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A LAWYER LOOKS AT CIVIL DISOBEDIENCE:
HOW LEWIS F. POWELL, JR. REFRAMED THE CIVIL RIGHTS REVOLUTION

ANDERS WALKER ♦

ABSTRACT

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

♦ Professor, Saint Louis University Law School, Yale University PhD 2003, Duke University JD 1998, Wesleyan University BA 1994. I would like to thank archivist John Jacob at the Lewis F. Powell, Jr. Archives at Washington & Lee University School of Law for invaluable assistance on this project. I would also like to thank Erik Luna, Victoria A. Shannon, Samuel Calhoun, Christopher M. Bruner, Brant J. Hellwig, Suzette Malveux, Margaret Howard, Margaret Hu, Timothy C. McDonnell and the faculty at Washington & Lee University School of Law for their comments, suggestions, and critiques; as well as Melissa Hart, Ellen Katz, Adam Winkler, Christopher W. Schmidt, Tom Romero, Mary Ziegler, Ann Southworth, Dennis Parker, and the participants at the 2014 Rothgerber Conference at the University of Colorado School of Law for their comments on the piece.

INTRODUCTION

On a brisk spring day in April 1966, Richmond attorney Lewis F. Powell, Jr. mounted a measured, thoughtful assault on the civil rights movement.¹ Standing before an attentive audience at his alma mater, the Washington & Lee University School of Law, Powell unloaded a steady forty-five minute barrage against the movement's most visible leader, Martin Luther King, Jr., for embracing "reckless" tactics, invoking "irrelevant" arguments, and spreading the "heresy" of civil disobedience.² According to Powell, civil disobedience was "fundamentally inconsistent with the rule of law," a tactic that anyone "trained in logic" should have "rallied promptly to denounce," not least because it threatened "the foundations of our system of government" and jeopardized the very "human freedoms [that government] strives to protect."³⁴

Powell even mocked King's *Letter from Birmingham Jail*, a Pauline epistle that the black leader had penned in an Alabama cell in 1963, part of a string of protest actions that had helped earn the minister international acclaim, including a Nobel Peace Prize in 1964 for declaring that individuals had a "moral responsibility to disobey unjust laws," and that unjust laws were those that did not square with the "law of God."⁵ Powell found such a claim absurd. "Whatever may be said for the idealism of a view that permits each man to apply his own predilection as to a higher natural or moral law," he argued, "it affords no basis for a system of organized society."⁶ To him, King's argument was "simply a doctrine of anarchy," and no one who was "intellectually honest" could reasonably claim its use was warranted in the United States, a clear jab at the integrity of the black leader.⁷

¹ Powell delivered his speech on April 16, 1966, a day that registered a high of 60 degrees Fahrenheit in nearby Richmond, see "Weather History for Richmond, VA," Week of April 10, 1966 through April 16, 1966, retrieved at:

http://www.wunderground.com/history/airport/KRIC/1966/4/16/WeeklyHistory.html?req_city=NA&req_state=NA&req_statename=NA

² Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 208, 224 n. 66 (1966).

³ Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205 (1966).

⁴ Whites who resorted to violence and "intimidation" were not representative of the South, argued Powell, but rather a "small and deprived minority." Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 207 (1966).

⁵ Martin Luther King, Jr., "Letter from Birmingham Jail," April 16, 1963, *reprinted in* MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* (1964, New York: Signet, 2000). Glenn Eskew refers to the letter as a "Pauline epistle" in GLENN ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* 244 (1997).

⁶ Lewis F. Powell, Jr., "A Lawyer Looks at Civil Disobedience," 23 WASH. & LEE L. REV. 210 (1966).

⁷ Lewis F. Powell, Jr., "A Lawyer Looks at Civil Disobedience," 23 WASH. & LEE L. REV. 208 (1966). For him, the letter "met the needs of intellectuals and theologians for a moral and philosophical justification of conduct which, by all previous standards, was often lawless and

Powell's effort to impugn King's honesty at Washington & Lee was no isolated rant. He mounted similar attacks on the black leader again and again through the 1960s, in speeches, bar journal essays and law review articles, even using his position as President of the American Bar Association from 1964 to 1965 to criticize the civil rights movement.⁸ Yet, Powell's critiques faded from view once he joined the Supreme Court in 1971, most experts turning to his judicial opinions, which have since been remembered as moderate compromises between liberal and conservative wings of the Court.⁹ Meanwhile, historians who have delved earlier into Powell's career have tended also to ignore his anti-movement diatribes, finding evidence instead of a latent sympathy for civil rights, most notably in his public rejection of massive resistance to *Brown v. Board of Education* in Virginia in the 1950s.¹⁰

However, Powell's critiques of King and the movement in the 1960s are worth revisiting, not least because they provide insight into his ideas about black rights, racial justice, and the appropriate relationship between law and social equality, all ideas that went on to shape some of his most important opinions in the 1970s and 80s. Though remembered as a moderate, Powell displayed little sympathy for the black struggle in the 1960s, concluding instead that *Brown's* mandate had been met with the dismantling of overt segregation, and that the quest for racial reform had, by the close of the 1960s, reached its logical conclusion. This view reflected a larger sense on Powell's part that the Constitution was not a vehicle for reform so much as a framework for pluralism, a guarantor of procedural fairness, and a bulwark against socialism; a doctrine that Powell felt was emerging increasingly, and alarmingly, in the words and writings of Dr. King. While Martin Luther King's early call for the eradication of overt Jim Crow laws in the South in the 1950s struck Powell as an acceptable, if not completely copacetic, constitutional position; King's shift from overt segregation to more aggressive demands that the federal government end poverty, abolish racial inequality and provide "compensatory" justice to blacks in the 1960s were

indefensible." Only "reckless extremists" would endorse such a position. Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 206 (1966).

⁸ Lewis F. Powell, Jr., *Respect for Law and Due Process – the Foundation of a Free Society*, 18 FLORIDA L. REV. 1 (1965); Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 208 (1966); Lewis F. Powell, Jr., *Civil Disobedience: Prelude to Revolution?* 40 N.Y. ST. B.J. 172 (1968).

⁹ J. Harvie Wilkinson, III, *Lewis F. Powell, Jr. – A Personal View* 65 WASH. & LEE L. REV. 3 (2008); Oliver W. Hill, *Tribute to Lewis F. Powell, Jr.* 49 WASH. & LEE L. REV. 11 (1992); Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?* 67 CAL. L. REV. 23 (1979).

¹⁰ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 145 (1994). Powell tried to distance himself from his early critiques of King, arguing in a note to John Jeffries that he was primarily upset with King's opposition to the Vietnam War, a position that did not fully account for the fact that Powell criticized King long before the civil rights leader came out publicly against Vietnam. See, e.g. Lewis F. Powell, Jr. to Lewis Powell III and John Jeffries, June 30, 1981, on file with the Lewis F. Powell, Jr. Archives, Washington and Lee University School of Law, Lexington, Virginia (noting that "I've kept these papers in the event – after my death – there is criticism of what I said about King after he became a Vietnam activist, contributing to disorders").

not, as Powell saw it, legitimate constitutional matters.¹¹ Social inequality, believed the Virginia native, constituted a basic reality of life in the United States, even contributing to what he termed America's "pluralistic society," a society marked by racial, ethnic, religious, and economic "diversity" – a diversity of experience and achievement that the Constitution was bound not to change but to protect.¹²

Powell's faith in diversity and doubts about equality provide particularly relevant insight into one of the single most important questions confronting litigation in the school arena today, namely the continued constitutionality of race in university admissions.¹³ To Powell, who sanctioned the consideration of color by admissions committees, diversity warranted constitutional protection on its own terms, independent of affirmative action or other "compensatory" schemes, precisely because it was a defining characteristic of American civilization that distinguished the United States from the Soviet Union.¹⁴ Though his negative views of the movement reeked of Confederate mothballs, Powell's vision of diversity and pluralism as bedrock values that distinguished the United States from Russia provides an intriguing, perhaps even useful frame for assessing the continued relevance of diversity in university admissions today.¹⁵ Courts have tended to miss this, presuming instead that diversity constitutes little more than a guise for affirmative action programs aimed at addressing racial discrimination, an argument popularized by Robert Dahl in the 1980s.¹⁶ However, Powell's

¹¹ MARTIN LUTHER KING JR., *Letter from Birmingham Jail*, reprinted in *WHY WE CAN'T WAIT* 124 (1964).

¹² For work on the rhetoric of equality, see DOUGLAS RAE ET AL., *EQUALITIES* (1981); PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF 'EQUALITY' IN MORAL AND LEGAL DISCOURSE* (1990). "A distinctive feature of America's tradition has been respect for diversity," wrote Powell in 1982 in an opinion defending sex segregation in schools, "[t]his has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system." (*Mississippi University for Women v. Hogan*, 458 U.S. 745 (1982) (Powell, J., concurring)). Powell further elaborated on the importance of diversity in *Bob Jones v. United States*, where he noted that "[e]ven more troubling to me is the element of conformity that appears to inform the Court's analysis." Extolling the "important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints." *Bob Jones v. United States*, 461 U.S. 609 (1983) Quoting Justice Brennan, Powell noted that "private, nonprofit groups receive tax exemptions because 'each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.'" *Bob Jones v. United States*, 461 U.S. 609 (1983) *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), 689, 90 S.Ct. 1421 (Brennan, J. concurring).

¹³ Tony Mauro, *Ex-Wiley Rein Lawyers form Appellate Boutique*, NAT'L LAW JOURNAL, retrieved on 10/20/2014 at <http://www.nationallawjournal.com/supremecourtbrief/id=1202672649620/ExWiley-Rein-Lawyers-Form-Appellate-Boutique?cmp>.

¹⁴ Martin Luther King, Jr. referred to the need for "compensatory" justice in MARTIN LUTHER KING JR., *Letter from Birmingham Jail*, reprinted in *WHY WE CAN'T WAIT* 124 (1964).

¹⁵ Powell's take on the Cold War differed starkly from the liberal notion that integration was part of what Mary L. Dudziak terms a "Cold War imperative." See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

¹⁶ ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* (1982); Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986) (arguing that the Supreme Court has tended to view diversity programs as "penance for the specific sins of racism a government, union, or employer has committed in the

vision was different. He discounted the need for affirmative action, arguing that African Americans had not suffered any more discrimination than whites and did not deserve special dispensation by the state. However, he conceded that blacks might nevertheless bring a unique perspective to the classroom, as might certain privileged whites, both of whom could have low scores forgiven to achieve diversity.

To further explain Powell's views on diversity, race, and equality, this essay will proceed in two parts. Part I will focus on Powell's critique of the civil rights movement in the 1960s, emphasizing those aspects of his argument that explicitly addressed civil disobedience. Part II will then discuss the manner in which Powell furthered his vision as a Supreme Court Justice, elevating his own version of diversity to the Constitutional plane.¹⁷

I. POWELL CRITIQUES THE MOVEMENT

For almost a decade following *Brown v. Board of Education*, Lewis F. Powell, Jr. remained "steadfastly silent" about the civil rights movement.¹⁸ He assured locals in Richmond, Virginia, for example, that he would not openly defy the Supreme Court's ruling in *Brown*, nor would he close public schools.¹⁹ Of course, he also promised that he would do all that he could – within legal bounds – to preserve segregation in the city, a task he assumed as head of Richmond's School Board.²⁰ For example, he sanctioned elaborate "placement" schemes that

past"); Paul D. Carrington, *Diversity!* 1992 UTAH L. REV. 1105 (1992) (noting the adoption of diversity rhetoric "to compensate members of groups said to be disadvantaged by historic injustices to their ancestors"); Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1848 (1996) (observing that diversity "has become the preferred euphemism for the déclassé phrase 'affirmative action'"); Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573 (2000) (discussing the Fifth Circuit's rejection of Powell's definition of diversity in lieu of one rooted in affirmative action in *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996)); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997) (arguing that assessments of diversity should incorporate an awareness of past discrimination); Mark H. Grunewald, *Quotas, Politics, and Judicial Statesmanship: The Civil Rights Act of 1991 and Powell's Bakke*, 49 WASH. & LEE L. REV. 53 (1992) (describing Powell's *Bakke* opinion as an act of judicial statesmanship); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990) (endorsing a case for affirmative action rooted in challenging white supremacy and racial hierarchy). *But see*, Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003) (criticizing Powell's diversity rationale for thwarting the cause of racial justice).

¹⁷ EUGENE D. GENOVESE, *THE SOUTHERN TRADITION: THE ACHIEVEMENT AND LIMITATIONS OF AN AMERICAN CONSERVATISM* (1994). *See also* Samuel W. Calhoun, *Justice Lewis F. Powell's Baffling Vote in Roe v. Wade*, 71 WASH. & LEE L. REV. (2014) (arguing that Powell departed from strict construction in the abortion context).

¹⁸ JEFFRIES, POWELL, 234.

¹⁹ Lewis F. Powell, Jr. "Statement on Behalf of the School Board Supporting Construction of the New High Schools Without Delay," May 6, 1959, 8, Folder: Richmond School Board, 1950-1961, Box 94, Lewis F. Powell, Jr. Archives, Washington & Lee University Law School, Lexington, Virginia.

²⁰ Lewis F. Powell, Jr. "Statement on Behalf of the School Board Supporting Construction of the New High Schools Without Delay," May 6, 1959, 8, Folder: Richmond School Board, 1950-1961,

assigned students to schools based on factors that were only obliquely related to race, meanwhile constructing new facilities to alleviate overcrowding.²¹ “[I]t is the considered opinion of the Board,” explained Powell in May 1959, “that the new schools would appreciably improve both the short and long range prospect for minimizing the impact of integration.”²² Though Powell conceded that at least some integration would be necessary to survive Supreme Court review, he tended to frame the admission of small numbers of black students to predominantly white schools as tactical efforts aimed at preserving rather than transforming the status quo. We foresee no substantial integration in the elementary schools in Richmond,” assured Powell in 1959, noting that ample facilities existed for a continuation of dual systems, meanwhile advocating the construction of new facilities to accommodate black students at the high school level.²³

Even as some wondered whether Powell might secretly sympathize with the black plight, his actions indicated otherwise. By the time he stepped down from his position as chair of Richmond’s school board in 1960, for example, he had helped steer Richmond away from massive resistance, rewritten local policy to comply with the Supreme Court, and preserved segregation virtually intact: only 2 of 23,000 black children in Richmond attending school with whites.²⁴ While even such miniscule integration angered hardcore segregationists, Powell cautioned massive resisters to accept token integration lest the federal government come knocking.²⁵ More frustrated were black leaders like Richmond attorney Henry L. Marsh III, who claimed that Powell had “simply been [more] ingenious and sophisticated” than his more radical white counterparts in preserving Jim Crow.²⁶

Even more frustrated were young blacks, including college students in Richmond who gave up on legal process late in the winter of 1960, entering whites-only eating establishments and demanding to be served.²⁷ Powell remained silent on such protests, even as they escalated to integrated bus rides

Box 94, Lewis F. Powell, Jr. Archives, Washington & Lee University Law School, Lexington, Virginia.

²¹ Lewis F. Powell, Jr. “Statement on Behalf of the School Board Supporting Construction of the New High Schools Without Delay,” May 6, 1959, 8, Folder: Richmond School Board, 1950-1961, Box 94, Lewis F. Powell, Jr. Archives, Washington & Lee University Law School, Lexington, Virginia.

²² Lewis F. Powell, Jr. “Statement on Behalf of the School Board Supporting Construction of the New High Schools Without Delay,” May 6, 1959, 8, Folder: Richmond School Board, 1950-1961, Box 94, Lewis F. Powell, Jr. Archives, Washington & Lee University Law School, Lexington, Virginia.

²³ Lewis F. Powell, Jr. “Statement on Behalf of the School Board Supporting Construction of the New High Schools Without Delay,” May 6, 1959, 8, Folder: Richmond School Board, 1950-1961, Box 94, Lewis F. Powell, Jr. Archives, Washington & Lee University Law School, Lexington, Virginia.

²⁴ JEFFRIES, POWELL, 234.

²⁵ Lewis F. Powell, Jr. “Statement on Behalf of the School Board Supporting Construction of the New High Schools Without Delay,” May 6, 1959, 8, Folder: Richmond School Board, 1950-1961, Box 94, Lewis F. Powell, Jr. Archives, Washington & Lee University Law School, Lexington, Virginia.

²⁶ JEFFRIES, POWELL, 234.

²⁷ James Jackson Kilpatrick, *The Sitdowns*, THE RICHMOND NEWS LEADER, Feb. 22, 1960.

through Richmond in 1961, to demonstrations in Albany, Georgia in 1962 and, finally, in 1963, to a massive campaign of civil disobedience in Birmingham, Alabama.²⁸ During that campaign, local authorities arrested black minister Martin Luther King, Jr. and locked him in the city jail, prompting him to write an extended letter justifying the use of civil disobedience to effect legal reform.²⁹

King's *Letter from Birmingham Jail* garnered almost immediate national attention when it was published in the *Atlantic Monthly* in August 1963 and again in a larger book by King entitled *Why We Can't Wait* in 1964.³⁰ The letter provided a sustained defense of civil disobedience, arguing that "one has a moral responsibility to disobey unjust laws," and that unjust laws were those that were "out of harmony" with "the law of God."³¹ The issue had arisen when a local judge issued a temporary injunction forbidding "marches," "picketing," and "sit-ins" in Birmingham, effectively thwarting the civil rights movement's campaign there.³² Long respectful of legal process, King and others decided to defy the court, thereby embarking on a "revolutionary shift" in movement tactics, away from efforts to uphold the "judicial system" and towards concerted – albeit peaceful – law-breaking.³³ Disappointed with this move, a group of local ministers wrote a letter criticizing King's tactics, arguing that his radical approach was actually thwarting interracial solutions in the region, a critique that King dismissed out of hand.³⁴ To the black leader, moderates who counseled adherence to legal process were increasingly becoming a roadblock to justice; prompting him to unleash a scathing indictment not just of the Birmingham ministers but white moderates generally in the South. "I must confess," lamented King, "that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Council or the Ku Klux Klanner, but the white moderate, who is more devoted to 'order' than to justice ... who constantly says: 'I agree with you in the goal you seek, but I cannot agree with your methods of direct action.'"³⁵

It was a blistering indictment, but arguably one that King had to make. If, for example, he had adhered to legal process in 1963, Birmingham would never

²⁸ See e.g. CLAYBORNE CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S* (1981); RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* 114 (2006); DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN LEADERSHIP CONFERENCE* (1986).

²⁹ JONATHAN RIEDER, *GOSPEL OF FREEDOM: MARTIN LUTHER KING, JR.'S LETTER FROM BIRMINGHAM JAIL AND THE STRUGGLE THAT CHANGED A NATION* (2014).

³⁰ Martin Luther King, Jr., *The Negro is Your Brother*, 212 *THE ATLANTIC* 78-84 (Aug. 1963); MARTIN LUTHER KING, JR. *WHY WE CAN'T WAIT* (1964).

³¹ MARTIN LUTHER KING JR., *Letter from Birmingham Jail*, reprinted in *WHY WE CAN'T WAIT* (1964).

³² ESKEW, *BIRMINGHAM*, 237.

³³ ESKEW, *BIRMINGHAM*, 240 (noting that "a deliberate violation of the law signaled a revolutionary shift for King, who had always subscribed to the NAACP's view of respecting the judicial system").

³⁴ MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* (1958)

³⁵ MARTIN LUTHER KING JR., *Letter from Birmingham Jail*, reprinted in *WHY WE CAN'T WAIT* (1964).

have drawn the national attention, or support for federal legislation, that it ultimately did.³⁶ Neither would the movement's next major campaign, in the forgettable hamlet of Selma, Alabama; where King would also choose to violate an injunction, this time a federal one.³⁷ King's recurring disobedience contributed directly to federal action, both the Civil Rights Act of 1964 and the Voting Rights Act of 1965, helping to explain his contempt for moderate pleas that the movement adhere to legal process.³⁸

However, if King hoped that his attack on legal process would lead southerners like Powell to side with the movement, he was wrong. Powell appeared particularly stung by King's jabs – including the one against moderates like himself – and began to reference *Letter from Birmingham Jail* in a series of increasingly hostile speeches against King and the movement. His first was at a Law Day address in Columbia, South Carolina on May 1, 1964. Noting recent “disobedience of court orders,” “sit-ins,” “demonstrations,” and “other racial disorders by adults,” Powell announced to an audience of attorneys that, “it is not surprising that crime and delinquency by children within schools appear to be increasing sharply.”³⁹ “Unless our cherished system of liberty under law is to become a mockery,” he continued, “the courts – rather than the streets – must be the arbiters of our differences.”⁴⁰

Powell's aversion to the streets revealed an awareness of the manner in which civil disobedience flaunted legal process. However, his allusion to this topic on May 1 was important for another, arguably deeper reason; for the goal of “Law Day,” as Powell explained it, “was to dramatize the contrast with Communism's May Day.”⁴¹ For Powell, the occasion commemorated the stark contrast between America's “freedom under law” and the “repressive system of Communism” a system that, to his mind, placed redistributive ends above procedural means.⁴²

³⁶ GLENN ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* (1997); CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* (2014); TODD S. PURDUM, *AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964* (2014).

³⁷ JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT FOR CIVIL RIGHTS* 238 (1993).

³⁸ MARTIN LUTHER KING JR., *Letter from Birmingham Jail*, reprinted in *WHY WE CAN'T WAIT* (1964).

³⁹ Lewis F. Powell, Jr., “Law Day: A Time for Rededication,” address before South Carolina Bar Association, Columbia, South Carolina, May 1, 1964, File: Law Day, Box 28, LPPP, 5.

⁴⁰ Lewis F. Powell, Jr., “Law Day: A Time for Rededication,” address before South Carolina Bar Association, Columbia, South Carolina, May 1, 1964, File: Law Day, Box 28, Washington & Lee University School of Law, Lexington, Virginia, 5.

⁴¹ Lewis F. Powell, Jr., “Law Day: A Time for Rededication,” address before South Carolina Bar Association, Columbia, South Carolina, May 1, 1964, File: Law Day, Box 28, Washington & Lee University School of Law, Lexington, Virginia, 8.

⁴² Lewis F. Powell, Jr., “Law Day: A Time for Rededication,” address before South Carolina Bar Association, Columbia, South Carolina, May 1, 1964, File: Law Day, Box 28, Washington & Lee University School of Law, Lexington, Virginia, 5.

Powell's interest in Communism stemmed at least as far back as 1958, when he visited the Soviet Union with a delegation from the ABA.⁴³ During this trip, he became impressed by the strides that the Soviets had made in education, even as he recoiled at the restrictions imposed by the Soviet state on its people.⁴⁴ "The entire educational system" in the U.S.S.R., noted Powell, "is planned and operated with the purpose of thoroughly indoctrinating every child with Marxism; the theme that the Marxist always triumphs is an ever present one, and the inevitability and 'justness' of the 'class struggle' is taught both directly and indirectly."⁴⁵ Powell found Soviet schools to be direct evidence that "Communism requires a totalitarian dictatorship," where the "instrument of power is the small minority" who impose "its will upon the masses."⁴⁶

Powell drew a direct link between Soviet totalitarianism and civil disobedience at a meeting of the American Bar Association in Texas in the summer of 1965, just as the Voting Rights Act was being put into effect.⁴⁷ He began by lamenting "the growing lack of respect for law and for due process" in America, noting that one of the primary causes of civil unrest in the nation was "the growing belief that laws and court orders are to be obeyed, constitutional safeguards honored, and the rights of others respected only so long as they do not interfere with the attainment of goals believed to be just."⁴⁸ To illustrate, he quoted one of his predecessors, Supreme Court Justice Hugo Black, who held that "[t]hose who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket the streets whenever they choose in order to advance what they think to be a just and noble end, do no service to those minority groups, their cause or their country."⁴⁹ Black wrote his opinion in 1965 in response to civil rights demonstrations in Baton Rouge; also engaging questions that appeared to stem directly from King's endorsement of civil disobedience in 1963. However, Powell went farther than Black in condemning King, arguing that his *Letter from Birmingham Jail* invited totalitarian rule. "The fundamental difference between a totalitarian society, and one in which the individual is afforded freedom of conscience and protected from

⁴³ Lewis F. Powell, Jr. "Soviet Education: Means Towards World Domination," (Report on Trip to Soviet Union, July-August 1958) Folder: A Means Toward World Domination, Box 27: Speeches & Writings, 1930-1962, Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law, Lexington, Virginia.

⁴⁴ Lewis F. Powell, Jr. "Soviet Education: Means Towards World Domination," (Report on Trip to Soviet Union, July-August 1958) Folder: A Means Toward World Domination, Box 27: Speeches & Writings, 1930-1962, Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law, Lexington, Virginia.

⁴⁵ Lewis F. Powell, Jr. "Soviet Education: Means Towards World Domination," (Report on Trip to Soviet Union, July-August 1958) Folder: A Means Toward World Domination, Box 27: Speeches & Writings, 1930-1962, Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law, Lexington, Virginia.

⁴⁶ Lewis F. Powell, Jr., "Notes on Panel Program," National School Boards Association Meeting, April 26, 1960, Chicago, Illinois, F: Richmond School Board, 1950-1961, Box 94, Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law, Lexington, Virginia.

⁴⁷ Lewis F. Powell, Jr., *State of Law and Order*, 28 TEX. B.J. 587 (1965).

⁴⁸ Lewis F. Powell, Jr., *State of Law and Order*, 28 TEX. B.J. 587 (1965).

⁴⁹ Lewis F. Powell, Jr., *State of Law and Order*, 28 TEX. B.J. 588 (1965) quoting *Cox v. Louisiana*, 379 U.S. 536, 584 (1965) (Black J., concurring in part and dissenting in part).

arbitrary force,” explained Powell, “is that in the latter ‘means’ are of the essence. Under our system, the ‘end,’ however worthy, should never justify resort to unlawful means.”⁵⁰

It was an almost complete inversion of King’s position, which was that a narrow-minded focus on lawful means almost certainly foreclosed the pursuit of meaningful ends: in this case the eradication of racial inequality in the United States. However, Powell claimed an even higher end than King, declaring the fate of American freedom itself to be in the balance; whether racial inequities were addressed or not. This was not simply an argument for gradualism, as scholars have tended to maintain, but the postulation of a very different set of values than the ones King set forth, values that might be said to have placed the preservation of an ordered liberty over the achievement of substantive, or distributive equality. “Our freedoms can only survive,” concluded Powell, “in an ordered society, where there is genuine respect in action as well as words, for law and orderly processes.”⁵¹ Powell’s faith in processes reflected a larger sense that procedural justice alone was important, a concept that respected the dignity of individuals by including them in the political process, whether or not that process resulted in egalitarian results.⁵²

Powell continued his critique of King in a subsequent talk delivered at Washington & Lee University Law School in April 1966. During that talk, he raised the same issues that he had in Texas, but focused more directly on King’s *Letter from Birmingham Jail*, even citing it to show how King should be criticized for spreading the “heresy” of civil disobedience.⁵³ “Articulated by Martin Luther King in his much publicized *Letter from a Birmingham Jail*,” argued Powell, civil disobedience “quickly gained nationwide attention and support outside of the South,” in part by invoking the concept of a “higher law” that was superior to written law.⁵⁴ Precisely such a law, however, had been invoked by southern segregationists to justify their resistance to *Brown*, Powell maintained. “If the decision to break the law really turns on individual conscience,” noted Powell, “it is hard to see in law how Dr. King is any better off than former Governor Ross Barnett of Mississippi, who also believed deeply in his cause and was willing to go to jail.”⁵⁵ To illustrate, he cited the case of “James Farmer and other CORE

⁵⁰ Lewis F. Powell, Jr., *State of Law and Order*, 28 TEX. B.J. 590 (1965).

⁵¹ Lewis F. Powell, Jr., *State of Law and Order*, 28 TEX. B.J. 589 (1965).

⁵² Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (asserting that “procedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding norms.”); See also John P. Beal, *Making Connections: Procedural Law and Substantive Justice*, 54 JURIST 113-114 (1994).

⁵³ Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 206 (1966).

⁵⁴ Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 206 (1966).

⁵⁵ Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 210 (1966), quoting Burke Marshall, *The Protest Movement and the Law*, 51 VIRGINIA L. REV. 785 (1965).

workers” who “were arrested for lie-downs at the World’s Fair in New York.”⁵⁶ While Farmer and company claimed that they “were simply using disobedience techniques” to dramatize “the contrast between the [Fair’s] glittering world of fantasy and the real world of brutality, bigotry and poverty,”⁵⁷ Powell displayed little sympathy. “If valid breach of peace and trespass laws may be violated at will to protest these age old infirmities of mankind,” he maintained, “rather than seeking to ameliorate them by lawful and democratic processes, there would soon be little left of law and order.”⁵⁸ “Even the ebullient Dr. King,” mocked Powell, “has recognized that his theory is not ‘legal.’”⁵⁹

Powell unleashed his final salvo on King in 1968, just before the black leader was gunned down on a motel balcony in Memphis.⁶⁰ He began by lamenting the explosion of riots in American cities, including Watts in 1965, Cleveland in 1966, and Detroit in 1967. For Powell, ’67 was “a year of crises in which the symptoms of incipient revolution are all too evident.”⁶¹ The “revolution” as Powell explained it, was being stoked by “militant leaders” like Stokely Carmichael and H. Rap Brown, a Louisiana native and graduate of Southern University who also happened to endorse armed resistance to white oppression.⁶² Brown became notorious for condoning inner city riots with slogans like “burn this town down” and “stop singing and start swinging.”⁶³ Powell had little patience for such rhetoric, arguing that what had begun as a controlled, middle class campaign to dismantle formal segregation had devolved into a much less organized call for violent revolt. To Powell, Rap Brown and Carmichael were part of a logical, if frightening progression, heirs to the early, seemingly innocuous theories espoused by Martin Luther King, Jr.⁶⁴

As Powell saw it, King was not a moral leader so much as a “prophet of civil disobedience” guilty of planting seeds of unrest by advancing specious theories, among them the notion that some laws were “just” others “unjust,” and

⁵⁶Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 213 (1966).

⁵⁷Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 216 (1966).

⁵⁸Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 216 (1966).

⁵⁹Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 215 (1966).

⁶⁰Lewis F. Powell, Jr., *Civil Disobedience: Prelude to Revolution?* 40 N.Y. ST. B.J. 172, 173 (1968).

⁶¹Lewis F. Powell, Jr., *Civil Disobedience: Prelude to Revolution?* 40 N.Y. ST. B.J. 172, 173 (1968).

⁶²*Black Militant: Focus on Rap Brown*, NEW YORK TIMES, Aug. 13, 1967, 153.

⁶³Gene Roberts, “The New S.N.C.C.: Weaker, Fierier,” *New York Times*, Aug. 20, 1967, 45; “Rap Brown Calls Nation On ‘Eve’ of a Negro Revolt,” *New York Times*, Sep. 11, 1967, 76.

⁶⁴A shadow of its former self, SNCC had lost most of its members by the time Powell addressed the New York Bar, some estimated that the group was down from 300 permanent staff to 80; and running out of money. Brown had joined Carmichael in taking the group down a radically different path from its initial commitment to nonviolence and political process (voter registration) turning instead to calls like Brown’s and stunned crowds with calls for an armed uprising against whites. Gene Roberts, “The New S.N.C.C.: Weaker, Fierier,” *New York Times*, Aug. 20, 1967, 45.

that “each person” could “determine for himself which laws” [were] ‘unjust’” at which point they were “morally bound – to violate the ‘unjust’ laws.”⁶⁵ To establish this point, Powell cited King’s *Letter from Birmingham Jail*, as a call for extra-legal means of reform that amounted to “heresy.”⁶⁶ “It is paradoxical,” he noted, “that this threat of rebellion should come at a time of unprecedented progress towards equal rights and opportunities for Negroes. Moreover, as the *New York Times* has stated editorially: American Negroes ‘are economically the most prosperous large group of nonwhites in the world, enjoying a higher average income than the inhabitants of any nation in Africa, Asia, or Latin America.’”⁶⁷ Remarkably tone deaf to persistent inequality in the United States, Powell dismissed black complaints as illegitimate quibbles over the inevitable inequalities of life, or what he termed the “age old infirmities of mankind.”⁶⁸

Powell’s sense that blacks expected too much stayed with him, even as he won appointment to the Supreme Court of the United States in 1971. There, he would come to decide a series of cases that touched on racial issues, often arriving at original results. Many came to view him as a moderate intent on reconciling the more radical wings of the Court, others deemed him simply an unpredictable swing vote. However, Powell’s rulings on race appear more consistent if viewed through the lens of his earlier critiques of the civil rights movement, all efforts to impose a very different conception of the appropriate relationship between law, race, and equality on America, as the next section shall demonstrate.

II. POWELL ASCENDS TO THE COURT

Not four months after Martin Luther King died in Memphis, a panel of experts published a report suggesting that “Negro violence” had become so intense it was “likely to influence the Presidential election” of 1968, boosting “candidates advocating more stringent law enforcement.”⁶⁹ Though the report’s contributors found that most African Americans did not in fact “want to overthrow American society,” they nevertheless concluded that the “revolutionary rhetoric of [black] extremists,” had stoked “white intransigence” emboldening conservatives to campaign heavily on platforms emphasizing law and order.⁷⁰

Few sold law and order more deftly than Richard Milhous Nixon, former Vice President under Dwight D. Eisenhower and long-time White House hopeful. Three months before King’s death, in January, Nixon warned a banquet hall full

⁶⁵ Lewis F. Powell, Jr., *Civil Disobedience: Prelude to Revolution?* 40 N.Y. ST. B.J. 172 (1968).

⁶⁶ Lewis F. Powell, Jr., *Civil Disobedience: Prelude to Revolution?* 40 N.Y. ST. B.J. 172 (1968).

⁶⁷ Lewis F. Powell, Jr., *Civil Disobedience: Prelude to Revolution?* 40 N.Y. ST. B.J. 172, 176 (1968), citing N.Y. times editorial, July 24, 1967.

⁶⁸ Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 216 (1966).

⁶⁹ Henry Raymon, *Whites’ Reaction to Riots Studied: Panel Finds Conservative Attitudes Stiffening*, N.Y. TIMES, Aug. 29, 1968, 35.

⁷⁰ Henry Raymon, *Whites’ Reaction to Riots Studied: Panel Finds Conservative Attitudes Stiffening*, N.Y. TIMES, Aug. 29, 1968, 35. Though King’s death swelled support for a final civil rights act in 1968, in other words, his demise sparked no revolution. DAVID L. CHAPPELL, *WAKING FROM THE DREAM: THE STRUGGLE FOR CIVIL RIGHTS IN THE SHADOW OF MARTIN LUTHER KING, JR.*, (2014), 16-17.

of Manhattan businessmen that a “war in the streets” was likely that summer, sparked by “race conflicts.”⁷¹ Serious law enforcement, continued Nixon, was the best strategy for preventing such conflagrations, not poor people’s campaigns, not direct action protest, and certainly not left-wing calls for restructuring American society. Even a federal report on riots issued by the conservative Kerner Commission struck Nixon as soft, in part because it blamed “everybody for the riots except the perpetrators of the riots.”⁷²

However, Nixon did not the blame riots on Martin Luther King. To Nixon, King remained “a great leader” despite his forays into increasingly radical tactics, and increasingly revolutionary politics, just prior to his death.⁷³ More contemptible, blasted Nixon, was the Supreme Court, who had sided with “criminal forces” over “peace forces” by imposing unreasonable requirements on police, suggesting to the former Vice President that certain Justices had “‘gone too far’ and injected ‘social and economic ideas’ into their opinions.”⁷⁴ To counter such a move, Nixon promised voters he would appoint Justices likely to “interpret the Constitution strictly and fairly.”⁷⁵ To follow through, he tapped two Circuit Judges – Warren Burger and Harry Blackmun – an Assistant Attorney General from Arizona named William H. Rehnquist and, finally, after two flubbed southern selections, Lewis F. Powell, Jr.. Ostensibly committed to strict construction, Powell fit two other criteria as well.⁷⁶ One, he occupied a prominent, widely-respected place in the American legal profession, having served as President of the American Bar Association and in several high profile federal posts. Two, he hailed from the South, providing Nixon with a means of replacing Alabama Justice Hugo Black and also reaching out to southern voters who had begun to migrate from the Democratic Party to the Republican in states like Virginia, North Carolina and Tennessee.⁷⁷ Such voters had made their presence known in the 1968 presidential election and promised to do so again in 1972, boosted by Alabama Governor George Wallace, a conservative stalking horse who junked his motto “segregation forever” for bombastic appeals to “law

⁷¹ Edward C. Burks, *Nixon Sees Nation ‘Torn Apart’ and Warns of ‘War in Streets Next Summer,’* N.Y. TIMES, Jan. 9, 1968, 21.

⁷² Robert B. Semple, *Nixon Scores panel for ‘Undue’ Stress On White Racism,* N.Y. TIMES, March 7, 1968, 1.

⁷³ Paul Hoffman, *National Political, Labor and Religious Leaders Mourn Dr. King,* N.Y. TIMES, April 6, 1968, 27.

⁷⁴ Homer Bigart, *Politics: Nixon, Abandoning Silence on Wallace, Attacks Him and LeMay as Hawks,* N.Y. TIMES, Oct. 4, 1968, 50; Robert B. Semple, Jr., *Nixon Decries ‘Lawless Society’ and Urges Limited Wiretapping,* N.Y. TIMES, May 9, 1968, 1.

⁷⁵ Homer Bigart, *Politics: Nixon, Abandoning Silence on Wallace, Attacks Him and LeMay as Hawks,* N.Y. TIMES, Oct. 4, 1968, 50.

⁷⁶ Samuel W. Calhoun is right to question Powell’s adherence to strict construction. Not only did he depart from a strict reading of the Constitution in *Roe v. Wade*, as Calhoun demonstrates, but he also departed from a strict reading of the Constitution in his landmark opinion in *Regents v. Bakke*. See Samuel W. Calhoun, *Justice Lewis F. Powell’s Baffling Vote in Roe v. Wade*, 71 WASH. & LEE L. REV. (2014)(arguing that Powell departed from strict construction of the Constitution in the abortion context).

⁷⁷ EARL & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2002).

and order” that even northern voters found appealing, or at least sufficiently so to put him on the ballot in every northern and western state in ‘68.⁷⁸

As Wallace lit the North like a burning cross, Nixon drew more genteel southerners, like Powell, to his camp.⁷⁹ Though Powell joined Wallace in condemning civil disobedience, he also served on the National Advisory Committee on Legal Services to the Poor, endorsing legal representation to the indigent, a concern that struck many as evidence of a sympathetic, perhaps even liberal streak.⁸⁰ However, Powell’s interest in representing the poor coincided less with liberal leanings than with his deep-seated commitment to legal process, the same commitment that had led him to blast King for lawlessness.⁸¹ Few recognized the degree to which Powell’s interest in legal services dovetailed with his antipathy for King, an outlook that sought procedural fairness and respect for the disadvantaged, but a firm rejection of radical political means, and even more radical, redistributive ends. Like Atticus Finch, Powell believed that the poor deserved representation but showed little interest in redistributing wealth, opting for procedural over substantive reform.

Nixon could not have found a scion of southern order more eloquent, more reasonable, and ultimately more prepared to curb the contours of the civil rights struggle than Powell.⁸² Though deeply implicated in Richmond’s circumvention of *Brown*, he fox-trotted through his hearings; transforming the gauntlet of the Senate Judiciary Committee into a Richmond cotillion. Critical to Powell’s success was his astute awareness that the civil rights movement had pushed far beyond what most Americans felt was a reasonable horizon of racial reform. Integrating buses and drinking fountains, understood Powell, was something most Americans could accept. Ordering people’s children to suffer interminable bus rides every morning to achieve “racial balance,” however, was not; nor was rewriting American law to achieve King’s dream of substantive, poverty-ending, job-providing, “compensatory” equality.⁸³

Powell gained a chance to elevate his views on equality early in his tenure, when the Court agreed to consider a Texas challenge to public school funding in June 1972. The plaintiffs represented Mexican-American children who lived in “school districts with low property valuations,” prompting them to argue that funding schools through local property taxes led to gross inequalities in education,

⁷⁸ Henry Raymon, *Whites Reaction to Riots Studied: Panel Finds Conservative Attitudes Stiffening*, N.Y. TIMES, Aug. 29, 1968, 35; DAN CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (1995); MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* (2006).

⁷⁹ JOHN C. JEFFRIES, *JUSTICE LEWIS F. POWELL, JR.*, 222-228 (1994).

⁸⁰ For Powell’s views on indigent defense, see Lewis F. Powell, Jr. *The Response of the Bar*, 51 A.B.A. J. 751 (1965). President Nixon called Powell personally on Oct. 21, 1971. *White House Concedes Nixon Spoke to Powell*, N.Y. TIMES, Nov. 3, 1971, 22.

⁸¹ Lewis F. Powell, Jr. *The Response of the Bar*, 51 A.B.A. J. 751 (1965).

⁸² EUGENE D. GENOVESE, *THE SOUTHERN TRADITION: THE ACHIEVEMENT AND LIMITATIONS OF AN AMERICAN CONSERVATISM* (1994).

⁸³ MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 124 (1964, New York: Signet, 2000).

violating the Constitution's guarantee of equal protection.⁸⁴ In Texas alone, for example, students who happened to live in wealthy school districts received an average of \$585.00 per pupil, while students in poor districts averaged only \$60.00 per pupil.⁸⁵ The consequent difference in educational quality, argued the plaintiffs, was substantial.

Powell seized the case as an opportunity to engage the question of persistent inequality in the United States, meanwhile elevating an even higher, more compelling state goal than eliminating distinctions between rich and poor. He began by conceding that while funding and education may be linked, poor people might occasionally find themselves in wealthy districts. "The taxable wealth of the school district," explained Powell to his clerks in a private memo, "does not necessarily reflect the wealth of the citizens who reside in it."⁸⁶ To illustrate, Powell cited Sussex County, Virginia, where a corporation named Vepco had "recently constructed an atomic power plant" that substantially boosted revenue from local property taxes.⁸⁷

Of course, most poor children were unlikely to have nuclear plants bankrolling their schools. The plaintiffs made clear, for example, that the tax revenue per student in their downtrodden Edgewood district amounted to \$21 per student, while the tax revenue per student in the city's more affluent Alamo Heights district amounted to \$307 per pupil, a dramatic contrast.⁸⁸ However, Powell's point was not to say that all poor students could expect atomic funding, but rather to demonstrate that poverty alone was not the target of state discrimination. Some poor, he noted, did land in well-funded districts, thereby weakening the case that wealth classifications operated in the same categorical way that racial classifications did.⁸⁹

Still, Powell could not deny that "reliance on local property taxation for school revenues" yielded unequal results, providing "less freedom of choice with respect to expenditures for some districts than for others."⁹⁰ However, even this was not necessarily a negative. In Powell's mind, one of the advantages of preserving inequality in school funding was that it kept schools tied to local communities, thereby inhibiting centralized state "control."⁹¹ Altering school funding, he warned, threatened "national control of education," a move that he

⁸⁴ Memorandum, June 2, 1972 (on file with Powell Archive, Washington & Lee University Law School).

⁸⁵ CFP to LFP, June 2, 1972 (on file with Powell Archive, Washington & Lee University Law School).

⁸⁶ Lewis F. Powell, Jr. to J. Harvie Wilkinson, III, Aug. 30, 1972 (on file with Powell Archive, Washington & Lee University Law School).

⁸⁷ Similar wealth existed in Richmond, continued Powell, despite the fact that "the wealth per individual or family may be relatively low in view of the large black population." Lewis F. Powell, Jr. to J. Harvie Wilkinson, III, August 30, 1972 (on file with Powell Archive, Washington & Lee University Law School).

⁸⁸ Lewis F. Powell, Jr. to J. Harvie Wilkinson, III, August 30, 1972 (on file with Powell Archive, Washington & Lee University Law School).

⁸⁹ *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

⁹⁰ 411 U.S. at 50.

⁹¹ Lewis F. Powell, Jr. to Larry A. Hammond, Memorandum Re: No. 71-1332 *San Antonio v. Rodriguez*, Oct. 9, 1972 (on file with Powell Archive, Washington & Lee University Law School).

likened to communism.⁹² “I would abhor such control for all the obvious reasons,” complained Powell, “I have in mind the irresistible impulse of politicians to manipulate public education for their own power and ideology – e.g. Hitler, Mussolini, and all Communist dictators.”⁹³ This, of course, was what he had witnessed in the Soviet Union in 1958.⁹⁴

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

For example, Powell actually found inequality to have some benefit. “Each locality,” argued Powell in *San Antonio v. Rodriguez* “is free to tailor local programs to local needs,” an arrangement that lent itself to a multiplicity of educational approaches, or what he called “pluralism.”⁹⁵ “Pluralism,” declared Powell, “affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.”⁹⁶ Even if some school districts received less money, in other words, they could always develop new ways of teaching, perhaps even arriving at more effective forms of pedagogy than wealthier districts. It was a slightly obtuse, arguably tone deaf argument when juxtaposed onto the gross inequalities that gripped San Antonio schools, but it illuminated a vibrant strand of Powell’s political thought. The perpetuation of inequality, to him, was not necessarily a bad thing, for it held out the possibility of encouraging innovation and growth.

Powell’s interest in the symbiotic relationship between innovation and inequality suggested a very different vision of law’s role in society than that espoused by Martin Luther King. King stressed the evils of inequality, particularly the harm it caused to racial minorities and the poor.⁹⁷ As he put it in 1964, “rural and urban poverty” had “stultified” the lives of the poor, demanding aggressive state action, including “a massive program by the government of special, compensatory measures” for blacks who had been “robbed” of their wages during slavery.⁹⁸ Powell found such arguments for reparations unpersuasive, chastising blacks for not recognizing that they were in fact

⁹² Lewis F. Powell, Jr. to Larry A. Hammond, Memorandum Re: No. 71-1332 *San Antonio v. Rodriguez*, Oct. 9, 1972 (on file with Powell Archive, Washington & Lee University Law School).

⁹³ Lewis F. Powell, Jr. to Larry A. Hammond, Memorandum Re: No. 71-1332 *San Antonio v. Rodriguez*, Oct. 9, 1972 (on file with Powell Archive, Washington & Lee University Law School).

⁹⁴ See *infra* Part I.

⁹⁵ 411 U.S. at 50.

⁹⁶ 411 U.S. at 50.

⁹⁷ See generally, MARTIN LUTHER KING, JR. WHY WE CAN’T WAIT (1964).

⁹⁸ MARTIN LUTHER KING, JR. WHY WE CAN’T WAIT 127, 130 (1964).

considerably better off than their peers in Uganda and Zaire.⁹⁹ Not only did he dismiss black gripes as unwarranted, but he found King's insistence on "massive" government action to smack of communism, a system he personally loathed.¹⁰⁰

Powell's tendency to associate King with communism placed him firmly within a larger current of political thought in the South at the time, a sense that the civil rights movement was infiltrated by reds.¹⁰¹ While evidence of this ultimately proved flimsy, Powell's critique of the movement was quite a bit more sophisticated than most. To Powell's mind, the movement did not have to be infiltrated by actual communists to still pose a threat to cherished American ideals, among them the ideals of diversity, competition, and the pursuit of pecuniary wealth.¹⁰² Such ideas drew strength from earlier traditions in southern thought, including a brand of political and constitutional thinking that historian Eugene D. Genovese termed "the southern tradition."¹⁰³ While much of that tradition was tied to presumptions about race, it held to be true a series of fundamental principles about government that stood alone, independent of racial concerns.¹⁰⁴ Among these were notions set forth by Virginia planter James Madison who, two hundred years before Powell penned *Rodriguez*, declared that individuals of "different and unequal faculties," invariably acquired "different degrees and kinds of property" and that the "protection" of those faculties, and that property, was "the first object of government."¹⁰⁵ Essential to this view was the notion that inequality could be positive, and that government should protect inequality precisely because it incentivized people to develop their talents, or "faculties."¹⁰⁶ People, Madison presumed, were different, and that difference should be rewarded. Anything else, including efforts to achieve "an equal division of property," constituted a "wicked project."¹⁰⁷

Strains of Madison's thinking reverberated in Powell's reasoning about the appropriate relationship between law, race and inequality in the context of

⁹⁹ Lewis F. Powell, Jr., *Civil Disobedience: Prelude to Revolution?* 40 N.Y. ST. B.J. 172, 176 (1968), citing N.Y. times editorial, July 24, 1967 (noting that American Negroes 'are economically the most prosperous large group of nonwhites in the world, enjoying a higher average income than the inhabitants of any nation in Africa, Asia, or Latin America.')

¹⁰⁰ Lewis F. Powell, Jr. "Soviet Education: Means Towards World Domination," (Report on Trip to Soviet Union, July-August 1958) Folder: A Means Toward World Domination, Box 27: Speeches & Writings, 1930-1962, Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law, Lexington, Virginia.

¹⁰¹ JEFF WOODS, *BLACK STRUGGLE, RED SCARE: SEGREGATION AND ANTI-COMMUNISM IN THE SOUTH, 1948-1968* (2004); GEORGE LEWIS, *THE WHITE SOUTH AND THE RED MENACE: SEGREGATIONISTS, ANTICOMMUNISM, AND MASSIVE RESISTANCE, 1945-1965* (2004).

¹⁰² For a general sense of Powell's views on wealth, diversity, and inequality, see his opinions in *San Antonio v. Rodriguez*, *Keyes v. School District #1*, and his amicus brief filed with Virginia Attorney General Andrew Miller in *Swann v. Mecklenburg County*.

¹⁰³ EUGENE D. GENOVESE, *THE SOUTHERN TRADITION: THE ACHIEVEMENT AND LIMITATIONS OF AN AMERICAN CONSERVATISM* (1994).

¹⁰⁴ EUGENE D. GENOVESE, *THE SOUTHERN TRADITION: THE ACHIEVEMENT AND LIMITATIONS OF AN AMERICAN CONSERVATISM* (1994).

¹⁰⁵ ALEXANDER HAMILTON, JAMES MADISON, JOHN JAY, *THE FEDERALIST PAPERS* 48 (Lawrence Goldman, ed., Oxford University Press, 2008)(1788)(hereinafter *Federalist* 10).

¹⁰⁶ *Federalist* 10, 48.

¹⁰⁷ *Federalist* 10, 49.

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

Powell’s faith in pluralism emerged in other decisions as well, most notably a challenge to affirmative action plans in university admissions in 1978. There, he wrote the controlling opinion in a case involving a white plaintiff named Allan Bakke who had been denied admission to the University of California at Davis Medical School.¹⁰⁸ Convinced of his eligibility, Bakke blamed his rejection on a policy that reserved sixteen out of one hundred available entry positions to minorities, including African Americans, Mexican Americans, and American Indians. While average scores for minority accepts hovered around the 35th percentile on the Medical College Admissions Test, or MCAT, Bakke’s score neared the 90th percentile, fueling his outrage that lower scoring minorities had been admitted before him.¹⁰⁹

Conservatives on the Court, like William Rehnquist, sided immediately with Bakke, arguing that the racial set-asides endorsed by UC Davis were discriminatory. In a joint opinion, Justices Stevens, Burger, Stewart, and Rehnquist agreed that UC Davis’s quota system violated Title VI of the 1964 Civil Rights Act, which banned racial discrimination by any institution that received federal funds.¹¹⁰ Though the Act had been written to ameliorate conditions in the American South, conservatives on the Court believed that the Act applied to any institution that singled out individuals by race. Whether the victims of such policies were minorities or not, they argued, quotas like the one at the UC Davis Medical School represented an arbitrary and therefore illegitimate racial classification.¹¹¹

Liberals Brennan, White, Blackmun, and Marshall all disagreed, siding with the school officials.¹¹² To them, the UC Davis program was race conscious but not discriminatory. Unlike segregation statutes in the American South, which they viewed to be fundamentally racist, Davis’s affirmative action plan did not stamp minorities with a badge of inferiority, nor did it direct an “allegation of inferiority” against whites.¹¹³ Therefore, because Bakke was never “stereotyped as an incompetent,” his claim fell flat.¹¹⁴

Powell disagreed. To his mind, racial considerations were invalid so long as they sought to compensate minorities for past discrimination, a position that had animated his early critiques of Martin Luther King and the civil rights

¹⁰⁸ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹⁰⁹ JEFFRIES, POWELL, at 456.

¹¹⁰ JEFFRIES, POWELL, at 486.

¹¹¹ 438 U.S. at 325.

¹¹² 438 U.S. at 324.

¹¹³ JEFFRIES, POWELL, at 486.

¹¹⁴ 438 U.S. at 357.

movement.¹¹⁵ “[T]he purpose of helping certain groups,” held Powell, simply because they were “victims of ‘societal discrimination’” did “not justify a classification that imposes disadvantages upon persons like respondent [Allan Bakke] who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”¹¹⁶

However, Powell did identify a separate rationale for allowing consideration of race in admissions to survive: a rationale that he associated with pluralism, or what he termed “diversity.”¹¹⁷ Citing First Amendment protections of academic freedom, Powell claimed “genuine diversity” to be an interest sufficiently compelling to allow schools to rely on racial considerations in deciding to admit students with lower test scores.¹¹⁸ So long as such programs did not rely on quotas, posited Powell, “racial or ethnic origin” could be taken into account, as could “geographic” origin and whether applicants were “culturally advantaged or disadvantaged.”¹¹⁹

To many, this was confusing. “For reasons that were not – and could not be – satisfactorily explained,” complained Powell biographer John Jeffries, “Powell insisted that fixed quotas ‘would hinder rather than further attainment of genuine diversity.’”¹²⁰ Yet, Jeffries missed the manner in which Powell felt that diversity operated independent of questions of “compensatory” justice, applicable both to whites who were “culturally advantaged” and blacks who were not.¹²¹ Unlike legal liberals, Powell did not think of diversity as part of a larger scheme for overcoming past discrimination against African Americans, but rather an attempt to recognize the inherent, rich diversity of the United States, a diversity that coexisted with substantial, at times even remarkable, levels of inequality.¹²²

Even Powell supporters missed this. To them, Powell’s decision represented a strategic compromise or, as Circuit Judge Henry Friendly put it, a laudable example of “moderation.”¹²³ General Maxwell Taylor hailed Powell’s invocation of white minorities as an “amazing feat of making all parties reasonably happy.”¹²⁴ Harvard Law Professor Alan M. Dershowitz proclaimed Powell’s opinion “an act of judicial statesmanship.”¹²⁵ Others saw in Powell’s ruling more than simply an aim to compromise but a genuine shift in his segregationist views in favor of the African American struggle. According to Jeffries, for example, Powell’s decision reflected a clear break from his past, evidence that he suddenly felt “personal responsibility for racial justice.”¹²⁶

¹¹⁵ See *supra* Part I.

¹¹⁶ 438 U.S. at 11.

¹¹⁷ 438 U.S. at 298, 306, n. 43.

¹¹⁸ JEFFRIES, POWELL, at 469.

¹¹⁹ *Bakke*, 438 U.S. at 314.

¹²⁰ JEFFRIES, POWELL, at 477.

¹²¹ 438 U.S. at 315.

¹²² 438 U.S. at 314.

¹²³ JEFFRIES, POWELL, at 498.

¹²⁴ JEFFRIES, POWELL, at 498.

¹²⁵ Linda Greenhouse, *Bell Hails Decision*, N.Y. TIMES, June 29, 1978, at A1.

¹²⁶ JEFFRIES, POWELL, at 499.

Yet, Powell forthrightly rejected the idea that blacks had suffered injustice, at least not any more than other “minorities” in the United States.¹²⁷ Indeed, Powell seemed to indicate that whites had themselves become something of a discrete and insular minority, even victims of past repression. “The white majority,” argued Powell in *Bakke*, is itself “composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.”¹²⁸ “[T]he United States had become a Nation of minorities,” he continued, including Mexicans, Chinese, and “Celtic Irishmen.”¹²⁹ Each had to struggle, “and to some extent struggles still.”¹³⁰ Though aware that the Fourteenth Amendment had been written expressly for “members of the Negro race,” Powell insisted that its language was sufficiently neutral to embrace a broader principal including discrimination against other “minorities” as well, including whites.¹³¹

While many liberals celebrated Powell’s decision as a victory for blacks, more critical voices balked.¹³² One prominent detractor was Thurgood Marshall, who complained that it is “more than a little ironic” that Powell would rule in favor of Bakke given the “several hundred years of class-based discrimination” directed against African Americans in the United States.¹³³ Others took an even harsher line, finding Powell’s invocation of diversity little more than a bid to enhance the educational experiences of whites by allowing for the “token assimilation of people of color.”¹³⁴ According to this view, Powell’s model of diversity meant little more than “assimilating token people of color into the dominant white-supremacist culture for the benefit of maintaining that culture.”¹³⁵

Yet, Powell did not necessarily believe there was such a thing as a “dominant white-supremacist culture.”¹³⁶ To him, diversity was a more robust concept, a call for including students of different backgrounds, even advantaged backgrounds, both black and white. “The diversity that furthers a compelling state interest,” he noted, “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”¹³⁷ Indeed, in Powell’s mind, any admissions program that “focused

¹²⁷ *Bakke*, 438 U.S. at 292.

¹²⁸ *Bakke*, 438 U.S. at 295. Powell’s notion of whites as minorities echoed the views of Jewish intellectual Morris Cohen. Father of legal pluralist Felix Cohen, Morris believed that ultimately every “group of human being” was “a minority in one situation or another.” DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* 15 (2007).

¹²⁹ *Bakke*, 438 U.S. at 292.

¹³⁰ *Bakke*, 438 U.S. at 292.

¹³¹ *Bakke*, 438 U.S. at 292.

¹³² Greenhouse, *Bell supra* note 121, at 2.

¹³³ *Bakke*, 438 U.S. at 311-13.

¹³⁴ Barbara Phillips Sullivan, *Gift of Hopwood: Diversity and the Fife and Drum March Back to the Nineteenth Century*, 34 GA. L. REV. 291, 298 (1999).

¹³⁵ Barbara Phillips Sullivan, *Gift of Hopwood: Diversity and the Fife and Drum March Back to the Nineteenth Century*, 34 GA. L. REV. 291, 297 (1999). See also Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 765-769 (1997); Fran Ansley, *Classifying Race, Racializing Class*, 68 U. COLO. L. REV. 1001, 1009-14 (1997).

¹³⁶ *Bakke*, 438 U.S. at 311-13.

¹³⁷ *Bakke*, 438 U.S. at 315.

solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”¹³⁸

Admittedly, this was not about correcting past injustice. However, a close reading of Powell’s critique of the civil rights movement in the 1960s reveals his conviction that there was no past injustice to correct, or at least not any publicly sponsored injustice that warranted legal remediation. Inequality, such as it was, argued Powell, posed no legal issue, a view that departed dramatically from Martin Luther King, Jr.’s position that “massive” public responses were needed to address structural racism and poverty.¹³⁹ Powell rejected King out of hand, in part by placing inequality firmly within a larger frame of pluralism, or what he termed diversity.

As Powell explained it, diversity bore a close relationship to the First Amendment’s protection of academic freedom, a protection that allowed public schools to pick and choose who to admit and what to teach them.¹⁴⁰ If schools chose to admit minority students with lower test scores, for example, they could do so, provided their goal was linked to pedagogical and not redistributive or “compensatory” goals. For precisely this reason, Powell envisioned public schools admitting other types of students with lower scores as well, including candidates who were – surprisingly – “culturally advantaged.”¹⁴¹ Presumably this included applicants who hailed from privileged backgrounds, like legacy students at Harvard, whose plan Powell took as an inspiration.¹⁴²

In a memo written in August 1977, Powell’s clerk Bob Comfort alerted the Justice to the diversity argument, noting that UC Davis had cited Harvard’s plan to justify including minority candidates with lower scores than Alan Bakke. “Petitioner repeatedly sounds the theme of academic freedom to pick a diverse, invigorating group of students,” noted Comfort, “[j]ust as a farmboy from Idaho – simply by being different – brings something to Harvard College that a Boston Brahmin cannot.”¹⁴³ Harvard’s interest in Idaho farmboys proved more complicated than Comfort let on, stemming from fears in the 1920s that Jewish applicants with high grades were trouncing their gentile counterparts on the college’s admissions test.¹⁴⁴ Administrators and alums alike feared that Harvard’s traditional student stock: elite, North East Protestants might find themselves a minority at the school, their cultural influence on campus weakened by large numbers of immigrant, East European Jews reluctant to assimilate.¹⁴⁵ To

¹³⁸ *Bakke*, 438 U.S. at 315.

¹³⁹ MARTIN LUTHER KING, JR. WHY WE CAN’T WAIT 127 (1964).

¹⁴⁰ Bob Comfort, Memorandum for Mr. Justice Powell, Aug. 29, 1977, 1978 Bakke76-811, Folder 2, Lewis F. Powell, Jr. Archives, Washington and Lee University School of Law, Lexington, VA,

¹⁴¹ *Bakke*, 438 U.S. at 315.

¹⁴² JOHN JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 484 (1994).

¹⁴³ Bob Comfort, “Memorandum for Mr. Justice Powell,” Aug. 29, 1977, 1978 Bakke76-811, Folder 2, Lewis F. Powell, Jr. Archives, Washington and Lee University School of Law, Lexington, VA, 39, citing Harvard brief in *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

¹⁴⁴ Oliver B. Pollak, “Antisemitism, the Harvard Plan, and the Roots of Reverse Discrimination,” *Jewish Social Studies*, 45 (Spring, 1983):114, 117. Harold S. Wechsler, “The Rationale for Restriction: Ethnicity and College Admission in America, 1910-1980 36 (Winter, 1984): 650.

¹⁴⁵ Oliver B. Pollak, “Antisemitism, the Harvard Plan, and the Roots of Reverse Discrimination,” *Jewish Social Studies*, 45 (Spring, 1983):114, 117.

compensate, Harvard's admissions committee developed a plan to de-emphasize test scores and admit students from diverse regions based solely on their high school GPA, effectively diluting the number of Jewish applicants with Wasps from the South and Mid-West.¹⁴⁶ Harvard continued to expand this white-centric "concept of diversity" following World War II, looking not simply at geographic diversity but also different backgrounds and a wider variety of "talents and aspirations."¹⁴⁷

The Crimson plan suited Powell nicely, underscoring his argument that diversity had nothing to do with affirmative action for blacks, and that whites were not a unified bloc.¹⁴⁸ However, Powell did not endorse a blanket requirement that all schools seek diversity in the same manner that Harvard did. For example, Powell found that some schools provided diversity simply because they adhered to a particular educational vision, a position that led him to endorse private religious schools. "Parochial schools," argued Powell in 1977, "have provided an educational alternative for millions of young Americans," often encouraging "wholesome competition with our public schools," a point similar to the one that he had made in *San Antonio v. Rodriguez*.¹⁴⁹ Though Powell took a conservative view of the extent to which states could financially support sectarian schools, he nevertheless recognized the role that such schools played in "promoting pluralism and diversity" among the nation's "public and nonpublic schools."¹⁵⁰

Nonpublic, or private, schools played a particularly important role in Powell's America, not least because they provided, as he put it in 1967, the "major remaining barrier to maximum integration – socially, racially, and economically."¹⁵¹ This was startling. Though he had formally accepted the Supreme Court's opinion in *Brown*, Powell still dared articulate a critique of integration that tied into his larger fear of centralization and authoritarianism. In a manner that is worth noting, given its relatively late date, Powell viewed racial integration and economic integration to be parts not of the same solution, but the same problem, a move towards what he termed the "mass production" of "thoughts and ideas."¹⁵²

That private schools might thwart integration did not bother Powell, nor did the idea that some schools might disseminate unpopular ideas. For example, Powell took issue with the notion that institutions who found themselves pedagogically "at odds with [the] declared position of the whole government"

¹⁴⁶ Oliver B. Pollak, "Antisemitism, the Harvard Plan, and the Roots of Reverse Discrimination," *Jewish Social Studies*, 45 (Spring, 1983):119-120.

¹⁴⁷ Oliver B. Pollak, "Antisemitism, the Harvard Plan, and the Roots of Reverse Discrimination," *Jewish Social Studies*, 45 (Spring, 1983): 120.

¹⁴⁸ *Bakke*, 438 U.S. at 311-13.

¹⁴⁹ *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J. concurring in part, dissenting in part).

¹⁵⁰ *Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) (Powell, J.).

¹⁵¹ Lewis F. Powell, Jr., "The Challenge to the Private Preparatory School," Jan. 31, 1967, Box 29, Lewis F. Powell, Jr. Archive, Washington & Lee University School of Law, Lexington, Virginia.

¹⁵² Lewis F. Powell, Jr., "The Challenge to the Private Preparatory School," Jan. 31, 1967, Box 29, Lewis F. Powell, Jr. Archive, Washington & Lee University School of Law, Lexington, Virginia.

could not claim tax exemptions in 1983.¹⁵³ “Given the importance of our tradition of pluralism,” explained Powell, the IRS should keep in mind that exemptions for unpopular institutions provided an “indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.”¹⁵⁴ The case at hand, *Bob Jones University v. the United States*, involved a controversial university policy that banned interracial dating. Though Powell agreed that such a policy could not stand under *Brown*, he made sure to note that simply because an institution espoused an unpopular view did not necessarily mean that the IRS could withhold tax exempt status.¹⁵⁵

Averse to orthodoxy but proud of pluralism, Powell even celebrated schools that boasted grossly exclusionary policies under the rubric that they provided diversity. For example, he wrote a dissent in a challenge to the Mississippi University for Women’s exclusion of men, arguing that excluding men allowed the institution to promote the goal of diversity. “Left without honor – indeed, held unconstitutional,” argued Powell, “is an element of diversity that has characterized much of American education and enriched much of American life.”¹⁵⁶ This element, continued Powell, was same-sex education, an institution sewn into America’s pluralist quilt. “A distinctive feature of America’s tradition,” explained Powell in *Mississippi University for Women v. Hogan*, “has been respect for diversity. This has been characteristic of the people from numerous lands who have built our country. It is the essence of our democratic system.”¹⁵⁷ Same-sex education, continued Powell, comprised “a small aspect of this diversity.”¹⁵⁸ The male plaintiff struck Powell as an unsympathetic character “who represents no class and whose primary concern is personal convenience.”¹⁵⁹ “Coeducation,” argued Powell, “is a novel educational theory,” given that for “much of our history” most children were educated in “sexually segregated classrooms.”¹⁶⁰ To bolster his point, Powell cited New England’s “Seven Sister” colleges: Mount Holyoke, Vassar, Smith, Wellesley, Radcliff, Bryn Mawr, and Barnard, explaining that such schools produced a “disproportionate number of women leaders” in part because the large number of female faculty provided “a motivation for women students.”¹⁶¹ Though the gender demographics of all-female colleges was less diverse than at coeducational institutions, the simple existence of an all-female option provided, argued Powell, “an element of diversity.”¹⁶²

¹⁵³ *Bob Jones University v. United States*, 461 U.S. 574, 609 (1983) (Powell, J. concurring). In footnote 4 of his concurring opinion, Powell cited his claim that diversity was “a distinctive feature of America’s tradition,” in *Mississippi University for Women*, and that parochial schools provided “wholesome competition” to public schools in *Wolman v. Walter*. 413 U.S. at 611 n. 4.

¹⁵⁴ *Bob Jones University v. United States*, 461 U.S. 574, 610-611 (1983) (Powell, J. concurring).

¹⁵⁵ *Bob Jones University v. United States*, 461 U.S. 574, 610-611 (1983) (Powell, J. concurring).

¹⁵⁶ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 735 (1982) (Powell, J. dissenting).

¹⁵⁷ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 745 (1982) (Powell, J. dissenting).

¹⁵⁸ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 745 (1982) (Powell, J. dissenting).

¹⁵⁹ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 735 (1982) (Powell, J. dissenting).

¹⁶⁰ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 736 (1982) (Powell, J. dissenting).

¹⁶¹ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 736 n. 4 (1982) (Powell, J. dissenting).

¹⁶² *Mississippi University for Women v. Hogan*, 458 U.S. 718, 735 (1982) (Powell, J. dissenting).

Presumably, Powell could have made the same argument about historically black colleges, a topic that never came before him as a judge. However, Powell's invocation of diversity in *Bakke* suggested that explicit considerations of race, like explicit considerations of gender, were perfectly fine so long as they comported with a particular, pedagogical vision.¹⁶³ However, Powell barred the use of race for purposes of compensatory justice; a move that he refused – bizarrely – to make for women, noting that women's colleges served not only the goal of pluralism but also aimed “to overcome the historic repression of the past,” a point that he was not willing to concede in the context of race-based affirmative action.¹⁶⁴ Justices Brennan, White, Blackmun and Marshall all disagreed with Powell on this point, arguing in *Bakke* that programs which sought to benefit blacks should be assessed under a lower standard scrutiny, like the one that applied to women.¹⁶⁵ Powell rejected such a notion, countering that all racial minorities, including white minorities, had suffered discrimination in the past; an arguably tenuous point that nevertheless resonated with Powell's critique of the civil rights movement, a critique that held law had done all it could for African Americans, and that no further, legitimate correctives for past injustice were required.¹⁶⁶

Powell's lack of sympathy for blacks coincided with his lack of sympathy for the poor, a position he charted in *San Antonio v. Rodriguez*, where he also found pluralism midst the dramatically unequal funding patterns of public schools, even schools that received only a fraction of the money that their better located, peer institutions did. Of course, this had nothing to do with pedagogical goals: schools that found themselves in poor districts obviously did not choose to receive less money. However, Powell found arbitrary funding less constitutionally relevant than preserving the overall landscape of educational diversity, a landscape that incorporated relatively broad ranges of inequality, both in terms of funding, student body composition, and curricula. To Powell, such incongruities were actually a good thing, relating directly to America's core identity as a “pluralistic society” that stood apart from the totalitarian “orthodoxy” endorsed by the Soviet Union. Shocked at Soviet educational policies during his trip to the U.S.S.R. in 1958, Powell returned with a profound sense that totalitarian regimes relied heavily on uniformity in education to indoctrinate their youth, a phenomenon that he worked hard to avoid. Countering such a trend was, to his mind, the essence of American pluralism, an institution that struck Powell as not only central to the academic freedom protected by the First Amendment,

¹⁶³ Underlying this apparent synthesis was Powell's own effort in *Bakke* to erase compensatory justice for African Americans, a move that he was not willing to make for gender. In *Mississippi University for Women v. Hogan*, for example, Powell proved willing to concede that certain explicit gender classifications might be warranted to compensate women for past or even present discrimination, a move he was unwilling to make for blacks. See, e.g. SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 130 (2011).

¹⁶⁴ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 740 n. 5 (1982) (Powell, J. dissenting).

¹⁶⁵ *Bakke*, 438 U.S. at 311-13 (Brennan, Marshall, Blackmun, & White, J. dissenting).

¹⁶⁶ *Bakke*, 438 U.S. at 311-13 (Powell dissenting in part & concurring in part).

but to liberty itself. As he saw it, diversity in education possessed inherent value, independent of compensatory justice or affirmative action.

CONCLUSION

Little attention has been paid to Lewis F. Powell's critiques of civil disobedience in the 1960s.¹⁶⁷ As this essay demonstrates, however, Powell took the movement to task repeatedly in public speeches, bar journal pieces, and law review articles, challenging the use of direct action protest to achieve legal reform.¹⁶⁸ Of particular interest to Powell was Martin Luther King Jr.'s *Letter from Birmingham Jail*, a widely celebrated document that justified peaceful law-breaking in the name of achieving a broad definition of racial equality in the United States, one that included "compensatory consideration" to African Americans for slavery and Jim Crow.¹⁶⁹

Powell rejected such a vision, linking it to models of redistributive justice that characterized totalitarian regimes like the Soviet Union, which Powell visited in 1958.¹⁷⁰ To counter, Powell advanced a very different theory of justice, one that hinged on procedural fairness but allowed for substantial, substantive inequality.¹⁷¹ In fact, Powell even went so far as to find value in the perpetuation of inequality, one of the many sources of America's great diversity, or "pluralism."¹⁷²

Powell's interest in pluralism is worth recovering today, not least because proponents of diversity tend to conflate their cause with the achievement of racial equality, a move that Powell refused to make. Long suspicious of the civil rights movement, Powell drew a stark line between the compelling interest of diversity and the significantly less compelling interest of racial equality, something that he considered to be a completely separate, more dubious goal. However, Powell's distinction has been all but lost. Current proponents of diversity in higher education, for example, continue to conflate their cause with affirmative action, a type of compensatory consideration that emerged out of the civil rights battles of the 1960s.¹⁷³ Similarly, opponents of affirmative action have also tended to confuse diversity with efforts to compensate blacks for past repression, a cause they argue is illegitimate and unworthy of constitutional protection.¹⁷⁴ Recently, the Supreme Court itself weighed in on the issue, also confusing diversity with

¹⁶⁷ See *supra* Part I.

¹⁶⁸ See *supra* Part I.

¹⁶⁹ See *supra* Part I. See also MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 124 (1964, New York: Signet, 2000).

¹⁷⁰ See *supra* Part I.

¹⁷¹ See *supra* Part I.

¹⁷² See *supra* Part II.

¹⁷³ TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 60 (2004).

¹⁷⁴ Arianna Assaf, *Proposal 2 goes to U.S. Supreme Court*, MICHIGAN DAILY, March 25, 2013.

affirmative action in a challenge to a state law banning the use of racial classifications in college admissions.¹⁷⁵

Powell provides a refreshing, if not completely un-troubling, corrective to the current confusion. By advancing a case for diversity as a compelling state interest that had nothing to do with racial equality or compensatory justice, he provides us with a way of thinking about the use of race in college admissions programs that should, on its face, have nothing to do with affirmative action. While Powell's refusal to acknowledge problems with persistent racial inequality may be troubling, his doctrinal separation of diversity from affirmative action gives us a reason for endorsing creative considerations of race and other factors in college admissions that should not, on their face, have anything to do with timelines, invocations of *Brown v. Board of Education*, or other contentious matters dealing with questions of substantive equality and racial justice.¹⁷⁶

¹⁷⁵ *Schuette v. BAMN*, 572 U.S. ____ (2014).

¹⁷⁶ *See, e.g. Fisher v. Texas*, 570 U.S. ____ (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2013).