹² Ordering people's children to suffer interminable bus rides every morning to achieve "racial balance,"¹¹³ however, was not; nor was rewriting American law to achieve King's dream of substantive, poverty-ending, job-providing, "compensatory" equality.¹¹⁴

III. PROMOTING PLURALISM AND DIVERSITY

Powell gained a chance to elevate his views on equality early in his tenure, when the Court agreed to consider a Texas challenge to public school funding in June 1972.¹¹⁵ Styled *San Antonio v. Rodriguez*, the plaintiffs were Mexican-Americans who lived in "school districts with low property valuations,"¹¹⁶ prompting them to argue that funding schools through local property taxes led to gross inequalities in education, violating the Constitution's guarantee of equal protection.¹¹⁷ In Texas, for example, students who happened to live in wealthy school districts received an average of \$585.00 per pupil, while students in poor districts averaged only \$60.00 per pupil.¹¹⁸ The consequent difference in educational quality, argued the plaintiffs, was substantial.¹¹⁹

Powell seized the case as an opportunity to engage the question of persistent inequality in the United States. He

110. See *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92nd Cong. 1 (1971), available at https://www.senate.gov/pagelayout/reference/one_item_and_teasers/Supreme_Court_Nomination_Hearings.htm, archived at <https://perma.cc/Y7QB-LDHH>.

111. See JEFFRIES, *supra* note 10, at 210–11.

112. See *id.* at 211.

113. See *id.* at 285.

114. KING, *supra* note 37, at 124.

115. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

116. See Brief for Appellants at 3, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332).

117. See Brief for Appellees at 3–4, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332); Memorandum from Covert E. Parnell, III, to Lewis F. Powell, Jr., 2–3 (June 2, 1972) (on file with Washington & Lee Law School Library).

118. Memorandum from Covert E. Parnell, III, *supra* note 117, at 2–3.

119. See Brief for Appellees at 3–4, *supra* note 117.

began by conceding that funding and education may be linked, but argued that poor people were not categorically barred from living in wealthy districts.¹²⁰ “The taxable wealth of a school district,” explained Powell to his clerk in a private memo, “does not necessarily reflect the wealth of the citizens who reside in it.”¹²¹ To illustrate, Powell cited Sussex County, Virginia, where a corporation named Vepco had recently built a nuclear power plant that substantially boosted revenue from local property taxes.¹²²

Of course, most poor children were unlikely to have nuclear plants bankrolling their schools. As Powell’s clerk Larry Hammond noted, by way of example, the tax revenue per student in the poor district amounted to \$21 per student, while the tax revenue per student in the city’s more affluent Alamo Heights district amounted to \$307 per student.¹²³ However, Powell adhered to the position that poverty alone was not the target of state discrimination. Some poor, he noted, did land in well-funded districts, thereby weakening the case that wealth classifications operated in the same categorical way that racial classifications did.¹²⁴

Still, Powell could not deny that funding schools through property taxes yielded unequal results, providing “less freedom of choice with respect to expenditures for some districts than for others.”¹²⁵ However, even this was not necessarily a negative. In Powell’s mind, one of the advantages of preserving inequality in school funding was that it kept schools tied to local communities, thereby inhibiting centralized state “control.”¹²⁶ Altering school funding, he warned, threatened to bring about “national control of education,” a move that he likened to communism.¹²⁷ “I would abhor such control for all the obvious reasons,” complained Powell, noting that he had “in

120. See Memorandum from Lewis F. Powell, Jr., to J. Harvie Wilkinson III (Aug. 30, 1972) (on file with Washington & Lee Law School Library).

121. *Id.* at 2.

122. Similar wealth existed in Richmond, continued Powell, despite the fact that “the wealth per individual or family may be relatively low in view of the large black population.” *Id.* at 3.

123. Memorandum from Larry A. Hammond to Lewis F. Powell, Jr., 4 (Oct. 2, 1972) (on file with Washington & Lee Law School Library).

124. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 27–28 (1973).

125. *Id.* at 50.

126. Memorandum from Lewis F. Powell, Jr., to Larry A. Hammond 3–4 (Oct. 9, 1972) (on file with Washington & Lee Law School Library).

127. *Id.* at 3.

mind the irresistible impulse of politicians to manipulate public education for their own power and ideology—e.g., Hitler, Mussolini, and all Communist dictators.”¹²⁸ This, of course, was what he had witnessed in the Soviet Union in 1958.¹²⁹

Here we find a thread linking Powell’s thoughts on education, civil disobedience, and totalitarianism. Just as Powell had linked civil disobedience to Soviet-style totalitarianism in his attacks on Martin Luther King Jr., so too did he link the centralization of school funding to totalitarianism in his attacks on proponents of leveling school resources. In both instances, he equated efforts to achieve distributive equality with Soviet-style communism, even as he extolled America for resisting that communism—whether by stressing procedural justice or keeping school funding a local, decentralized matter. Of course, King and others had long argued that a preoccupation with procedural equality and decentralized rule, or “states’ rights,” limited the chances of obtaining substantive justice,¹³⁰ but this was precisely why Powell disliked King: their views of what constituted justice, and what constituted equality, differed.

For example, Powell actually found inequality to have some benefit. “Each locality,” argued Powell in *San Antonio v. Rodriguez*, “is free to tailor local programs to local needs,” an arrangement that lent itself to a multiplicity of educational approaches, or what he called “pluralism.”¹³¹ “Pluralism . . . affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.”¹³² In other words, even if some school districts received less money, they could always develop new ways of teaching, perhaps even arriving at more effective forms of pedagogy than wealthier districts. It was a slightly obtuse, arguably tone deaf position when juxtaposed with the gross inequalities that gripped San Antonio schools, but it illuminated a vibrant strand of Powell’s political thought. The perpetuation of inequality, to him, was not necessarily a bad thing, for it held out the possibility of encouraging innovation and growth.

Powell’s interest in the symbiotic relationship between

128. *Id.* at 3–4.

129. *See supra* Part I.

130. King, Letter from Birmingham Jail, *supra* note 4.

131. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

132. *Id.*

innovation and inequality suggested a very different vision of law's role in society than that espoused by Martin Luther King Jr. King stressed the evils of inequality, particularly the harm it caused to racial minorities and the poor.¹³³ As he put it in 1964, "rural and urban poverty" had "stultified" the lives of the poor, demanding aggressive state action, including "a massive program by the government of special, compensatory measures" for blacks who had been "robbed" of their wages during slavery.¹³⁴ Powell found such arguments for reparations unpersuasive, chastising blacks for not recognizing that they were in fact considerably better off than their peers in Uganda and Zaire.¹³⁵ Not only did he dismiss black gripes as unwarranted, but he found King's insistence on civil disobedience to be a stepping stone to more radical reform, to a reworking of American society along socialist lines as endorsed by the "New Left."¹³⁶

Powell's tendency to associate King with the New Left placed him firmly within a larger current of political thought in the South at the time: a sense that the civil rights movement was infiltrated by reds.¹³⁷ While evidence of this supposition ultimately proved flimsy, Powell's critique of the Movement was quite a bit more sophisticated than most. To Powell, the Movement did not have to be infiltrated by actual communists to still pose a threat to cherished American ideals, among them the ideals of diversity, competition, and the pursuit of pecuniary wealth.¹³⁸ Such ideals drew strength from earlier traditions in southern thought, including a brand of political and constitutional thinking that historian Eugene D. Genovese

133. See generally KING, *supra* note 4.

134. *Id.* at 127, 130.

135. Powell, *Prelude to Revolution?*, *supra* note 7, at 176 n.19 (citing Editorial, N.Y. TIMES, July 24, 1967) (noting that "American Negroes 'are economically the most prosperous large group of nonwhites in the world, enjoying a higher average income than the inhabitants of any nation in Africa, Asia, or Latin America.'").

136. Powell, *Prelude to Revolution?*, *supra* note 7, at 173.

137. See generally JEFF WOODS, BLACK STRUGGLE, RED SCARE: SEGREGATION AND ANTI-COMMUNISM IN THE SOUTH, 1948-1968 (2004); GEORGE LEWIS, THE WHITE SOUTH AND THE RED MENACE: SEGREGATIONISTS, ANTICOMMUNISM, AND MASSIVE RESISTANCE, 1945-1965 (2004).

138. For a general sense of Powell's views on wealth, diversity, and inequality, see his opinions in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), and *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 217-53 (1973) (Powell, J., concurring in part and dissenting in part), and his amicus brief filed with Virginia Attorney General Andrew Miller in *Brief for Commonwealth of Virginia as Amicus Curiae, Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (No. 281).

termed “the southern tradition.”¹³⁹ While much of that tradition was tied to presumptions about race, it also drew from principles about government that stood alone, independent of racial concerns.¹⁴⁰ Among these principles were notions set forth by Virginia planter James Madison, who, two hundred years before Powell penned *Rodriguez*, declared that individuals of “different and unequal faculties” invariably acquired “different degrees and kinds of property” and that the “protection” of those faculties, and that property, was “the first object of government.”¹⁴¹ Essential to this view was the notion that inequality could be positive, and that government should protect inequality precisely because it incentivized people to develop their talents, or “faculties.”¹⁴² People, Madison presumed, were different, and that difference should be rewarded.¹⁴³ Anything else, including efforts to achieve “an equal division of property,” constituted a “wicked project.”¹⁴⁴

Strains of Madison’s thinking reverberated in Powell’s reasoning about the appropriate relationship between law, race, and inequality in the context of schools. Though Powell conceded that overt racial classifications could no longer be used to structure southern society, he remained adamant that the elimination of Jim Crow did not at the same time necessitate compensatory redistributions of wealth.¹⁴⁵ Racism may have been forbidden by law, but inequality was not. In fact, as he noted in *San Antonio v. Rodriguez*, inequality remained, just as it had for Madison, a good thing.¹⁴⁶ It encouraged innovation, incentivized teachers in poor schools to utilize their faculties, and encouraged pluralism.¹⁴⁷

Powell’s faith in pluralism emerged in other decisions as well, most notably in a challenge to affirmative action plans in university admissions in 1978.¹⁴⁸ There, he wrote the

139. EUGENE D. GENOVESE, *THE SOUTHERN TRADITION: THE ACHIEVEMENT AND LIMITATIONS OF AN AMERICAN CONSERVATISM* ix (1994).

140. *Id.* at 44–46.

141. THE FEDERALIST NO. 10, at 48 (James Madison) (Lawrence Goldman ed., 2008).

142. *Id.* For more on southern endorsements of inequality, even among whites, see GENOVESE, *supra* note 139, at 50–51.

143. GENOVESE, *supra* note 139, at 50–51.

144. *Id.* at 49.

145. Powell, *supra* note 88, at 21.

146. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973).

147. See *id.* at 50.

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

controlling opinion in a case involving a white plaintiff named Allan Bakke who had been denied admission to the University of California at Davis Medical School (UC Davis).¹⁴⁹ Convinced of his eligibility, Bakke blamed his rejection on a policy that reserved sixteen out of one hundred available entry positions to minorities, including African Americans, Mexican Americans, and American Indians.¹⁵⁰ While average scores for minority admits hovered around the 35th percentile on the Medical College Admissions Test, or MCAT, Bakke's score neared the 90th percentile, fueling his frustration that lower-scoring minorities had been admitted before him.¹⁵¹

Conservatives on the Court, like William Rehnquist, sided immediately with Bakke, arguing that the racial set-asides endorsed by UC Davis were discriminatory.¹⁵² In a joint opinion, Justices Stevens, Burger, Stewart, and Rehnquist agreed that UC Davis's quota system violated Title VI of the 1964 Civil Rights Act, which banned racial discrimination by any institution that received federal funds.¹⁵³ Though the Act had been written to ameliorate conditions in the American South, conservatives on the Court believed that the Act applied to any institution that singled out individuals by race.¹⁵⁴ Whether the victims of such policies were minorities or not, they argued, quotas like the one at UC Davis represented an arbitrary and therefore illegitimate racial classification.¹⁵⁵

Liberal justices Brennan, White, Blackmun, and Marshall all disagreed, siding with the school officials.¹⁵⁶ To them, the UC Davis program was race conscious but not discriminatory.¹⁵⁷ Unlike segregation statutes in the American South, which they viewed to be fundamentally racist, UC Davis's affirmative action plan did not stamp minorities with a badge of inferiority, nor did it direct an "allegation of inferiority" against whites.¹⁵⁸ Therefore, because Bakke was never "stereotyped as an incompetent," his claim fell flat.¹⁵⁹

149. *Id.* at 276–77.

150. *Id.*

151. JEFFRIES, *supra* note 10, at 456.

152. *Bakke*, 438 U.S. at 412 (Stevens, J., concurring in the judgment).

153. *See id.*; JEFFRIES, *supra* note 10, at 486.

154. *Bakke*, 438 U.S. at 413.

155. *Id.* at 325 (Brennan, J., concurring in the judgment).

156. *Id.* at 325–26.

157. *Id.* at 370.

158. JEFFRIES, *supra* note 10, at 486.

159. *Bakke*, 438 U.S. at 357; JEFFRIES, *supra* note 10, at 486.

Powell disagreed. In his mind, racial considerations were invalid so long as they sought to compensate minorities for past discrimination, a position that had animated his early critiques of Martin Luther King Jr. and the civil rights movement.¹⁶⁰ “[T]he purpose of helping certain groups” simply because they were “victims of ‘societal discrimination,’” held Powell, did “not justify a classification that imposes disadvantages upon persons like respondent [Allan Bakke], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”¹⁶¹

However, Powell did identify a separate rationale for allowing consideration of race in admissions to survive: a rationale that he associated with pluralism, or what he termed “diversity.”¹⁶² Citing First Amendment protections of academic freedom, Powell claimed “genuine diversity” to be an interest sufficiently compelling to allow schools to rely on racial considerations in deciding to admit students with lower test scores.¹⁶³ So long as such programs did not rely on quotas, posited Powell, “racial or ethnic origin” could be taken into account, as could “geographic origin” and whether applicants were “culturally advantaged or disadvantaged.”¹⁶⁴

To many, this rationale was confusing. “For reasons that were not—and could not be—satisfactorily explained,” complained Powell biographer John Jeffries, “Powell insisted that fixed quotas ‘would hinder rather than further attainment of genuine diversity.’”¹⁶⁵ Yet, Jeffries missed the manner in which Powell felt that diversity operated independent of questions of “compensatory” justice, applicable both to whites who were “culturally advantaged” and blacks who were not.¹⁶⁶ Unlike legal liberals, Powell did not think of diversity as part of a larger scheme for overcoming past discrimination against African Americans, but rather as an attempt to thwart totalitarianism, a condition characterized by creeping tendencies toward state-imposed orthodoxy. Having witnessed such orthodoxy in the Soviet Union, Powell came to view the United States as a nation defined by its diversity—a diversity

160. *See supra* Part I.

161. *Bakke*, 438 U.S. at 310.

162. *Id.* at 311–12.

163. *Id.* at 314–15.

164. *Id.* at 314.

165. JEFFRIES, *supra* note 10, at 477.

166. *Bakke*, 438 U.S. at 314–15.

that coexisted with substantial, and at times even remarkable, levels of inequality.

That the government might condone racial classifications in ways that coincided with racial inequality defied the original vision for affirmative action.¹⁶⁷ As early as the 1930s, the federal government had begun to tinker with racially motivated programs aimed at overcoming racial discrimination, including “a proportional hiring system aimed at employing a fixed percentage of skilled black workers” in 1933.¹⁶⁸ Three decades later, President John F. Kennedy first invoked the term “affirmative action” to describe federal efforts to overcome discrimination in hiring by developing “a more aggressive strategy to pry open employment opportunities for minorities.”¹⁶⁹ Republican President Richard Nixon operationalized Kennedy’s vision in 1970, relying on Assistant Secretary of Labor Arthur Fletcher’s sense that years of segregation and discrimination had created “obvious imbalances” between blacks and whites.¹⁷⁰

That Powell might have had reasons for endorsing diversity that were separate from correcting racial imbalances did not occur to his supporters. To them, Powell’s decision represented a strategic compromise or, as Circuit Judge Henry Friendly put it, a laudable example of “moderation.”¹⁷¹ General Maxwell Taylor hailed Powell’s opinion as an “amazing feat of making all parties reasonably happy.”¹⁷² Harvard Law Professor Alan M. Dershowitz proclaimed Powell’s opinion “an act of judicial statesmanship.”¹⁷³ Others saw in Powell’s ruling not only a simple aim to compromise, but a genuine shift in his segregationist views in favor of the African American struggle. According to Jeffries, for example, Powell’s decision reflected a clear break from his past—evidence that he suddenly felt “personal responsibility for racial justice.”¹⁷⁴

Yet, Powell forthrightly rejected the idea that blacks had suffered any more injustice than other “minorities” in the

167. See generally TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 46 (2004).

168. *Id.*

169. *Id.* at 60–61.

170. *Id.* at 117.

171. JEFFRIES, *supra* note 10, at 498.

172. *Id.*

173. Linda Greenhouse, *Bell Hails Decision*, N.Y. TIMES, June 29, 1978, at A1.

174. JEFFRIES, *supra* note 10, at 499.

United States.¹⁷⁵ Indeed, Powell seemed to indicate that whites had themselves become something of a discrete and insular minority, even victims of repression. “The white majority,” argued Powell in *Bakke*, is itself “composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.”¹⁷⁶ “[T]he United States had become a Nation of minorities,” he continued, including Mexicans, Chinese, and “Celtic Irishmen.”¹⁷⁷ “Each had to struggle—and to some extent struggles still.”¹⁷⁸ Though aware that the Fourteenth Amendment had been written expressly for “members of the Negro race,” Powell insisted that its language was sufficiently neutral to embrace a broader principal including discrimination against other “minorities” as well, including whites.¹⁷⁹

Longtime civil rights activists balked.¹⁸⁰ Thurgood Marshall complained that “it is more than a little ironic that” Powell would rule in favor of Bakke given the “several hundred years of class-based discrimination” directed against African Americans in the United States.¹⁸¹ Others took an even harsher line, finding Powell’s invocation of diversity little more than a bid to enhance the educational experiences of whites by allowing for “assimilating token people of color into the dominant white-supremacist culture for the benefit of maintaining that culture.”¹⁸² The idea here was that diversity in admissions would not help black students as a group so much as exploit select members of that group for white gain.¹⁸³

175. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 292 (1978).

176. *Id.* at 295. Powell’s notion of whites as minorities echoed the views of Jewish intellectual Morris Cohen. Father of legal pluralist Felix Cohen, Morris believed that ultimately every “group of human beings” was “a minority in one situation or another.” DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* 15 (2007).

177. *Bakke*, 438 U.S. at 292.

178. *Id.*

179. *Id.*

180. Greenhouse, *supra* note 173; *see also Bakke*, 438 U.S. at 70 (Marshall, J. dissenting)

181. *Bakke*, 438 U.S. at 400.

182. Barbara Phillips Sullivan, *The Gift of Hopwood: Diversity and the Fife and Drum March Back to the Nineteenth Century*, 34 GA. L. REV. 291, 297 (1999). *See also* Fran Ansley, *Classifying Race, Racializing Class*, 68 U. COLO. L. REV. 1001, 1009–14 (1997); Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 765–69 (1997).

183. Nancy Leong has made precisely this argument, claiming that diversity

Yet, Powell did not necessarily believe there was such a thing as a “dominant white-supremacist culture.”¹⁸⁴ To him, diversity was a more robust concept; a call for including students of different backgrounds, even advantaged white backgrounds.¹⁸⁵ “The diversity that furthers a compelling state interest,” he noted, “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”¹⁸⁶ Indeed, in Powell’s mind, any admissions program that “focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”¹⁸⁷

Admittedly, this was not about correcting past injustice. Indeed, a close reading of Powell’s critique of the civil rights movement in the 1960s reveals his conviction that there was no past injustice to correct, or at least not any publicly sponsored injustice that warranted legal remediation. Inequality, argued Powell, posed no legal issue—a view that departed dramatically from Martin Luther King Jr.’s position that massive public responses were needed to address structural racism and poverty.¹⁸⁸ Powell rejected King’s view out of hand, in part by placing inequality firmly within a larger frame of pluralism, or what he termed diversity.

As Powell explained it, diversity bore a close relationship to the First Amendment’s protection of academic freedom, a protection that allowed public schools to pick and choose who to admit and what to teach them.¹⁸⁹ If schools chose to admit minority students with lower test scores, for example, they could do so, provided their goal was linked to pedagogical and not redistributive or “compensatory” ends, as Martin Luther King Jr. had demanded in *Why We Can’t Wait*.¹⁹⁰ For precisely this reason, Powell envisioned public schools admitting other types of students with lower scores as well, including candidates who were culturally advantaged. Presumably this included applicants who hailed from privileged backgrounds,

programs in university admissions have actually commoditized minority students. See generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

184. *Bakke*, 438 U.S. at 295.

185. See *id.* at 315.

186. *Id.*

187. *Id.*

188. KING, *supra* note 4, at 127.

189. *Bakke*, 438 U.S. at 312.

190. KING, *supra* note 4, at 124.

like legacy students at Harvard, a school whose admissions plan Powell took as an inspiration.¹⁹¹

In a memo written in August 1977, Powell's clerk Bob Comfort alerted the Justice to the diversity argument, noting that UC Davis had cited Harvard's plan to justify including minority candidates with lower scores than Alan Bakke.¹⁹² "Petitioner repeatedly sounds the theme of academic freedom to pick a diverse, invigorating group of students," noted Comfort, "[j]ust as a farmboy from Idaho—simply by being different—brings something to Harvard College that a Boston Brahmin cannot."¹⁹³ Harvard's interest in Idaho farmboys proved more complicated than Comfort let on, stemming from fears in the 1920s that Jewish applicants with high grades were trouncing their gentile counterparts on the college's admissions test.¹⁹⁴ Administrators and alums alike feared that Harvard's traditional student stock—White Anglo Saxon Protestants (WASPs)—might find themselves a minority at the school, their cultural influence on campus weakened by large numbers of poor immigrant Jews.¹⁹⁵ To compensate, Harvard's admissions committee developed a plan to de-emphasize test scores and admit students from diverse regions based solely on their high school GPA, effectively diluting the number of Jewish applicants with WASPs from the South and Mid-West.¹⁹⁶ Harvard continued to expand this white-centric "concept of diversity" following World War II, looking not simply at geographic diversity but also different backgrounds and a wider variety of "talents and aspirations."¹⁹⁷

The Harvard plan suited Powell nicely, underscoring his argument that diversity had nothing to do with affirmative action for blacks, and that whites were not a unified bloc.¹⁹⁸

191. JEFFRIES, *supra* note 10, at 484.

192. Memorandum from Bob Comfort, Law Clerk, to Lewis F. Powell, Jr., U.S. Supreme Court Justice, 39 (Aug. 29, 1977) (citing Brief for Harvard, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235)) (on file with Washington & Lee Law School Library), available at <http://law2.wlu.edu/deptimages/powell%20archives/Bakke76-811folder2.pdf>, archived at <http://perma.cc/HVE8-BMYT>.

193. *Id.*

194. See Oliver B. Pollak, *Antisemitism, the Harvard Plan, and the Roots of Reverse Discrimination*, 45 JEWISH SOC. STUD., no. 2, 1983, at 113, 119.

195. See *id.* at 117; JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 86–90 (2005).

196. KARABEL, *supra* note 195, at 86–90; Pollak, *supra* note 194, at 119.

197. Pollak, *supra* note 194, at 120.

198. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–17 (1978).

However, Powell did not endorse a blanket requirement that all schools seek diversity in the same manner that Harvard did. For example, Powell found that some schools provided diversity simply because they adhered to a particular educational vision, a position that led him to endorse private religious schools.¹⁹⁹ “Parochial schools,” argued Powell in 1977, “have provided an educational alternative for millions of young Americans,” often encouraging “wholesome competition with our public schools,” a point similar to the one he had made in *San Antonio v. Rodriguez*.²⁰⁰ Though Powell took a conservative view of the extent to which states could financially support sectarian schools, he nevertheless recognized the role that such schools played in “promoting pluralism and diversity.”²⁰¹

Private schools played a particularly important role in Powell’s America, not least because they provided, as he put it in 1967, the “major remaining barrier to maximum integration—socially, racially, and economically.”²⁰² This was startling. Though he had accepted the Supreme Court’s opinion in *Brown* over a decade earlier, Powell still ventured a critique of integration. However, the manner in which he framed this critique was important, illustrating his general tendency to link diversity and liberty. “Maximum integration” should not be avoided because it threatened white supremacy, he argued, but because it contributed to the centralization of state power and, ultimately, authoritarianism. This was true not just of racial integration, but social and economic integration as well. Powell viewed all three to be parts not of the same solution, but the same problem, a move towards what he termed the “mass production” of “thoughts and ideas.”²⁰³

Because he opposed the mass production of ideas, Powell took issue with state efforts to silence institutions promoting unpopular views, including moves by the IRS to deny certain non-profit organizations tax-exempt status.²⁰⁴ This became

199. *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (Powell, J., writing for the Court).

200. *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, dissenting in part).

201. *Nyquist*, 413 U.S. at 773.

202. Lewis F. Powell, Jr., *The Challenge to the Private Preparatory School 2* (Jan. 31, 1967) (on file with Washington & Lee Law School Library).

203. *Id.* at 3–4.

204. *Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (1983) (Powell, J.,

clear in *Bob Jones University v. United States*, a case involving a controversial university policy that banned interracial dating.²⁰⁵ Though Powell agreed that such a policy could not stand under *Brown*, he made sure to note that simply because an institution espoused an unpopular view did not necessarily mean that the IRS could withhold tax-exempt status.²⁰⁶ “Given the importance of our tradition of pluralism,” explained Powell, the IRS should keep in mind that exemptions for unpopular institutions provided an “indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.”²⁰⁷

Averse to orthodoxy but positive on pluralism, Powell celebrated schools that boasted exclusionary policies for the simple reason that such policies promoted diversity. For example, he wrote a dissent in a challenge to the Mississippi University for Women’s exclusion of men, arguing that excluding men allowed the institution to promote the goal of diversity.²⁰⁸ “Left without honor—indeed, held unconstitutional,” argued Powell, “is an element of diversity that has characterized much of American education and enriched much of American life.”²⁰⁹ This element, continued Powell, was same-sex education, an institution sewn into America’s pluralist quilt.²¹⁰ “A distinctive feature of America’s tradition,” explained Powell in *Mississippi University for Women v. Hogan*, “has been respect for diversity. This has been characteristic of the people from numerous lands who have built our country. It is the essence of our democratic system.”²¹¹ Same-sex education, continued Powell, comprised “a small aspect of this diversity.”²¹² The male plaintiff struck Powell as an unsympathetic character “who represents no class and

concurring). In footnote 4 of his concurring opinion, Powell cited his dissent in *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 735 (1982), for the proposition that diversity was “a distinctive feature of America’s tradition.” He also cited his concurrence in *Wolman*, 433 U.S. at 262, for the idea that parochial schools provided “wholesome competition” to public schools.

205. *Bob Jones*, 461 U.S. at 610–11.

206. *Id.* at 609.

207. *Id.* at 609–10.

208. *Hogan*, 458 U.S. at 735.

209. *Id.*

210. *See id.*

211. *Id.* at 745.

212. *Id.*

whose primary concern is personal convenience.”²¹³ “Coeducation,” argued Powell, “is a novel educational theory,” given that for “much of our history” most children were educated in “sexually segregated classrooms.”²¹⁴ To bolster his point, Powell cited New England’s “Seven Sister” colleges: Mount Holyoke, Vassar, Smith, Wellesley, Radcliff, Bryn Mawr, and Barnard,²¹⁵ explaining that such schools produced a “disproportionate number of women leaders” in part because the large number of female faculty provided a “motivation for women students.”²¹⁶ Though the gender demographics of all-female colleges were less diverse than at coeducational institutions, the simple existence of an all-female option provided, argued Powell, “an element of diversity.”²¹⁷

Presumably, Powell could have made the same argument about historically black colleges, a topic that never came before him as a judge. However, Powell’s invocation of diversity in *Bakke* suggested that explicit considerations of race, like explicit considerations of gender, were perfectly fine so long as they comported with a particular, pedagogical vision.²¹⁸ However, Powell barred the use of race for purposes of compensatory justice: a move that he refused—bizarrely—to make for women, noting that women’s colleges served not only the goal of pluralism but also aimed “to overcome the historic repression of the past,” a point that he was not willing to concede in the context of race-based affirmative action.²¹⁹ Justices Brennan, White, Blackmun, and Marshall all disagreed with Powell on this point, arguing in *Bakke* that programs that sought to benefit blacks should be assessed under a lower standard of scrutiny, like the one that applied to women.²²⁰ Powell balked, arguing that the law had done all it could for African Americans and that no further, legitimate

213. *Id.* at 735.

214. *Id.* at 738.

215. *Id.* at 737.

216. *Id.* at 738 n.4.

217. *Id.* at 735.

218. For Powell’s views on diversity and same-sex education, see SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 213 (2011).

219. *Hogan*, 458 U.S. at 740 n.5 (quoting Brief for Mississippi University for Women Alumnae Association as *Amicus Curiae* 2–3).

220. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 328 (1978) (Brennan, Marshall, Blackmun & White, JJ., dissenting).

correctives for past injustice were required.²²¹

Powell's lack of sympathy for blacks coincided with his lack of sympathy for the poor. He adopted this position in *San Antonio v. Rodriguez*, where he also found pluralism amidst the dramatically unequal funding patterns of public schools, even schools that received only a fraction of the money of their better-located peer institutions.²²² Of course, this had nothing to do with pedagogical goals; schools that found themselves in poor districts obviously did not choose to receive less money. However, Powell found no problem with a landscape that incorporated relatively broad ranges of inequality in terms of funding, student-body composition, and curricula.²²³ To him, such incongruities were actually a good thing, by-products of America's core identity as a "pluralistic society" that stood apart from nations defined by government "orthodoxy."²²⁴ Shocked at Soviet educational policies during his trip to the U.S.S.R. in 1958, Powell returned with a profound sense that totalitarian regimes relied heavily on uniformity in education to indoctrinate their youth, a phenomenon that he worked hard to avoid.²²⁵ Countering such a trend was, to his mind, the essence of American pluralism, an institution that struck Powell as not only central to the academic freedom protected by the First Amendment, but to liberty itself. As he saw it, diversity in education possessed inherent value, independent of compensatory justice or affirmative action.

IV. MISINTERPRETATIONS

Few recognized the manner in which Powell de-coupled diversity from affirmative action in *Regents v. Bakke*. Early reactions from journalists placed the opinion entirely within the rubric of affirmative action. As John Herbers put it for the *New York Times*, *Bakke* meant that "the great majority of affirmative action programs, public and private, will continue."²²⁶ Herbers placed hope in the fact that *Bakke* might allow for future efforts to help minorities, forming a type of

221. *Id.* at 295–310 (Powell, J.).

222. *See supra* notes 135–136 and accompanying text.

223. *See supra* notes 158–159 and accompanying text.

224. *Bob Jones Univ. v. United States*, 461 U.S. 574, 610–11 (1983) (Powell, J., concurring).

225. *See supra* Part I; Powell, *supra* note 53.

226. John Herbers, *A Plateau for Minorities*, N.Y. TIMES, June 29, 1978, at A1.

“legal concrete” upon which “further affirmative action programs can be made.”²²⁷ The United States Commission on Civil Rights agreed, as did Attorney General Griffin Bell and President Jimmy Carter, both of whom celebrated the ruling as a “great gain for affirmative action.”²²⁸

Critics countered that *Bakke* boded ill for African Americans, but tended to read the opinion through the lens of affirmative action as well.²²⁹ Powell’s colleague Thurgood Marshall spearheaded this approach by declaring the opinion a setback for civil rights, followed quickly by veteran activists like Julian Bond who lamented the ruling as a “plateau” for reform, threatening future “attempts to broaden educational and employment opportunities for blacks and other minorities.”²³⁰ While this was certainly true, even *Bakke*’s detractors failed to recognize just how decisively Powell rejected the rubric of compensating blacks for past harm, meanwhile writing into law a completely separate, non-compensatory case for diversity. For example, Yale law professor Guido Calabresi derided Powell’s invocation of diversity as a ruse, a sleight of hand aimed ultimately at hiding his interest in compensating blacks for past discrimination.²³¹ “After stating that no advantage can be given to individuals solely because they belong to groups that have suffered past discrimination,” complained Calabresi, “Justice Powell, in effect, permitted such advantage, at least in University admissions.”²³² The Yale law professor accused Powell of engaging in a deliberate “subterfuge” by veiling “reparation[s]” in the trappings of diversity.²³³ It would have been better, argued Calabresi, had Powell simply conceded that “[s]pecial consideration for blacks” was constitutionally permissible “so long as they, as a group, remain subject to generalized disadvantages, since redress of these on a societal level

227. *Id.* at A22; see also Edward B. Fiske, *Educators Welcome Bakke Ruling As Signal to Retain Current Policy*, N.Y. TIMES, June 29, 1978, at A23; Anthony Lewis, *A Solomonic Decision: Abroad At Home*, N.Y. TIMES, June 29, 1978, at A25.

228. Greenhouse, *supra* note 173; *Civil Rights Unit Lauds Decision in Bakke Case*, N.Y. TIMES, July 2, 1978, at 18; Roger Wilkins, *U.S. Officials Praise Bakke Ruling*, N.Y. TIMES, June 30, 1978, at A10.

229. John Herbers, *Minority Leaders, After Review, Regard Bakke Ruling as Setback*, N.Y. TIMES, July 9, 1978, at 14.

230. Herbers, *supra* note 226.

231. Guido Calabresi, *Bakke: Lost Candor*, N.Y. TIMES, July 6, 1978, at A19.

232. *Id.*

233. *Id.*

remains a legal object of the Civil War amendments.”²³⁴

Of course, Powell rejected the notion that the Civil War amendments called for further aid to blacks in America, a point he made clear in *Bakke* by stating that “it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority” since the United States had itself become “a Nation of minorities.”²³⁵ Calabresi missed this, along with Powell’s larger fear that the civil rights movement’s flouting of legal process had opened the door to totalitarian rule. The law professor’s ignorance of the Justice’s positions led him to misinterpret Powell’s motives, blinding him to the possibility that the Virginian actually did believe in diversity as a stand-alone principle, a guarantor of liberty rather than a “ruse” for equality.²³⁶

While Calabresi impugned Powell’s honesty, others impugned his ability. Harvard law professor Alan Dershowitz declared that Powell “erred seriously” in relying on Harvard’s admissions plan in *Bakke*, not least because it had “in fact been deliberately manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions.”²³⁷ Dershowitz referred, of course, to Harvard’s invocation of diversity as a means of curtailing Jewish enrollment.²³⁸ However, the Harvard professor failed to recognize that Powell did not necessarily see a problem with curtailing Jewish enrollment, particularly not if it meant accepting “culturally advantaged,” white, Protestant “minorities” with lower grades.²³⁹ If Harvard wanted to admit such students for the purpose of achieving diversity, that was its choice. Dershowitz missed this, and in so doing made the same mistake as Calabresi, misinterpreting Powell as a liberal who blundered by citing Harvard’s plan but was otherwise bent on using diversity as a “pretext” for affirmative action.²⁴⁰

Because they misunderstood Powell’s reasons for endorsing

234. *Id.*

235. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 292 (1978); *see also supra* Part I.

236. Calabresi, *supra* note 231.

237. Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 *CARDOZO L. REV.* 379, 385 (1979).

238. *Id.* at 387–88, 397.

239. *Bakke*, 438 U.S. at 315.

240. Dershowitz & Hanft, *supra* note 237, at 385.

diversity, Dershowitz and Calabresi also misunderstood why, precisely, diversity constituted a compelling state interest. As the Virginia Justice explained it, diversity was directly related to the First Amendment's defense of academic freedom, a "special concern" that granted universities the discretion to make their "own judgments" regarding the makeup of their entering classes.²⁴¹ Universities might legitimately seek to enroll minority students, argued Powell, in order to foster a "robust exchange of ideas," thereby improving educational "quality."²⁴² Dershowitz balked at this claim, arguing that quality education was "simply not a very compelling interest," hardly comparable to national security or safety.²⁴³ However, Powell's interest in educational quality formed part of a larger, arguably more compelling vision that extended beyond improvements in the classroom to the overarching relationship between institutions of higher learning and the state. Without the freedom to select the students they wanted, argued Powell, universities might be subject to the "authoritative selection" of applicants by the government.²⁴⁴ To prevent this, schools should be allowed to admit students as they saw fit. Powell cited *Keyshian v. Board of Regents*, a 1967 case in which the Supreme Court came to the defense of a cadre of college professors forced to take loyalty oaths in New York, arguing that the First Amendment's interest in academic freedom did not "tolerate laws that cast a pall of orthodoxy over the classroom."²⁴⁵ The notion that diversity countered orthodoxy was a different claim than the assertion that diversity promoted educational quality.²⁴⁶ It echoed the arguments of First Amendment scholars who held that separating church and state curtailed totalitarian tendencies by promoting diversity across institutions, creating zones of liberty free from

241. *Bakke*, 438 U.S. at 312.

242. *Id.*

243. Dershowitz & Hanft, *supra* note 237, at 408.

244. *Bakke*, 438 U.S. at 312.

245. *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

246. As Powell wrote his *Bakke* opinion, schools remained free not to admit minority students with lower scores if they so wished, forgoing educational quality in the name of resisting state orthodoxy. *Bakke*, 438 U.S. at 312–20. This, ultimately, was the argument that Powell made in his concurring opinion in *Bob Jones* in 1983, arguing that the IRS should be discouraged from using tax-exempt status as a means of promoting orthodox ideas. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 606–11 (1983).

state interference and control.²⁴⁷ This was precisely the position that Powell had taken on schools in the past, including his defense of private schools in 1967 and his later defense of parochial schools in 1973.²⁴⁸ It also coincided with his position on school funding in *San Antonio v. Rodriguez*, which allowed for diversity between public institutions by “tailor[ing] local programs to local needs,” an arrangement that lent itself to a multiplicity of educational approaches, or “pluralism.”²⁴⁹ Even as Powell’s support for disparate school funding, parochial schools, and private education promoted institutional pluralism—or what constitutional scholar Heather Gerken has termed “second-order diversity”—none of these arrangements were likely to foster classroom diversity.²⁵⁰ Already, the rise of private religious schools in the South was perpetuating patterns of racial segregation in the region, as was white flight to better-funded school districts in cities like Atlanta, Richmond, and San Antonio.²⁵¹ Instead of promoting diverse classrooms, these arrangements guaranteed zones of liberty free from centralized government control, forming a final defense against state orthodoxy, or what Powell unapologetically termed “maximum integration.”²⁵²

Dershowitz missed this, as did other constitutional scholars.²⁵³ Many assumed, like Calabresi, that diversity was simply a ruse for reparations.²⁵⁴ Others focused on Powell’s

247. Ristroph & Murray, *supra* note 21, at 1241–50 (providing an overview of the various ways in which pluralism has been invoked as a defense against totalitarianism); *see also* McConnell, *supra* note 21, at 425–26; GALSTON, LIBERAL PLURALISM, *supra* note 21; Galston, *The Idea of Political Pluralism*, *supra* note 21, at 95.

248. *See supra* Part II.

249. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

250. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102 (2005).

251. *See* CRESPINO, *supra* note 103, at 236; LASSITER, *supra* note 103, at 230, 245. *See generally* KEVIN KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2007).

252. *See supra* note 212 and accompanying text.

253. Heather Gerken demonstrates that most scholars tend to view diversity and integration as related rather than opposed, missing the extent to which institutional diversity, or what Gerken terms “second-order diversity,” actually involves the separation of political units. *See* Gerken, *supra* note 250, at 1102.

254. Kennedy, *supra* note 15 (endorsing a case for affirmative action rooted in challenging white supremacy and racial hierarchy); Carrington, *supra* note 15, at 1006 (noting the adoption of diversity rhetoric “to compensate members of groups said to be disadvantaged by historic injustices to their ancestors”); Grunewald, *supra* note 15 (describing Powell’s *Bakke* opinion as an act of judicial

mention of educational quality, taking great pains to demonstrate that students benefitted from encountering classmates different from themselves.²⁵⁵ Few noticed the manner in which Powell saw diversity as part of a larger institutional bulwark against tyranny, or “orthodoxy.”²⁵⁶ For example, Dershowitz argued that “[m]any excellent universities have long survived and flourished in the absence of universal diversity within their student bodies,” a point demonstrated by “women’s schools like Wellesley, Mt. Holyoke, and Smith.”²⁵⁷ Powell actually agreed with this point, arguing in 1983 that the existence of single-sex institutions themselves contributed to diversity by adding to the number of educational offerings available in the United States, a point he addressed explicitly in a challenge to the Mississippi University for Women’s rejection of male applicants.²⁵⁸ Though the majority voted to admit men, Powell complained in a dissenting opinion that single-sex institutions contributed to “an element of diversity that has characterized much of American education and enriched much of American life.”²⁵⁹ Also important, argued Powell, were private schools, parochial schools, and other institutions that could be both quite exclusive and also quite homogenous, their mere presence providing important alternatives to state sponsored “orthodoxy.”²⁶⁰

That Powell viewed diversity as a defense to orthodoxy was a point lost not just on academics but judges as well, an issue that became clear when the University of Michigan Law School drafted an admissions policy allowing for the enrollment of

statesmanship); Jim Chen, *supra* note 15, at 1848 (observing that diversity “has become the preferred euphemism for the déclassé phrase ‘affirmative action’”); Levinson, *supra* note 15 (discussing the Fifth Circuit’s rejection of Powell’s definition of diversity in lieu of one rooted in affirmative action in *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996)); Malamud, *supra* note 15 (arguing that assessments of diversity should incorporate an awareness of past discrimination); Jeffries, *supra* note 12, at 1 (claiming that Powell “saved” affirmative action).

255. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1999); *DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION* (G. Orfield & M. Kurlander eds., 2001); *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (M. Chang, D. Witt, J. Jones & K. Hakuta eds., 2003).

256. *Bob Jones Univ. v. United States*, 461 U.S. 574, 610–11 (1983).

257. Dershowitz & Hanft, *supra* note 237, at 408.

258. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 735 (1982).

259. *Id.*

260. *See supra* notes 211–218 and accompanying text.

minority applicants with suboptimal scores in 1992.²⁶¹ Tailored to fit Powell's opinion in *Bakke*, the policy allowed for the consideration of race as one of several "soft variables" that might be considered in deciding to admit a student with lower test scores for the express purpose of achieving "that diversity which has the potential to enrich everyone's education."²⁶² A white student named Barbara Grutter challenged the policy after being rejected in 1996, arguing her case all the way to the Supreme Court.²⁶³ Decided in 2003, *Grutter v. Bollinger* became the first case since *Bakke* to assess the role of racial preferences in university admissions, upholding Powell's designation of diversity as a compelling state interest.²⁶⁴ However, in her majority opinion, Justice Sandra Day O'Connor misinterpreted Powell in three key ways: first by reading his invocation of diversity as a ruse for affirmative action, then by taking diversity to be important primarily as a means of enhancing academic quality, and finally by making the tenuous claim that diverse law school classes contributed to more diverse national leadership and therefore bolstered the compelling interest of national security.²⁶⁵

To make her first point, O'Connor argued that the invocation of diversity in university admissions should not be considered a permanent measure, but rather a stopgap solution to the larger problem of racial inequality.²⁶⁶ "The requirement that all race-conscious admissions programs have a termination point," held O'Connor, "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."²⁶⁷ This was precisely the move that Calabresi had accused Powell of in the 1970s,

261. *Grutter v. Bollinger*, 539 U.S. 306, 314 (2003), *superseded by constitutional amendment as stated in* *Schuetz v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (Schuetz v. BAMN)*, 134 S. Ct. 1623 (2014); *see also* Sullivan, *supra* note 15 (arguing that the Supreme Court has tended to view diversity programs as "penance for the specific sins of racism a government, union, or employer has committed in the past").

262. *Grutter*, 539 U.S. at 315.

263. *Id.*

264. *Id.*

265. *Id.*

266. *See id.*

267. *Id.* at 342 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

namely enlisting diversity in the cause of racial equality.²⁶⁸ Once equality was reached, argued O'Connor, diversity would no longer need to be invoked to admit students with lower test scores.²⁶⁹ "We expect that 25 years from now," asserted the Justice, "the use of racial preferences will no longer be necessary to further the interest approved today."²⁷⁰

To establish her second point, that diversity contributed to educational quality, O'Connor deferred to the University of Michigan, which claimed that diversity was "essential to its educational mission" because it promoted "cross-racial understanding," broke down "racial stereotypes" and "enable[d] [students] to better understand persons of different races."²⁷¹ While this may well have been true, O'Connor confused diversity's pedagogical utility with its transinstitutional value. For example, she referenced Powell's invocation of academic freedom in *Keyishian*, noting that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."²⁷² Of course this was true, but the freedom to choose students and the value of a diverse classroom were two separate issues. After all, a parochial school might choose to focus on students of a particular faith at the expense of bringing together pupils from different religious backgrounds, while a same-sex institution might choose to focus on recruiting students of a particular gender. Powell stressed the value of institutional diversity in several other opinions on schools that O'Connor failed to cite, including *Committee for Public Education vs. Nyquist*, which praised private parochial schools for "promoting pluralism and diversity," and *Mississippi University for Women v. Hogan*, which praised single-sex education for contributing to "an element of diversity that has characterized much of American education and enriched much of American life."²⁷³ Neither of these opinions endorsed diversity because it contributed to a "robust exchange of ideas,"²⁷⁴ but rather the opposite: because

268. Calabresi, *supra* note 231.

269. *Grutter*, 539 U.S. at 342.

270. *Id.* at 343.

271. *Id.* at 330.

272. *Id.* at 329 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)) (internal quotations omitted).

273. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 735 (1982); *Comm. for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) (Powell, J.).

274. *Bakke*, 438 U.S. at 312.

it promoted the congregation of students with uniform ideas or similar backgrounds. This was a case for institutional pluralism, not educational quality, and should have been used to defend the invocation of diversity at Michigan—but O'Connor failed to mention it.

To make her third point, that diversity promoted national security by producing better leaders, O'Connor again cited one of Powell's references to *Keyishian v. Board of Regents*, this time arguing that the "nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."²⁷⁵ While Powell clearly acknowledged that some schools might adhere to this position and assemble their classes accordingly, he made no indication that this interest trumped the freedom that schools retained to enroll students as they saw fit, whether their policies promoted diversity or not. Citing Justice Frankfurter's opinion in *Sweezy v. New Hampshire*, Powell held that the university should be able "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."²⁷⁶ Some institutions may rightfully decide not to promote diversity, went Powell's reasoning, and still produce excellent leaders, a point that he had made in 1967 by praising private schools for producing leaders precisely because they remained free from government control, forming the last "major remaining barrier to maximum integration," or state-imposed orthodoxy.²⁷⁷ Institutional pluralism, in other words, trumped classroom diversity as a compelling interest, a point that escaped Justice O'Connor's analysis. O'Connor's narrow reading of Powell's take on the relationship between diversity and education shaped her opinion in *Grutter* and set the tone for the Supreme Court's subsequent treatment of diversity for years to come.²⁷⁸ Either the Court stressed diversity as a continuation of affirmative action, which was a misinterpretation of Powell, or it limited the relevance of diversity to the educational benefits that flowed from polyglot classrooms, a narrow reading of the

275. *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313).

276. *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

277. Powell, *supra* note 202.

278. See, e.g., *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013); *Schuette v. BAMN*, 134 S. Ct. 1623 (2014).

Virginian's jurisprudence.²⁷⁹ This became clear in 2013, when the Supreme Court reviewed an admissions policy at the University of Texas and concluded that the use of racial classifications to achieve the "educational benefits" of diversity warranted strict scrutiny review.²⁸⁰ Justice Anthony Kennedy's majority opinion adhered to the educational-benefit definition of diversity while lone dissenter, Justice Ruth Bader Ginsburg, advanced the affirmative action read, arguing that institutions "need not be blind to the lingering effects of 'an overtly discriminatory past,'" including "centuries of law-sanctioned inequality."²⁸¹

Only two Justices questioned O'Connor's interpretation. Justices Antonin Scalia and Clarence Thomas both found the argument that diversity furthered educational goals sufficiently weak to warrant outright rejection.²⁸² Thomas delivered a particularly scathing rebuke, noting that southern segregationists had in fact used the same rationale to justify Jim Crow.²⁸³ "[T]he argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's," argued Thomas, in part because southern whites believed that segregation "provided more leadership opportunities for blacks."²⁸⁴ Thomas drew his critique from segregationist briefs in *Briggs v. Elliot* and *Brown v. Board of Education*, raising the specter that perhaps Powell's interest in diversity also bore southern roots.²⁸⁵ However, Thomas failed to consider whether Powell may have supported diversity in the sense of second-order diversity or institutional pluralism, leaving open the possibility that this justification might have warranted more serious consideration as a compelling state interest.

One year after *Fisher*, the Supreme Court delivered a glancing blow to *Grutter*, upholding a provision in Michigan's constitution that had been enacted post-*Grutter* to ban the use

279. For the narrow reading of diversity as a compelling interest primarily due to its classroom benefits, see the majority opinions in *Fisher* and *Schuette*. For the interpretation of diversity as a form of affirmative action, see Justice Ginsberg's dissent in *Fisher*, and Justice Sotomayor's dissent in *Schuette*.

280. *Fisher*, 133 S. Ct. at 2417, 2420.

281. *Id.* at 2433 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003)).

282. *See id.* at 2422.

283. *See id.* at 2426.

284. *Id.* at 2426 (Thomas, J., dissenting).

285. *Id.*

of all racial classifications in higher education admissions, even those implemented for the sake of promoting diversity.²⁸⁶ The case, styled *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, did not directly address diversity's status as a compelling interest, but did implicate O'Connor's opinion nevertheless.²⁸⁷ One, the campaign to ban racial classifications in Michigan was heavily informed by popular opposition to affirmative action, not institutional pluralism, a clear indicator that the public understood *Grutter* in O'Connor's and not Powell's terms.²⁸⁸ Two, both Justices Sotomayor and Ginsburg viewed the Court's decision to uphold the ban as an assault on affirmative action, further obscuring the extent to which Powell's vision of diversity had nothing to do with compensating blacks for past harm.²⁸⁹ Such mistranslations would have been less likely had Powell's early writings on the civil rights movement been better known, or better heeded, by Powell's successors on the Supreme Court.

CONCLUSION

Little attention has been paid to Lewis F. Powell's critiques of civil disobedience in the 1960s.²⁹⁰ As this essay demonstrates, however, Powell took the Movement to task repeatedly in public speeches, bar journal pieces, and law review articles challenging the use of direct-action protest to achieve legal reform.²⁹¹ Of particular interest to Powell was Martin Luther King Jr.'s "Letter from Birmingham Jail," a widely celebrated document that justified peaceful law-breaking in the name of achieving a broad definition of racial equality in the United States, one that included "compensatory consideration" to African Americans for slavery and Jim Crow.²⁹²

286. *Schuette v. BAMN*, 134 S. Ct. 1623, 1638 (2014).

287. *Id.* at 1630.

288. 'No' on Proposal 2: Affirmative-Action Ban Sends Wrong Message, *BATTLE CREEK INQUIRER* (Battle Creek, Mich.), Oct. 22, 2006, at A10; *Proposal 2: Voters Erred, But Court Fights Aren't Best Way to Fix It*, *LANSING ST. J.*, Dec. 17, 2006, at A6.

289. *Schuette*, 134 S. Ct. at 1651 (Sotomayor J., dissenting).

290. *See supra* Part I.

291. *See supra* Part I.

292. *See supra* Part I; *see also* KING, *supra* note 4, at 124.

Powell rejected such a vision, linking it to models of redistributive justice that characterized totalitarian regimes like the Soviet Union, which Powell visited in 1958.²⁹³ To counter, Powell advanced a very different theory of justice, one that hinged on procedural fairness but allowed for substantial, substantive inequality.²⁹⁴ In fact, Powell even went so far as to find value in the perpetuation of inequality, one of the many sources of America's great "pluralism" or what Powell also termed "diversity."²⁹⁵

Powell's interest in pluralism is worth recovering today, not least because proponents of diversity tend to conflate their cause with the achievement of racial equality, a move that Powell refused to make. Long suspicious of the civil rights movement, Powell drew a stark line between the compelling interest of diversity and the significantly less compelling interest of racial equality, something that he considered to be a completely separate, more dubious goal. However, Powell's distinction has been all but lost. Current proponents of diversity in higher education, for example, continue to conflate their cause with affirmative action, a type of compensatory consideration that emerged out of the civil rights battles of the 1960s.²⁹⁶ Similarly, opponents of affirmative action have also tended to confuse diversity with efforts to compensate blacks for past repression, a cause they argue is illegitimate and unworthy of constitutional protection.²⁹⁷ Recently, the Supreme Court weighed in on the issue, also confusing diversity with affirmative action in a challenge to a state law banning the use of racial classifications in college admissions.²⁹⁸

Powell provides a refreshing, if not completely trouble-free, corrective to the current confusion. By advancing a case for diversity as a compelling state interest that had nothing to do with racial equality or compensatory justice, he provides us with a way of thinking about the use of race in college admissions programs that should, on its face, have nothing to do with affirmative action. While Powell's refusal to

293. See *supra* Part I.

294. See *supra* Part I.

295. See *supra* Part II.

296. ANDERSON, *supra* note 167, at 60.

297. Arianna Assaf & Peter Shahin, *Proposal 2 Goes to U.S. Supreme Court*, MICH. DAILY (Mar. 25, 2013), <http://www.michigandaily.com/news/us-supreme-court-takes-prop-2-case>, archived at <http://perma.cc/5G9J-QL45>.

298. *Schuetz v. BAMN*, 134 S. Ct. 1623 (2014).

acknowledge problems with persistent racial inequality may be troubling, his doctrinal separation of diversity from affirmative action gives us a reason for endorsing creative considerations of race and other factors in college admissions that should not, on their face, have anything to do with timelines, invocations of *Brown v. Board of Education*, or other contentious matters dealing with questions of substantive equality and racial justice.²⁹⁹

299. See, e.g., *Fisher v. Univ. of Texas*, 570 U.S. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2013).