

# Diversity to Deradicalize

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*For four decades, diversity has functioned as the dominant rationale for affirmative action. During this time, scholars have debated whether diversity should have this hegemonic hold on the policy. Central to the debate is Justice Lewis Powell's opinion in Bakke, an opinion that no other justice joined. What motivated him to turn to the diversity rationale to begin with, and what conception of diversity did he have in mind? The conventional answer is that Justice Powell articulated the "robust exchange of ideas" formulation of diversity as a compromise that would keep affirmative action alive on a Supreme Court increasingly divided over civil rights. Powell deployed diversity as a lifeline to affirmative action and in the process ostensibly signaled his own commitment to a more racially inclusive society.*

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*This Article challenges that conventional story by offering a new interpretation of the Bakke decision. Drawing on a variety of archival materials, this Article contends that Powell's opinion was motivated, at least in part, by a desire to deradicalize college campuses. Beginning in the mid-1960s, in the midst of the Cold War, and against the backdrop of a spate of intense campus protests erupting throughout the nation, Powell became consumed by a suspicion that White and Black leftist radicals had banded together to plot a revolution that would overthrow representative democracy and the capitalist system. Importantly, he believed that radicals aimed to establish college campuses as "their principal base of revolution." From his perspective, institutions of higher learning were increasingly becoming sites of political corruption, radicalizing impressionable college students "from our finest homes." More precisely, Powell worried that if the future leaders of America—specifically, White male college students—internalized the leftist political line circulating on college campuses that the United States was irredeemably racist, repressive, and imperialistic, communists would more easily be able to "undermine or destroy our democracy and replace it with the tyranny of a Castro or a Mao Tse-tung." Well before Bakke, Powell argued that exposing college students to "a robust exchange of ideas" would weaken the influence radicals had on forming students' worldviews.*

*Yet, to demonstrate that Powell was influenced by his concerns about left-oriented radicalism does not necessarily disrupt the widespread belief that his Bakke opinion was primarily motivated by a desire to promote racial equality. Thus, in addition to highlighting Powell's views on campus radicalism, this Article contests what I call *The Tale of Two Powells*. Undergirding this tale are the pre-Court Lewis Powell, who is credited with creating the blueprint for the modern conservative movement, and the Supreme Court Justice Powell, who is often regarded as a left-leaning centrist with a commitment to promoting integration. The Article challenges this dichotomy, revealing profound continuities between Powell's normative commitments before and after his appointment to the Court as well as the strategies he employed to advance those commitments.*

*Powell's sole-authored opinion was hugely influential not only vis-à-vis affirmative action in American universities, but also in helping to remake the goal of racial integration more generally. The diversity rationale has become the primary justification for efforts to create more inclusive organizations—from classrooms to corporations. As it turns out, the turn to diversity likely stemmed more from a deradicalizing than a racial justice imperative.*

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## INTRODUCTION

For the past forty years, the constitutionality of affirmative action has hinged on the importance of attaining a central goal: diversity on college campuses. The Supreme Court first articulated this goal in *University of California v. Bakke*,<sup>1</sup> where Justice Lewis Powell wrote in a key opinion that “[t]he [n]ation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues . . .’”<sup>2</sup> He stipulated that “genuine diversity,” the kind of diversity that furthered a compelling state interest, required universities to consider more than just an applicant’s race.<sup>3</sup> They should also seek to admit other groups, including the “culturally advantaged,”<sup>4</sup> “farm boy[s] from Idaho,”<sup>5</sup> and “potential stockbrokers,”<sup>6</sup> as their perspectives would “promote beneficial educational

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1. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

2. *Id.* at 312 (quoting Justice William Brennan’s majority opinion in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) and *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

3. *Id.* at 315.

4. *Id.* at 314.

5. *Id.* at 316.

6. *Id.* at 322.

pluralism" within the nation's universities.<sup>7</sup> No other justice joined this opinion.<sup>8</sup> Yet, because of a deeply fractured Court, Justice Powell's belief in the importance of intellectual diversity on college campuses has determined the logic of affirmative action for generations and remains its dominant justification today.<sup>9</sup>

Why did the intellectual diversity argument resonate with Justice Powell? The prevailing explanation characterizes Powell as a centrist who was sympathetic to the plight of racial minorities but who also worried about legitimating an interpretation of the Constitution that, from his perspective, would endow certain groups of Americans with more rights than others.<sup>10</sup> According to this theory, by basing his support of affirmative action on the importance of having various viewpoints represented on campuses, Powell was able to allow for racially integrated universities without explicitly endorsing "preferences" for racial minorities.<sup>11</sup> Critical scholars, on the other hand, speculate that Powell's endorsement of the diversity rationale was motivated by a belief that White students could accrue educational benefits by being exposed to the perspectives of students of color. This Article provides an alternative explanation of the Justice's motivations. I argue that Powell's largely forgotten war against radicalism on college campuses shines new light onto his opinion in *Bakke*.

Using previously unanalyzed speeches, written commentaries, and personal notes from Powell's archives,<sup>12</sup> I show that by the time *Bakke* reached the Court, the Justice had already been on a decade-long crusade to further intellectual diversity on the nation's campuses in pursuit of a goal that had little to do with affirmative action. Instead, Powell was concerned foremost with preventing the radicalization of students who would soon preside over American institutions.

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7. *Id.* at 317.

8. Justices Brennan, White, Blackmun, and Marshall upheld affirmative action because the policy was necessary to address a legacy of racial discrimination. *Id.* at 324–25 (Brennan, J., concurring in the judgment in part and dissenting in part). Justices Stevens, Burger, Stewart, and Rehnquist voted against the policy citing their belief that racial preferences violated the Civil Rights Act of 1964. *Id.* at 408, 412–13 (Stevens, J., concurring in the judgment in part and dissenting in part).

9. Justice Powell's rhetoric in *Bakke* continues to color more recent Supreme Court opinions regarding affirmative action. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 308 (2013) (citing Justice Powell's reasoning that "securing diversity's benefits . . . 'is not an interest in simple ethnic diversity'").

10. *See infra* Part I. For an alternative explanation, *see generally* ANDERS WALKER, THE BURNING HOUSE: JIM CROW AND THE MAKING OF MODERN AMERICA (2018) (arguing that Powell's embrace of diversity is a product of his embrace of a particular brand of pluralism popular in the American South).

11. *See generally* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008) (arguing that given the importance of personal statements in college admissions, forcing applicants of color to not discuss their race when describing themselves to admissions committees will tend to favor those for whom their racial identity is insignificant to their overall life story).

12. The Lewis F. Powell, Jr. Archives are located at the Washington and Lee University School of Law.

Beginning in the mid-1960s, when he was an education official in Virginia, Powell became consumed by a suspicion that White and Black radicals, influenced by communists, had teamed up to plot a revolution that would dismantle capitalism and overthrow American democracy. According to Powell, the effort to foment insurrection was being executed on two fronts. Black “militant leaders”<sup>13</sup> like Martin Luther King Jr. and the Black Panthers used civil disobedience to sow discord in the streets, and White militants—represented by the New Left—sought to radicalize “an ever-increasing number of white middle-class Americans”<sup>14</sup> by corrupting the intellectual climate of the nation’s universities. Powell specifically warned audiences that left extremists aimed to “establish the campus as the principal base of revolution.”<sup>15</sup>

It was the radicals’ strategy, according to Powell, to infiltrate American universities to “brainwash[]” the nation’s future leaders with anti-American propaganda.<sup>16</sup> The purported goal of the indoctrination was to undermine future leaders’ faith in American institutions so that radicals could more easily overthrow U.S. democracy and “replace it [with] the tyranny of a Castro or a Mao Tse-tung.”<sup>17</sup> The spate of intense campus protests that erupted throughout the nation during the ‘60s and ‘70s around the war in Vietnam and racial injustice were proof for Powell that radicals were prevailing in an ideological war for the hearts and minds of American college students.

How were they winning? By acting as intellectual gatekeepers on university campuses. According to Powell, radical students and professors inundated college students with the dubious message that America was racist, repressive,

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13. Lewis F. Powell, Jr., Address at the Southern Company Conference of Directors and Executives at Point Clear, Alabama: Civil Disobedience: Prelude to Revolution? 7 (Oct. 5, 1967), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_Civil%20Disobedience%20Prelude%20To%20Revolution%20October%205%201967\\_117-9.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Civil%20Disobedience%20Prelude%20To%20Revolution%20October%205%201967_117-9.pdf) [https://perma.cc/96JR-2Q43] [hereinafter Powell, Prelude to Revolution].

14. Lewis F. Powell, Jr., Address at the Kenbridge Chamber of Commerce Citizenship Award Night: Radical Leftist Movement, at Exhibit C (Feb. 27, 1969) (quoting a document distributed to Anti-Vietnam War groups in 1968 discussing “the progression from moderate liberalism to the ultimate goal of ‘radicalization’ of enough Americans to overthrow our system”), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_Radical%20Left%20Movement,%20February%2027,%201969\\_117-21.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Radical%20Left%20Movement,%20February%2027,%201969_117-21.pdf) [https://perma.cc/FU3M-9AT4] [hereinafter Powell, Radical Left Movement].

15. Lewis F. Powell, Jr., Address at the Southern Industrial Relations Conference: Attack on American Institutions 8 (July 15, 1970), <http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeechAttackOnAmericanInstitutionsJuly15,1970.pdf> [https://perma.cc/4YXB-TK76] [hereinafter Powell, Attack on American Institutions].

16. *Id.* at 23.

17. Lewis F. Powell, Jr., Address at the Key Club Leadership Banquet of Thomas Jefferson High School in Richmond, Virginia: What Is “Right” about America 2 (Apr. 16, 1970), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_What%20Is%20Right%20About%20America,%20April%2016,%201970\\_117-29.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_What%20Is%20Right%20About%20America,%20April%2016,%201970_117-29.pdf) [https://perma.cc/23CC-X2EA] [hereinafter Powell, What Is “Right” about America].

and imperialistic.<sup>18</sup> Simultaneously, to ensure that they had maximum influence in shaping students' worldviews, radicals also used coercive means to deny the articulation of conservative and moderate perspectives. Powell believed that leftists were successful not because they had the most compelling ideas but instead because "[y]oung extremists, professing to be 'liberals', deny free speech to those with whom they disagree."<sup>19</sup> Having access only to a range of thought that spanned from liberal to radical during their most intellectually formative years, many impressionable and "easily duped" students were becoming radicalized in college.<sup>20</sup>

Powell was eager to curb left-oriented radicalism, particularly on college campuses. He wanted to prevent campus radicals, whom he identified as "basically white,"<sup>21</sup> from corrupting White students "from our finest homes."<sup>22</sup> After initially advocating for the expulsion of radical students and for stripping tenure from professors who aided them, Powell eventually concluded that the best strategy to defeat radical leftists was to push for more intellectual diversity in the nation's universities.<sup>23</sup> By promoting educational pluralism, Powell aimed to increase the representation of moderate and conservative viewpoints on campuses. Exposure to a diversity of perspectives was primarily a means to dilute the influence that leftists had on forming college students' ideological orientations.

This Article contends that Powell's opinion in *Bakke* was motivated by an effort to quell radicalism on two fronts. To explain, it helps to separate Powell's vote to uphold affirmative action from his reasoning for doing so. His vote is

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18. This Article frequently uses the terms *radical*, *liberal*, and *conservative* to describe the varying political identities on college campuses. In distinguishing between the three groups, I rely on the definition provided by President Nixon's Commission on Campus Unrest:

With regard to objectives, American students today occupy the full political spectrum that runs from radical to conservative. Radicals generally reject the prevailing institutions and policies of American society and seek to establish a new kind of society. Liberals desire social change but believe it can be accomplished through reforms within the existing political system. Conservative students believe that American society is basically sound and wish to preserve its prevailing values and institutions.

President's Comm'n on Campus Unrest, The Report of the President's Commission on Campus Unrest 19 (1970), <https://files.eric.ed.gov/fulltext/ED083899.pdf> [<https://perma.cc/4J9C-FLDM>] [hereinafter Campus Unrest Commission].

19. Lewis F. Powell, Jr., Address to Virginia's State Board of Education: Citizenship Education as to Law, Disorder Extremism and Civil Disobedience 3 (July 19, 1968), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_Citizenship%20Education%20As%20To%20Law,%20Disorder,%20Extremism%20and%20Civil%20Disobedience,%20July%2019,%201968\\_117-15.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Citizenship%20Education%20As%20To%20Law,%20Disorder,%20Extremism%20and%20Civil%20Disobedience,%20July%2019,%201968_117-15.pdf) [<https://perma.cc/YL5F-WKMP>] [hereinafter Powell, Citizenship Education].

20. Powell, Attack on American Institutions, *supra* note 15, at 8.

21. *Id.* at 5.

22. *Id.* at 11.

23. See Lewis F. Powell, Jr., Address to the American Association of State Colleges and Universities in Washington D.C.: A Strategy for Campus Peace 20–21 (Nov. 11, 1968), available at [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_A%20Strategy%20For%20Campus%20Peace,%20November%2011,%201968\\_117-16.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_A%20Strategy%20For%20Campus%20Peace,%20November%2011,%201968_117-16.pdf) [<https://perma.cc/4LNJ-QJG8>] [hereinafter Powell, A Strategy for Campus Peace].

best contextualized by reading it alongside his longstanding views on race and education. Powell was neither a committed integrationist, nor a zealous segregationist. Over a twenty-year period, his views on school integration were motivated by neither sympathy for nor hostility toward racial minorities. Instead, Powell approached issues of school integration with an eye toward achieving whichever outcome would cause the least amount of social disruption. For K-12 desegregation, the search for stability prompted him to oppose *both* compulsory integration *and* massive resistance. In *Bakke*, however, Powell recognized that banning affirmative action outright would likely cause more disruption than allowing universities to continue what they had already been doing for well over a decade. As Powell noted behind the scenes, it was “too late in the day” to forbid any consideration of an applicant’s race.<sup>24</sup>

Moreover, deeming affirmative action unconstitutional would lend credence to the critiques of campus radicals and Black militants, who both pointed to the absence of racial minorities in the country’s most elite institutions as damning evidence that America was irredeemably racist and oppressive. Powell recognized that if the Court closed the doors of higher education to Black and Latinx students once again, it risked reigniting the fires of racial unrest that had embroiled the country just a few years earlier. As the Justice told the law clerk who helped draft his *Bakke* opinion, outlawing affirmative action would be “a disaster for the country.”<sup>25</sup> Read in this light, voting to allow universities to keep affirmative action programs would lead to less disruption both on campuses and in society more generally.

However, to explain why Powell voted for affirmative action says little about why he landed on the “educational benefits of diversity” rationale. The evidence does not suggest that he was attracted to the “robust exchange of ideas” justification for affirmative action simply because he had an abstract commitment to promoting a marketplace of ideas in universities. Indeed, as a private citizen, Powell forcefully condemned college administrators for giving radical thought leaders a platform to speak to students, once asking, “Are our campuses to become Hyde Parks and Times Squares, where a soap box is provided for every huckster?”<sup>26</sup> Instead, understanding elite universities to be sites of leftist indoctrination, Powell believed that increased exposure to intellectual diversity would have a moderating effect on students’ ideological orientations. As he argued before he joined the Court, if college students were exposed to a robust exchange of ideas, the great majority of them would naturally

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24. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 469 (1st ed. 2001).

25. *Id.*

26. Powell, A Strategy for Campus Peace, *supra* note 23, at 18.

come to see the inherent wisdom of free market capitalism and the greatness of time-honored American institutions.<sup>27</sup>

In Powell's view, radicalism was born of ignorance, and ignorance, at least on college campuses, was born from a lack of exposure to competing ideas. By upholding the educational benefits of diversity—and explicitly signaling to universities that they should approach admissions decisions with an eye toward cultivating viewpoint diversity—Powell was able to create conditions that might lead to a moderation of students' views. This would be beneficial both for students' intellectual development and the stability of the country that these students would soon lead. As he noted in his opinion, "The [n]ation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"<sup>28</sup>

In articulating a new explanation of Powell's motives in *Bakke*, this Article not only calls into question the prevailing understanding that Powell was motivated by his commitment to racial justice, it also complicates a more critical view of the diversity rationale that locates the Court's endorsement of "the educational benefits of diversity" in a recognition that exposure to racial minorities confers benefits onto Whites.<sup>29</sup> Under this theory, Powell's endorsement of diversity stemmed from an awareness that White college students needed exposure to the views of students of color to be effective leaders in an increasingly multiracial society.<sup>30</sup>

There is certainly evidence to suggest that this kind of racial instrumentalism inspired Justice Sandra Day O'Connor's rearticulation of the diversity rationale in *Grutter v. Bollinger* twenty-five years later.<sup>31</sup> Yet there is

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27. See generally Memorandum from Lewis F. Powell, Jr.: Attack on American Free Enterprise System, to Eugene B. Sydnor, Jr., Chairman, Education Committee of the U.S. Chamber of Commerce (Aug. 23, 1971), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo> [https://perma.cc/RK79-7SAK] [hereinafter: Powell, Confidential Memorandum] (outlining the ways in which American business could mobilize to re-assert its political power).

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

29. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155 (2013) (noting that the diversity rationale as articulated in *Bakke* and *Grutter* reflects a belief that "[n]onwhiteness has . . . become something desirable—and for many, it has become a commodity to be pursued, captured, possessed, and used").

30. Natasha K. Warikoo further finds that White college students at elite universities are ambivalent about racial diversity. They generally oppose diversity programs when they perceive them to limit their own opportunities. However, they reluctantly agree with diversity programs when they are thought to be of personal benefit to them by providing them with a diverse learning environment. See generally NATASHA K. WARIKOO, THE DIVERSITY BARGAIN: AND OTHER DILEMMAS OF RACE, ADMISSIONS, AND MERITOCRACY AT ELITE UNIVERSITIES (2016).

31. *Grutter v. Bollinger*, 539 U.S. 306 (2003). O'Connor's opinion in *Grutter*, as well as the amicus briefs submitted by universities in a number of Supreme Court cases, liberally reference this defense for diversity. See, e.g., Brief for Respondents at 30, *Grutter*, 539 U.S. 306 (No. 02-241) ("The Law School values the presence of minority students because they will have direct, personal *experiences* that white students cannot—experiences which are relevant to the Law School's mission.") (emphasis in original).

little to suggest that Powell himself was concerned with White students learning from racial minorities. Indeed, he dismissed as too narrow the University of California's conception of diversity, which explicitly focused on the goal of promoting cross-racial understanding. Instead, he embraced Harvard's more catholic vision of diversity, where race was merely a "plus factor" in service of the larger goal of attaining intellectual diversity on college campuses.<sup>32</sup>

It is necessary to excavate Justice Powell's political views to understand how viewpoint diversity became the key compelling interest to uphold affirmative action. This Article proceeds in four parts. I begin by calling into question the prevailing notion that what drove Powell's stance on affirmative action was his longstanding commitment to integration and racial equality. This notion rests on an incomplete, and at times incorrect, depiction of the positions he took on racial justice issues before joining the Court. Under the conventional reading, Powell's decision in *Bakke* is a natural extension of his work to facilitate school integration as an education official in Virginia. Part I complicates this view by surfacing Powell's steadfast opposition to the Court's desegregation decrees when he served as a school board official in the state of Virginia, as well as his opposition to the Civil Rights Movement more generally. Powell spent nearly two decades resisting compulsory integration, calling it "an unwelcome social change forced upon us by law," because he feared it would destabilize society.<sup>33</sup> As one of the nation's premier lawyers, Powell also traveled the country telling audiences that African Americans were owed nothing for injustices of the past, warning that militant inner-city Blacks were planning a race war, and encouraging the government to bring criminal sanctions against civil rights activists, like Martin Luther King Jr., who engaged in civil disobedience.<sup>34</sup> At the very least, Powell's pre-Supreme Court professional life raises questions about whether his *Bakke* opinion was motivated by an integrationist impulse.

Part II responds to claims that Powell's racial views became increasingly more liberal over time. Powell's principal biographer, for instance, explains the *Bakke* opinion by speculating that Powell's appointment to the Court endowed the Justice with a newfound "sense of personal responsibility for racial justice."<sup>35</sup> As Part II explains, the belief that Powell's role as a Supreme Court Justice

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32. See *Bakke*, 438 U.S. at 316 ("In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases.") (quoting App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae 2–3, *Bakke*, 438 U.S. 265 (No. 76-811)).

33. Lewis F. Powell, Jr., Statement on Behalf of the School Board Supporting Construction of the New High Schools Without Delay 4 (May 6, 1959) [hereinafter Powell, Statement].

34. See *infra* Part I for a discussion of Powell's view on and opposition to the Civil Rights Movement. For an alternative viewpoint, see WALKER, *supra* note 10.

35. JEFFRIES, *supra* note 24, at 499.

shifted his ideological commitments from racial segregationism to racial liberalism is not well-supported by his judicial record. There is, in fact, significant continuity between pre-Court Powell's opposition to desegregation and the positions he took after his appointment. As a Justice, he was instrumental in restricting desegregation efforts and limiting the educational opportunities for children of color. Moreover, in his *Bakke* opinion, Powell went to significant lengths to explain that racial minorities deserved no "heightened judicial solicitude," even as he voted to uphold affirmative action.<sup>36</sup> Given his record, it is difficult to sustain the claim that Powell's appointment to the Court prompted a significant leftward shift in his racial politics, which in turn motivated his *Bakke* opinion.<sup>37</sup>

After establishing the shortcomings of the dominant theory of Powell's motivations in *Bakke*, the Article introduces an alternative explanation. Part III broadens the debate by taking up a crucial aspect of his life that scholars have largely ignored: his deep investment in protecting the country from communists and other radicals who were, from Powell's perspective, positioned on "the 'hate America' left."<sup>38</sup> Sixteen years before *Bakke*, Powell told audiences that "education is one of the major 'battlefields' of the Cold War."<sup>39</sup> In the mid-1960s, beginning with Berkeley's Free Speech Movement and the subsequent rash of nationwide campus protests, he believed that communists had finally made inroads into their long-term goal of corrupting the nation's future leaders. From 1964 until his appointment onto the Court, Powell spoke frequently about the importance of promoting intellectual diversity on campuses. For him, this was not simply an abstract commitment to a marketplace of ideas. It was a targeted strategy aimed at preventing what he perceived to be the continued radicalization of American college students and the erosion of capitalism and American democracy.

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36. *Bakke*, 438 U.S. at 296.

37. See Janet L. Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative?*, 52 J. POL. 530, 546 (1990). After doing a quantitative analysis of Powell's voting patterns on civil liberties case—which include those cases dealing with issues of civil rights, first amendment guarantees, criminal procedure, due process, and privacy—Blasecki finds,

Powell's voting record throughout his years on the Court was distinctly conservative.

The strength of his overall opposition to civil liberties claims approached that of Burger and Rehnquist, moderating perhaps only slightly during his last year. Powell, together with White, Burger, and Rehnquist, formed a strong consistent conservative voting bloc on the Court. In the 'close' cases, decided by a single vote, as well as in the more lop-sided decisions, Powell overwhelmingly supported the right.

*Id.*

38. Powell, *Prelude to Revolution*, *supra* note 13, at 14.

39. Lewis F. Powell, Jr., Address at Federal Bar Association in Washington, D.C.: Higher Education – Soviet Style (Apr. 27, 1962), 20, [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_Higher%20Education%20-%20Soviet%20Style,%20April%2027,%201962\\_113-19.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Higher%20Education%20-%20Soviet%20Style,%20April%2027,%201962_113-19.pdf) [https://perma.cc/5DLN-W8F6] [hereinafter Powell, Soviet Style].

Powell's elevation of the "diversity rationale" has had a profound influence on American society, well beyond the bounds of constitutional law. It has helped to fundamentally reshape our society's understanding of the importance of both affirmative action and the project of racial integration more generally. The "benefits of diversity" rationale has become the logic deployed to justify the integration of not only selective universities but also institutions as disparate as corporations and preschools. Part IV argues that while this account of how we ended up with the diversity rationale should not necessarily unsettle affirmative action doctrine, it might offer an occasion to reassess our continued commitment to Powell's logic when pursuing the goal of racial integration.

## I. RACIAL JUSTICE VERSUS SOCIAL STABILITY

More than any other case, *Bakke* solidified Powell's legacy as a racial moderate with integrationist leanings.<sup>40</sup> In his obituary, the *New York Times* pointed to his reasoning in the case to support their characterization of Powell as a centrist who "stood for moderation and consensus-building on matters of race."<sup>41</sup> A similar tribute praised him as someone who "steadfastly pursued the twin goals of educational excellence and racial cooperation."<sup>42</sup>

The leading biography on Powell argues that it was this sense of moderation that drove his *Bakke* opinion.<sup>43</sup> On the one hand, his biographer argues, Powell found "repugnant" the prospect of elite universities becoming, once again, bereft of African Americans.<sup>44</sup> Given the nation's history of separate and unequal education, he supposedly knew that forcing schools to take a colorblind approach to admissions decisions would eliminate most Black students from consideration. Yet, on the other hand, he worried that legitimating a compensatory rationale for the policy would allow racial preferences to go on indefinitely.<sup>45</sup> Thus, it was an attempt to balance two important concerns that led

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40. See, e.g., J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 301 (1979) (explaining that "the result was typical of Powell the diplomat, Powell the balancer, Powell the quiet man of the middle way").

41. Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES, Aug. 26, 1998, <https://www.nytimes.com/1998/08/26/us/lewis-powell-crucial-centrist-justice-dies-at-90.html> [https://perma.cc/4FMW-VNT6].

42. Oliver W. Hill, *A Tribute to Lewis F. Powell, Jr.*, 49 WASH. & LEE L. REV. 11, 13 (1992).

43. See JEFFRIES, supra note 24, at 332.

44. See John C. Jeffries Jr., *Bakke Revisited* 7 (Univ. of Va. Sch. of Law 2003 Pub. Law & Legal Theory Research Papers, Working Paper No. 03-12), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=476061](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=476061) [https://perma.cc/WP2V-APFZ].

45. But see RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 182–202 (2013) (noting the weakness of this argument, Professor Kennedy argues that if the Court were primarily concerned with having an end date for affirmative action, the emphasis on the educational benefits of diversity seems not to address that concern because universities would always believe that is important to have various viewpoints represented in class).

Powell to the moderate position of upholding affirmative action on the grounds of intellectual pluralism.<sup>46</sup>

The origins of Powell's commitment to racial integration is often traced back to his professional experiences before joining the Supreme Court.<sup>47</sup> Powell was responsible for carrying out desegregation orders while working as an education official in Virginia during the 1950s and 1960s. This experience is said to have made him sympathetic to the goal of achieving racially integrated schools.<sup>48</sup> Justice Sandra Day O'Connor discussed how deeply the Virginia native revered *Brown* and how that reverence affected his approach as a Justice:

Perhaps most vivid in my mind is the acute appreciation that he has always shown for the delicate and profoundly important legacy of *Brown v. Board of Education*. Before coming to the Court, Justice Powell was president of the Richmond School Board, and in that role he worked to implement the *Brown* decision. He knew, from that experience and others, the importance of eliminating racial discrimination and the underlying significance of a fundamentally sound system of public school education.<sup>49</sup>

This characterization, however, belies the truth of Powell's tenure as head of Richmond's education system. As school board chair, he opposed school desegregation and the Civil Rights Movement more generally. In reviewing his record on racial issues prior to joining the Court, even Powell's otherwise sympathetic biographer labeled him an "unresisting heir to the traditions of white supremacy."<sup>50</sup>

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46. Richard Fallon, for example, noted that Powell's decision was compelled by his astute recognition "that no 'tragic choice' be made to exalt one of the competing sets of constitutional values in a way that wholly sacrifices the other." Richard H. Fallon, Jr., *Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 399, 402 (1987); *see also* Constance Baker Motley, *Race Discrimination Cases: The Legacy of Justice Lewis F. Powell*, 21 SUFFOLK U. L. REV. 971, 980 (1987) ("Justice Powell's equal concern for the individual rights of both blacks and whites compelled him to seek an intermediate position between the extremes adopted by the other members of the Court.").

47. Editorial, *Bad Law on Affirmative Action*, N.Y. TIMES, Mar. 22, 1996, at A26, <https://www.nytimes.com/1996/03/22/opinion/bad-law-on-affirmative-action.html> [https://perma.cc/X4V6-MR47] (saying of Powell's opinion in *Bakke*, "[I]t has been widely hailed as the work of a respected moderate well grounded in experience as head of the school board in Richmond, Va.").

48. *See, e.g.*, Motley, *supra* note 46, at 971 (noting that "Justice Powell's opinions in the area of race relations had given him a special place in the hearts of most Americans concerned with equality. He had displayed a sophisticated appreciation of the multi-dimensional problem of race. His fine-tuned understanding stemmed, I believe, from his southern background and his first-hand experience with school desegregation in Richmond, Virginia after the Supreme Court decided *Brown v. Board of Education* in 1954 and 1955").

49. Sandra Day O'Connor et al., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395 at 395–420, 396 (1987).

50. JEFFRIES, *supra* note 24, at 469. Jeffries argued that Powell "acquiesced in desegregation, but did not actively support it." *Id.* at 178–79. To explain Powell's motivations for not speaking out against segregation, Jeffries offered three main reasons: (1) "Powell feared that public comment would undermine his effectiveness"; (2) "Powell had a pronounced distaste for public discourse on issues of

Yet, Powell was not the typical Southern segregationist. His views on integration during this time were informed neither by hostility against nor sympathy for African Americans. The welfare of African Americans was, at best, a peripheral matter for Powell. His paramount concern was preserving order. Both school integration and the Civil Rights Movement—particularly the tactics of civil disobedience—required large-scale disruption of existing social practices. This is what alarmed Powell and ultimately motivated his opposition. Understanding both Powell’s deep commitment to social stability and his general apathy toward the struggles of African Americans helps to contextualize his idiosyncratic opinion in *Bakke*.

#### *A. School Desegregation and the Preservation of Order*

For the quarter century leading up to *Bakke*, Powell opposed state-mandated efforts to racially integrate public schools. Shortly after *Brown* was announced, he made clear that he was against the decision, saying, “I am not in favor of, and will never favor compulsory integration.”<sup>51</sup> *Compulsory* is the key word. Unlike many of his segregationist peers and forebears, Powell’s opposition to desegregation was not motivated by fears of miscegenation, a desire to preserve the morality of White children, or the perception that the introduction of Black students would erode the education standards of White schools. Instead, he worried that forcing integration would lead to outcomes that threatened social stability, including a mass exodus of White families from areas impacted by desegregation decrees, a resulting destruction of the school system, an increase in racial tension, and the degradation of community ties.<sup>52</sup> As Powell later noted while on the Court, he was not opposed to individual White students voluntarily choosing to attend schools in Black neighborhoods, as that would not produce great social upheaval. But forcing Whites to integrate with Blacks was a dangerous proposition—one that he spent considerable effort trying to prevent.

Powell’s work at the Richmond School Board also saw his attempts to undercut the desegregation efforts during and after *Brown*. Powell’s law firm represented one of the school boards in *Brown v. Board of Education*.<sup>53</sup> It is not clear the extent to which Powell himself was directly involved in the litigation.<sup>54</sup> What is clear, however, is that after his firm lost the case, Powell worked behind

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race and desegregation”; and (3) many of the key figures pushing for massive resistance were Powell’s friends and allies, thus Powell refrained from speaking out in favor of desegregation because of his “strong sense of group allegiance.” *Id.* at 180.

51. EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 348 (2013).

52. Powell, Statement, *supra* note 33.

53. Jeffries, *supra* note 24, at 39.

54. *Id.* The full name of the lawsuit was *Davis v. County School Board*, 103 F. Supp. 337 (E.D. Va. 1952), *rev’d sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). Powell’s partners Justin Moore and Archibald Robertson were the official counsel. However, because Powell stood as the head of the Richmond School Board at the time when his firm was litigating *Brown v. Board*, it is difficult to imagine that he had no input in the litigation.

the scenes to ensure the *Brown* decision would have little practical impact. Powell served as the chairman of the school board in Richmond, Virginia, from 1952 to 1961.<sup>55</sup> During that time, he was a deft strategist in the service of subverting desegregation.

Rather than comply with the Court's desegregation mandate, a number of Virginia's school districts shut down completely in what was known as massive resistance. To compensate for the lack of public education, the state paid for White parents to send their children to segregated private schools. Black children, however, were often denied state funding and many went without formal education for the better part of a decade until the Supreme Court denounced the practice as unconstitutional in 1964.<sup>56</sup>

Powell was a vocal opponent of massive resistance in the state of Virginia.<sup>57</sup> Some have mistakenly interpreted his opposition to massive resistance as early evidence of his commitment to integration, a commitment that would be used to explain his *Bakke* decision. In truth, Powell did not oppose massive resistance because he opposed segregation. He was against massive resistance for the same reason he was against *Brown*: it created too much instability. Powell sought to maintain segregated schools, but believed there were less disruptive and ultimately more effective ways to do so.<sup>58</sup>

As historian Robert Pratt has argued, Richmond school officials began to adopt "passive resistance" when it became clear that massive resistance would not be a workable strategy.<sup>59</sup> These officials, Pratt notes, were "equally committed to maintaining segregated schools" as those who endorsed massive resistance, but recognizing that it would be a "foolhardy venture" to "becom[e] embroiled in constitutional warfare with the Supreme Court," they adopted less

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55. Robert A. Pratt, *A Promise Unfulfilled: School Desegregation in Richmond, Virginia, 1956–1986*, 99 VA. MAG. HIST. & BIOGRAPHY 415, 423 (1991).

56. *See Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 218 (1964) (holding that the action of the County School Board in closing the public schools of Prince Edward County while contributing to the support of private segregated White schools that took their place denied African American children equal protection of the law).

57. *See Dallin H. Oaks, Tribute to Lewis F. Powell, Jr.*, 68 VA. L. REV. 161, 163 (1982) (noting that Powell "is credited with leading the opposition to, and ultimately defeating, the 'massive resistance' posed by influential political leaders in his state").

58. While Powell's opposition to massive resistance is often taken as evidence as his opposition to segregation writ large, historian Robert Pratt has noted that in Richmond as it became evident that massive resistance was not a viable plan, Richmond officials began to engage in "passive resistance." He explains,

[O]pponents of school desegregation began to think in more pragmatic terms, as it suddenly dawned on them that token compliance with the *Brown* decision might succeed where brazen defiance had failed. They correctly surmised that it might be possible to maintain the essence of segregation and satisfy the federal courts at the same time by admitting only a handful of well-qualified blacks to white schools. In this way, school desegregation could be forestalled for yet another generation.

Pratt, *supra* note 55, at 416.

59. *See id.* and accompanying text.

conspicuous means to preserve segregated schools.<sup>60</sup> Powell, a staunch opponent of massive resistance, was one of the leading figures in the passive resistance movement.

Speaking to the Richmond mayor and city council members in 1959, a half decade after *Brown* was announced, Powell characterized school integration as “an unwelcome social change forced upon us by law.”<sup>61</sup> Yet, he advised, if officials wanted to preserve segregation, massive resistance was not the best way.<sup>62</sup> Powell warned that closing public schools in Richmond would result in a litany of problems for the city, including the creation of an uninformed electorate, an increase in juvenile delinquency, a rise in taxes for the educated (as they would be left to shoulder the financial burdens of the uneducated), and injury to the overall economic health of the city.<sup>63</sup> Additionally, he argued that sending Richmond’s children to private schools was not a viable alternative.<sup>64</sup> Unlike smaller school districts in the state that could create a private school system that would replace the public schools, Richmond had nearly forty thousand students, sixty separate schools, and fifteen hundred teachers.<sup>65</sup> On top of that, the existing private schools were already overcrowded.<sup>66</sup> It was simply unrealistic to build enough new private schools to educate the city’s schoolchildren. Even if it were possible, Powell warned, “[M]any constitutional lawyers feel that the resulting private school system would in fact be deemed public in nature and would inevitably go down before the federal courts.”<sup>67</sup> Pragmatism and the desire to avoid volatility motivated Powell’s rejection of massive resistance, not an opposition to segregation *per se*.<sup>68</sup>

Yet, also committed to avoiding integration, Powell warned that the conditions in Richmond’s school district made it likely that courts would soon intervene and force desegregation. Black schools were significantly overcrowded, and White schools were often well below capacity. Maintaining overcrowded Black schools put a judicial bullseye on Richmond’s school district. Integration would address not only racial inequality but also the inefficient distribution of students within the school system. In order to “ameliorate the integration problem,”<sup>69</sup> Powell asked the city mayor’s office to

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60. ROBERT A. PRATT, THE COLOR OF THEIR SKIN: EDUCATION AND RACE IN RICHMOND, VIRGINIA, 1954–89 13 (1992).

61. Powell, Statement, *supra* note 33.

62. For Powell’s opposition to interposition, see JEFFRIES, *supra* note 24, at 145.

63. Powell, Statement, *supra* note 33, at 4–5.

64. *Id.* at 5.

65. *Id.* at 6

66. *Id.*

67. *Id.* at 7.

68. See generally ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS (2009) (discussing how Southern moderates strategically avoided open hostility to *Brown* and instead deployed subtler means to preserve racial segregation).

69. Powell, Statement, *supra* note 33, at 7.

build more segregated schools.<sup>70</sup> By building new facilities for White students, Powell believed the city could convert what were formerly White schools into institutions where Black youth could receive a segregated education. Accommodating Black students comfortably within segregated schools, he noted, would “appreciably improve both the short and long range prospect for minimizing the impact of integration.”<sup>71</sup>

Powell warned his audience of what might come from a failure to act: “If these schools are not built we cannot release existing school buildings to house this rapidly increasing Negro school population. . . . [T]his lack of facilities for Negro pupils may well accelerate the pressure for integration.”<sup>72</sup> Yet, the chairman realized that integration might still be “forced upon” Richmond residents despite his best efforts.<sup>73</sup> Given that uncertainty, he assured city officials that “every proper effort will be made to minimize the extent and effect of integration when it comes.”<sup>74</sup>

Powell held true to that promise. In 1961, at the end of his eight-year tenure as head of the Richmond School Board, only two of the city’s twenty-three thousand Black children attended school with White students.<sup>75</sup> Shortly after Powell stepped down as its chairman, the Richmond School Board was sued in federal court for refusing to comply with the *Brown* ruling. The Fourth Circuit agreed that Richmond had a history of intentionally sidestepping desegregation orders.<sup>76</sup> The court explicitly identified Powell’s approach of creating new schools in order to avoid desegregating existing ones. Admonishing the school board, the court wrote:

[T]he system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue. Though many of the Negro schools are overcrowded and white schools are not filled to normal capacity, the only effort to alleviate this condition has been to provide new buildings or additions to existing buildings, a move obviously designed to

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70. Jeffries argued that this request was “disingenuous,” and that Powell knew that building new schools would facilitate integration. *See JEFFRIES, supra* note 24, at 156.

71. Powell, Statement, *supra* note 33, at 8.

72. *Id.* at 9.

73. *Id.* at 4, 8. Powell explained that there was no guarantee this strategy would work:

It is not suggested that the availability of the new schools would in itself prevent some integration at the secondary level in Richmond. The extent to which this occurs will depend upon various unpredictable factors, such as the leadership in both races, the attitudes and restraint of our people, the extent and results of litigation, and the shifts of population.

*Id.* at 8.

74. *Id.* at 10.

75. *See JEFFRIES, supra* note 24, at 140–41. Pratt noted, “Powell’s eight-year tenure as chairman was characterized by overcrowded black schools, white schools not filled to normal capacity, and the board’s effective perpetuation of a discriminatory assignment system that trapped black children in inadequate, segregated schools.” Pratt, *supra* note 55, at 425.

76. *See Bradley v. Sch. Bd.*, 317 F.2d 429, 431–32 (4th Cir. 1963).

perpetuate what has always been a segregated school system.<sup>77</sup>

By the time that decision came down, Powell had moved from managing the education system of one city to managing that of the entire state. From 1961 to 1969, he served on Virginia's Board of Education, initially as a member and eventually as its chairman. Powell's first act as a board member was to join in issuing regulations that gave local school boards control over student placement.<sup>78</sup> Of the criteria that localities should consider when assigning students to schools, the board suggested that local authorities avoid "any general or unnecessary reallocation or reassignment of pupils."<sup>79</sup> In the context of the times, this was a clear directive to local leaders to refrain from undertaking significant efforts to desegregate their school systems.<sup>80</sup>

Speaking to public school teachers before the Virginia Education Association in November 1962, Powell opened his remarks on a celebratory note: "It is not too much to say we are entering a new and hopeful phase in public education in Virginia. . . . The preoccupation with the difficult integration problem which diverted much of our attention and effort, has appreciably subsided."<sup>81</sup> This, of course, was not because the state's schools were desegregated, but instead because the board passed the buck onto the localities with clear instructions to avoid desegregation.

In spite of this history of active efforts to avoid desegregation, Powell is usually criticized—when he is at all—merely for his inaction. For instance, remarking on his tenure on Virginia's Board of Education, Powell's biographer criticized Powell by noting that he "never did any more than was necessary to facilitate desegregation . . . [and] never spoke out against foot-dragging and gradualism. He never really identified himself with the needs and aspirations of Virginia's black schoolchildren."<sup>82</sup> In reality, however, Powell did not simply fail to take the initiative to push for faster desegregation. He consciously fought to preserve a racially segregated school system.

Despite this, one might be inclined to discount Powell's outward support of school segregation. Perhaps he did not truly support Jim Crow schooling but rather realized that he had little choice but to support the will of his constituents in a Southern state where the White majority and government officials were deeply opposed to *Brown*.<sup>83</sup> However, Powell's opposition to school

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77. *Id.* at 436.

78. Pratt, *supra* note 55, at 423.

79. JEFFRIES, *supra* note 24, at 169.

80. *See id.*

81. Lewis F. Powell, Jr., Address at Virginia Education Association: Educational Research—A New Opportunity in Virginia 1 (Nov. 1, 1962), <http://law2.wlu.edu/deptimages/powell%20archives/11-1-1962EducationalResearch.pdf> [<https://perma.cc/6EVY-LNC2>].

82. JEFFRIES, *supra* note 24, at 172.

83. In 1986, Powell explained his failure to desegregate Richmond schools by saying that, in a city where the majority favored segregation, efforts to integrate would be disastrous:

desegregation was not limited to his home state. In the nationwide battle between segregationists and integrationists, Powell vocally criticized those who fought for desegregation and seemed to sympathize with education officials who prioritized social stability over integration. In Powell's estimation, many school officials who resisted segregation were simply trying to preserve order, whereas civil rights activists who engaged in civil disobedience were little more than lawless agitators.

The Virginia native was particularly struck by what was happening with public schools in Chicago during the mid-1960s. There, Benjamin C. Willis, the superintendent of schools, defied intense protests by civil rights activists and refused to move Black children into schools in White communities. He chose this route even as Black schools had become significantly overcrowded and many White schools were well below capacity.<sup>84</sup> It was a situation similar to the one Powell confronted as Richmond School Board chair. While Powell tried to skirt integration by creating more segregated buildings, Willis opted to establish hundreds of "classrooms" housed inside of mobile trailers for Black students who could not fit within their existing segregated schools.<sup>85</sup> In response, Black citizens organized protests to get Superintendent Willis removed from his position.

Speaking at a Southern seminary in 1965, Powell called the demonstrations "lawless coercion."<sup>86</sup> For him, Superintendent Willis was simply doing the right thing by preserving the segregated schools. The activists were the ones stirring up trouble. In Powell's words, "Civil rights groups . . . are determined to 'get' Superintendent Willis because he will not further disrupt public education by

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Had we attempted to integrate the schools in the early years, this would have resulted in closing the schools. The Richmond city council that provided the funds to operate the public schools was stridently opposed to any integration. Both Richmond newspapers also opposed integration, as did Virginia governors, and the majority of the Virginia General Assembly, until finally the Virginia Supreme Court invalidated the massive resistance laws. I do not suggest, however, that perhaps we should not have moved toward integration 'with greater deliberate speed' than we believed was feasible.

Pratt, *supra* note 55, at 424.

84. Sarah Lyall, *B.C. Willis, 86; Led Chicago Schools for 13 Years*, N.Y. TIMES, Aug. 31, 1988, at D21, <https://www.nytimes.com/1988/08/31/obituaries/be-willis-86-led-chicago-schools-for-13-years.html> [https://perma.cc/2AS9-PK5D].

85. His critics called them "Willis Wagons." *Id.*

86. Lewis F. Powell, Jr., Address at Union Theological Seminary: Civil Disobedience vs. The Rule of Law 11 (Oct. 11, 1965), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_Civil%20Disobedience%20vs.%20the%20Rule%20of%20Law,%20October%2011,%201965\\_116-16.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Civil%20Disobedience%20vs.%20the%20Rule%20of%20Law,%20October%2011,%201965_116-16.pdf) [https://perma.cc/J27H-32D7] [hereinafter Powell, Civil Disobedience vs. The Rule of Law]. Explaining their lawlessness, Powell in a different speech said, "Groups of demonstrators, purporting to be practicing civil disobedience, lay down in the streets during the rush hours, blocking traffic and causing extreme inconvenience to the public generally." Lewis F. Powell, Jr., Address at Founder's Day at Wake Forest College: Limitations on the Right to Demonstrate 11 (Oct. 21, 1966), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_LimitationsOnTheRightToDemonstrate\\_10-21-1966.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_LimitationsOnTheRightToDemonstrate_10-21-1966.pdf) [https://perma.cc/9RQJ-A4R3].

busing pupils and destroying the neighborhood school.”<sup>87</sup> Of course, his concern for preserving “the neighborhood school” seemed tilted towards those schools located in the White neighborhood as Black schools were already suffering.

Even after Powell stepped down from his school board position in Virginia, he continued to oppose desegregation efforts. In 1970, acting as special counsel for the Commonwealth of Virginia, Powell was the principal author of an amicus brief for *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>88</sup> The brief opposed the busing of K-12 students as a means to achieve racial integration.<sup>89</sup> The future Justice’s opposition to busing was motivated by a fear that racially integrated schools would diminish the educational quality of White, middle-class neighborhoods.<sup>90</sup>

Powell used the brief not only to oppose busing but also to re-litigate the merits of integration itself. Attempting to delegitimize racial integration as the primary means to achieve educational equality, Powell criticized courts for having a “preoccupation with the ‘racial mixing of bodies.’”<sup>91</sup> Busing, the amicus brief argued, was both “regressive and unproductive.”<sup>92</sup> Powell warned that enforcing integration within a city’s limits would instigate a White flight to suburbia. However, he was not particularly critical of the practice of White flight, labeling it a natural “exercise of freedom.”<sup>93</sup> The key problem for Powell was the forced racial balancing in schools that triggered White flight. The brief urged the Court not to mandate busing because, if it did, property values would deteriorate, sources of local taxation would shrink, municipal services and education would suffer, and “worst of all,” the quality of civic leadership would erode.<sup>94</sup>

Powell’s opposition to busing was attractive to President Richard Nixon, who campaigned by stoking the racial resentment of Whites disillusioned by the Court’s desegregation mandate.<sup>95</sup> Nixon considered Powell and Senator Howard Baker of Tennessee when attempting to fill a Supreme Court vacancy. To explain their appeal, Nixon told aides, ““Both these men are against busing. And that will help us like hell.””<sup>96</sup> Well aware that he had earned the scorn of civil rights

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87. Powell, Civil Disobedience vs. The Rule of Law, *supra* note 86, at 11.

88. Brief for the Commonwealth of Virginia as Amicus Curiae, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (No. 281).

89. *Id.* at 2–3.

90. *Id.* at 7.

91. *Id.* at 22. Lawyers and civil rights activists who were concerned for the well-being of Black students made similar arguments about the goal of achieving racial balance. See, e.g., Derrick A. Bell, Jr., *A Reassessment of Racial Balance Remedies: I*, 62 PHI DELTA KAPPAN 177 (1980).

92. Brief for the Commonwealth of Virginia, Amicus Curiae, *supra* note 88, at 16.

93. *Id.* at 15.

94. *Id.* at 16.

95. For a discussion of how the Nixon campaign deployed racial resentment, see IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 22–34 (2014).

96. David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1099 (2004)

activists, however, Powell was reluctant to go through Supreme Court nomination hearings. Indeed, when Powell first learned that he was on a shortlist for potential Supreme Court nominees, he asked that his name be withdrawn, citing his belief that civil rights leaders would actively work to block his appointment due to his record on school desegregation.<sup>97</sup>

Sure enough, when Powell eventually accepted the Supreme Court nomination in 1971, Black leaders testified before the Senate against his appointment to the nation's highest court. The Congressional Black Caucus, the Old Dominion Bar Association (Virginia's Black bar association), and the vice mayor of Richmond, an African American, all centered their opposition to Powell's appointment on his record of being a lawless segregationist. They argued that when Powell sat on the state's Board of Education he did, in fact, support massive resistance efforts—he just did so quietly. Presenting minutes from the Board of Education meetings, Black leaders showed that Powell voted to support the practice of providing tuition grants to White families who placed their children in segregated private schools, and also voted to use state funds to reimburse White parents who had paid out of pocket for their children to attend White private schools.<sup>98</sup> Virginia's Black bar association, represented in part by the vice mayor of Richmond, summed up their remarks: "We suggest . . . [that] to put Mr. Powell on the Court in face of his record, his record of continued hostility to the law, his continual war on the Constitution, would be to demonstrate to us that this Senate is not concerned for the rights of black citizens in this country."<sup>99</sup>

#### *B. Powell on the Civil Rights Movement*

What was far less prominent during his confirmation hearings was Powell's status as a vocal critic of the Civil Rights Movement. During the same time he was disobeying the Court's desegregation orders, Powell began to promote "law and order" in an effort to condemn civil rights activists for refusing to comply with the laws of the nation.<sup>100</sup> The use of sit-ins, marches, and protests during

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97. JEFFRIES, *supra* note 24, at 2.

98. See, e.g., *Nomination of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 380–86 (1971) (prepared statement by Hon. John Conyers, Jr., Representative from Mich.) (discussing the need to make an inquiry into the minutes of Richmond School Board meetings to ascertain Powell's participation in resistance efforts).

99. *Id.* at 389–90 (statement of Mr. Henry L. Marsh III, Attorney).

100. Powell would later revise his personal history, portraying himself as someone who had cooperated with the *Brown* decision. Speaking in 1965 about the dangers of civil rights leaders engaging in civil disobedience he noted,

May I also say that, in an area in which there is an abundance of emotion—and often too little of cool reason—I have at least been consistent. Eleven years ago, when *Brown v. Board of Education* became the law of the land, I opposed the view, then widely held in Virginia and the South, that disobedience and massive resistance were proper and justified. It is my conviction that those who believe in the rule of law have a duty to oppose disobedience in all of its devious forms . . .

Powell, Civil Disobedience vs. The Rule of Law, *supra* note 86, at 3–4.

the 1960s alarmed the future Justice. But while Powell framed his criticism of the movement around the tactics deployed by its leaders, it is clear that he also fundamentally took issue with the movement's goals.

Key to Powell's criticisms was his belief that African Americans in the United States should be grateful for the rights that their country had recently bestowed upon them. Black Americans had it good, according to Powell, not necessarily in comparison to White Americans, but certainly in comparison to people of color living in other countries. In 1965, he expressed alarm and confusion about the growing momentum of the Civil Rights Movement, or as he called it, the "rebellion." He was perplexed that "this threat of rebellion should come at a time of unprecedented progress towards equal rights and opportunities for Negroes."<sup>101</sup> Powell saw in the resistance an even greater affront given that—as he stated—Black Americans were enjoying a higher average income than citizens within any nation in Africa, Asia, or Latin America, making them the most affluent collection of nonwhites in the world.<sup>102</sup>

In a 1967 speech entitled "Civil Disobedience: Prelude to Revolution?" Powell condemned civil rights activists for engaging in disorderly tactics of resistance. Among the most worrisome figures was Martin Luther King Jr., whom Powell designated a "militant leader[]"<sup>103</sup> and "[t]he prophet of civil disobedience."<sup>104</sup> According to Powell, King was working "arm-in-arm" with the Black Panthers and other Black nationalists.<sup>105</sup> He took issue with King's efforts to achieve social change using extralegal means. While King often cited Gandhi's use of nonviolent resistance as his inspiration, Powell found the comparison inapposite. He argued that civil disobedience may have been appropriately endorsed by Gandhi because in India, "[t]here were no courts and no democratically established political institutions" for Gandhi to channel his grievances.<sup>106</sup> That was not the case in the United States. Powell claimed that "within the framework of the American system of freedom under law . . . minority groups often have political power disproportionate to their actual numbers, and where—with rapidly diminishing exceptions in the Deep South—the courts and legislative halls are open to all."<sup>107</sup>

Powell reluctantly acknowledged that African Americans did perhaps face some residual discrimination, yet he dismissed this as simply normal "age-old social and economic problems of bias."<sup>108</sup> For all intents and purposes, Powell believed that racial minorities had received all that they rightly deserved. There was little more that the government could or should do for them. Moreover, he

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101. Powell, *Prelude to Revolution*, *supra* note 13, at 12.

102. *Id.* (referencing a New York Times Editorial from July 24, 1967).

103. *Id.* at 7.

104. *Id.* at 8.

105. *Id.* at 9.

106. Powell, *Civil Disobedience v. The Rule of Law*, *supra* note 86, at 6.

107. *Id.* at 4.

108. Powell, *Prelude to Revolution*, *supra* note 13, at 3.

believed that White Americans were under no obligation to compensate African Americans for the oppression they faced in earlier generations. In 1970, rehearsing a logic that he would memorialize in *Bakke*, Powell noted that White Americans could not properly be held accountable for the historical harms perpetrated against African Americans:

We have witnessed racial injustice in the past, as has every other country with significant racial diversity. But contrary to the guilt-ridden views of those who talk about reparations for past injustice, a people can fairly be judged only by their record—not that of earlier generations. Racism, in all shapes and forms, is now prohibited by laws which provide the most sweeping civil liberties ever enacted by any country for the benefit of a minority race.<sup>109</sup>

What he saw in the civil disobedience of the Civil Rights Movement was “the expanding use of coercion in the streets as a substitute for due process and the orderly procedures of democracy.”<sup>110</sup> He implied that Black activists were not engaging in civil disobedience to gain equal rights. Rather, they were planning a revolution by using tactics long deployed “by some of the leading tyrants in history.”<sup>111</sup>

If there was any evidence of this pending revolution, it was the nationwide race riots that erupted in the 1960s. While the Kerner Commission would ultimately cite systemic racism as the cause of the riots,<sup>112</sup> Powell disagreed. Pointing to the racial unrest in Detroit, he repeated the claim that Black Americans had no reason to rebel. He argued that the city had “‘no housing ghetto’; its Negro population was largely prosperous; and its race relations considered excellent. . . . This was no revolt of oppressed people against local conditions. It was armed rebellion against American society.”<sup>113</sup>

Powell believed the United States was engendering a culture of permissiveness by not being harsher on those who engaged in civil disobedience. Quoting Daniel Patrick Moynihan, Powell said that this permissiveness had enabled Black protestors to engage in a “massive opposition to the rules of white society.”<sup>114</sup> He believed that granting activists’ demands did not satisfy them; it

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109. Powell, Attack on American Institutions, *supra* note 15, at 21.

110. Lewis F. Powell, Jr., Address at Virginia Manufacturers Association: The Disordered Society 18 (Sept. 16, 1966), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1027&context=powellspeeches> [https://perma.cc/KCR9-BYUL]

111. *Id.* at 16.

112. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1967), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf> [https://perma.cc/2XDY-4763]; see also Donald Nieman, “*Two Societies, One Black, One White*”— the Kerner Commission’s Prophetic Warnings, CONVERSATION (Feb. 27, 2018), <http://theconversation.com/two-societies-one-black-one-white-the-kerner-commissions-prophetic-warnings-91964> [https://perma.cc/9TLV-VY98] (presenting a contemporary summary of the Kerner Commission’s findings).

113. Powell, Prelude to Revolution, *supra* note 13, at 18–19.

114. *Id.* at 19.

only emboldened them. After years of government acquiescence to civil rights leaders, Powell worried that militant Blacks were trying to initiate an all-out race war. As he told a group of Southern businessmen in 1967, “The Negro militant viewpoint, gaining increasing support, is that America is ‘irredeemably racist’; that Negroes should ‘forget America’; and that the ‘only course for Negroes is to bring about a final, violent apocalyptic confrontation of black and white.’”<sup>115</sup>

Rather than try to mend race relations, Powell advocated that government officials get tough on crime instead. The Virginia statesman told his audience: “Toleration of civil disobedience and justification of lawlessness must end.”<sup>116</sup> Those who incited rebellion “should be treated as the most dangerous of criminals and relentlessly prosecuted”; those who participated in rebellion should be “prosecuted with vigor”; and those who engaged in nonviolent civil disobedience “should also be subjected to criminal sanctions.”<sup>117</sup>

## II. QUESTIONING THE RACIAL AWAKENING THEORY

One might fully accept the account I provided in Part I and still conclude that Powell’s *Bakke* opinion was motivated by an interest in promoting racial integration. The basic point would be that regardless of where Powell stood in the 1960s, he became more progressive over the years, especially after joining the Supreme Court.<sup>118</sup> The *Bakke* opinion reflects a gradual shift under this theory. In Part II, I challenge the racial-segregationism-to-racial-liberalism-trajectory story.

As late as 1970, Powell was still trying to curtail desegregation efforts, calling for criminal sanctions for civil rights activists, telling audiences that the U.S. government had no further obligation to help racial minorities, and warning that offering more concessions might lead to a race war. Nevertheless, some maintain that by 1978, Powell had become sympathetic to the plight of racial minorities. The primary evidence put forward in support of this transformation is the swing vote he used to uphold affirmative action in higher education. Powell’s biographer, John Jeffries, explained this surprising shift by asserting that “the Supreme Court had changed Lewis Powell.”<sup>119</sup> According to Jeffries, “The crucial and indispensable ingredient in Powell’s acceptance of racial preferences was a sense of personal responsibility for racial justice. That came with the oath of office.”<sup>120</sup>

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115. *Id.* at 19–20.

116. *Id.* at 21.

117. *Id.* at 21–22.

118. Lee Epstein et al., *Ideological Drift among Supreme Court Justices: Who, When, and How Important?*, 101 NW. L. REV. COLLOQUY 127 (2007).

119. JEFFRIES, *supra* note 24, at 499.

120. *Id.*

While Powell undoubtedly experienced some measure of growth after joining the Court, this does not fully explain what motivated his opinion in *Bakke*. As an initial matter, there is significant continuity between his views before he joined the Court and the way he voted as a Justice on key cases involving race and education. This Section explains that continuity. Against this backdrop of cases, one might say that, just as pre-Supreme Court Powell advanced segregation on the K-12 level by undermining massive resistance, post-Supreme Court Powell eroded integration in higher education by barely permitting one path to pursue it: diversity. Justice Powell spent considerable jurisprudential effort to limit the reach and effectiveness of racial integration before, during, and after *Bakke*.

#### *A. K-12 Desegregation*

Powell became a Justice at a time when the Court was being asked to give teeth to *Brown* by forcing school districts to take concrete steps to desegregate. During Powell's tenure, and with his help, the Court largely abandoned its commitment to integration. On key desegregation cases, the former school board chair most often sided with those Justices who sought to limit the desegregation mandate. Powell's decision-making was animated by a fear that forcing desegregation would harm White students and destabilize White neighborhoods.

When minority communities asked the Court to require that their schools receive equal funding, Powell was pivotal in turning down their request. In *San Antonio Independent School District v. Rodriguez*,<sup>121</sup> for example, Mexican American parents in a low-income school district sought to equalize the funding their schools received so that they would be on par with that of public schools in wealthier, and most often Whiter, communities.<sup>122</sup> Like most states, Texas relied heavily on local property taxes to fund its public schools.<sup>123</sup> This led to a system whereby students who resided in poor neighborhoods were forced to attend underfunded schools and receive substandard educations. But this was not simply a class issue. The parents who brought the case were clear to note that class could not be divorced from race.<sup>124</sup> They argued that Texas's history of segregated housing and education both denied racial minorities opportunities for upward mobility and concentrated them in impoverished areas.<sup>125</sup> This resulted in a system where, according to the parents' brief, "the districts with the highest percentages of Mexican-Americans and Blacks are low expenditure districts,

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

122. See Brief for Appellees at 3, *Rodriguez*, 411 U.S. 1, (No. 71-1332).

123. *Rodriguez*, 411 U.S. at 6–7.

124. See generally Camille Walsh, *Erasing Race, Dismissing Class: San Antonio Independent School District v. Rodriguez*, 21 BERKELEY LA RAZA L.J. 133 (2011).

125. *Id.* at 154 (summarizing oral argument where appellant's attorney argued that "mobility is a key issue in this litigation" and noting that several briefs and affidavits reported evidence that "a legacy of racially restrictive covenants . . . had historically segregated minorities in lower-income neighborhoods, thereby interconnecting poverty and race and limiting mobility").

while those with few minority people spend substantially more per student for education.”<sup>126</sup>

The parents argued that substandard education did not only impair the poor minority students’ chances for upward mobility, but also made them less capable of engaging in the democratic process.<sup>127</sup> One might have expected this argument to resonate with Powell. Fourteen years earlier, when sitting as the chair of the Richmond school district, he implored the mayor and city council members to maintain its public school system because a lack of education would result in a “diluted capacity of our citizens to exercise intelligently the franchise of voting.”<sup>128</sup> However, if Powell had indeed worked to dilute the Black vote during this time—as he was accused of doing during his Senate confirmation hearings—it is likely that his concern for creating an engaged citizenry was limited to the White community. Here, the plaintiffs tried, unsuccessfully, to leverage the link between education and democratic participation to advance educational opportunities for low-income students, who were disproportionately racial minorities.

Writing for the conservative majority in a 5-4 decision, Powell, unconvinced by the parents’ arguments, held that disparities in school funding did not violate equal protection.<sup>129</sup> He largely ignored their claim of racial discrimination and instead focused on class discrimination. He was able to stand on firmer constitutional ground by ignoring race. Since poor people did not constitute a suspect class, unequal treatment between poor and wealthy children did not merit heightened scrutiny. Moreover, he wrote, there was no fundamental right to schooling at all.<sup>130</sup> While he acknowledged that a substandard education might impair one’s ability to exercise other fundamental rights—i.e., voting—the Court was under no obligation to ensure that citizens had the ability to make informed electoral choices.<sup>131</sup>

The following year, in *Milliken v. Bradley*,<sup>132</sup> Powell joined the 5-4 conservative majority to deal a major blow to desegregation. The case involved an effort to desegregate Detroit’s school system.<sup>133</sup> In Detroit, as in many other areas in the country, Whites had responded to the Court’s push for school integration by fleeing urban centers and resettling in suburban areas. This left the

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126. Brief for Appellees, *supra* note 122, at 16. Citing a specific example of the nexus between race and class in a specific school district in Texas, the parents noted, “It is no historical accident that 90% of school children in Edgewood are Mexican-Americans and Edgewood is the poorest district within metropolitan San Antonio.” *Id.* at 17.

127. *Id.* at 25.

128. Powell, Statement, *supra* note 33, at 5.

129. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

130. *Id.* at 37 (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unconvincing.”).

131. *Id.* at 36.

132. 418 U.S. 717 (1974).

133. *Id.* at 717.

city's public schools filled overwhelmingly with Black students, while school districts in nearby suburbs were mostly White. In order to desegregate Detroit's schools, a federal court ordered nearby suburban school districts to integrate with the Detroit school district.<sup>134</sup> The majority found that a court could not impose a multi-district remedy to integrate a single district unless it was found that each of the districts involved had fostered discrimination or that a state law had produced the inter-district remedy.<sup>135</sup> Absent that showing, efforts to remedy segregation could only involve the district that had been found to unlawfully promote segregation. As a practical matter, this meant that for many areas in the country where there had been residential segregation, school desegregation became an impossibility.

The combination of the *Milliken* and *Rodriguez* rulings virtually ensured the maintenance of schools that were separate and unequal.<sup>136</sup> Because of these two decisions, both supported by Powell, the best-funded public schools are most often found in wealthy White suburbs, while low-income students of color are often trapped in underfunded schools in nearby metropolitan centers.

One might point to *Keyes v. School District No. 1* as a counterexample where Powell voted to further the interest of minority school children.<sup>137</sup> *Keyes* was the first time that the Court addressed segregated schools in the North where, unlike in the South, segregation was not mandated by state laws. Thus, the Court had to determine what constituted a violation of equal protection in the absence of explicit laws mandating school segregation. In a 7-1 decision, the Court held that where there was only de facto segregation, there must also be proof of a discriminatory purpose.<sup>138</sup>

In a concurring opinion, Powell seemed to push for a broader desegregation mandate than even his more liberal counterparts. Powell disagreed with the Court's distinction between de jure and de facto discrimination, arguing that "the evil of operating separate schools is no less in Denver than in Atlanta."<sup>139</sup> However, what animated Powell's disagreement was not simply a desire to achieve equality for students of color in the North.<sup>140</sup> Rather, he was concerned primarily with achieving equal treatment for Southern school districts. The Virginia native resented that school districts in his part of the country were subjected to more stringent rules than those of the North. As someone who had

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134. *Id.* at 733-34.

135. *Id.* at 717.

136. *Brown* at 60 and *Milliken* at 60, HARV. ED. MAG., Summer 2014, <https://www.gse.harvard.edu/news/ed/14/06/brown-60-milliken-40> [https://perma.cc/VX6G-RZ98] ("Both *Milliken* and *Rodriguez* remain good law. Taken together, these cases created a legal structure that allowed segregated, unequal schools to continue. They betrayed the promise of *Brown*.").

137. 413 U.S. 189 (1973).

138. *Id.* at 208-09.

139. *Id.* at 219 (Powell, J., concurring in part and dissenting in part).

140. Powell discussed in only a paragraph how the distinction between de jure and de facto segregation hurts minority children in the North. See *id.* at 229-30.

been responsible for carrying out desegregation in the South, Powell was frustrated by the hypocrisy of Northerners, who “denounced the evils of segregated schools in the South,” while perpetuating segregation in their own backyards through different means.<sup>141</sup> Powell’s vote to eliminate the distinction between de jure and de facto desegregation was inspired less by a desire to promote equal treatment among the races, than a desire to promote equal treatment between Northern and Southern Whites.

The contention that Powell’s *Keyes* concurrence was not motivated by an interest in achieving integration is supported by the fact that he spent more than half of his opinion detailing his “profound misgivings” about a key mechanism to achieve integration: busing.<sup>142</sup> In articulating his opposition to school busing, Powell made a larger argument against the Court’s “[o]verzealousness in pursuit” of desegregation.<sup>143</sup> He wrote that public school boards should balance the interest in desegregation “with other, equally important educational interests which a community may legitimately assert.”<sup>144</sup> He quoted text from a law review comment to support this proposition: “The relevant inquiry is ‘whether the costs of achieving desegregation in any given situation outweigh the legal, moral, and educational considerations favoring it.’”<sup>145</sup> The quote continued, “the Constitution should not be held to require any transportation plan that keeps children on a bus for a substantial part of the day, consumes significant portions of funds . . . or involves a genuine element of danger.”<sup>146</sup>

Powell opposed forced integration because it would likely cause significant disruption, but he was not categorically opposed to all integration. He suggested that instead of requiring students to integrate, school board officials could take actions to “encourage the likelihood of integration,” like creating new schools or establishing “[a]n optional majority-to-minority transfer program” whereby “desiring” White students could choose to be bussed to schools in Black neighborhoods.<sup>147</sup> In specifying that it was to be a “majority-to-minority transfer program,” Powell made clear that minority students should not be free to choose to enter schools in White neighborhoods, only vice versa.<sup>148</sup> Key to this distinction was Powell’s belief that a mandatory minority-to-majority transfer program would engender great pushback from—and volatility within—White communities.

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141. *Id.* at 219.

142. *Id.* at 238.

143. *Id.* at 240.

144. *Id.*

145. *Id.* at 240 n.19 (citing Robert I. Richter, Comment, *School Desegregation after Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421, 422, 443 (1972)).

146. *Id.* at 240.

147. *Id.* at 241.

148. *Id.*

### B. Affirmative Action

*The University of California v. Bakke* involved a challenge to the admissions practices at the University of California Davis School of Medicine. Davis set aside sixteen of one hundred slots in its entering class for racial minorities.<sup>149</sup> Alan Bakke, a White applicant who twice applied and was twice denied to the medical school, sued the school for racial discrimination. He cited the fact that he had a higher GPA and MCAT scores than some of the minority students who were admitted through the set-aside program.<sup>150</sup>

The Court split when deciding the case. Justices Brennan, White, Marshall, and Blackmun voted to uphold UC Davis's program. They agreed that intermediate scrutiny was appropriately applied to programs meant to help racial minorities. Justices Stevens, Burger, Stewart, and White avoided both the constitutional issue and the discussion of the appropriate level of scrutiny by concluding that UC Davis's affirmative action program violated Title VI of the 1964 Civil Rights Act. In this fractured Court, Powell ended up writing the controlling opinion, which none of his colleagues joined.

Powell used *Bakke* to significantly limit the scope of racial integration in higher education. Contrary to his biographer's interpretation, Powell's opinion did not reflect the worldview of someone who felt a "personal responsibility for racial justice."<sup>151</sup> Instead, it reflected the view of someone skeptical that minorities faced particularly harsh forms of discrimination. To the extent that the Court should worry about racial discrimination, Powell seems to have thought that it was Whites who particularly needed protection.

Articulating a position that neither conservatives nor liberals on the Court seemed comfortable staking out, Powell wrote that racial classifications meant to help minorities were subject to strict scrutiny.<sup>152</sup> Powell acknowledged that the Court previously identified the Fourteenth Amendment's "one pervading purpose" as protecting African Americans from "the oppressions of those who had formerly exercised dominion" over them. Powell dismissed that purpose as antiquated.<sup>153</sup> Powell argued that the Fourteenth Amendment could not be read to only protect people of color given the country's increasing ethnic and racial minorities—including White minorities.<sup>154</sup>

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149. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 278–79 (1978).

150. *Id.* at 276–78.

151. JEFFRIES, *supra* note 24, at 499.

152. In his draft memo to his fellow justices, Powell noted that the "crucial battle" in *Bakke* was "over the proper scope of judicial review." BERNARD SCHWARTZ, BEHIND *BAKKE*: AFFIRMATIVE ACTION AND THE SUPREME COURT 82 (2d ed. 1988). Relying on *Caroene Products* footnote 4, the University of California argued that strict scrutiny "should be reserved for classifications disadvantaging 'discrete and insular minorities.'" *Id.* Bakke, on the other hand, argued that determining "the level of scrutiny" applicable to "a racial classification d[id] not turn upon membership in a discrete and insular minority." *Id.*

153. *Bakke*, 438 U.S. at 291.

154. *Id.* at 292.

Powell executed a subtle shift from the language of race to that of ethnicity in order to fit Whites into the definition of “minority.”<sup>155</sup> Eliding the fact that Whites were a clear majority in the United States, he disaggregated Whites into all of their assorted ethnic categories. Powell noted, “[T]he white ‘majority’ itself is 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.”<sup>156</sup> And indeed, Powell argued, if the Court were to grant ethnic Whites special standing in addition to people of color, it would simply create a new category of oppressed minorities, White Anglo-Saxon Protestants.<sup>157</sup>

Ignoring the specificity of White-over-Black racial subordination that has characterized the nation since its inception, Powell presented the plight of Whites as virtually indistinguishable from that of Blacks and a host of other racial minorities.<sup>158</sup> Speaking of the various groups in his “[n]ation of minorities,” he wrote, “Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a ‘majority’ composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups.”<sup>159</sup> Powell based his decision on a strange retelling of U.S. history that Whites had been just as oppressed as people of color. Thus, no racial group should receive special consideration from the Court.<sup>160</sup>

After Powell established that race-based affirmative action must be examined under strict scrutiny, he looked at the compelling interests articulated

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155. There is evidence that Powell truly believed that Whites were a minority in the United States. The handwritten notes from a speech he gave in 1969 detail what he believes to be the biggest shifts since 1954. Of the biggest shifts that have occurred in the United States, he writes, “white race—minority.” Lewis F. Powell Jr., 15 Years Have Transformed Our World (Jan. 12, 1969), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_15YearsHaveTransformedOurWorld\\_1-12-1969.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_15YearsHaveTransformedOurWorld_1-12-1969.pdf) [<https://perma.cc/BKG5-UNA5>]. For an enlightening discussion of how Powell’s *Bakke* opinion rests on the conflation of race and ethnicity, see Ian F. Haney López, “*A Nation of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007).

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

157. *Id.* at 295–96.

158. In contrast, Marshall declared, “The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups.” *Id.* at 400 (Marshall, J., concurring).

159. *Id.* at 292.

160. This part of Powell’s opinion was especially outrageous to Thurgood Marshall. In his personal notes, Justice Brennan wrote of Justice Marshall’s reaction:

[Marshall] had been extremely sensitive the entire Term regarding the Court’s approach to the Bakke issue. He was livid over [Powell’s] opinion which he regarded as racist. Certainly [Powell] had not been careful regarding the tenor of the opinion. Language such as “It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others, harkened back to the insensitivity, if not racism, in the Court’s opinion in the Civil Rights Cases,” a point which infuriated [Marshall] and for which he chided [Powell] in his opinion. In response to [a Powell] memo urging those who had not yet responded to the May 9th circulation to do so, [Marshall] shot back tartly: “I will not join any part of the opinion.”

Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan’s Account of Regents of the University of California v. Bakke*, 19 YALE L. & POL’Y REV. 341, 359 (2001).

in the University of California's brief to see if any interests permitted the racial distinctions in its admissions decisions. UC Davis argued that considering race in its admissions decisions served three important goals: addressing societal discrimination, providing healthcare to underserved communities, and promoting diversity. Powell countenanced only the last of these goals.

### 1. *Addressing Societal Discrimination*

First, and most important, UC Davis asserted that it was combating the “[l]egacy of [p]ervasive [r]acial [d]iscrimination in [e]ducation, [m]edicine and [b]eyond.”<sup>161</sup> UC Davis argued that its medical applicants in the 1970s had “seen the hope but not the promise of *Brown*,” noting that many of the students of color applying received their K-12 education after the Court announced *Brown* but before the Court actually began enforcing it.<sup>162</sup> The university argued that simply refraining from intentionally excluding minorities was insufficient to combat the legacy of discrimination. Instead, UC Davis would need to consider the societal discrimination faced by applicants of color to realize the promise of integration.

Powell quickly dispensed with this goal, calling societal discrimination “an amorphous concept of injury that may be ageless in its reach into the past.”<sup>163</sup> His argument suggested that he dismissed this goal primarily due to the imprecision of the injury and subsequent difficulty of providing a remedy.<sup>164</sup> However, the language he chose when discussing the merits of this goal revealed his general skepticism that racial minorities faced “societal discrimination.”

Whereas Powell described White applicants in sympathetic terms, calling them “innocent individuals,”<sup>165</sup> he described applicants of color as people who needed special consideration from the Court, referring to them as “persons perceived as members of relatively victimized groups.”<sup>166</sup> Adding the modifiers “perceived” and “relatively” revealed the Justice’s skepticism that people of color actually faced discrimination worse than that faced by Whites. In contrast, the Justice did not qualify the “innocence” of Whites. He ultimately dismissed

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161. Brief for Petitioner at 17, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811).

162. *Id.*

163. *Bakke*, 428 U.S at 307. In the *Swann* amicus brief Powell authored, he foreshadowed his reluctance to take into account historical context when assessing constitutionality. He noted that the states that had de facto segregation should not be treated differently from those whose segregation was de jure because “[h]istory is irrelevant to the enforcement of a constitutional right.” Brief for the Commonwealth of Virginia, Amicus Curiae, *supra* note 88, at 6.

164. See *Bakke*, 438 U.S. at 307. For more on Powell’s dismissal of “societal discrimination,” see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

165. *Bakke*, 438 U.S. at 307.

166. *Id.* The trope of White innocence shows up in other Powell opinions. As Mark Tushnet notes, “In the employment context, Powell concentrated on the impact of affirmative action programs on those he called ‘innocent employees,’ and he was less sensitive to the impact on those Justice Brennan called ‘equally innocent victims of racial discrimination.’” Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1874 (1995) (reviewing JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994)) (emphasis omitted).

the goal of ameliorating societal discrimination, saying that innocent White applicants “bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”<sup>167</sup> Here again, the phrase “are thought to have suffered” indicates Powell’s skepticism toward the plight of racial minorities.

It is difficult to accept that Powell was sincerely unaware that racial minorities, including the medical school’s applicants of color, faced discrimination within the United States. Powell had seen entire school districts shut down in order to keep Black children away from White children. He also presided over key desegregation and racial discrimination cases in which he observed hard evidence of the racial discrimination that Black Americans continued to face. Rather, it is more likely that Powell’s primary concern lay with protecting the welfare of White Americans. He was willing to minimize or altogether dismiss the racial oppression faced by people of color if acknowledging their suffering could lead to adverse impacts for Whites.

## 2. *Providing Healthcare to Underserved Communities*

Next, UC Davis suggested that enacting race-conscious admissions practices would increase the number of medical professionals in underserved communities. The university noted that up until the 1970s, medical schools had been “all-white islands in a multi-racial society.”<sup>168</sup> This created a shortage of Black doctors, which resulted in a paucity of medical professionals willing to practice in Black communities. Using census data, UC Davis noted, “The reported ratio of black physicians to blacks is far lower than the physician/non-physician ratio for the nation at large.”<sup>169</sup>

The university argued that this shortage of Black doctors contributed to minority communities suffering from increased sickness and premature death. While acknowledging that not all Black doctors would choose to practice in Black communities, UC Davis believed that in a still largely segregated society: “There is an overwhelming disproportion of probability that black people will return by necessity of culture and custom to the black community, to use their talents.”<sup>170</sup>

Powell was unmoved by this argument. He dismissed the idea that educating more minority doctors would result in communities of color having access to better healthcare. The Justice did not believe that minority doctors would be guaranteed to work in underserved communities. He dispensed with this argument in just a few paragraphs by citing a lower court’s estimation that “there is no empirical data to demonstrate that any one race is more selflessly

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

168. Brief for Petitioner, *supra* note 161, at 10.

169. *Id.* at 23.

170. *Id.* at 25.

socially oriented or by contrast that another is more selfishly acquisitive.”<sup>171</sup> The Justice believed there were more direct ways to increase the number of doctors practicing in underserved areas, ways that did not use race as a proxy for where a student would ultimately practice.

### 3. Promoting Diversity

Powell only found one of the University of California’s arguments compelling, although it was scarcely articulated in its brief and never mentioned in oral argument: that there were educational benefits of diversity. However, in accepting this justification, Powell adopted neither UC Davis’s conception of diversity nor its aims.

In its brief, UC Davis argued that by cultivating racial diversity, students of color and White students alike would be able to learn from one another. White medical students might better understand the concerns of their future minority patients.<sup>172</sup> White students could also develop better rapport with patients of color. The exposure to classmates of color might even induce White students to locate their practice in those minority communities that experienced a shortage of doctors. In short, the educational benefits articulated by UC Davis centered on facilitating cross-racial interaction and focused primarily on how those interactions could benefit communities of color.

Powell accepted diversity as a goal that furthered a compelling state interest, but he rejected UC Davis’s focus on *racial* diversity. In earlier drafts of his opinion, Powell wrote that UC Davis’s articulation of diversity was “seriously flawed” because it misinterpreted the state interest.<sup>173</sup> “Racial or ethnic origin,” Powell wrote, “is but a single element” of the kind of diversity that would further a substantial state interest.<sup>174</sup>

Instead, he relied on a broader conception of diversity described in the appendix of an amicus brief submitted by Harvard and joined by other elite universities.<sup>175</sup> In many respects, the Harvard amicus brief when viewed in its entirety resembled the UC Davis brief. Harvard’s main arguments centered on the points that Powell dismissed, namely that affirmative action was necessary

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171. *Bakke*, 438 U.S. at 311 (citing *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 56 (1976)).

172. Brief for Petitioner, *supra* note 161, at 33.

173. SCHWARTZ, *supra* note 152, at 219.

174. *Id.* In the actual opinion, Powell would add the word *important*, saying that racial diversity is a “single though important element” of what constitutes genuine diversity. *Bakke*, 438 U.S. at 315.

175. Brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188007. For an insightful discussion of the Harvard brief, see David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 VA. J. SOC. POL’Y & L. 158 (2018) (noting that much of the brief was recycled from *DeFunis v. Odegaard*, 416 U.S. 312 (1974), an earlier affirmative action case that was ultimately ruled moot). Oppenheimer argues that Powell was attracted to the diversity argument when he first encountered it in *DeFunis*. Four years later in *Bakke*, referring to Harvard’s more inclusive conception of diversity, he told his law clerk, “This is the position that appeals to me. Use DeFunis.” *Id.* at 174.

to remedy societal discrimination. The brief urged the Court to let universities consider “the educational deficit under which America’s non-whites have labored throughout our history.”<sup>176</sup> It also discussed the importance of creating minority professionals, noting, “If our pluralistic society is to achieve its objective of increasing the number of minority doctors, judges, corporate executives, university faculty members and government officials, universities must make available to qualified minority students the opportunity to gain the necessary education.”<sup>177</sup>

Powell ignored these central arguments of the brief and focused instead on the appendix, where Harvard described its own admissions policy. “The belief that diversity adds an essential ingredient to the educational process” helped to inform the university’s admissions process.<sup>178</sup> Harvard tied intellectual diversity to demographic diversity. Believing that one’s identity helps to determine a person’s outlook, Harvard wrote, “A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer.”<sup>179</sup> “Similarly,” it went on, “a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.”<sup>180</sup> The Ivy League school sought to create an intellectually heterogeneous learning environment “that reflect[ed] the rich diversity of the United States” by taking into account an applicant’s race.<sup>181</sup>

Powell accepted this argument without the skepticism that typified his analysis of justifications centered on minority uplift.<sup>182</sup> Harvard offered no empirical evidence that diversity of student background leads to better learning outcomes. Harvard simply asserted the theory as a long-held belief. To support his view that diversity leads to better educational outcomes, Powell cited only a statement from Princeton University’s president that appeared in an alumni

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176. Brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae, *supra* note 175, at 4.

177. *Id.* at 8.

178. *Id.* at Appendix, 2.

179. *Id.*

180. *Id.*

181. *Id.* at Appendix, 3.

182. See WILKINSON, *supra* note 40, at 303–04 (“It was the most traditional justification, because the most analogous to geographical preference. Diversity, to be real, implied more than token minority numbers. But it supposed also that minority students had something genuine to contribute to higher education; they had not been let in simply to avenge ancestral sins. Diversity, as such, was a narrower rationale than compensatory justice; it applied obviously to education, not so clearly to employment. And it skirted the sticky questions of compensatory justice: whom do we compensate, how much, and for how long. For the need for diversity will continue forever, as long as race matters to men. But diversity, though color-conscious, was also color-blind. Working class whites might one day be seen as capable of bringing more diversity to middle-class havens of higher education than well-off blacks. All, in fact, can be diverse, because all are different: the Alaskan or Greek American, the oboist or naturalist, all, said Powell, who ‘exhibit qualities more likely to promote beneficial educational pluralism.’”)

magazine.<sup>183</sup> The statement itself acknowledged that “it is hard to know how, and when, and even if, this informal ‘learning through diversity’ actually occurs. It does not occur for everyone.”<sup>184</sup> Nevertheless, Powell accepted the statement as compelling. Perhaps the argument was sufficiently plausible that it did not require evidence. But the same could be said of the assertion that in a racially segregated society, training more minority doctors would increase the number of medical professionals practicing in underserved communities of color. Yet the Justice dismissed that argument for having no evidentiary basis.

Attaining a diverse student body, in Powell’s words, was “clearly . . . a constitutionally permissible goal.”<sup>185</sup> He argued that the First Amendment gave universities latitude to create the intellectual environment “most conducive to speculation, experiment and creation.”<sup>186</sup> Quoting a district court opinion, Powell discussed the importance of universities maintaining intellectually diverse environments: “Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us. . . . The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”<sup>187</sup>

Powell’s reasoning in *Bakke* recognized that the nation’s universities partly functioned as incubators for the next generation of decision-makers. The intellectual climate that students marinated in during their university years affected not only the students’ personal development but also the country’s development. Emphasizing this point, he reframed the quotation above, writing that “it is not too much to say that the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>188</sup>

Yet Powell made clear that his decision should not be read as allowing universities to take only race into account. He said focusing solely on racial diversity “would hinder rather than further attainment of genuine diversity.”<sup>189</sup> He went on to observe that “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics . . . .”<sup>190</sup> Powell clearly stated the directive: if universities wanted to consider the race of an applicant, they must also consider other applicant

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183. See *Bakke*, 438 U.S. at 312 n.48.

184. *Id.* (citing William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY 7, 9 (Sept. 26, 1977)).

185. *Id.* at 311–12.

186. *Id.* at 312.

187. *Id.* (quoting United States v. Associated Press, 52 F. Supp. 362, 372. (S.D.N.Y. 1943)).

188. *Id.* at 313.

189. *Id.* at 315.

190. *Id.*

characteristics with the goal of exposing future leaders to a “robust exchange of ideas.”<sup>191</sup>

### III. DIVERSITY TO DERADICALIZE

If Powell was not committed to racial integration even as he voted to uphold affirmative action, what might have motivated his opinion in *Bakke*? To answer this question, it is necessary to look at his other ideological commitments. In this Section, I examine Powell’s *Bakke* opinion in light of a top priority for him: fighting radicalism on college campuses.

In the decades leading up to *Bakke*, Powell became convinced that White and Black radicals, propelled by communists, teamed up to plot a revolution aimed at overthrowing American democracy and capitalism. He believed that the revolutionaries strove to radicalize the intellectual climate on college campuses and, in turn, the next generation of leaders. Speaking to an audience in 1970, Powell warned:

Our democracy, and the values which it sustains, are under broad and virulent attack. For the first time in America’s existence, there is concern that revolution could engulf this country. . . . Yet the chilling fact remains that revolution is being planned and seriously pressed by determined white and black radicals, who are winning acceptance and support—not from workers or farmers—but from students and intellectuals.<sup>192</sup>

To better understand how this fear materialized, it is important to go back a decade earlier.

#### *A. Education for National Defense*

Perhaps what most drove Powell’s educational policy before joining the Court was his belief that the United States was losing an ideological war against forces that threatened to destroy the country. Beginning in the 1950s, the Virginia statesman identified communism as the nation’s most dangerous enemy. He spoke often and forcefully of the communist assault on the United States, referring to the Cold War as “The Conflict We Are Losing.”<sup>193</sup> He observed that communist ideology was gaining acceptance across the globe and—most troublingly—within the United States. Determined to fight back in his capacity as an education official, Powell focused on what he believed to be a

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191. *Id.* at 313.

192. Powell, Attack on American Institutions, *supra* note 15, at 2.

193. Lewis F. Powell, Jr., Address at Grace-Covenant Cathedral: The Conflict We Are Losing (Nov. 1, 1962), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_The%20Conflict%20We%20Are%20Losing%20September%202023,%201962\\_113-23.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_The%20Conflict%20We%20Are%20Losing%20September%202023,%201962_113-23.pdf) [https://perma.cc/TEC2-ABP3].

key dimension of national defense: the fight for the hearts and minds of American students.

Believing that America's classrooms were key sites to promote national defense against communist encroachment, Powell referred to education as "one of the major 'battlefields' of the Cold War."<sup>194</sup> In a 1962 speech to education officials explaining Soviet Cold War strategies, he identified the communists' ability to exploit the transformative power of education as one of their greatest sources of strength. Through education, communist countries not only produced citizens with the knowledge and skills to keep their nations globally competitive, but they also "remold[ed] the character of the individual and inculcate[d] a uniform pattern of prescribed beliefs, attitudes, and values—all consonant with Communist ideology."<sup>195</sup>

Based, in part, on the perceived effectiveness of communist strategies, Powell argued that focusing on the nation's classrooms constituted "the most important thing" America could do to prevail against its enemies.<sup>196</sup> Speaking before the Federal Bar Association in 1960, he said that the "paramount duty" of American schools—both K-12 and college level—was to "work affirmatively to see that a free society is indeed preserved."<sup>197</sup> He went on: "And, urgently at all levels of education, we must teach our people to . . . defend America—the great country upon which the entire free world depends."<sup>198</sup>

Powell believed that instilling patriotism required teachers to indoctrinate students to despise communism. A leader in education for two decades, he had ample opportunity to put his philosophy into practice. In 1960, the Richmond School Board chair broke ranks with many of his board members to implement a mandatory course that taught the benefits of the free market and the perils of communism. Laying out the guidelines for the course, Powell specified that teachers must instruct students that "communism is a world-wide conspiracy which changes its techniques from time to time, but which has never deviated from its imperialistic purpose of world conquest—by force and violence if necessary."<sup>199</sup>

That same year, Powell gave a speech before the National School Board Association entitled, "What Should Our Students Understand About the Communist System?"<sup>200</sup> He urged teachers and education officials to teach students that "Marx was one of the bitterest [sic] and most inhuman [sic] of all

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194. Powell, Soviet Style, *supra* note 39, at 20.

195. *Id.* at 4.

196. *Id.* at 5.

197. *Id.* at 21.

198. *Id.*

199. JEFFRIES, *supra* note 24, at 166.

200. Lewis F. Powell, Jr., Address at National School Boards Association Meeting: What Should Our Students Understand About the Communist System? (Apr. 26, 1960), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_What%20Should%20Our%20Students%20Know%20\\_%20April%202026,%201960\\_112-31.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_What%20Should%20Our%20Students%20Know%20_%20April%202026,%201960_112-31.pdf) [<https://perma.cc/X6CY-RXRE>].

philosophers. He showed no trace of compassion for anyone . . . . Like his disciples, Marx had a dictatorship complex and was a totalitarian.”<sup>201</sup> But, he continued, “By far the most important thing for all Americans to realize is that international Communism is a strange new force which has entered and corrupted our world beyond anything else ever known to history.”<sup>202</sup>

Powell worried that communist countries would use education not only to indoctrinate their own citizens but to win over Americans as well. Communist countries did not employ indoctrination solely as a strategy to shape the beliefs of their own citizens. Powell worried that they might also use education to win over Americans. More specifically, he believed that if there were to be a communist revolution in the United States, the nation’s intellectuals would be one of the first groups targeted. Relaying Leninist philosophy in 1960, Powell warned the National School Board that “for revolution to be successful,” intellectuals “must be infiltrated, propagandized and used . . . to promote communist ends.”<sup>203</sup>

### *B. The Campus Revolt*

Within a few years, in the thick of the Vietnam War and the Civil Rights Movement, universities erupted with tension. Progressive and radical students staged large-scale demonstrations on their campuses to address injustice in their universities and throughout the broader society. Demonstrations usually centered around three issues: U.S. aggression in Southeast Asia, racial injustice, and the repression of student activists.<sup>204</sup>

Campuses throughout the nation became sites of intense political contestation as left-leaning students protested unjust policies of both their universities and government. At Columbia University, nearly a thousand students occupied various campus buildings and took the Dean hostage. The students tried to prevent the university from providing the Defense Department with weapons research for a potentially unjust war.<sup>205</sup> At Harvard University, administrators thought the intensity of student demonstrations for racial inclusion could shut down the entire campus.<sup>206</sup> At Kent State University, the National Guard was called in to disband a mass student protest. Officers would eventually kill four unarmed students in the process.<sup>207</sup>

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201. *Id.* at 1.

202. *Id.* at 5.

203. *Id.* at 3–4. According to Powell, “Lenin pointed out that three groups require special attention from the Communists: (i) the army, (ii) the workers and their union organizations, and (iii) the intellectuals.” *Id.* at 3.

204. See CAMPUS UNREST COMMISSION, *supra* note 18, at 3–4.

205. Also, campus protestors wanted the University to stop building what they referred to as a segregated gymnasium in Harlem. See *id.* at 36–43 (describing unrest on Columbia’s campus).

206. See generally STEVEN KELMAN, PUSH COMES TO SHOVE: THE ESCALATION OF STUDENT PROTEST (1970) (providing student accounts of the April 1969 protests and evaluating causes).

207. For an account of the Kent State tragedy, see CAMPUS UNREST COMMISSION, *supra* note 18, at 287–90.

The frequency and popularity of campus protests alarmed government officials, who worried that students were becoming radicalized in college. As President Nixon's commission on campus unrest would note of the 1960s, "When the decade began, the vast majority of American students were either apolitical or dedicated to working peacefully for change within the existing system; as it ends, ever-increasing numbers of students accept a radical analysis of American society and despair of the possibilities of peaceful social change."<sup>208</sup> Increasingly, students began regarding their universities as key drivers in perpetuating societal injustices.

Powell cited UC Berkeley's Free Speech Movement as the event that sparked the spate of nationwide campus protests. Ironically, the man who became associated with promoting differing perspectives on campuses took issue with a movement calling for unfettered speech within the nation's universities. The Berkeley unrest started in 1964 when school officials banned student activists from passing out information about the Civil Rights Movement. However, Powell felt that the Berkeley students had no legitimate grievance against their university. Calling the student agitation the "filthy speech" movement, he argued that, "few, if any, campuses afforded greater freedom of discussion."<sup>209</sup> Powell suggested that, if anything, Berkeley students enjoyed too much freedom to espouse their views. He wrote that on California's flagship campus, students of "every variety of radical politics" held open meetings where they "advocated everything from 'imbibing of marijuana' to 'selling contraceptives in the student union.'"<sup>210</sup>

Powell believed there were no true restrictions on speech within universities and, so, he suspected the protests were orchestrated by outside agitators with ulterior motives. The Nixon administration largely supported his suspicions. Speaking at the Atlanta regional meeting of the American Bar Association on October 22, 1964—only weeks after the Free Speech Movement at Berkeley had begun—Powell said, "A message from J. Edgar Hoover to all law enforcement officials has just come to my desk. It is dated October 1, 1964, and relates to what Mr. Hoover describes as the 'intensive Communist Party efforts to erect its new facade on the nation's college campuses.'"<sup>211</sup>

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208. *Id.* at 18–19.

209. Lewis F. Powell, Jr., Address to Virginia Association of Colleges: The New Left on the Campus 4 (Feb. 25, 1966), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1030&context=powellspeeches> [https://perma.cc/WG2N-SZP9] [hereinafter Powell, The New Left] (quoting a Berkeley professor).

210. *Id.*

211. Lewis F. Powell, Jr., Address at Atlanta Regional Meeting: Seminar on the Need for Education About Communism 6 (Oct. 22, 1964), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_EndofanEraandNewHorizons\\_5-12-1971.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_EndofanEraandNewHorizons_5-12-1971.pdf) [https://perma.cc/W67X-WZ4V] [hereinafter Powell, The Need for Education].

Powell held deep respect for J. Edgar Hoover and admiringly referred to his longstanding opposition to civil disobedience.<sup>212</sup> He found “prophetic” the FBI Director’s views on the efforts by “black extremists” to foment revolution by inciting riots in inner cities.<sup>213</sup> Now, however, Hoover identified a new threat to national security: communist infiltration of college student groups. Powell wholeheartedly agreed with Hoover’s assessment.

The FBI Director’s letter, as Powell relayed it to his audiences, said that communists used student organizations to get young adults to turn against America and toward communism. Communists tried to convince students that the ultimate goal of communism was “unity and brotherhood.”<sup>214</sup> But as Powell noted, this kind of strategic deception “makes it so difficult for young Americans to comprehend the real meaning of communism.”<sup>215</sup> Convinced that the ideological war against America had reached college campuses, Powell told audiences, “As Mr. Hoover pointed out, the only answer is to arm the youth of this nation with ‘the scalpel of truth’ – and this can only be accomplished through education.”<sup>216</sup>

Over the next few years, Powell would fully embrace his suspicions that communists had infiltrated American universities. In 1966, he explained the emergence of campus radicalism to the Virginia Association of Colleges, noting that “[a] prime target of Communist effort throughout the world, and with increasing emphasis in the United States, is the college student and indeed the college professor.”<sup>217</sup> Powell later explained why those seeking to foment a revolution found college campuses so appealing:

Lacking the traditional popular base of oppressed workers and peasants, these radicals believe our society can be overthrown by new techniques. They understand that the levers of power—especially the means of influencing thought and emotion—are different in the modern world. They believe these levers can best be manipulated from and through the college campus, with a base of support being built among students, faculty and other intellectuals. Their first objective, therefore, has been to disrupt our major universities.<sup>218</sup>

According to Powell, communists aimed to destabilize the American system by influencing those who would one day lead it. The university was home to two of the most influential contingents in American society: the future leaders of the nation and those charged with shaping the minds of those leaders. Powell would later explain how campus radicalization threatened to “destroy the entire

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212. See, e.g., Powell, *Prelude to Revolution*, *supra* note 13, at 18 (“See excellent statement of Mr. Hoover—long prophetic on this subject.”).

213. *Id.* at 18, 20.

214. Powell, *The Need for Education*, *supra* note 211, at 7.

215. *Id.*

216. *Id.*

217. Powell, *The New Left*, *supra* note 209, at 15.

218. Powell, *Attack on American Institutions*, *supra* note 15, at 6.

system.”<sup>219</sup> Referring to graduates taught to be critical of America while in college, Powell said these “bright young men,” from campuses across the country, seek opportunities to change a system which they have been taught to distrust — if not, indeed ‘despise’ — they seek employment in the centers of the real power and influence in our country . . . .”<sup>220</sup> Upon graduation, many assume “key positions of influence where they mold public opinion and often shape governmental action.”<sup>221</sup> He worried about what would happen to America when these graduates assumed “large authority” over a “system they do not believe in.”<sup>222</sup>

Until he joined the Court in 1972, Powell went around the country warning people of the revolution being planned in the nation’s universities—an effort that ultimately attracted the attention and admiration of President Nixon. In response to a 1970 speech on radicalism in which Powell compared campus radicals to “Hitler and his storm troopers,”<sup>223</sup> President Nixon sent Powell a personal letter expressing his approval. Nixon wrote, “I can see that we share many similar attitudes concerning the problems we are facing in America today. It was good to see you speak out in such a forthright manner!”<sup>224</sup> The President attached two articles about the radicalism brewing within American universities “[i]n view of,” Nixon wrote to Powell, “your special concern for campus problems . . . .”<sup>225</sup>

### C. The Culprits

According to Powell, the revolution to overthrow American democracy was being executed on two fronts.<sup>226</sup> While “the extremist” Black Power movement disrupted the nation’s major cities, the New Left disrupted the campus. The New Left was a leftist political movement of the 1960s that was run primarily by college students. It brought together various liberal, Marxist, and radical groups.<sup>227</sup> Powell identified Students for a Democratic Society, the W.E.B. Du Bois Clubs of America, the Student Non-Violent Coordinating Committee, the Progressive Labor Party, “and a host of so-called peace organizations” as the

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219. Powell, Confidential Memorandum, *supra* note 27, at 2.

220. *Id.* at 14.

221. *Id.*

222. *Id.* at 15.

223. Powell, Attack on American Institutions, *supra* note 15, at 4.

224. Letter from Richard Nixon to Lewis Powell, Hunton, Williams, Gay, Powell & Gibson (Oct. 26, 1970), <http://law2.wlu.edu/deptimages/powell%20archives/PowellCorresRePoliticalWarfarePaper.pdf> [https://perma.cc/UV9N-NS7Y].

225. *Id.*

226. Powell, Prelude to Revolution, *supra* note 13, at 5.

227. For a brief summary about the New Left, see James P. O’Brien, *The Development of the New Left*, 395 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 15 (1971).

principal organizations in this movement.<sup>228</sup> Noting that the White radicals of the New Left and Black militants shared “common hatreds, common willingness to resort to violence,” and a similar Marxist orientation, Powell believed that the two camps were cooperating “to achieve their common end — the destruction of the American system.”<sup>229</sup>

Notably, Powell saw the White students of the New Left as the greater menace. He understood college campuses as the “principal base of revolution.”<sup>230</sup> In the mid-1960s, elite universities—the ones Powell seemed most concerned about—had not reached more than token levels of racial integration.<sup>231</sup> Thus, New Left organizations were most often run by White students. While Black students did in fact play a vital role in the student protests of the decade,<sup>232</sup> Powell seemed not to regard them as key threats, at one point warning audiences, “The most visible element of the revolutionary movement is basically white and campus oriented.”<sup>233</sup>

Powell argued that the New Left’s “ultimate goal” was the ‘radicalization’ of enough Americans to overthrow our system.”<sup>234</sup> But it was not just any Americans that Powell was concerned about. Rather, he worried that the New Left had set its sights on “the radicalization of an ever-increasing number of white middle-class Americans.”<sup>235</sup> According to Powell, campus radicals enticed non-radical White students from middle-class families by promoting seemingly sympathetic causes like racial justice and world peace. Once non-radicals were on board, the New Left strategists would escalate their tactics of resistance and radicalize White middle-class Americans in the process. Explaining how small demonstrations would eventually lead to revolution, Powell said, “The progression is from peaceful demonstrations to unlawful demonstrations, sit-ins and the like; and then to sabotage and insurrection.”<sup>236</sup>

Powell saw Black militants as outside agitators, playing a limited but nevertheless key role in radicalizing students. As he noted, the tactics of campus

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228. Lewis F. Powell, Jr., Address to the Virginia Retail Merchants Association: Anarchy on the Campus 17 (May 20, 1968), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1015&context=powellspeeches> [https://perma.cc/8UZK-JGNZ] [hereinafter Anarchy on the Campus]

229. Powell, Attack on American Institutions, *supra* note 15, at 5. The quote continued: “Although perhaps not orchestrated by the Communist party, they promote its ends and employ its techniques.” *Id.*

230. *Id.* at 8.

231. CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 159 (2004) (showing that in 1967, Black students made up on average just 1.8% of the student bodies at a sample of private universities including Columbia, Duke, Emory, Northwestern, Princeton, Tufts, Tulane, University of Pennsylvania, Vanderbilt, and Yale).

232. See generally MARTHA BIONDI, THE BLACK REVOLUTION ON CAMPUS (2012) (providing an account of Black student protests during the late 1960s and early 1970s).

233. Powell, Attack on American Institutions, *supra* note 15, at 5.

234. Powell, Radical Left Movement, *supra* note 14, at Exhibit C.

235. *Id.*

236. *Id.*

protests—sit-ins, marches, and other forms of nonviolent resistance—largely imitated the “militant leaders” of the Civil Rights Movement. Moreover, radical Black figures like Malcolm X and the Black Panthers, who were frequent campus lecturers, served as intellectual inspiration for students in the New Left.

Yet Powell seemed to regard the New Left as a bigger threat than Black militants. Students in the New Left were often from well-to-do backgrounds; they were well-connected and had the kind of pedigrees and social capital needed to one day run the nation. This made them harder to control. Black militants, on the other hand, were largely disenfranchised, lacked political and social clout, and could be more easily repressed by law enforcement officials. Moreover, Powell believed that Black militants did not enjoy the support of the larger Black community. Instead, he thought that “the great majority of blacks are probably included among the ‘silent Americans’ who oppose radical extremism from both the left and the right.”<sup>237</sup> Thus, Powell was less concerned with Black students on campus than with a small minority of White radicals wielding outsized political and social power.

Powell did worry, however, that the New Left could persuade Black militants to join forces with them by advocating for racial justice, participatory democracy, and the end of U.S. aggression in Vietnam. Powell warned audiences not to be fooled by the New Left’s professed causes. He believed that the core of the New Left did not actually want to achieve racial justice domestically or peace abroad, as “[t]heir objective is revolution; not reform.”<sup>238</sup> Picking these causes was a carefully calculated strategy to unite large segments of Americans against their country. Indeed, Powell suggested that the New Left would be disappointed if the war ended “because it would leave them without a cause in their struggle to ‘organize all the opposition to the government into a solid front.’”<sup>239</sup> Similarly, he argued that there was a strategic effort to depict the war in Vietnam not only as unjust but also as “racist”—a tactical move “to coalesce certain elements of the civil rights movement with the Vietnam peace movement.”<sup>240</sup>

Powell explained that the New Left’s true goal was “first to disrupt and then destroy our most cherished democratic institutions—our system of higher education and our representative form of government.”<sup>241</sup> Democracy would then be replaced by a dictatorship in the mold of other communist systems. Powell explained, “New Leftists who now seek to undermine or destroy our democracy would replace it by the tyranny of a Castro or a Mao Tse-tung.”<sup>242</sup>

While many in the New Left embraced Marxist ideology, Powell did not believe that all their members were communists. Instead, he thought that

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237. Powell, Attack on American Institutions, *supra* note 15, at 6.

238. Powell, A Strategy for Campus Peace, *supra* note 23, at 11.

239. Powell, The New Left, *supra* note 209, at 7.

240. *Id.*

241. Powell, A Strategy for Campus Peace, *supra* note 23, at 5.

242. Powell, What Is “Right” about America, *supra* note 17, at 1–2.

communists sat at the command center of the New Left and used unwitting students from the mainstream of American life to further their own ends.<sup>243</sup> He told an audience of college administrators in 1968, “It is important to remember, however, that many of the participating and sympathizing students are neither Communist nor revolutionaries. For the most part, these are the dupes. . . . But the hard core New Leftists are revolutionaries. Their foreign policy posture, and their domestic goals, are straight Communist Party line.”<sup>244</sup>

#### *D. Homogenizing the Intellectual Climate*

Powell sought to make audiences understand that the New Left was turning White, middle-class American college students against their own country and thereby endangering the future of the nation. He acknowledged that students had traditionally flirted with radical ideas in college, but he saw this dalliance with leftist thinking mostly as a passing phase of naïveté. Before the New Left descended on campuses in the 1960s, he had been confident that with maturity, students would embrace conservative and moderate values. To the extent that they wanted to push for social change, students would do so using the preapproved institutional channels and processes. But the New Left was changing that dynamic. It was turning young, privileged, middle-class White students into radicals who thought their country was so corrupt that it was better off overhauled than reformed.

As Powell wrote:

There is nothing new about certain restlessness on the part of students. Johnny has always developed a lot of ideas at college which make his old man nervous. But Johnny matures in due time, as he faces the realities of making a living, and as his student liberalism is tempered by experience and responsibility. This has been a natural and wholesome evolution, contributing to a desirable process of ordered social change. But the New Left on the campus is not within this honored American tradition. It does not want ordered and evolutionary change. It demands revolutionary change—now!<sup>245</sup>

Giving the convocation address before a group of liberal arts college students in 1970, Powell wondered aloud how a small group of radicals was able to win over so many students who were “often from privileged families.”<sup>246</sup> Why

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243. See, e.g., Powell, Civil Disobedience v. The Rule of Law, *supra* note 86, at 12 (“Some of these [left-wing student groups] are well financed and skillfully led, often by experienced agitators who are neither students nor professors.”).

244. Powell, Anarchy on the Campus, *supra* note 228, at 17.

245. *Id.* at 16.

246. Lewis F. Powell, Jr., Convocation Address at Longwood College: The Ideological Assault on America 12 (Nov. 17, 1970) [hereinafter Powell, Ideological Assault on America], available at [http://law2.wlu.edu/depimages/powell%20archives/PowellSpeech\\_The%20Ideological%20Assault%20On%20America,%20November%202017,%201970\\_118-4.pdf](http://law2.wlu.edu/depimages/powell%20archives/PowellSpeech_The%20Ideological%20Assault%20On%20America,%20November%202017,%201970_118-4.pdf) [<https://perma.cc/R4YC-GREQ>].

were students “from our finest homes”<sup>247</sup> so willing “to disrupt their own educational opportunity, to embrace or tolerate coercion, and to denigrate the entire American system”?<sup>248</sup>

The problem, as Powell diagnosed it, was a homogenized intellectual climate on college campuses: radicals had a bullhorn while moderate and conservative voices were being muffled. The New Left had commandeered the academic discourse at universities, inundating students with anti-America propaganda while denying any opportunity for rebuttal. Without being exposed to a “robust exchange of ideas,” impressionable students were uncritically accepting vicious condemnations of America. Speaking on the unpatriotic groupthink happening on campuses throughout the nation, Powell said, “There has been general unanimity on issues relating to the Vietnam war and to alleged racism. There also has been surprising student support for spurious issues such as alleged repression, injustice in the courts, brutality by the police and machinations by the ‘military-industrial complex.’”<sup>249</sup> He continued, “On these and related issues many nonradical students and faculty members swallow the party line of the revolutionaries. There is an astonishing absence of critical analysis and little concern for truth. At times, campuses have been engulfed by mass hysteria in an almost total flight from reason.”<sup>250</sup>

Explaining how students were being brainwashed in college, Powell said that they were exposed to an “unending barrage of insidious criticism leveled by Americans against America itself, our institutions, our system of government and upon the values which for centuries have sustained western civilization.”<sup>251</sup> Students were no longer being taught that they lived in the land of the free and the home of the brave. Instead, they were being taught that they lived in “a wholly selfish, materialistic, racist and repressive society.”<sup>252</sup>

To Powell, these characterizations of America were not factual. Rather, he believed that they were merely propaganda “designed to undermine confidence in our free institutions, to brainwash the youth, and ultimately to overthrow our democratic system.”<sup>253</sup> The truth about America, in Powell’s eyes, was that the nation had the best economic and political system “ever conceived by man”;<sup>254</sup>

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247. Powell, *Attack on American Institutions*, *supra* note 15, at 11.

248. Powell, *Ideological Assault on America*, *supra* note 246, at 13.

249. *Id.* at 11.

250. *Id.* at 11–12.

251. *Id.* at 14.

252. Powell, *Attack on American Institutions*, *supra* note 15, at 14.

253. Lewis F. Powell, Jr., Article Prepared for Perspective Section of Richmond Times Dispatch: *Repression of Civil Liberties—Fact or Fiction?* 14 (June 28, 1971) [hereinafter Powell, *Repression of Civil Liberties*], [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_CivilLibertiesRepression\\_8-1-1971.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_CivilLibertiesRepression_8-1-1971.pdf) [<https://perma.cc/RRA3-MLMK>].

254. Powell, *Attack on American Institutions*, *supra* note 15, at 2.

it was “generous and humane”,<sup>255</sup> it gave its citizens more rights than any other country; it had “no caste or class system”,<sup>256</sup> regardless of race or class, “every youth may be President.”<sup>257</sup> Moreover, Powell maintained that America was not imperialist, a charge he dismissed as “the Big Lie of Communists.”<sup>258</sup> In short, the United States was a “Country Everyone Would Like to Live in.”<sup>259</sup> Instead of hearing about these ideas in college, however, students learned insidious critiques of America that combined “half truths with fiction and even falsehood.”<sup>260</sup>

Powell blamed the nation’s universities for not equipping students with the critical thinking skills to see through the radicals’ unpatriotic propaganda. Explaining the radicalization of college students, he said, “It is evident that the modern university has failed in its historic task of training young minds to be skeptical of sloganists, to question the glib huckster, and to seek rational rather than emotional solutions.”<sup>261</sup> Consequently, students were easily won over by leftist lies and propaganda. Powell complained that “[r]adical leaders have been able consistently to inflame, confuse, exploit and even radicalize tens of thousands of fine young Americans—almost as if they were untutored children.”<sup>262</sup>

#### E. Faculties

Powell believed that professors provided little assistance in the effort to restore order on campuses because they were intellectually aligned with the left. He assessed their political orientations as ranging from Marxist and socialist to “the ambivalent liberal critic who finds more to condemn than to commend.”<sup>263</sup> Powell often cited examples of the radical professors who taught students to despise their country. They included a Yale professor who justified Black militants’ call for revolution by “citing the American Revolution and other irrelevant precedents”<sup>264</sup> and an NYU professor who publicly “characterized Vice-President Humphrey and Mr. Nixon as ‘racist bastards.’”<sup>265</sup>

In the fight to keep peace on campuses, Powell most often characterized professors as siding with the enemy. Other times, they *were* the enemy. Speaking to college presidents in 1968, he quoted Harvard Law School dean Erwin

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255. Lewis F. Powell, Jr., Address at Key Club, T.J. High School 1 (Apr. 16, 1970) <http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeechAttackOnAmericanInstitutionsJuly15,1970.pdf> [<https://perma.cc/4YXB-TK76>].

256. Powell, What Is “Right” about America, *supra* note 17, at item 2.

257. *Id.*

258. *Id.* at item 4.

259. *Id.* at item 6.

260. Powell, Attack on American Institutions, *supra* note 15, at 19.

261. *Id.* at 11.

262. *Id.*

263. Powell, Confidential Memorandum, *supra* note 27, at 13.

264. Powell, Prelude to Revolution, *supra* note 13, at 11.

265. Powell, A Strategy for Campus Peace, *supra* note 23, at 16.

Griswold, who gave voice to Powell's "own deeply-held views": "The only persons for whom I have more contempt than for the student groups (which created the discord) are the faculty members who lent support to them."<sup>266</sup>

He worried about the great influence these professors had on their students. Even on those campuses where left-leaning professors were a minority, they had undue influence in molding students' thoughts. Powell explained how liberal and radical professors seduced so many students: "They are often personally attractive and magnetic; they are stimulating teachers, and their controversy attracts student following; they are prolific writers and lecturers; [and] they author many of the textbooks . . ."<sup>267</sup> There was no true robust exchange of ideas even when conservative and moderate professors were present because, as Powell noted, they were usually "less articulate and aggressive than their crusading colleagues."<sup>268</sup>

According to Powell, the problem was not that liberals were on the faculties. He said that the presence of liberal ideology was crucial to providing a balanced perspective. However, Powell explained, "The difficulty is that 'balance' is conspicuous by its absence on many campuses, with relatively few members being of conservative or moderate persuasion."<sup>269</sup> This intellectual imbalance was contributing to the radicalization of students in more ways than one.

Liberal faculty determined the intellectual climate on campus not only through their own pedagogy but also by voting on how the university itself would be run and which perspectives would be highlighted. As an example of how universities endorsed "the ideological assault on America," Powell noted that "an irresponsible faculty committee" at UC Berkeley had allowed Eldridge Cleaver to come to campus to give lectures on racism.<sup>270</sup> He was outraged that Cleaver, "a black racist, and a leader of the militant Black Panther Party," would be invited to speak to students.<sup>271</sup>

While Powell's *Bakke* decision suggested a desire for people to share different perspectives on campuses, his speeches made it clear that not all perspectives should be welcomed. He chided university administrators for allowing so many unpatriotic speakers onto campuses, asking, "Are our campuses to become Hyde Parks and Times Squares, where a soap box is provided for every huckster?"<sup>272</sup> Criticizing those who cited academic freedom to defend allowing an influential figure like Cleaver to share his views with students, Powell said:

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266. *Id.* at 14–15.

267. Powell, Confidential Memorandum, *supra* note 27, at 13.

268. *Id.*

269. *Id.*

270. Powell, A Strategy for Campus Peace, *supra* note 23, at 16.

271. *Id.*

272. *Id.* at 18.

One may doubt that a Black Panther leader, a convicted felon, is qualified to bring anything worthwhile to the campus. If it is said that he knows much about racial hatred, it can also be said that a Mafia leader knows much about vice and extortion, and that the Grand Dragon of the Klan knows much about bigotry.<sup>273</sup>

According to Powell, the elevation of radical speakers mirrored curricular changes in elite universities in the late 1960s. Courses geared toward upholding the state were being replaced with ones focused on criticizing the state. A particularly sore spot for Powell was the diminished standing of Reserved Officer Training Corps (ROTC) programs on college campuses. Harvard and Yale faculty voted to demote ROTC to an extracurricular activity and stripped ROTC instructors of their titles as professors.<sup>274</sup> Other Ivy League schools quickly followed suit. Speaking of Yale's decision, Powell complained, "[O]ne is struck by the pettiness of a great university faculty taking pains to withdraw the title of professor from those who teach disliked courses. This gratuitous downgrading is to be contrasted with the toleration, and even honoring, of the most radical professors."<sup>275</sup>

Powell believed that downgrading ROTC played into communists' efforts to weaken the U.S. military. Noting the "high degree of parallelism" between communists' denigration of the American military and the logic of anti-militarism articulated by campus radicals, Powell said, "Communist parties throughout the world long have sought, by massive and insidious propaganda, to undermine public support for the entire U.S. defense structure."<sup>276</sup> He accused campus radicals of aiding communists by eroding confidence in the country's armed services.<sup>277</sup>

Simultaneously, the nation's most prestigious schools began, in Powell's words, "accrediting new courses of the most dubious academic merit" in response to student protestors' demands.<sup>278</sup> Powell cited a student-organized course at Harvard called "Radical Social Change" as a particularly "chilling example."<sup>279</sup> Aimed at producing "more and better radicals," this course featured lectures by activists from on and off campus.<sup>280</sup> Unlike ROTC, the class came

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273. *Id.*

274. See *Ivy Schools Deny Credit for ROTC*, COLUM. DAILY SPECTATOR, Feb. 6, 1969, at 7, <http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19690206-01.2.16> [https://perma.cc/AFZ9-67ZQ].

275. Lewis F. Powell, Jr., Thomas Jefferson Award Speech: Alienation of the Campus from National Defense 6 (Oct. 3, 1969), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_Alienation%20of%20the%20Campus%20From%20National%20Defense,%20October%203,%201969\\_117-25.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Alienation%20of%20the%20Campus%20From%20National%20Defense,%20October%203,%201969_117-25.pdf) [https://perma.cc/XD83-BQJF] [hereinafter Powell, Alienation of the Campus].

276. *Id.* at 14.

277. *Id.*

278. *Id.* at 7.

279. *Id.*

280. *Id.* at 7–8.

with full academic credit and quickly became the second most popular at Harvard.

#### *F. The Suppression of Non-Radical Voices*

Powell argued that the intellectual imbalance on campuses had been forcefully, at times coercively, orchestrated by New Leftists, who “deliberately inhibit and destroy free and honest debate.”<sup>281</sup> If universities truly fostered a marketplace of ideas, Powell believed that young adults “from our finest homes” would abandon radical ideologies.<sup>282</sup>

But according to Powell, no such marketplace existed because radicals had a monopoly on intellectual discourse and used force to maintain control. He complained that leftist students would “[p]icket and disrupt classes of conservative and moderate professors”<sup>283</sup> and that “it was standard practice to submerge administration spokesmen under waves of booing, hissing and cat-calling.”<sup>284</sup> Instead of engaging in rational discussion, students used “[c]oercion and violence to attain ends.”<sup>285</sup> Summarizing the general trend of suppressing non-radicals on campuses throughout the nation, Powell noted:

Freedom of speech has been denied, reasoned discourse repudiated and academic freedom endangered. The rights of nonradical students—to attend classes, to exercise freedom of choice, to hear moderate and conservative viewpoints, to participate in ROTC, and to enjoy the detached pursuit of truth and knowledge—have all been trampled upon.<sup>286</sup>

Writing in the *Richmond-Times Dispatch* in 1971, shortly before his nomination to the Supreme Court, Powell dismissed the accusation by those on the left that the Nixon administration repressed the voices of radical dissenters. He expressed a counterview that, in fact, conservatives and moderates were the only people denied free speech in America, especially on college campuses:

The only abridgement of free speech in this country is not by government. Rather, it comes from the radical left—and their bemused supporters—who do not tolerate in others the rights they insist upon for themselves. . . . It is common practice, especially on the campus, for leftists to shout down with obscenities any moderate or conservative speaker or physically to deny such speaker the rostrum.<sup>287</sup>

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281. Powell, The New Left, *supra* note 209, at 20.

282. Powell, Attack on American Institutions, *supra* note 15, at 11.

283. Powell, What Is “Right” about America, *supra* note 17, at item 2(b).

284. Powell, The New Left, *supra* note 209, at 20.

285. Powell, What Is “Right” about America, *supra* note 17, at item 3(a).

286. Powell, Ideological Assault of America, *supra* note 246, at 8.

287. Powell, Repression of Civil Liberties, *supra* note 253, at 11.

#### *G. The Fight for Intellectual Diversity*

Powell was determined to correct the intellectual imbalance on campuses, if only to prevent the radicalization of even more students. In 1970, speaking to a group of businessmen about campus radicalism, he said:

One thing we should not do is to lose faith in the nonradical students. They will be a part of the older generation in a few short years. Our country will then depend upon them for responsible citizenship. They will soon begin to understand—what we now know—that the revolutionaries wish to destroy their future and their opportunity to live in freedom. Let us condemn—not our own sons and daughters—but the Pied-pipers who so grievously mislead and exploit them.<sup>288</sup>

Believing that radical students were a small minority who had “duped” nonradical students into joining them,<sup>289</sup> Powell suggested that the key to restoring order in universities was to win over the nonradicals. In a 1968 speech entitled “A Strategy for Campus Peace,” Powell told university administrators, “The hope must be, not to placate the radicals, but to build a broad base of support among students in the main stream of campus life.”<sup>290</sup> Key to building that base was teaching students to be more supportive of their country and the rule of law.

Powell had already executed this strategy in Virginia’s K-12 public schools earlier that year. As the chairman of the state’s board of education, he successfully instituted a mandatory citizenship course in response to the rise of civil disobedience. This course was to emphasize that “all freedom and social progress depend upon maintaining the rule of law, now so gravely endangered by crime, disorders, extremism and disobedience.”<sup>291</sup>

Powell stipulated that Virginia students must be taught lessons such as “[t]he American citizen has greater personal freedom and his rights are better protected than under any other system known to history”,<sup>292</sup> “the only alternative to our democracy is totalitarianism”;<sup>293</sup> citizens have a “[d]uty to be loyal and

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288. Powell, Attack on American Institutions, *supra* note 15, at 23.

289. *Id.* at 8.

290. Powell, A Strategy for Campus Peace, *supra* note 23, at 12. 1968 was a pivotal year for the New Left. As historian Winifred Breines noted,

Nineteen sixty-eight, twenty years ago exactly, was an amazing year, the year of Lyndon B. Johnson’s decision not to run again for president; the murders of Robert Kennedy and Martin Luther King, Jr.; the urban riots after King’s death; the Tet Offensive in Vietnam; the French May rebellion and the international student uprising; the Columbia University revolt, occupation, and bust; and the massive violence in the streets of Chicago at the August Democratic party convention. Almost all books about the New Left note a turning point or an ending in 1968 when the leadership of the movement turned toward militancy and violence.

Winifred Breines, *Whose New Left?*, 75 J. AM. HIST. 528, 529 (1988).

291. Powell, Citizenship Education, *supra* note 19, at 11.

292. *Id.* at app. A at ii.

293. *Id.*

patriotic”,<sup>294</sup> sit-ins “are not legitimate means of protest”,<sup>295</sup> and citizens must “support and assist all police officers who are lawfully performing their duty.”<sup>296</sup> The board quickly approved Powell’s suggestion to teach<sup>297</sup> the state’s public school students about rule of law and patriotism.

Changing what college students learned, however, was much more difficult. Unlike the authority to alter K-12 education, the power to decide what college students learned was not centralized in a local school board. Instead, it resided with individual professors whom Powell believed could not be trusted to fight against the communist threat. He acknowledged that “[t]here is relatively little intentional pro-Communist teaching in this country.”<sup>298</sup> Yet he lamented that there was “a curious hostility among intellectuals to ‘anti-Communist’ teaching. Possibly as an over-reaction to ‘McCarthyism’, many leaders of intellectual opinion in the U.S. are more disposed to react adversely to ‘anti-Communism’ than to ‘Communism.’”<sup>299</sup>

Moreover, a Supreme Court decision handed down in 1967 only made it more difficult to restrict faculty members’ radicalism. In *Keyishian v. Board of Regents*,<sup>300</sup> the Supreme Court forbade universities from forcing professors to sign oaths declaring that they were not currently nor previously communists.<sup>301</sup> The practice was meant to remove “subversive persons” from faculties.<sup>302</sup> The Court ruled it unconstitutional in part because it infringed upon academic freedom.

Discussing the “transcendent value” of academic freedom, the Court used language that Powell would later quote in *Bakke*: “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”<sup>303</sup>

Yet in 1967, it was clear that Powell regarded “academic freedom” primarily as a source of frustration. In Powell’s view, “academic freedom” was used only to ensure the left’s presence on campuses. Few cared about the freedoms of those on the right. Speaking of Harvard’s decision to demote ROTC while introducing classes on radical thought, Powell said, “If this distorted sense

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294. *Id.* at iii.

295. *Id.* at vi.

296. *Id.* at viii.

297. See John T. Kinnler, *Citizenship Course Approved*, RICHMOND TIMES DISPATCH, July 21, 1968.

298. Lewis F. Powell, Jr., President’s Blue Ribbon Defense Panel, Political Warfare 16 (June 30, 1970), [http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_PoliticalWarfare\\_6-3-1070.pdf](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_PoliticalWarfare_6-3-1070.pdf) [https://perma.cc/M3ET-3FPC] (confidentially prepared and submitted to President Nixon).

299. *Id.*

300. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

301. See *id.* at 606.

302. *Id.* at 612.

303. *Id.* at 603.

of values were not so serious, one might find amusing this spectacle of intellectual hypocrisy [*sic*]—the curtailing of academic freedom with respect to long accepted courses in the national interest at the same time that academic freedom is stretched to embrace courses in violence taught by the Eldridge Cleavers.”<sup>304</sup>

“Academic freedom,” Powell noted, gave radical professors a “license without limit.”<sup>305</sup> Speaking the year after *Keyishian* came down, he criticized university administrators, saying that “two of the most ‘untouchable’ concepts in American life—academic freedom and academic tenure . . . are defended blindly and ferociously—few are bold enough to raise even the most restrained voice of analysis or doubt.”<sup>306</sup> These freedoms allowed professors to act recklessly: They could invite Black militants to speak to students, call the president a “racist bastard,”<sup>307</sup> and freely denounce “capitalist repression,”<sup>308</sup> and little could be done to stop them.

Powell challenged university administrators to intervene: “The question in simplest terms is whether responsible educators will continue to allow ‘academic freedom’ to be used as a cover for extremism on the campus, however violent or irrational?”<sup>309</sup> The “awesome power” of academic freedom belonged only to those with “honor,” “integrity,” and “responsibility.”<sup>310</sup> Powell called on administrators to keep these principles in mind when choosing who would be allowed to mold students’ minds: “The time has come for responsible educators to be far more discriminating in the selection of professors and lecturers, and especially in the granting of tenure.”<sup>311</sup>

Powell was conflicted. On the one hand, he wanted radicals removed from the nation’s universities. On the other hand, the Supreme Court had just ruled that it was unconstitutional to ban “subversives” from campuses.<sup>312</sup> Powell was one of the nation’s most prominent attorneys, known for applauding the great civil liberties that Americans enjoyed. He could not easily endorse banning the ideas—or people—that he found ideologically offensive. He told his audience in 1968, “As a lawyer, I subscribe wholeheartedly to the basic freedoms embodied in the concept of academic freedom. No one devoted to the educational process could entertain a different view.”<sup>313</sup> Yet in the same speech, he suggested that students who engage in civil disobedience should be expelled and professors who support them stripped of tenure:

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304. Powell, Alienation of the Campus, *supra* note 275, at 8.

305. Powell, A Strategy for Campus Peace, *supra* note 23, at 17.

306. *Id.* at 15.

307. *Id.* at 16.

308. Powell, Repression of Civil Liberties, *supra* note 253, at 11.

309. Powell, A Strategy for Campus Peace, *supra* note 23, at 17.

310. *Id.* at 15, 19.

311. *Id.* at 19.

312. *See Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967).

313. Powell, A Strategy for Campus Peace, *supra* note 23, at 17.

Like their heroes Che Guevara, Fidel Castro and Ho Chi Minh, the only language they understand is force. Such student extremists, and the faculty members who support them in their lawlessness, have forfeited any right to remain as members of a university community. The sooner they are expelled from student bodies and dismissed from faculties, the sooner our campuses will resume their historic roles as centers of reason and intellectual pursuit.<sup>314</sup>

Within a few years, however, Powell backed away from efforts to curtail academic freedom, viewing them as untenable. Instead, he suggested a new tactic. Rather than fight against academic freedom, he would fight for it. His fight, however, would focus on giving conservatives and moderates a louder voice on campuses.

#### *H. The Powell Memo*

In August 1971, two months before being nominated to the Supreme Court, Powell wrote a confidential memo to the head of the Chamber of Commerce's education committee imploring business leaders to combat the "broad attack" against capitalism.<sup>315</sup> Effective combat, according to Powell, required the business community to have significant influence in the media, the courts, and most importantly, the campus.<sup>316</sup> Calling campuses "the single most dynamic source"<sup>317</sup> of the assault on capitalism, Powell prescribed details for how conservatives could reclaim the intellectual heart of universities.<sup>318</sup>

Powell warned against any efforts aimed at limiting free speech on campuses. He observed, "Few things are more sanctified in American life than academic freedom. It would be fatal to attack this as a principle."<sup>319</sup> He continued, "But if academic freedom is to retain the qualities of 'openness', 'fairness' and 'balance'—which are essential to its intellectual significance—there is a great opportunity for constructive action."<sup>320</sup> If the problem was a

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314. *Id.* at 20–21.

315. Powell, Confidential Memorandum, *supra* note 27, at 1.

316. One year earlier, Powell also suggested creating public interest groups to combat the ACLU, a group he saw as siding with radicals. To a colleague on the subject, Powell wrote:

I feel the same frustration expressed by you as to the disruption being promoted by ACLU and similar groups and organizations interested only in promoting their brand of one-sided 'civil liberties'. The other side, concerned with the rights and liberties of the overwhelming majority of law-abiding citizens, is simply not being presented or represented. A counter force should be established which could intervene in litigation on behalf of the 'moderate center' in this country—which is largely voiceless, unrepresented and politically impotent in terms of addressing specific controversial issues, whether in litigation or otherwise.

Letter from Lewis F. Powell, Jr., to Harrison Mann, Esq. (May 30, 1970), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1009&context=powellspeeches> [<https://perma.cc/A45F-N4PF>].

317. Powell, Confidential Memorandum, *supra* note 27, at 12.

318. The Left included radicals as well as "respectable liberals and social reformers." *Id.* at 4.

319. *Id.* at 15.

320. *Id.*

homogenized intellectual climate that only highlighted voices on the left, Powell argued, the solution was to infuse the nation's universities with conservative perspectives. Once radical ideology was openly challenged on campuses, students would see the leftist ideas as hollow and embrace conservative values.

However, in order to win over students, business leaders first had to get onto the nation's campuses. Believing universities to be generally hostile to capitalism, Powell acknowledged that "few invitations would be extended" to business leaders to come speak to students.<sup>321</sup> However, he suggested, the Chamber of Commerce should "exert whatever degree of pressure—publicly and privately—may be necessary to assure opportunities to speak."<sup>322</sup> He thought an effective strategy for creating that pressure was to leverage the hallowed principle of intellectual diversity. Like academic freedom, intellectual diversity was an untouchable value that few could argue against. He explained, "University administrators and the great majority of student groups and committees would not welcome being put in the position publicly of refusing a forum to diverse views. Indeed, this is the classic excuse for allowing Communists to speak."<sup>323</sup>

Powell had a similar strategy for changing the faculty composition of the nation's universities. Describing the source of free market antagonism on campuses, Powell noted that "[p]erhaps the most fundamental problem is the [ideological] imbalance of many faculties."<sup>324</sup> He acknowledged that changing the political bent of American faculties would be "a long road and not one for the fainthearted," and advised business leaders to be careful in pursuing this goal.<sup>325</sup> Warning that "the obvious pitfalls must be avoided," he suggested that the business community should make appeals directly to the universities' boards of trustees and alumni associations.<sup>326</sup> Importantly, they should frame their appeals, in part, around the need for intellectual "balance," which would make the request for more conservative faculty "difficult to resist."<sup>327</sup>

Of course, Powell was not simply interested in achieving ideological balance on campuses. He wanted conservatives to wield greater influence than their leftist peers. Among his other suggestions, Powell wrote that it was "essential" that the conservative speakers who spoke to students were "attractive, articulate and well-informed."<sup>328</sup> In addition, in light of efforts by civil rights activists and labor unions to contribute to textbooks, Powell said that these books "should be kept under constant surveillance" by pro-capitalist scholars.<sup>329</sup>

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321. *Id.* at 18.

322. *Id.* at 18–19.

323. *Id.* at 18.

324. *Id.* at 19.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at 18.

329. *Id.* at 21.

Finally, the Chamber of Commerce should create incentives “to induce more ‘publishing’ by independent scholars who do believe in the system,” so that students—and the larger public—would have greater exposure to conservative ideas.<sup>330</sup>

After Powell joined the Court, the memo was leaked to the press. Critics began to impeach his ability to act as an impartial jurist given the memo’s explicit purpose to help corporate America achieve dominance in society. Journalist Jack Anderson, who originally published the memo, criticized Powell for presenting himself as “‘the model of a moderate, reasonable, judicious legalist’” when his writings revealed that he was, in fact, a fanatical counterrevolutionary.<sup>331</sup> Anderson noted that the views Powell articulated in the memo were “‘so militant that it raises a question about his fitness to decide any case involving business interests.’”<sup>332</sup> In part because of the backlash, Powell distanced himself from the memo.<sup>333</sup> But the idea that diversity could be a tool for deradicalization continued to inform his opinions on the Court.

### *I. Revisiting *San Antonio v. Rodriguez**

In 1973, Powell framed the majority opinion in *San Antonio v. Rodriguez* around the benefits of diversity. This was only two years after he presented intellectual diversity as a tool for deradicalization in his confidential memo. Besides *Bakke*, this was the only other time that Powell mentioned the importance of diversity in education in a judicial opinion. Explaining why schools ought to rely on both local and state funding sources, he wrote, “No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.”<sup>334</sup> Powell was specifically referring to diversity as a tool to prevent the radicalization of students.

Powell was moved by the arguments presented in an amicus brief on behalf of thirty states, which relied significantly on the work of education scholar Professor James Coleman. Professor Coleman argued that funding schools through local property taxes was a key means to prevent radical social change. He wrote that “on the issue of social change, national governments are more often on one side, the side of change, and local authorities are more often on the other side, the side of stability.”<sup>335</sup> He posited that schools run by local authorities tended to reinforce cultural and social norms and thus became “agents

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330. *Id.* at 22.

331. See KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 161 (2009).

332. *Id.*

333. Letter from Lewis F. Powell, Associate Justice of the United States Supreme Court, to Robert R. Hudson (Nov. 29, 1972) (on file with Washington and Lee University School of Law).

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

335. Brief of Amici Curiae in Support of Appellants at 36, *Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332).

for the maintenance of the social order.”<sup>336</sup> However, when schools were run by the national government, they tended to become “crucial institutions of social change.”<sup>337</sup>

Citing the precedents “[i]n Hitler’s Germany, in Stalin’s Russia, in Mao’s China and in Castro’s Cuba,” Coleman argued that following revolutions, totalitarian regimes commonly took control of the schools “to indoctrinate the new generation with the ideology of the regime.”<sup>338</sup> This allowed dictators “to consolidate their power and break the influence of the preceding generation upon the younger one.”<sup>339</sup> These regimes used schools “to achieve, in a single generation, radical social change.”<sup>340</sup>

Professor Coleman argued that “[w]hat is true in totalitarian regimes is true, to a lesser degree, in democratic ones: The national government is more likely to see the schools as instruments of social change than is the local government.”<sup>341</sup> To support this comparison, he cited the push for racial integration in the United States. According to Coleman, it was an example where the national government, “pressed by organizations at the national level,” tried to use schools to bring about “a major transformation of the social structure.”<sup>342</sup>

Powell was deeply influenced by Coleman’s argument and cited him multiple times in his opinion. He wrote a note to his law clerk about the brief, asserting, “I must confess that the brief appeals to me because it supports and confirms tentative judgments based on my own experience with Virginia education.”<sup>343</sup> While the parents in the case were only asking for the state to be in control of funding, Powell told his clerk, “I remain unconvinced . . . that the ultimate effect of the *Rodriguez* rule will not be national control of education. I would abhor such control . . . .”<sup>344</sup> He referred his clerk to the pages of the amicus brief where Coleman’s ideas were discussed to better understand why he was so opposed to national education. Offering a preview of his fear of radicalization, Powell wrote, “I have in mind the irresistible [sic] impulse of some politicians to manipulate public education for their own power and ideology—e.g. Hitler, Mussolini and all Communist dictators.”<sup>345</sup>

Powell ultimately used Professor Coleman’s ideas to support the Court’s stance that local governments should have a say in how its schools are run.<sup>346</sup>

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336. *Id.*

337. *Id.*

338. *See id.* at 37.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. Memorandum from Lewis F. Powell, Jr., to Larry A. Hammond 2 (Oct. 9, 1972), [http://law2.wlu.edu/deptimages/powell%20archives/71-1332\\_SanAntonioRodriguezBasic3.pdf](http://law2.wlu.edu/deptimages/powell%20archives/71-1332_SanAntonioRodriguezBasic3.pdf) [<https://perma.cc/YV3K-GUMP>].

344. *Id.* at 3.

345. *Id.* at 4.

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

Funding schools only through state funds would limit the influence of local communities. This, for Powell, would be a negative development. By invoking the importance of having a “multiplicity of viewpoints” and “a diversity of approaches” in education, he was referring to the presumed view of local state actors who were more likely to use schools to preserve traditional norms, as compared to the presumed view of more distant state actors who might use schools to push for progressive social change. In this case, promoting pluralism was an effort to limit the realization of a liberal or, worse, radical agenda in schools.

Powell would uphold affirmative action in *Bakke* five years later. Although the case was about racial integration, Powell made it about something different: the importance of furthering intellectual diversity on the nation’s campuses. He specified that universities had to look at more than just an applicant’s race for diversity to be considered a compelling state interest. He made clear that they ought to be primarily concerned with diversifying the intellectual climate of their campuses. This opinion reads as a natural extension of his belief that diversity was a tool to curb radicalism, particularly in schools. Given this history, we can understand *Bakke* in a new light.

#### IV. POWELL’S PUSH

The diversity rationale is one of the most criticized doctrines in constitutional law, and the criticism comes from both sides of the ideological divide. Opponents of affirmative action argue that the educational benefits of diversity do not rise to a compelling state interest, and even if they did, there is reason to be skeptical that race-based affirmative action helps to cultivate educational benefits. Many proponents, on the other hand, argue that the promotion of racial equality is the true compelling interest that affirmative action is intended to further. This Article provides historical context for why so many people—of all ideological persuasions—tend to find the diversity rationale unconvincing and unconvincing.

This Section briefly examines some of the unintended consequences of Powell’s opinion in *Bakke*. I argue that many have incorrectly interpreted Powell’s decision to be primarily concerned with promoting minority inclusion on campuses (even though, according to some, it was not primarily to benefit minorities themselves). The lingering belief that the decision masked ulterior motives has eroded confidence in the doctrine, even as the doctrine has come to remake our society’s racial integration efforts. The history of how Powell came to embrace diversity provides an occasion to reassess our societal adherence to his logic.

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The *Bakke* decision was met with skepticism by scholars both for and against affirmative action. To some, Powell’s decision seemed both historically

inaccurate<sup>347</sup> and logically clumsy.<sup>348</sup> It was unclear why “the educational benefits of diversity” was the only compelling interest satisfied by affirmative action. As one scholar asked the year after *Bakke* came down, “Can there be any validity to a conclusion like Justice Powell’s that a state may make race-conscious decisions regarding university admissions in order to enrich its academic dialogue, but not to counteract the distributive injustices of three centuries?”<sup>349</sup>

Unable to follow the logic that motivated his opinion, many have developed their own theories about what was truly behind Powell’s embrace of diversity. Conservative critics argued that although Powell pretended to be concerned with promoting diversity writ large, he merely cared about furthering *racial* diversity.<sup>350</sup> Throwing the “farm boy from Idaho” and the “culturally advantaged” into the mix with racial minorities was just an attempt to create a veneer of impartiality when, according to them, Powell was clearly partial to the goal of minority uplift. For these skeptics, the diversity rationale was largely pretense, a racial justice strategy masquerading as educational policy.<sup>351</sup> For example, calling Powell’s opinion “thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution,” then-professor Antonin Scalia accused Powell of engaging in deception while inviting universities to do the same.<sup>352</sup> Discussing the practical effects of Powell’s

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347. Ian Haney López argued that Powell’s rewriting of the history of American race relations is central to his *Bakke* analysis:

Powell wrote his opinion in a social context marked among whites by a revisionist version of American history in which they were nearly all Ellis Island immigrants or their children—and hence, not implicated in the racial oppression of minorities, but instead minorities themselves unfairly victimized by handouts to favored groups unwilling to follow the route to success blazed by other ethnics. Whatever the source, Powell’s reconfiguration of the United States from a country of dominant and subordinate races to a nation of minorities provided the foundation to his analysis in *Bakke*.

López, *A Nation of Minorities*, *supra* note 155, at 1045.

348. John Jeffries noted that, in the immediate aftermath of the decision, “[r]eviews of the intellectual craft of Powell’s opinion were largely negative and sometimes scathing.” See Jeffries, *supra* note 44, at 10.

349. Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21, 21 (1979).

350. Conservative writer John McWhorter, for instance, wrote of the *Bakke* decision, “The very term ‘diversity’ craftily overshoots the actual goal in question. Mormons, paraplegics, people from Alaska, lesbians, Ayn Randians, and poor whites exert little pull on the heartstrings of admissions committees so committed to making college campuses ‘look like America.’ The diversity that counts is brown-skinned minorities, especially African Americans.” John H. McWhorter, *The Campus Diversity Fraud*, CITY J. (Winter 2002), <https://www.city-journal.org/html/campus-diversity-fraud-12218.html> [<https://perma.cc/2N84-H8LA>].

351. That view still lives on today. Former dean of Yale Law School Anthony Kronman argues that Powell’s diversity rationale allows universities “to continue to honor their commitment to social justice but only by converting it into an educational ideal.” Anthony Kronman, *The Downside of Diversity*, WALL STREET J. (Aug. 2, 2019), [https://www.wsj.com/articles/the-downside-of-diversity-11564758009?reflink=share\\_mobilewebshare](https://www.wsj.com/articles/the-downside-of-diversity-11564758009?reflink=share_mobilewebshare) [<https://perma.cc/2B92-UG4C>].

352. Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U. L. Q. 147, 148 (1979).

opinion, Scalia wrote, “When it comes to choosing among these manifold diversities in God’s creation, will being a piano player, do you suppose, be regarded as more important than having yellow skin? Or will coming from Oshkosh, Wisconsin, be regarded as more important than having a Spanish surname?”<sup>353</sup> Answering his own questions, he continued, “[W]hen all is said and done, it is a safe bet that though there may not be a piano player in the class, there are going to be close to sixteen minority students. And I suspect that Justice Powell’s delightful compromise was drafted precisely to achieve these results.”<sup>354</sup>

Critical scholars on the left have imputed other motives to Powell. For them, the diversity rationale was motivated by a belief that exposure to racial diversity was beneficial to White students.<sup>355</sup> Under this reading of *Bakke*, Powell recognized that in an increasingly diverse country, White students stood to benefit from having access to the perspectives of students of color. This view is buttressed by the briefs that universities submitted in *Bakke* in support of UC Davis. In the Harvard brief that Powell appended to his opinion, university administrators wrote that minority students were valuable additions to the intellectual community because their perspectives would offer key supplements to White students’ educational experiences: “A primary value of liberal education should be exposure to new and provocative points of view, at a time in the student’s life when he or she has recently left home and is eager for new intellectual experiences.”<sup>356</sup> The university officials continued, “Minority students add such points of view, both in the classroom and in the larger university community.”<sup>357</sup> Or consider the brief that the American Association of Law Schools submitted in *Bakke*: “Precisely because race is so significant, prospective lawyers need knowledge of the backgrounds, views, attitudes, aspirations, and manners of the members of racial minorities.”<sup>358</sup> According to these arguments, students of color should be admitted because they help White law students become better lawyers. This mode of racial capitalism informed many of the articulations of the diversity rationale, including the Court’s own

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353. *Id.*

354. *Id.* Scholars have also made similar arguments about the pretense of the diversity rationale. Jed Rubenfeld, for instance, has argued that “the pro-affirmative action crowd needs to own up to the weakness of ‘diversity’ as a defense of most affirmative action plans. Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued. . . . The purpose of affirmative action is to bring into our nation’s institutions more blacks, more Hispanics, more Native Americans, more women, sometimes more Asians, and so on—period. Pleading diversity of backgrounds merely invites heightened scrutiny into the true objectives behind affirmative action.” Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997).

355. See Leong, *supra* note 29, at 2155, 2161–66 (describing how Powell’s *Bakke* decision considered non-Whiteness “as a source of value” for White students).

356. Brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae, *supra* note 175, at 12–13.

357. *Id.* at 13.

358. Brief Amicus Curiae for the Association of American Law Schools in Support of Petitioner at 51, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811).

interpretation when it revisited affirmative action twenty-five years later in *Grutter*. Therefore, it is unsurprising that many would assume that racial capitalism also informed Powell's embrace of "the educational benefits of diversity."

The history in this Article suggests that both conservative and critical scholars on the left have assigned too much weight to *racial* diversity when thinking about what motivated the Court's initial embrace of the educational benefits of diversity. If he were committed foremost to promoting racial diversity, Powell could have simply relied on UC Davis's brief, which framed the benefits of diversity squarely in terms of promoting cross-racial understanding. Yet, he took pains to stress that fostering "genuine diversity" would require more than merely considering an applicant's race.

Furthermore, this history suggests that to the extent that the diversity rationale was not simply about helping students of color, neither was it about helping White students writ large. Powell's embrace of diversity was about protecting a certain segment of "nonradical" White students from the corrupting influence of White radicals on the left who had a heavy hand in forming students' worldviews. But more than nonradical White students, it was the nation that ultimately stood to benefit from intellectual diversity on campus. An educational climate that was controlled by leftist radicals had produced, in his estimation, "mass hysteria," "an almost total flight from reason," and, ultimately, dangerous stirrings of revolution.<sup>359</sup> In diversity, Powell saw the promise of moderation, the embrace of conservative values, and, ultimately, the protection of the nation's future.

In this way, Powell's opinion was more upfront than many have believed. The Justice sincerely subscribed to the view that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas . . . ."<sup>360</sup> He was clear that he was not particularly sympathetic to the goal of increasing racial diversity. To use Derrick Bell's language of interest convergence, racial minorities were likely the fortuitous beneficiaries of a preexisting commitment to increase diversity on campuses.<sup>361</sup>

Still, the widespread suspicion that Powell's opinion was a judicial sleight of hand helped to erode public confidence in the diversity rationale. Even if one did not agree with affirmative action, a decision based on the anti-subordination values embodied in civil rights law would at least be seen as consistent with the aims of affirmative action. Or, on the other hand, if Powell had decided to vote against affirmative action on anti-classification grounds, that too would be a

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359. Powell, Attack on American Institutions, *supra* note 15, at 11.

360. *Bakke*, 438 U.S. at 312 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

361. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that the Court will only "accommodate[] the 'interest of blacks in achieving racial equality' when their interest 'converges with the interests of whites'").

comprehensible stance for proponents of affirmative action, even if they vigorously disagreed. However, Powell raised the eyebrows of parties on both sides by allowing for racial diversity only because it furthered intellectual pluralism on college campuses. He opened the door to both heightened scrutiny of and routine legal challenges to race-conscious admissions practices.

As a result of those challenges, the Powellian diversity rationale is not the same diversity rationale that the Court recognizes today.<sup>362</sup> While the importance of promoting intellectual exchange remains at the heart of the doctrine, the Court has subsequently updated the benefits of diversity. The Court has been unburdened by Powell's concerns about college radicalism and has more thoroughly reviewed the compelling nature of diversity. O'Connor infused the pedagogical benefits of intellectual pluralism in *Grutter*.<sup>363</sup> But she also incorporated diversity's furtherance of anti-subordination values<sup>364</sup> and free market capitalism.<sup>365</sup> The modern Court has stretched diversity to mean more

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362. Comparing O'Connor's conception of diversity to Powell's, Lani Guinier wrote:

[D]iversity has three important elements, which together justify the Court's deference to the law school's deployment of sponsored mobility to admit a critical mass of underrepresented students of color: diversity is pedagogical and dialogic; it helps challenge stereotypes; and it helps legitimate the democratic mission of higher education. Justice Powell's opinion in *Bakke* really endorsed only the first of these three benefits as a compelling interest, and his opinion generally has been read that way. Justice O'Connor's opinion in *Grutter*, by contrast, included encomiums to them all, which perhaps explains why she went out of her way to point out that the Court was not treating Justice Powell's opinion in *Bakke* as controlling precedent."

Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 175–76 (2003).

For a detailed explanation of how the diversity rationale has been expanded from *Bakke* to *Grutter*, see also Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130 (2013). Carbado noted that O'Connor's opinion in *Grutter* laid out eight benefits of diversity, including,

- Diversity to promote speech and the robust exchange of ideas
- Diversity to effectuate the inclusion of underrepresented students
- Diversity to change the character of the school
- Diversity to disrupt and negate racial stereotypes
- Diversity to facilitate racial cooperation and understanding
- Diversity to create pathways to leadership
- Diversity to ensure democratic legitimacy
- Diversity to prevent racial isolation and alienation.

*Id.* at 1145–46.

363. As O'Connor noted, “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (quoting App. to Pet. for Cert at 246a, *Bakke*, 539 U.S. 306, (No. 02-241)).

364. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1538 (2004) (noting that “*Grutter* transforms the diversity rationale in the course of adopting it, expanding the concept of diversity so that it explicitly embraces antisubordination values”).

365. Referencing an amicus brief submitted on behalf of major corporations, O'Connor noted that the educational benefits of diversity “are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

than Powell might ever have allowed. One might wonder whether, had it not been bound by precedent, the *Grutter* majority might have allowed for the remedial and corrective justifications for affirmative action rather than just merely expanding Powell's analysis.

One might also query, as a practical matter, why this history matters at all. If the Court has updated the diversity rationale and its endorsement is no longer tied to a single Justice, why does insight into Powell's thinking matter? To answer that question, it is important to consider how Powell's logic has traveled outside the bounds of constitutional law. While his words no longer singularly dictate the Court's stance on affirmative action, his opinion has had an outsized effect on determining the logic that governs modern efforts at racial integration in higher education and beyond.

Law does not simply establish rules. It also creates social meanings.<sup>366</sup> Powell's opinion in *Bakke* is perhaps the quintessential example of the power of legal doctrine to change public discourse and institutional logic. In writing an opinion that no one else joined, Powell's reasoning has helped to fundamentally reshape our society's understanding of the proper aims of affirmative action and, arguably, racial integration more generally.

With Powell's push, our society has arrived at what one scholar has called a "diversity consensus."<sup>367</sup> Diversity is not simply a new way to discuss integration. As sociologist Ellen Berrey writes, the turn to diversity is "the taming of the civil rights movement's provocative demands for integration, equality, and full citizenship."<sup>368</sup> By establishing diversity as the only interest sufficiently compelling to uphold affirmative action, Powell severed racial inclusion from the goal of remediation and the hope of equality. In the mid-1970s, affirmative action was widely understood to be a response to the Civil Rights Movement's call for racial equality.<sup>369</sup> The educational benefits of diversity, on the rare occasions they were mentioned, were simply bonus benefits of the policy. Today, however, the inverse is true: the institutional benefits of diversity have become the goal of racial inclusion, and racial equality—on the

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366. See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (exploring the expressive content of law and the social meaning of legal actions).

367. Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin and UW-Madison*, 32 L. & SOC. INQUIRY 985, 986 (2007).

368. ELLEN BERREY, THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE 9 (2015).

369. See, e.g., JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON (2005); Lisa M. Stulberg & Anthony S. Chen, *A Long View on "Diversity": A Century of American College Admissions Debates*, in DIVERSITY IN AMERICAN HIGHER EDUCATION: TOWARD A MORE COMPREHENSIVE APPROACH 51, 58 (Lisa M. Stulberg & Sharon Lawner Weinberg eds., 2011) (describing how universities' first efforts to implement affirmative action programs were "led by administrators who were inspired by the civil rights movement" and other watershed moments like the assassination of Reverend Martin Luther King, Jr., and the Watts riots).

rare occasions when it is mentioned—is counted merely as a bonus benefit. While Powell's opinion is not solely responsible for this shift, it has had a transformative effect on our shared cultural understanding.<sup>370</sup>

When *Bakke* was announced, the decision stood on shaky footing. The opinion seemed to be ahistorical, departing from precedent,<sup>371</sup> and lacking a moral core. As one scholar wrote, the opinion frequently seemed like “the intellectual equivalent of brute force” rather than the product of reasoned legal analysis.<sup>372</sup> Not only was the opinion endorsed by only one Justice but it was also grounded in flimsy evidence. In support of the bold assertion that the educational benefits of diversity constitute the *only* compelling interest satisfied by affirmative action, Powell quoted a single speculative assertion by a university president printed in an alumni magazine.<sup>373</sup> Realizing that diversity was now the only way to ensure the survival of affirmative action, universities, scholars, and institutions set out to back up Powell's assertion with social science evidence. They argued that the diversity benefits were real and compelling using interviews, regression analyses, and charts and graphs. Soon, a chorus of businesspeople, military officials, students, and faculty began singing in harmony the merits of diversity. In a legal climate of uncertainty and a broader political climate of racial retrenchment, those touting the remedial and corrective justifications for affirmative action were drowned out by the diversity choir. Even though some in the choir might have been more persuaded by the reparative aims, a commitment to the goal—integration—ultimately compelled many to join in singing the praises of diversity. In the process of shoring up diversity, the remedial articulations became little more than a whisper in the public dialogue.

Today, the promotion of a robust exchange of ideas has a hegemonic grip on racial integration efforts. When universities talk about the importance of racial diversity, they most commonly invoke a version of Powell's argument.

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370. See BERREY, *supra* note 368, at 30 (noting that “[t]he importance of [Powell's] opinion for the push for diversity in higher education and beyond cannot be overstated”).

371. In *Grutter*, Justice Thomas argued that diversity falls far short of the standard that the Court had historically used to establish what constitutes a compelling state interest. After surveying a line of strict scrutiny cases dating back to the 1940s, Thomas concluded that the Court had recognized as compelling state interests “only those measures the State must take to provide a bulwark against anarchy, or to prevent violence.” *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part). But this history shows that anarchy is exactly what worried Powell, and diversity was exactly the bulwark that he believed would guard against it. Intellectual pluralism would temper the “mass hysteria” happening on college campuses and thereby safeguard the nation against revolution. See Powell, Attack on American Institutions, *supra* note 15 at 10–11. Viewed in this light, *Bakke*'s diversity rationale could be read as in line with—rather than a departure from—the strict scrutiny standard.

372. See Jeffries, *supra* note 44, at 8.

373. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (citing Bowen, *supra* note 184, at 9).

The same is true for K-12 schools,<sup>374</sup> corporations,<sup>375</sup> and even the military.<sup>376</sup> While the legally recognized benefits of diversity have expanded to include decreasing racial isolation for minorities, opening pathways to leadership, and creating democratic legitimacy, these newer articulations have not had as much cultural traction as Powell's original explanation.

New insights into Powell's motivations likely will not—and perhaps should not—fundamentally alter the doctrine. After all, judges' opinions are regularly motivated by factors that are extrinsic to the case at hand. Indeed, this insight animated the legal realism movement for nearly a century. However, understanding what motivated the political commitments that structured Powell's opinion should provide an opportunity to reassess our cultural adherence to his logic.

In conducting that reassessment, there are no easy answers. Even if one has always believed that the diversity rationale is weak (and has become even more skeptical after reading this little-known history), there are strategic benefits in deploying Powell's argument. The belief that diversity benefits those in power has played a key role in keeping affirmative action—and the project of racial integration—alive, even if in a hobbled state.

But to the extent that Powell's opinion has kept affirmative action alive, it has also kept the policy in a state of perpetual precariousness. No matter how forcefully universities argue that they use affirmative action because of its

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374. As an example, consider the fight to desegregate New York City's schools. In response to a study that found New York City schools are the most segregated in the nation, a task force of civil rights activists and academics released a report in 2017 about the importance of integrating the city's public school system. As the task force reasoned, the primary importance of integration was not providing educational opportunity to the Black and Latinx children who were routinely routed to under resourced and underperforming schools. Instead, the key benefit was fostering the benefits of intellectual pluralism that accompany student body diversity. The report noted, "all students benefit when they can learn from classmates who have different life experiences to share, evidenced by higher academic outcomes, stronger critical thinking skills, and increased creativity." See Valerie Strauss, *New York City Should Set Ambitious Diversity Goals for Public Schools: New Report by Panel Commissioned by Mayor*, WASH. POST, Feb. 12, 2019, <https://www.washingtonpost.com/education/2019/02/12/new-york-city-should-set-ambitious-diversity-goals-public-schools-new-report-by-panel-commissioned-by-mayor/> [https://perma.cc/U2LV-MLHX]. Further mimicking Powell's language on how diversity prepares future leaders to function in society, the task force also noted that "all students benefit from experiences that prepare them for an increasingly diverse society." *Id.*

375. Consider, for example, how Google frames its efforts to build a racially inclusive workforce. On its website, the megacorporation affirms that it "is committed to creating a diverse and inclusive workforce." See *Diversity*, GOOGLE, <https://diversity.google> [https://perma.cc/K7XD-YZPE]. And why is it committed to diversity? Because of the benefits that emerge from a robust exchange of ideas: "We endeavor to build products that work for everyone by including perspectives from backgrounds that vary by race, ethnicity, social background, religion, gender, age, disability, sexual orientation, veteran status, and national origin." *Id.*

376. Military officials argue that "[d]iversity and inclusion are strategic imperatives in the D[epartment of Defense] and critical to mission readiness." DEP'T OF DEF. OFFICE OF DIVERSITY MGMT. & EQUAL OPPORTUNITY., DOD DIVERSITY AND INCLUSION 2013 SUMMARY REPORT 1 (2013), <https://diversity.defense.gov/Portals/51/Documents/ODMEO%20Diversity%20and%20Inclusion%20Summary%20Report%20FINAL.pdf> [https://perma.cc/TWS2-WFLD].

educational benefits, many people simply do not buy it. If the real goal of affirmative action is ensuring that students are exposed to a diversity of viewpoints, skeptics might ask, why can't professors just assign texts that represent a range of perspectives on a given issue? Why assume that students of color have different thoughts just because they have different skin tones or hair textures?<sup>377</sup> Or is it, as Justice Clarence Thomas once wrote, that universities are more interested in cultivating certain "racial aesthetics" than they are in promoting a robust exchange of ideas?<sup>378</sup>

Powell's opinion left affirmative action proponents struggling to answer questions that would once have been considered beside the point. In *Fisher*, when the counsel for the University of Texas began articulating the well-rehearsed goals of diversity, Chief Justice John Roberts—a critic of affirmative action—expressed his skepticism in the form of a question: "What unique perspective does a minority student bring to a physics class? . . . I'm just wondering, what the benefits of diversity are in that situation?"<sup>379</sup> The real answer is that the point of affirmative action is to promote racial equality. Counsel could have never articulated that in this legal environment even though it would have been regarded as common sense forty years earlier. There may indeed be benefits of having racial diversity in a hard science class, but even if there were not, there is benefit in marginalized groups having access to selective universities, which, as the Court has recognized, are key pathways to leadership.

The current political climate might provide an opportunity for more complete conversations about what ends affirmative action should rightly serve. The commitment to colorblindness that characterized the liberal stance toward race for much of the late twentieth and early twenty-first centuries is giving way to an increasing awareness on the political left of the importance of race consciousness. With a better understanding of its origins, we might more fully appreciate the limitations of the diversity rationale and resuscitate some of the justifications that Powell dismissed in his singular embrace of diversity.

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377. Arguments that dismiss the importance of race to a biological trait have also been articulated by federal judges. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir. 1996) ("The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.").

378. *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part and dissenting in part).

379. See Libby Nelson, *Chief Justice Roberts Asked Why Diversity Matters in a Physics Class. Here's an Answer*, VOX.COM (Dec. 10, 2015), <https://www.vox.com/policy-and-politics/2015/12/10/9886088/roberts-affirmative-action-physics> [https://perma.cc/MN74-3K23] (reporting on oral arguments in *Fisher v. Univ. of Tex.* at Austin, 570 U.S. 297, 308 (2013)).