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Diversity to Deradicalize

By

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Professor Catherine Albiston, Chair

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Abstract

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Doctor of Philosophy in Jurisprudence in Social Policy

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Professor Catherine Albiston, Chair

For the past 40 years, the constitutionality of affirmative action has rested on a central idea: racial minorities have unique perspectives, and without including those perspectives, universities are limited in their ability to expose students to a “robust exchange of ideas.”¹ This idea has prevailed in large measure because elite universities have consistently argued to the courts that underrepresented minorities add vital racial perspectives that enrich the education of their peers. This dissertation answers two key questions: one focuses on the Court’s initial embrace of the diversity rationale, the other aims to see how the diversity rationale plays out in practice today.

1. How did “the diversity rationale” become the primary—and for practical purposes, the only—justification that the Supreme Court has deemed sufficiently compelling to uphold affirmative action?
2. How do black students interpret and respond to the expectation embedded in the diversity rationale that they are to contribute unique intellectual insights that emerge from, as the Supreme Court has said, “being a racial minority in a society, like our own, in which race unfortunately still matters”?

To answer these questions, I rely on both archival research and interviews with graduate students at both a predominantly white and historically black university. As I uncover in this dissertation, the origins of the Court’s embrace of diversity are rooted in an effort to mold the ideological orientation of college students by policing the kinds of ideas that were present on campus. In line with that goal, black students attending predominantly white institutions today express a belief that despite their university’s outward embrace of intellectual diversity, that their racial viewpoints are devalued and, through subtle mechanisms, policed. Ultimately, this is a dissertation about race, intellectual freedom, and social control.

¹ See *Univ. of Calif. v. Bakke*, 438 U.S. 265, 313 (1978) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

Table of Contents

Chapter 1: Introduction	1
Chapter 2: Diversity to Deradicalize	6
Chapter 3: Race as Unintellectual	66
Chapter 4: Black Students' Reactions to Diversity	111
Chapter 5: Conclusion	126

Chapter 1| Introduction

In *University of California v. Bakke*,¹ the Supreme Court held that the educational benefits that a university gets from having students of color is the only constitutionally legitimate reason to consider race in the college admissions process.² In doing so, the Court explicitly dismissed all other reasons to consider race, many of which had historically positioned African Americans as the primary beneficiaries of racial inclusion. Remediating societal discrimination, creating more minority professionals and providing crucial services to under-resourced, minority communities were all rejected for not being sufficiently compelling to allow for race-conscious admissions decisions.³ Despite this, liberals generally support what has come to be known as “the diversity rationale,” as it is the one argument that keeps affirmative action alive.⁴ The diversity rationale posits, in part, that it is important to have underrepresented racial minorities in predominantly white universities because they bring in unique, intellectually provocative viewpoints that might otherwise be absent from the campus community.⁵

It is important to note that *Bakke*—as well as the diversity rationale it legitimated—marked a significant shift in how society has come to understand the goal of racial inclusion. Under an integrationist regime, the explicit goal of minority inclusion was racial equality. Granting black students access to well-resourced, predominantly white universities was one of the primary means to achieve that goal. Under a diversity regime, however, institutional success becomes the explicit goal of racial inclusion and many black students are allowed entry into selective universities only because those schools are thought to be impoverished without “minority perspectives.” Thus, on matters of access in higher education, the Court has gone from being concerned primarily about the well-being of black students to the well-being of predominantly white institutions.

Over the past 40 years, the diversity rationale has proliferated as diversity itself has become a core value in our nation’s universities.⁶ Each time the Supreme Court reconsiders race consciousness in higher education admissions, elite universities around the country flood the Court with amici briefs explaining that race-based intellectual

¹ 438 U.S. 265 (1978).

² *Id.* at 311-312.

³ *Id.* at 306-311.

⁴ See, e.g., WILLIAM G. BOWEN ET AL., *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (2000); *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield ed., 2001); Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330 (2002); *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (Mitchell Chang et al. eds., 1st ed. 2003); Expert Report of Patricia Gurin, *Gratz v. Bollinger*, (E.D. Mich. 2001) (No. 97-CV-75231), 2001 U.S. Dist. LEXIS 8887.

⁵ RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 100 (2013).

⁶ See generally ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* (2015).

pluralism is crucial to fulfilling their educational missions. So far, this argument has been effective. In 2003, the Court affirmed that the benefits of having racially diverse universities are “important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”⁷ Most recently, in *Fisher v. University of Texas*, a majority of Justices once again voted to uphold affirmative action in higher education in order to preserve the “educational benefits that flow from student body diversity.”⁸

Yet, during the same period that selective universities have worked to convince the Court of how much they value racial difference, some of the putative drivers of that difference—namely, black students—have claimed that the climate within these institutions is actually quite hostile to racial diversity, and specifically to black students.⁹ In the 2015-2016 academic year alone black students staged large-scale demonstrations at over 80 universities in the country, all in an effort to bring attention to what they perceive as pervasive anti-black racism on their campuses.¹⁰ For these student activists, the problem is bigger than a few rogue peers hurling racial epithets, or an errant professor making insensitive remarks. They identify a culture of disrespect and disregard for black students’ experiences and perspectives, the same experiences and perspectives that university officials have argued are so critically important for their intellectual communities.¹¹

The diversity rationale, when it was first articulated in *Bakke*, was based off of little more than anecdotal evidence culled together by the administrators of elite universities.¹² Since then, education scholars have sought to prove that racial diversity does in fact benefit student bodies. Much of that literature, however, focuses—either implicitly or explicitly—on how the presence of racial minorities improves educational outcomes for white students.¹³ Little work has

⁷ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal citations omitted).

⁸ *Fisher v. Univ. of Tex.*, 2198, 2203 (2016).

⁹ See, e.g., JOE R. FEAGIN, HERNAN VERA, & NIKITAH IMANI, *THE AGONY OF EDUCATION: BLACK STUDENTS AT A WHITE UNIVERSITY* (1st ed. 1996); SARAH SUSANNAH WILLIE, *ACTING BLACK: COLLEGE, IDENTITY AND THE PERFORMANCE OF RACE* (2003); Daniel Solorzano, Miguel Ceja, & Tara Yosso, *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. OF NEGRO EDUC. 60 (2000); Tanzina Vega, *Students See Many Sights as Racial “Microaggressions,”* NYT (Mar. 21, 2014), <http://www.nytimes.com/2014/03/22/us/as-diversity-increases-slights-get-subtler-but-still-sting.html>.

¹⁰ See *Campus Demands*, DEMANDS, <https://www.thedemands.org> (last visited July 14, 2019); Leah Libresco, *Here are the Demands from Students Protesting Racism at 51 Colleges*, FIVETHIRTYEIGHT (Dec. 3, 2015), <https://fivethirtyeight.com/features/here-are-the-demands-from-students-protesting-racism-at-51-colleges/>; Jamil Smith, *Black Protesters Have Reinvigorated Campus Activism*, NEW REPUBLIC (Dec. 17, 2015), <https://newrepublic.com/article/125843/black-protesters-reinvigorated-campus-activism>.

¹¹ See Smith, *supra* note 10; Libresco, *supra* note 10; MARTHA BIONDI, *THE BLACK REVOLUTION ON CAMPUS* (Reprint ed. 2014); IBRAM X. KENDI, *THE BLACK CAMPUS MOVEMENT: BLACK STUDENTS AND THE RACIAL RECONSTITUTION OF HIGHER EDUCATION, 1965-1972* (2012).

¹² JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* (Reprint ed. 2006).

¹³ Sylvia Hurtado, Alma R. Clayton-Pederson, Walter Recharde Allen, & Jeffrey F. Milem, *Enhancing Campus Climates for Racial/Ethnic Diversity: Educational Policy and Practice*, 21 REV. OF HIGHER

been done to show how students of color navigate intellectual environments that purportedly rely on them to introduce “provocative” and “diverse” racial perspectives into the existing academic discourse.

While the Court and a host of education scholars believe that the presence of racial minorities will result in a more vibrant intellectual community, the work of critical race theorists (CRT) points to another potential outcome. Examining social dynamics in the employment arena, these theorists have posited that racial minorities often feel that they must actively work to downplay, or “cover,” their outsider status in order to succeed within white-dominated institutions.¹⁴ One common strategy is silencing racial perspectives that could be potentially off-putting to insiders. Thus, while people of color can perhaps change norms within white-dominated institutions, the norms within those institutions can also change people of color. CRT scholars focus on the power of workplaces to repress minorities’ racial identities but, as sociologists and critical theorists have long noted, power is not only repressive, it is also productive.¹⁵ If that is the case, then it follows that institutions also have the capacity to create identities. This is perhaps especially true in universities, where the express mission is to mold students’ minds.

If graduate schools are indeed the place where young adults are socialized into their professional identities, the racial climate black students encounter might affect the sorts of racial opinions that they feel free to articulate, let alone cultivate, and ultimately the kinds of knowledge they are able to produce. And because elite universities are in the business of grooming the next generation of national leaders, the racial norms that black students internalize within these institutions could have significant implications for the Court’s long-abandoned goal of minority inclusion: racial equality.

This dissertation answers two key questions, one that focuses on the Court’s embrace of the diversity rationale, the other aims to see how the diversity rationale plays out in practice:

1. How did “the diversity rationale” become the primary—and for practical purposes, the only—justification that the Supreme Court has deemed sufficiently compelling to uphold affirmative action?
2. How do black students interpret and respond to the expectation embedded in the diversity rationale that they are to contribute unique intellectual insights that emerge from, as the Supreme

EDUC. 279 (1998); Expert Report of Patricia Gurin, *supra* note 4; DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield ed., 1st ed. 2001).

¹⁴ DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA (Reprint ed. 2015); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (Reprint ed. 2007).

¹⁵ Foucault 1995; Woodson 2013; Lukes 2005

Court has said, “being a racial minority in a society, like our own, in which race unfortunately still matters?”

To answer the first question, I focus on Lewis Powell, the Supreme Court Justice who singularly decided that the promotion of “a robust exchange of ideas” on college campuses is the only constitutional justification for affirmative action. The prevailing explanation characterizes Powell as a moderate 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. 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.

Chapter one of this dissertation challenges that conventional story by offering a new interpretation of the *Bakke* decision. Drawing on a variety of archival materials, I contend that Powell’s promotion of intellectual diversity 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 teamed together to plot a communist 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.”¹⁶ From his perspective, institutions of higher learning were increasingly becoming sites of political corruption, radicalizing impressionable college students “from our finest homes.”¹⁷ 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 could more easily “undermine or destroy our democracy and replace it with the tyranny of a Castro or a Mao Tse-tung.”¹⁸ Increased exposure to “a robust exchange of ideas,”

¹⁶ Lewis F. Powell, Jr., Address to the Southern Industrial Relations Conference: Attack on American Institutions 8 (July 15, 1970), available at <http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeechAttackOnAmericanInstitutionsJuly15.1970.pdf>.

¹⁷ Lewis F. Powell, Jr., Address to the Southern Industrial Relations Conference: Attack on American Institutions 27 (July 15, 1970), available at <http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeechAttackOnAmericanInstitutionsJuly15.1970.pdf>.

¹⁸ 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), available at

Powell believed, would weaken the influence radicals had on forming students' worldviews.

This history explains why Powell was the only Justice on the Court to decide that the promotion of intellectual diversity on college campuses was the only justification what would allow for affirmative action. It turns out that the initial constitutionalization of affirmative action in Bakke—the thin doctrinal lifeline Powell extended to the policy—was likely more of a deradicalizing, than a racial justice, imperative.

This justification for affirmative action has taken a life of its own, independent of Powell's motives. Today, universities most commonly explain the importance of having students of color by arguing that racial minorities have unique perspectives, and that universities are unable to provide the highest quality of education without incorporating those perspectives into their campus community. When specifying the unique contributions that students of color offer, elite universities often cite these students' ability to introduce important racial perspectives into classroom discussions and these perspectives enrich the learning for all students.

Yet, for all the intellectual labor that universities expect students of color to do to educate their fellow students, little research has been focused on how racial minorities navigate the expectation that they contribute racial insights to their intellectual communities. The second half of this dissertation addresses this question. To understand how black graduate students, interpret and respond to their universities' appetite for racial discourse, I conducted in-depth interviews with more than 100 law and social science graduate students (87 black, 18 white), both at an elite, predominantly white institution (PWI) and a historically black university. Findings reveal that despite their university's professed commitment to facilitating a "robust exchange of ideas," the overwhelming majority of black students at the PWI feel that their departments are dismissive of or hostile towards their racial views. Moreover, perceiving racial analysis to be devalued within their respective departments and aware of the long-running stereotype that black people lack intellectual ability, black students express a widespread belief that talking about race helps to confirm a suspicion that they are less intelligent than their classmates. Across the law school and social sciences, students identify three dominant perceptions within their departments that make them hesitant to articulate their racial views: (1) The impulse for black students to use race as an analytic frame is driven by emotion rather than reason; (2) Race is a distraction from the most important lenses through which students should understand legal, social and

http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_What%20Is%20Right%20About%20America.%20April%2016.%201970_117-29.pdf (last visited Oct. 23, 2018).

political developments and; (3) Black students resort to racial analysis in order to mask their inability to engage with more intellectually demanding topics. Afraid of confirming stereotypes about their intellectual inferiority, black students report significantly limiting or altogether avoiding discussions of race in the classroom.

Fearing further stigmatization, the majority of black students interviewed at the PWI reported feeling compelled to significantly limit or altogether avoid engaging in public discussions of race and racism. This is, in part, because they believe that black students who do not engage in racial discourse are generally viewed as smarter, friendlier, and are afforded greater professional opportunities. Thus, while affirmative action jurisprudence assumes that the integration of students of color will change the intellectual culture of predominantly white institutions, my research suggests that many students of color are instead changing their behavior in order to assimilate into a culture that they perceive to be unwelcoming of racial discourse.

Chapter 2 | Diversity to Deradicalize

For the past 40 years, the constitutionality of affirmative action has hinged on the importance of attaining a central goal: intellectual diversity on college campuses. The Supreme Court first articulated this goal in *University of California v. Bakke*,¹ where Justice Lewis Powell wrote in a controlling opinion that “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.’”² 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.³ They should also seek to admit, among others groups, the “culturally advantaged,”⁴ “farm boys from Idaho,”⁵ and “potential stockbrokers,”⁶ as their perspectives would “promote beneficial educational pluralism” within the nation’s universities.⁷ No other justice joined this opinion.⁸ 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 the dominant justification today.⁹

Why did the intellectual diversity argument resonate with Justice Powell? The prevailing explanation characterizes Powell as a moderate 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.¹⁰ 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.¹¹ This chapter challenges that

¹ 438 U.S. 265 (1978).

² *Id.* at 312

³ *Id.* at 315

⁴ *Id.* at 314

⁵ *Id.* at 316

⁶ *Id.* at 322

⁷ *Id.* at 316

⁸ Justices Brennan, White, Blackmun and Marshall voted for affirmative action because the policy was necessary to address a legacy of racial discrimination. *Id.* at 324-25 (Brennan, J., concurring in the judgment and dissenting in part). 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 (Stevens, J., concurring in the judgment 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.*, 570, U.S. 297 (2013).

¹⁰ *See infra* Part I. For alternative explanations, *see generally* Anders Walker, *A Lawyer Looks at Civil Disobedience: Why Lewis F. Powell Jr. Divorced Diversity from Affirmative Action*, 86 U. COLO. L. REV. 1229 (2015) (arguing that Powell’s defended diversity to advance the goal of political liberty rather than to champion the cause of minority rights).

¹¹ *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. 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. Those for whom race is central to their experiences risk being disadvantaged in this process because they have been stripped of

prevailing explanation. I argue that Powell’s opinion in *Bakke* is best understood as an extension of his largely forgotten war against radicalism on college campuses.

Using previously unanalyzed speeches, written commentaries, and personal notes from Powell’s archives,¹² I show that by the time *Bakke* reached the Court, the Justice had already been on a decades-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. 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 together 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: while black “militant leaders”¹³ like Martin Luther King and the Black Panthers used civil disobedience to sew discord in the streets, white militants—represented by the New Left—sought to radicalize “an ever-increasing number of white middle-class Americans”¹⁴ by corrupting the intellectual climate of the nation’s universities. Powell specifically warned audiences that left extremists aimed to “establish the campus as their principal base of revolution.”¹⁵

It was the radicals’ strategy, according to Powell, to infiltrate American universities in order to “brainwash” the nation’s future leaders with anti-American propaganda.¹⁶ The purported goal of the indoctrination was to undermine future leaders’ faith in American institutions so that radicals could more easily overthrow US democracy and “replace it [with] the tyranny of a Castro or a Mao Testing.”¹⁷ The spate of intense campus protests that erupted

their ability to tell their stories in a way that makes sense—both to themselves and to admissions committees).

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

¹³ Lewis F. Powell, Jr., Address to the Southern Company Conference of Directors and Executives at Point Clear, Alabama: Civil Disobedience: Prelude to Revolution? 7 (Oct. 5, 1967) [hereinafter *Prelude to Revolution*], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Civil%20Disobedience%20Prelude%20To%20Revolution%20October%205%201967_117-9.pdf (last visited Oct. 23, 2018).

¹⁴ Lewis F. Powell, Jr., Address at the Kenbridge Chamber of Commerce Citizenship Award Night: Radical Leftist Movement, at Exhibit C (Feb. 27, 1969) [hereinafter *Radical Left Movement*], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Radical%20Left%20Movement.%20February%2027.%201969_117-21.pdf (last visited Oct. 23, 2018).

¹⁵ Lewis F. Powell, Jr., Address to the Southern Industrial Relations Conference: Attack on American Institutions 8 (July 15, 1970) [hereinafter *Attack on American Institutions*], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeechAttackOnAmericanInstitutionsJuly15_1970.pdf.

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) [hereinafter *What is “Right” about America*], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_What%20Is%20Right%20About%20America.%20April%2016.%201970_117-29.pdf (last visited Oct. 23, 2018).

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, radicals—who were both students and professors—inundated college students with dubious messages that America was racist, repressive and imperialistic.¹⁸ Simultaneously, to ensure 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, in his words, "Young extremists, professing to be 'liberals,' deny free speech to those with whom they disagree."¹⁹ 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.²⁰

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 within the nation's universities.²¹ By promoting educational pluralism, Powell hoped to increase the representation of moderate and conservative viewpoints on campuses. Exposure to a diversity of perspectives was thought to help students see through leftist propaganda, thereby making future leaders less likely to assume radical positions.

In articulating a new explanation of Powell's motives in *Bakke*, this chapter challenges not only the prevailing understanding that Powell was motivated by his commitment to racial justice. It also

¹⁸ This chapter 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 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 COMMISSION ON CAMPUS UNREST, THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST 19 (1970) [hereinafter CAMPUS UNREST COMMISSION], available at <https://files.eric.ed.gov/fulltext/ED083899.pdf> (last visited Oct. 23, 2018).

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) [hereinafter Citizenship Education], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Citizenship%20Education%20As%20To%20Law.%20Disorder.%20Extremism%20and%20Civil%20Disobedience.%20July%2019.%201968_117-15.pdf (last visited Oct. 23, 2018).

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

²¹ Lewis F. Powell, Jr., Address to the American Association of State Colleges and Universities in Washington D.C.: A Strategy for Campus Peace 20 (Nov. 11, 1969) [hereinafter Powell, A Strategy for Campus Peace], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_A%20Strategy%20For%20Campus%20Peace.%20November%2011.%201968_117-16.pdf (last visited Oct. 23, 2018).

complicates the more cynical view of *Bakke* that attributes Powell's embrace of "the educational benefits of diversity" to his commitment to continued white dominance.²² Under this theory, Powell endorsed affirmative action because he recognized that, in order to be effective leaders in an increasingly multiracial society, white college students needed exposure to the views of students of color.²³

To be sure, there is certainly compelling evidence to suggest that this kind of racial instrumentalism inspired Justice O'Connor's re-articulation of the diversity rationale 25 years later in *Grutter v. Bollinger*.²⁴ Yet, there is little evidence to suggest that Powell himself was concerned with white students learning from racial minorities. Indeed, he dismissed the University of California's conception of diversity, which explicitly focused on the goal of promoting cross-racial understanding, as too narrow. Instead, he embraced Harvard's more ecumenical version of diversity, where race was simply a "plus factor" in service of the larger goal of attaining intellectual diversity on college campuses.

I argue that Powell's embrace of intellectual pluralism was a deradicalizing move that had both inter- and intra-racial implications. Inter-racially, Powell wanted, at a minimum, to pause the march towards civil rights and limit the presumed harm that white college applicants suffered as universities pursued racial integration.²⁵ Elevating diversity, rather than societal discrimination as a justification for affirmative action, and subjecting the policy to strict, rather than intermediate, scrutiny was a way for him to do precisely that. Intra-racially, Powell wanted to curb left-oriented white radicalism, particularly as it was being expressed on college campuses. His desire was to prevent campus radicals—whom he

²² Nancy Long, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2163 (2013). See also Ian F. Haney-Lopez, *Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2006); Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003).

²³ Empirical studies show that whites generally view racial diversity as detrimental to their educational and professional development. Using experimental psychological, Victoria Plaut finds that whites view efforts to promote a racially inclusive environment as excluding them. See, e.g., V. C. Plaut et al., "What About Me?" *Perceptions of Exclusion and Whites' Reactions to Multiculturalism*, 101 J. OF PERSONALITY & SOC. PSYCH 337 (2011). 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 NATASHA K. WARIKOO, *THE DIVERSITY BARGAIN AND OTHER DILEMMAS OF RACE, ADMISSIONS, AND MERITOCRACY* (2016).

²⁴ 539 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 amicus briefs, liberally reference this defense for diversity. See, e.g., Brief for Respondents at 30, *Grutter v. Bollinger*, 539 U.S. 305 (2003) (No. 02-241), 2003 WL 402236 ("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."). See also WARIKOO, *supra* note 23 (arguing that white college students support of affirmative action as long as it provides a diverse learning environment for them).

²⁵ See Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105 (1993) (arguing that the embrace of diversity rather than equality as the goal of affirmative action).

identified as “basically white”²⁶—from corrupting white students “from our finest homes.”²⁷ The “robust exchange of ideas” rationale for affirmative action, Powell likely thought, could temper the emerging radicalism on college campuses and render American democratic institutions more secure. In short, in addition to helping whites as a racial group, Powell specifically aimed to protect a certain segment of elite, non-radical white students who in his estimation would likely become the next generation of leaders.

The first half of this chapter calls into question the prevailing notion that Powell’s commitment to integration and racial equality drove his stance on affirmative action. Part One demonstrates Powell’s longstanding opposition to the Court’s desegregation decrees when he sat as a school board official in the state of Virginia. Fearing that compulsory integration would disrupt social stability, for nearly two decades, Powell expended significant energy resisting integration, calling it “an unwelcomed social change forced upon us by law.”²⁸ As one of the nation’s premiere lawyers, Powell also traveled the country telling audiences that the United States had already given African Americans all the rights they were owed, 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, who engaged in civil disobedience.²⁹ 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 Two anticipates a critique of my focus on Justice Powell’s pre-Supreme Court life. The basic rejoinder might be that people change and, more particularly, that the role of a Supreme Court Justice changes people. To put a finer point on it, despite Powell’s record of standing in opposition to racial integration and the Civil Rights Movement more generally, his appointment to the Supreme Court pushed him to evolve. Powell’s principal biographer, for instance, explains his *Bakke* opinion by speculating that his appointment to the Court endowed the Justice with a newfound “sense of personal responsibility for racial justice.”³⁰ Part Two explains why the Tale of Two Powell’s—the belief that Powell’s role as a Supreme Court justice shifted his ideological commitments from racial segregationism to racial liberalism—is flawed. Here, I show that there is in fact significant continuity between the pre-Court Powell’s opposition to desegregation and the positions he took after his appointment. As a justice, he was instrumental in restricting

²⁶ Attack on American Institutions, *supra* note 15, at 5.

²⁷ *Id.* at 11.

²⁸ Lewis F. Powell, Jr., Statement on Behalf of the School Board Supporting Construction of the New High Schools Without Delay 3 (May 6, 1959) [hereinafter Statement].

²⁹ 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.

³⁰ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL: A BIOGRAPHY 499 (1st ed. 2001).

desegregation efforts and limiting the educational opportunities for children of color. Moreover, a close reading of *Bakke* itself shows that Powell remained unsympathetic to the plight of racial minorities even as he voted to uphold affirmative action. In short, Part Two contends that Justice Powell was no racial liberal.³¹ He remained hostile to—and at best tolerated—various forms of racial remediation, including affirmative action.

Part Three broadens the debate about Powell’s ideological commitments and jurisprudential identity 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.”³² Sixteen years before *Bakke*, Powell told audiences that “education is one of the major battlefields of the Cold War.”³³ In the mid-60s, 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 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. Part IV concludes with a discussion of why knowing this history helps to illustrate how affirmative action has remained in such a constitutionally precarious position ever since Powell set the parameters of the legal debate in *Bakke*.

I. Racial Justice versus Social Stability

In reviewing his tenure on the Court, Powell called *Bakke* his most important opinion.³⁴ More than any other case, *Bakke* solidified

³¹ See Janet Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative*, 52 J. OF POLITICS 530, 546 (1990). After doing a quantitative analysis of Powell’s voting patterns on civil liberties cases—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.*

³² Prelude to Revolution, *supra* note 13, at 16.

³³ Lewis F. Powell, Jr., Address to Federal Bar Association in Washington, D.C.: Higher Education – Soviet Style (Apr. 27, 1962) [hereinafter Soviet Style], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Higher%20Education%20-%20Soviet%20Style.%20April%2027.%201962_113-19.pdf (last visited Oct. 23, 2018).

³⁴ John C. Jeffries, *Bakke Revisited*, 2003 SUPREME COURT REV. 1–25, 3 (2003).

Powell's legacy as a racial moderate with integrationist leanings.³⁵ 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."³⁶ Another tribute praised him as someone who "steadfastly pursued the twin goals of educational excellence and racial cooperation."³⁷

The leading biography on Powell argues that it was this sense of moderation that drove his *Bakke* opinion.³⁸ On the one hand, his biographer argues, Powell found "repugnant" the prospect of elite universities becoming, once again, bereft of African Americans.³⁹ 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.⁴⁰ Thus, it was an attempt to balance two important concerns that led Powell to the moderate position of upholding affirmative action on the grounds of intellectual pluralism.⁴¹

Powell's so-called moderate racial views are sometimes explained as the product of his professional experiences before joining the Supreme Court.⁴² Working as an education official in Virginia during the 1950s and 1960s, Powell was responsible for carrying out desegregation orders. This experience is said to have made him sympathetic to the goal of achieving racially integrated schools.⁴³ On the occasion of Powell's retirement from the Court, Justice Sandra Day O'Connor—who would go on to endorse Powell's diversity

³⁵ See, e.g., J. HARVIE WILKINSON III, *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").

³⁶ 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>.

³⁷ Oliver W. Hill, *A Tribute to Lewis F. Powell, Jr.*, 49 WASH. & LEE L. REV. 11, 13 (1992)

³⁸ See JEFFRIES, *supra* note 30.

³⁹ *Id.* at 6.

⁴⁰ See RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 182-202 (2015) (noting that if Powell were primarily concerned with having an end date for affirmative action, "the educational benefits of diversity" seems not to address that concern as it seems likely that universities will always believe that is important to have various viewpoints represented in class).

⁴¹ 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." Sandra Day O'Connor et al., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 Harv. L. Rev. 395, 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) (noting 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).

⁴² *Bad Law on Affirmative Action*, N.Y. TIMES (Mar. 22, 1996), <https://www.nytimes.com/1996/03/22/opinion/bad-law-on-affirmative-action.html> (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.>").

⁴³ See, e.g., Motley, *supra* note 41, 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.").

rationale to uphold affirmative action in *Grutter*—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.⁴⁴

Yet this is a striking mischaracterization of Powell’s views on *Brown* and his efforts to comply with desegregation orders when he presided over Richmond’s education system. As school board chair, he was an opponent of school desegregation and of 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.”⁴⁵

It is important to note that Powell’s views on racial justice reform 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 towards 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 opposed the decision saying, “I am not in favor of, and will never favor compulsory

⁴⁴ O’Connor et al., *supra* note 41, at 396.

⁴⁵ JEFFRIES, *supra* note 30, at 469. Jeffries argues that Powell “acquiesced in desegregation, but did not actively support it.” *Id.* at 178. To explain Powell’s reasons for not speaking out against segregation, Jeffries offers 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 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.

integration.”⁴⁶ Compulsory is the key word. Unlike many of his segregationist peers, Powell’s opposition to desegregation was not motivated by fears of miscegenation, a desire to preserve white children’s morality, or the perception that the introduction black students’ would erode the education standards of white schools. Instead, he worried that forcing integration would lead to chaotic outcomes, including a mass exodus of white families from areas impacted by desegregation decrees, a resulting destruction of the school system, increased racial tension, and the destruction of community ties.⁴⁷ 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 necessitate great social upheaval. But forcing whites to integrate with blacks was a dangerous proposition—one that he spent considerably effort trying to avoid.

The law firm that Powell co-owned represented one of the school boards in *Brown v. Board of Education*.⁴⁸ It is not clear the extent to which Powell was personally involved in the litigation.⁴⁹ However, after his firm lost the case, Powell worked behind the scenes to ensure that the *Brown* decision would have little practical impact. In addition to having a private practice, from 1952-1961 Powell served as the chairman of the school board in Richmond, Virginia.⁵⁰ During that time, he revealed himself as a deft strategist at subverting desegregation orders.

Rather than comply with the Court’s desegregation orders, a number of the 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

⁴⁶ EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 348 (2013).

⁴⁷ JEFFRIES, *supra* note 30, at 140. Powell would suggest that the *Brown* decision marked a shift in the way he thought about segregation. “I’m ashamed to say that I never questioned segregation until the Supreme Court decided that case [Brown],” he said in a 1986 interview, “Plessy was the law of the land. I was born and raised with separate laws. And that was a way of life. Now, I had a good many black friends, and I don’t think anybody could honestly say that I was a racist. But I did accept the society in which I was born and raised, and I’m not at all proud of that.” ROBERT A. PRATT, *THE COLOR OF THEIR SKIN: EDUCATION AND RACE IN RICHMOND, VIRGINIA, 1954-89* 34 (1992).

⁴⁸ JEFFRIES, *supra* note 30, at 139. *Brown v. Board of Education* was one of five school desegregation cases heard together. Powell’s firm represented the school board of Prince Edwards County, Virginia. *Id.*

⁴⁹ *Id.* at 39. The full name of the lawsuit was *Davis v. Cty. Sch. Bd. of Prince Edward Cty., Va.*, 103 F. Supp. 337 (E.D. Va. 1952), *rev’d sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (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.

⁵⁰ Robert A. Pratt, *A Promise Unfulfilled: School Desegregation in Richmond, Virginia, 1956-1986*, 99 VA. MAG. OF HIST. & BIOGRAPHY 415, 423 (1991).

better part of a decade, until the Supreme Court announced the practice unconstitutional in 1964.⁵¹

Powell was a vocal opponent of massive resistance in the state of Virginia.⁵² However, 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 volatility. Powell sought to maintain segregated schools, but believed that there were less disruptive and ultimately more effective ways to do so.⁵³ As historian Robert Pratt has argued, when it became clear that massive resistance would not be a workable strategy, Richmond school officials began to adopt what he calls “passive resistance.”⁵⁴ These officials, Pratt notes, were “equally committed to maintaining segregated schools”⁵⁵ as those who endorsed massive resistance, but recognizing that it would be a “foolhardy venture” to “become embroiled in constitutional warfare with the Supreme Court,” they adopted less conspicuous means to preserve segregated schools.⁵⁶ 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 unwelcomed social change forced upon us by law.”⁵⁷ Yet, he advised, if officials wanted to preserve segregation, massive resistance was not the best way.⁵⁸ 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, increased 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

⁵¹ See *Griffin v. Prince Edward County*, 337 U.S. 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 laws).

⁵² 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.”).

⁵³ 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 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 50, at 416.

⁵⁴ See *supra* note 53 and accompanying text.

⁵⁵ PRATT, *supra* note 47, at 12.

⁵⁶ *Id.*

⁵⁷ Statement, *supra* note 28, at 4.

⁵⁸ For Powell’s opposition to interposition, see JEFFRIES, *supra* note 30, at 145.

health.⁵⁹ Additionally, he argued that sending Richmond's children to private schools was not a viable alternative.⁶⁰ Unlike smaller school districts in the state that could create a private school system that would replace the public schools, Richmond had nearly 40,000 students, 60 separate schools, and 1500 teachers. On top of that, the existing private schools were already overcrowded.⁶¹ It was simply unrealistic to build enough new private schools to educate the city's school children. Even if it were possible, Powell warned, "Many 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."⁶² Pragmatism and the desire to avoid volatility motivated Powell's rejection of massive resistance, not an opposition to segregation per se.⁶³

Yet, also committed to avoiding integration, Powell warned that the conditions within 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 the Richmond's school district. Integration would address not just racial inequality but also the inefficient distribution of students within the school system. In order to "ameliorate the integration problem,"⁶⁴ Powell asked the city's mayor's office to build more segregated schools.⁶⁵ By building new facilities for white students, Powell argued, 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 would "appreciably improve both the short and long range prospect for minimizing the impact of integration."⁶⁶

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 . . . this of lack facilities for Negro pupils may well accelerate the pressure for integration."⁶⁷ Yet, the chairman realized that integration might still be "forced upon" Richmond residents despite his best efforts.⁶⁸

⁵⁹ Statement, *supra* note 28, at 5.

⁶⁰ *Id.*

⁶¹ *Id.* at 6.

⁶² *Id.* at 7.

⁶³ See generally ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS (1st ed. 2009) (discussing how Southern moderates strategically avoided open hostility to *Brown* and instead deployed subtler means to preserve racial segregation).

⁶⁴ Statement, *supra* note 28, at 7.

⁶⁵ Jeffries argues that this request was "disingenuous," and that Powell knew that building new schools would facilitate integration. See JEFFRIES, *supra* note 30, at 156.

⁶⁶ Statement, *supra* note 28, at 8.

⁶⁷ *Id.* at 9.

⁶⁸ Powell explained that there was no guarantee that 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

Given that uncertainty, Powell assured city officials that “every proper effort will be made to minimize the extent and effect of integration when it comes.”⁶⁹

Powell held true to that promise. In 1961, at the end of his 8-year tenure as head of the Richmond School Board, only two of the city’s 23,000 black children attended school with white students.⁷⁰ Shortly after Powell stepped down as its chairman, the Richmond school board was sued in federal court for refusing to comply with desegregation orders. The Fourth Circuit agreed that Richmond had a history of intentionally sidestepping desegregation orders.⁷¹ It was Powell who had crafted the strategy for avoiding integration. The court explicitly identified his strategy 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 perpetuate what has always been a segregated school system.⁷²

By the time that decision came down, Powell had moved from managing one city’s education system to managing that of the entire state. From 1961 to 1969, he sat on Virginia’s Board of Education, initially as a member and eventually as its chairman. Powell’s first act as board member was to join in issuing regulations that gave local school boards control over student placement.⁷³ 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.”⁷⁴ 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.⁷⁵

Speaking to public school teachers before the Virginia Education Association in November of 1962, Powell opened his remarks on a celebratory note: “It is not too much to say we are

leadership in both races, the attitudes and restraint of our people, the extent and results of litigation, and the shifts of population” at 8.

⁶⁹ Powell, *supra* note 39 at 10.

⁷⁰ See JEFFRIES, *supra* note 30, at 140. Pratt notes: “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 50, at 425.

⁷¹ *Bradley v. School Bd. of City of Richmond* 317 F.2d 429 (4th Cir. 1963)

⁷² *Id.* at 436.

⁷³ Pratt, *supra* note 50, at 423.

⁷⁴ JEFFRIES, *supra* note 30, at 169.

⁷⁵ *Id.* at 169.

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.”⁷⁶ This, of course, was not because the state’s schools had been desegregated, but instead because the board had passed the buck onto the localities with clear instructions that they were to avoid desegregation.

In spite of this history, Powell is often heralded for presiding over the state’s desegregation efforts. To the extent that people criticize his actions on the school board, it is usually for not pushing for faster desegregation. 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 with the needs and aspirations of Virginia’s black school children.”⁷⁷ In reality, however, Powell did not simply fail to take the initiative to push for faster desegregation. He actively disobeyed the law by fighting to maintain segregation.

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*.⁷⁸ However, Powell’s opposition to school desegregation was not limited to his home state. In the nationwide battle between segregationists and those who fought for integration, his sympathy lay with the segregationists and his contempt was largely reserved those who sought to realize the promise of *Brown*. In Powell’s estimation, school officials who resisted segregation were simply trying to preserve order, whereas civil rights activists pushing for integration were dangerous 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, refused to move black children into schools in white communities in the face of intense protests by civil rights activists, even as black schools had become significantly overcrowded and many white schools were well

⁷⁶ Lewis F. Powell, Jr., Address to Virginia Education Association: Educational Research—A New Opportunity in Virginia I (Nov. 1, 1962), available at <http://law2.wlu.edu/deptimages/powell%20archives/11-1-1962EducationalResearch.pdf> (last visited Oct. 27, 2018).

⁷⁷ JEFFRIES, *supra* note 30, at 172.

⁷⁸ In 1986, Powell would go on to explain his failure to desegregate Richmond schools by saying that, in a city where the majority favored segregation, efforts to integrate would have been disastrous: “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 50, at 424.

below capacity.⁷⁹ 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.⁸⁰ In response, black citizens organized protests to get Superintendent Willis removed from his position.

Speaking at a southern seminary in 1965, Powell called those demonstrations “lawless coercion.”⁸¹ For him, Superintendent Willis was simply doing the right thing by preserving the segregated schools. It was the activists who were 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 busing pupils and destroying the neighborhood school.”⁸² Of course, his concern for preserving “the neighborhood school” was limited to the white neighborhood school as black schools, overcrowded and under-resourced, were already suffering.

Even after Powell was no longer an education official in Virginia, he continued to oppose desegregation efforts. In 1970, acting as special counsel for the Commonwealth of Virginia, Powell was the principal author an amicus brief in *Swann v. Charlotte-Mecklenburg Board of Education*.⁸³ The brief opposed the busing of K-12 students as a means to achieve racial integration.⁸⁴ In writing the amicus brief, Powell was likely expressing his own views rather than simply giving voice to the state’s position. His biographer, for instance, believes that the words Powell penned “came from his heart.”⁸⁵ Animating the future Justice’s opposition to busing was a fear that racially integrated schools would diminish the educational quality in white, middle-class neighborhoods.⁸⁶

He used the brief not simply to oppose busing but to re-litigate the merits of integration itself. Attempting to delegitimize racial integration as the primary means to achieve educational equality,

⁷⁹ Sarah Lyall, *B.C. Willis, 86; Led Chicago Schools for 13 Years*, N.Y. TIMES (Aug. 31, 1988), <https://www.nytimes.com/1988/08/31/obituaries/bc-willis-86-led-chicago-schools-for-13-years.html>.

⁸⁰ His critics called them “Willis Wagons.” *Id.*

⁸¹ Lewis F. Powell, Jr., *Address to Union Theological Seminary: Civil Disobedience vs. The Rule of Law* 11 (Oct. 11, 1965) [hereinafter *Civil Disobedience vs. The Rule of Law*], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Civil%20Disobedience%20vs.%20the%20Rule%20of%20Law.%20October%201965_116-16.pdf (last visited Oct. 27, 2018).

Explaining their lawlessness, Powell in a different speech would go on to say, “Groups of demonstrators purporting to be practicing civil disobedience Jay down in the streets during the rush hours, blocking traffic and causing extreme inconvenience to the public general.” Lewis F. Powell, Jr., *Address on Founder’s Day at Wake Forest College: Limitations on the Right to Demonstrate* 11 (Oct. 21, 1966), available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_LimitationsOnTheRightToDemonstrate_10-21-1966.pdf.

⁸² *Civil Disobedience vs. The Rule of Law*, *supra* note 81, at 11.

⁸³ Brief for the Commonwealth of Virginia, Amicus Curiae, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (No. 281), 1970 WL 122664.

⁸⁴ *Id.* at *26-27.

⁸⁵ JEFFRIES, *supra* note 30, at 284.

⁸⁶ *Id.* at 285

Powell criticized courts for having a “preoccupation with the ‘racial mixing of bodies.’”⁸⁷ Ensuring that schools were racially balanced, the amicus brief argued, was both “regressive and unproductive.”⁸⁸ Powell warned that enforcing integration within a city’s limits would instigate a white flight to suburbia. However, Powell did not understand white flight as a problem. Instead, he labeled it as a natural “exercise of freedom.”⁸⁹ The problem, for Powell, was the forced racial balancing in schools that triggered white flight. The brief urged the Court not to force 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.⁹⁰ Again, he paid little attention to the costs black students paid under a segregated regime.

Powell’s opposition to busing was attractive to President Nixon, who had campaigned by stoking the racial resentment of whites disillusioned by the Court’s desegregation mandate. When attempting to fill a Supreme Court vacancy, Nixon considered Powell and Tennessee Senator Howard Baker. To explain their appeal, Nixon told aides: “Both these men are against busing. And that will help us like hell.”⁹¹ Powell, however, was aware that he had earned the scorn of civil rights activists and was resultingly reluctant to go through Supreme Court nomination hearings. Indeed, when Powell first learned that he was on a short-list 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.⁹²

Indeed, 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, 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 the state’s 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

⁸⁷ Brief for the Commonwealth of Virginia, Amicus Curiae, *supra* note 83, 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, A Reassessment of Racial Balance Remedies: I, 62 PHIDELTA KAPPAN 177 (1980).

⁸⁸ Brief for the Commonwealth of Virginia, Amicus Curiae, *supra* note 83, at *16.

⁸⁹ *Id.* at 15.

⁹⁰ *Id.* at 16.

⁹¹ The Honorable David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U.L. REV. 1071, 1099 (2004)

⁹² JEFFRIES, *supra* note 30, at 2.

children to attend white private schools.⁹³ Summing up their remarks, Virginia's Black bar association, represented in part by the Vice-Mayor of Richmond said, "We suggest . . . to put Mr. Powell on the Court in face of his record, his record of continued hostility to the law, and 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."⁹⁴

B. Powell on the Civil Rights Movement

What came up less during his confirmation hearings was Powell's history of being 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.⁹⁵ The use of sit-ins, marches and protests during the 1960s appalled 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 criticism of the Civil Rights Movement was his belief that African Americans in the United States should be grateful for the rights that their country had recently bestowed upon them and not agitate for more. 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 angered "that this threat of rebellion should come at a time of unprecedented progress equal rights and opportunities for Negroes," especially considering that black Americans "are economically the most prosperous large group of nonwhites in the world, enjoying a higher average income than any nation in Africa, Asia, or Latin America."⁹⁶

⁹³ See, e.g., *Nomination of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Committee on the Judiciary United States Senate*, 92d Cong. 380-86 (1971) (prepared statement by Mr. Conyers) (discussing the need to make inquiry into the minutes of Richmond School Board meetings to ascertain Powell's participation in resistance efforts), available at <https://www.govinfo.gov/content/pkg/GPO-CHRG-REHNQUIST-POWELL/pdf/GPO-CHRG-REHNQUIST-POWELL.pdf> (last visited Oct. 27, 2018).

⁹⁴ *Id.* at 389-390 (statement of Mr. March).

⁹⁵ See, e.g., IAN HANEY LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 64-65 (2014). Powell would later go on to revise his personal history, portraying himself as someone who 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." *Civil Disobedience vs. The Rule of Law*, *supra* note 81, at 3-4.

⁹⁶ *Prelude to Revolution*, *supra* note 13, at 12 (referencing a New York Times Editorial from July 24, 1967).

In a 1967 speech entitled “Civil Disobedience: Prelude to Revolution?,” Powell condemned civil rights activists for engaging in nonviolent resistance. Among the most worrisome figures was Martin Luther King Jr., who Powell designated a “militant leader”⁹⁷ and “the prophet of civil disobedience.”⁹⁸ King, according to Powell, worked “arm-in-arm” with the Black Panthers and black nationalists.⁹⁹ He took issue with King’s efforts to achieve social change using extralegal means. While King often cited Gandhi’s use of nonviolence resistance as his inspiration, Powell thought the comparison was inapposite. He argued that civil disobedience may have been appropriately endorsed by Gandhi because in India, “there were no courts and no democratically established political institutions” for Gandhi to channel his grievances.¹⁰⁰ That was not the case in the U.S. According to Powell, “within the framework of the American system of freedom under law, . . . minority groups often have political power disproportionate to their actual numbers, [and] with rapidly diminishing exceptions in the Deep South - the courts and legislative halls are open to all.”¹⁰¹

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.”¹⁰² 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 believed that white Americans were under no obligation to compensate African Americans for the oppression they faced from earlier generations. In 1970, rehearsing a logic that he would memorialize in *Bakke*, Powell noted that innocent white Americans could not be held accountable for racial injustices of the past:

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.¹⁰³

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

⁹⁷ *Id.* at 7.

⁹⁸ *Id.* at 8.

⁹⁹ *Id.* at 9.

¹⁰⁰ *Civil Disobedience v. The Rule of Law*, *supra* note 81, at 6.

¹⁰¹ *Id.* at 4.

¹⁰² *Prelude to Revolution*, *supra* note 13, at 3.

¹⁰³ *Attack on American Institutions*, *supra* note 15, at 21.

democracy.”¹⁰⁴ He implied that black activists were engaging in civil disobedience not to get to equal rights. Rather, they were planning a revolution by using tactics long deployed “by some of the leading tyrants in history.” Unwilling to achieve their ends through fair democratic processes (i.e. voting), black Americans were using disruption and force.

If there was any evidence of this pending revolution, it was the race riots that erupted throughout the nation in the 1960s. While the Kerner Commission would ultimately cite systemic racism as the cause of the riots,¹⁰⁵ 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.”¹⁰⁶

Powell believed that because the U.S. had engendered a culture of permissiveness because it had not been harsher on those who engaged in civil disobedience. Quoting Patrick Moynihan, Powell said that this permissiveness had enabled black protestors to engage in a “massive opposition to the rules of white society.”¹⁰⁷ Indeed, he believed granting activists’ demands did not satisfy them; it 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.”¹⁰⁸

Rather than try to mend race relations, however, Powell advocated that government officials get tough on crime. The Virginia statesman told his audience, “Toleration of civil disobedience and justification of lawlessness must end.”¹⁰⁹ Those who incited rebellion “should be treated as the most dangerous criminals and relentlessly prosecuted;” those who participated in rebellion should be “prosecuted with vigor;” and those who engaged in non-violent civil disobedience “should also be subjected to criminal sanctions.”¹¹⁰

¹⁰⁴ *Id.*

¹⁰⁵ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1967), available at <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>; 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> (presenting a contemporary summary of Kerner Commission’s findings).

¹⁰⁶ Prelude to Revolution, *supra* note 13, at 19.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 20.

¹⁰⁹ *Id.* at 21.

¹¹⁰ *Id.* at 22.

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 racial integration. The basic point would be that Powell had a racial awakening that was facilitated, in part, by his ascendancy to the Supreme Court. In Part II, I challenge the racial segregationism to racial liberalism trajectory story.

Few people might know that, as late as 1970, Powell was still trying to gut *Brown*, calling for criminal sanctions for civil rights activists, telling audiences that the US 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. Their primary evidence for this transformation is the swing vote he used to uphold affirmative action in higher education.¹¹¹ Powell's biographer, John Jeffries, explains this surprising shift by asserting that "the Supreme Court had changed Lewis Powell."¹¹² According to Jeffries, "The crucial and indispensable ingredient in Powell's acceptance of racial preference was a sense of personal responsibility for racial justice. That came with the oath of office."¹¹³

While Powell undoubtedly experienced some measure of growth after joining the Court, the claim that his Supreme Court appointment led to a racial awakening is hard to sustain. For one thing, 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 during his tenure. In this Part of the chapter, I explain 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 one particular form of it (massive resistance), post-Court Powell eroded integration in higher education by barely permitting one path to pursue it: diversity. This is to say, prior to *Bakke*, Justice Powell, spent considerable jurisprudential effort to limit educational opportunities for students of color.

A. K-12 Desegregation

¹¹¹ Justice Scalia speculated that Powell's true motives were not to actually ensure general diversity of background, as he said they were, but rather to achieve racial diversity in particular. Criticizing the diversity rationale, Scalia noted, "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? . . . [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 result." Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 1979 WASH. U. L. REV. 147, 149 (1979).

¹¹² JEFFRIES, *supra* note 30, at 499.

¹¹³ *Id.*

Powell became a Justice a time when the Court was being asked to give teeth to *Brown* by forcing schools districts to take concrete steps to desegregate. With Powell on the Court, however, the Court largely abandoned its commitment to integration, allowed for the continuation of an education system that was both separate and unequal, and eroded the promise of *Brown*. On key desegregation cases, the former schoolboard chair most often sided with those Justices who sought to limit the desegregation mandate. What animated Powell's decision-making was a fear that forcing desegregation would harm white students and white communities. He demonstrated general apathy for the well-being of students of color.

When minority communities asked the Court to live up to the old promise of separate but equal, Powell was unwilling. In the 1973 controversy in *San Antonio Independent School District v. Rodriguez*,¹¹⁴ 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.¹¹⁵ Like most states, Texas relied heavily on local property taxes to fund its public schools.¹¹⁶ This led to a system whereby students who resided in poor neighborhoods were forced to attend underfunded schools and received substandard educations. This was not simply a class issue, however. The parents who brought the case were clear to note that class could not be divorced from race.¹¹⁷ 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.¹¹⁸ This resulted in a system where, according to the parents' brief, "the districts with the highest percentages of Mexican-American and Blacks are low expenditure districts, while those with few minority people spend substantially more per student for education."¹¹⁹ Giving 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."¹²⁰

Receiving substandard education, the parents argued, did not only impair the poor minority students' chances for upward mobility;

¹¹⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹¹⁵ See Brief for Appellees, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), (No. 71-1332), 1972 WL 134333.

¹¹⁶ *San Antonio Independent School Dist*, 411 U.S. at 6-7.

¹¹⁷ See Camille Walsh, *Erasing Race, Dismissing Class: San Antonio Independent School District v. Rodriguez*, 21 BERKELEY LA RAZA L.J. 133 (2011).

¹¹⁸ *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").

¹¹⁹ Brief for Appellees, *supra* note 115, at *16.

¹²⁰ *Id.* at *17.

it also made them less capable of engaging in the democratic process.¹²¹ 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.”¹²² However, if Powell had indeed worked to dilute the black vote during this time—as Richmond’s vice-Mayor and the city’s black bar association accused him of 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.

Powell, writing for the conservative majority in a 5-4 decision, was unconvinced by the parents’ arguments and held that disparities in school funding did not violate equal protection.¹²³ He largely ignored their claim of racial discrimination and instead focused on class discrimination. By ignoring race, he was able to stand on firmer constitutional ground. Since poverty was not 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.¹²⁴ 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.¹²⁵

The following year, in *Milliken v. Bradley*,¹²⁶ 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.¹²⁷ 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 city’s public schools filled overwhelmingly with black students, while school districts in nearby suburb 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.¹²⁸ The majority found that a court could not impose a multidistrict remedy to integrate a single district unless it was found that each of the districts involved had fostered discrimination or it a state law produced the inter-district remedy.¹²⁹ Absent that

¹²¹ *Id.* at *25.

¹²² Statement, *supra* note 28, at 5.

¹²³ *San Antonio Indep. Sch. Dist.*, 411 U.S. at 55.

¹²⁴ *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 unpersuasive.”)

¹²⁵ *Id.* at 36.

¹²⁶ 418 U.S. 717 (1974).

¹²⁷ *Id.* at 717.

¹²⁸ *Id.* at 733-34.

¹²⁹ *Id.* at 717.

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. As critics have noted, the combination of *Milliken* and *Rodriguez* worked to ensure the maintenance of separate and unequal schools. 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.¹³⁰

One might point to *Keyes v. School District No. 1*¹³¹ as a counter-example where Powell voted to further the interest of minority school children. *Keyes* was the first time 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 desegregation. 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.¹³²

In a concurring opinion, Powell seemed to push for a broader desegregation mandate than even his more liberal counterparts. The Southerner 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."¹³³ However, what animated Powell's disagreement was not simply a desire to achieve equality for students of color in the North.¹³⁴ 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 had been responsible for carrying out desegregation in the South, Powell was frustrated by the hypocrisy of Northerners. He wrote that the same Northerners who "denounced the evils of segregated schools in the South," perpetuated segregation in the North, just by different means.¹³⁵ By pushing for the abandonment of the de jure/de facto distinction, Powell wanted Northern whites to face the same difficulty that they had forced upon their Southern counterparts.

Supporting the contention that Powell's *Keyes* concurrence was not motivated by an interest in achieving integration is the fact that he spent more than half of his opinion detailing his "profound

¹³⁰ CONSTITUTIONAL LAW 747 (Erwin Chemerinsky, ed., 3d ed. 2009).

¹³¹ 413 U.S. 189 (1973).

¹³² *Id.* at 208-09.

¹³³ *Id.* at 209 (Powell, J., concurring).

¹³⁴ Powell discusses in only a paragraph how the distinction between de jure and de facto segregation hurts minority children in the North. *See id.* at 229.

¹³⁵ *Id.*

misgivings” about a key mechanism to achieve integration: busing.¹³⁶ More to the point, in articulating his opposition to school busing, Powell made a larger argument against the Court’s “[o]verzealous . . . pursuit” of desegregation.¹³⁷ He wrote that public school boards should balance the interest in desegregation “with other, equally important educational interests which a community may legitimately assert.”¹³⁸ To support this proposition, he quoted text from a law review comment which read: “The relevant inquiry is ‘whether the costs of achieving desegregation in any given situation outweigh the legal, moral, and educational considerations favoring it.’”¹³⁹ The quote continued, “the Constitution should not be held to require a 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.”¹⁴⁰

Powell suggested that instead of forcing students to integrate, school board officials could take actions to “encourage the likelihood of integration,” like creating new schools or establishing “an optional majority-to-minority transfer program whereby “desiring” white students could choose to be bussed to schools in black neighborhoods.¹⁴¹ 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.¹⁴² As he had been before he joined the Court, Powell seemed to be most concerned with preserving the well-being of white communities and white children, even if that meant sacrificing the interest and well-being of communities of color.

The prior cases were decided within the first couple of years of Powell’s tenure on the Court. Thus, a skeptical reader might say that Powell could have still had a racial awakening by the time *Bakke* came about in 1978. Yet, the Court heard two significant school desegregation cases the year after *Bakke*.¹⁴³ In both, Powell joined the conservative minority in an effort to place significant limits desegregation in public schools.

B. Affirmative Action

One might argue that other considerations compelled Powell’s resistance to public school desegregation. After all, desegregation required a massive, complicated, and often messy restructuring of

¹³⁶ *Id.* at 238.

¹³⁷ *Id.* at 240.

¹³⁸ *Id.*

¹³⁹ *Id.* at 240 n.19 (citing Robert I. Richter, Comment, *School Desegregation after Swann: A Theory of Government Responsibility*, 39 U. Chi. Rec. 421, 422, 443 (1972).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 241.

¹⁴² *Id.*

¹⁴³ The two cases I refer to are *Columbus Bd. of Educ. v. Penick*, 439 U.S. 1348 (1978), and *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977).

society. The same is true for changing how public schools are funded throughout the nation. Opposition to large-scale societal transformations of society could be rooted in a desire for order rather than a desire to maintain racial hierarchies.

In *Bakke*, however, Powell faced a more moderate request. Selective universities asked the Court to allow them to continue considering race, something that they had been doing more little more than a decade. It did not require massive transportation of students or changes in funding. Yet, Powell used *Bakke* to significantly limit the scope of racial integration in higher education. His opinion did not reflect the worldview of someone who felt a “personal responsibility for racial justice.”¹⁴⁴ Instead, it reflected the logic of someone who was skeptical that minorities continued to face harsh forms of discrimination and was dismissive of any goals that centered on the uplift communities of color. To the extent the Court should worry about racial discrimination, Powell seems to have thought that it was whites who were most vulnerable to its pernicious effects.

Bakke involved a challenge to the admissions practices of University of California at Davis Medical School. Davis set aside 16 of 100 slots in its entering class for racial minorities.¹⁴⁵ Alan Bakke, a white applicant who twice applied and was twice denied to the medical school, sued the school for racial discrimination, citing 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.¹⁴⁶

In deciding the case, the Court was split. Justice Brennan, White, Marshall and Blackmun voted to uphold Davis’s program. They agreed that intermediate scrutiny was the appropriate test for programs that were 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, an opinion that none of his colleagues joined.

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.¹⁴⁷ While he acknowledged that the Court had previously stated that the “one pervading purpose” of the 14th Amendment was to protect African Americans “from the oppressions of those who had

¹⁴⁴ JEFFRIES, *supra* note 31, at 499.

¹⁴⁵ *Regents of Univ. of Cali. V. Bakke*, 438 U.S. 265, 278.

¹⁴⁶ *Id.* at 276-78.

¹⁴⁷ In his draft memo to his fellow justices, Powell noted that the “crucial battle” in *Bakke* was “over the proper scope of judicial review.” Relying on *Carole Products* footnote 4, University of California argued that strict scrutiny “should be reserved for classifications disadvantages ‘discrete and insular minorities.’” BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 82 (2d ed. 1988). *Bakke*, on the other hand, argued that determining the level of scrutiny applied to a racial classification did not turn upon membership in a discrete and insular minority.” *Id.*

formerly exercised dominion on him,” Powell dismissed that purpose as antiquated.¹⁴⁸ Given the country’s increasing racial and ethnic diversity, Powell argued, the 14th Amendment could not be read only to protect racial minorities because “the United States had become a Nation of minorities.”¹⁴⁹

In order to shoehorn whites into the definition of “minority,” Powell subtly shifted from the language of race to that of ethnicity.¹⁵⁰ Eliding the fact that whites were a clear majority in the U.S., he disaggregated whites into all their assorted ethnic categories. Powell noted, “the 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.”¹⁵¹ And indeed, if the Court were to grant ethnic whites a special standing in addition to people of color, that would simply create a new category of oppressed minorities, White Anglo Saxon Protestants.¹⁵²

Ignoring the specificity of white-over-black racial subordination that has characterized the nation since its inception, Powell presented the plight of whites in America as virtually indistinguishable from that of blacks and other racial minorities.¹⁵³ Speaking of the various groups in his “Nation of minorities,” he writes: “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.”¹⁵⁴ In a strange retelling of US history, Powell based his decision on an argument that whites had been just as oppressed as people of color. Thus, neither group should receive special consideration from the Court.¹⁵⁵

¹⁴⁸ *Bakke*, 438 U.S. at 291.

¹⁴⁹ *Id.* at 292

¹⁵⁰ There is evidence that Powell truly believed that whites were a minority in the U.S. The 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 US, he writes, “white race - minority.” Lewis F. Powell Jr., 15 Years Have Transformed Our World (Jan 1, 1969), available at http://law2.wlu.edu/deptimages/powell%20Archives/PowellSpeech_15YearsHaveTransformedOurWorld_1-12-1969.pdf.

¹⁵¹ *Bakke*, 438 U.S. at 292.

¹⁵² *Id.* at 296

¹⁵³ 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 401 (Marshall, J., concurring.)

¹⁵⁴ *Id.* at 292

¹⁵⁵ 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, JM 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).

After Powell established that race-based affirmative action must be examined under strict scrutiny, he then examined the compelling interests that University of California articulated in its brief to see if any were sufficiently compelling to allow for racial distinctions in its admissions decisions. UC Davis argued that by considering race in its admissions decisions it was attempting to serve three important goals.

i. Addressing Societal Discrimination

First, and most importantly, Davis asserted that it was combating the “legacy of pervasive racial discrimination in education, medicine and beyond.”¹⁵⁶ Noting that many of the students of color applying to medical school in the late 1970s had received their K-12 education during the time after *Brown* had been announced but before the Court actually began enforcing it, Davis argued that medical school applicants in the 1970s had “seen the hope but not the promise of *Brown*.”¹⁵⁷ Simply refraining from intentionally excluding racial minorities, the university argued, was insufficient to combat the legacy of discrimination. Instead, if it were to make inroads into realizing the promise of integration, Davis would have to consider the societal discrimination faced by applicants of color.

Powell quickly dispensed with this goal, calling societal discrimination “an amorphous concept of injury that may be ageless in its reach into the past.”¹⁵⁸ His argument suggested that the primary reason for dismissing this goal was the imprecision of the injury and thus the difficulty of providing a remedy.¹⁵⁹ However, the language he chose when discussing the merits of this goal revealed his deep skepticism that racial minorities faced “societal discrimination.”

Powell described white applicants in sympathetic terms, but he never explicitly referred to their race. He simply called them “innocent individuals.”¹⁶⁰ Applicants of color, however, were described with language that casted doubt on their status as members of society who needed special consideration from the Court. They were referred to as “persons perceived as members of relatively victimized groups.”¹⁶¹

¹⁵⁶ Brief for Petitioner at *17, *Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187977.

¹⁵⁷ *Id.*

¹⁵⁸ *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, “History is irrelevant to the enforcement of a constitutional right.” Brief for the Commonwealth of Virginia, Amicus Curiae, *supra* note 83, at 6.

¹⁵⁹ *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).

¹⁶⁰ *Bakke*, 438 U.S. at 307.

¹⁶¹ *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;’” 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*

Adding the modifiers “perceived” and “relatively” revealed the Justice’s skepticism that people of color faced discrimination that was worse than that faced by whites. In contrast, the “innocence” of whites was not modified by any qualifying terms. Ultimately, he dismissed 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.”¹⁶² Here again, the phrase “are thought to have suffered” indicated Powell’s skepticism towards the plight of racial minorities.

Given that Powell had seen entire school districts shut down in order to keep black children away from white children and had presided over key desegregation and racial discrimination cases where he was presented hard evidence of the kinds of racial discrimination that black Americans faced, it stretches the imagination to accept that Powell was legitimately skeptical of the notion that racial minorities faced societal discrimination. Rather, it is more likely that Powell’s allegiance lay with white Americans. Thus, he was willing to minimize or altogether dismiss the racial oppression faced by blacks if acknowledging their suffering might lead to adverse impacts for whites.

ii. Providing Healthcare to Underserved Communities

Next, UC Davis suggested that enacting a race-conscious admissions practice would help to increase the number of medical professionals in underserved communities. The university noted that up until the 1970s medical schools had been “white islands in a multi-racial society.”¹⁶³ This created a shortage of black doctors, which in turn, resulted in a paucity of medical professionals willing to practice in black communities. Using Census data, Davis noted: “The reported ratio of black physicians to blacks is far lower than the physician/non-physician ratio for the nation at large.”¹⁶⁴

The university argued that this shortage of black doctors contributed to minority communities suffering increased sickness and premature death. While acknowledging that not all black doctors would choose to practice in black communities, Davis believed that in what was still largely a segregated society: “[T]here 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.”¹⁶⁵

Jurisprudence of Centrism Justice Lewis F. Powell, Jr. by John C. Jeffries, Jr. New York: Charles Scribner's Sons. 1994. Pp. Xii, 690. \$30.00., 93 MICH. L. REV. 1854, 1874 (1995)

¹⁶² *Bakke*, 438 U.S. at 309.

¹⁶³ Brief for Petitioner, *supra* note 156, at *10.

¹⁶⁴ *Id.* at *23.

¹⁶⁵ *Id.* at *25.

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 believed that there was no guarantee that minority doctors would work in underserved communities. Citing a lower court's estimation that "there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive," Powell dedicated just a few paragraphs to dispensing with this argument.¹⁶⁶ If increasing the amount of doctors practicing in underserved areas was in fact the goal, the Justice believed that there were more direct ways to achieve it, ways that did not use race as a proxy for where a student would ultimately practice.

iii. Diversity

The one argument that Powell found compelling is the one that the University of California scarcely articulated in its brief and never mentioned in oral arguments: that there were educational benefits of diversity. However, in accepting this justification Powell adopted neither Davis' conception of diversity nor its aims.

In its brief, Davis argued that by having 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.¹⁶⁷ They could also develop better rapport with patients of color. The exposure to classmates of color might even compel white students to locate their practice in those minority communities that have a shortage of doctors. In short, the educational benefits of diversity, as articulated by 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 Davis's focus on *racial* diversity. In earlier drafts of his opinion Powell wrote that Davis's articulation of diversity was "seriously flawed" because it misinterpreted the nature of the state interest.¹⁶⁸ "Racial or ethnic origin," Powell wrote, "is but a single element" of the kind of diversity that would further a substantial state interest.¹⁶⁹

Instead, he relied on a more ecumenical conception of diversity that Harvard described in the appendix of an amicus brief that a few elite universities jointly submitted to the Court.¹⁷⁰ In many respects,

¹⁶⁶ *Bakke*, 438 U.S. at 311.

¹⁶⁷ Brief for Petitioner, *supra* note 156, at *19.

¹⁶⁸ SCHWARTZ, *supra* note 147, at 219.

¹⁶⁹ *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.

¹⁷⁰ Brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae, *Univ. of Calif. 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*

when viewed in its entirety, the Harvard brief was similar to the one UC Davis submitted. Harvard's main arguments centered on the points that Powell dismissed, namely that affirmative action was a necessary step to remedy societal discrimination. The brief urged the Court to let universities take into account “the educational deficit under which America's non-whites have labored throughout our history.”¹⁷¹ 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.”¹⁷²

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.¹⁷³ Harvard tied intellectual diversity to demographic diversity. Believing that one’s identity helps to determine his outlook, Harvard wrote: “A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer.”¹⁷⁴ “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.”¹⁷⁵ Taking account of an applicant’s race, according to the Ivy, was part of a broader effort to create an intellectually heterogeneous environment on its campus “that reflect[ed] the rich diversity of the United States.”¹⁷⁶

Powell accepted this argument without subjecting it to the same level of skepticism that typified his analysis of justifications centered on minority uplift.¹⁷⁷ Harvard offered no empirical evidence

and the Diversity Justification for Affirmative Action, (U.C. Berkeley Public Law Research Paper No. 2913310, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913310 (noting that much of the brief was recycled from *DeFunis v. Odegaard*, an earlier affirmative action case that was ultimately ruled moot). Oppenheimer argues that Powell was attracted the diversity argument when he first encountered in *DeFunis*. Four years later in *Bakke*, referring of Harvard’s more inclusive conception of diversity, he told his law clerk, “This is the position that appeals to me. Use *DeFunis*.” *Id.* at 16. .

¹⁷¹ Brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae, *supra* note 170, at *24.

¹⁷² *Id.* at 8.

¹⁷³ *Id.* at Appendix, *1.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at Appendix, *2.

¹⁷⁶ *Id.* at Appendix, *3.

¹⁷⁷ See WILKINSON, *supra* note 35, at 304 (“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, 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,

that diversity of students' backgrounds leads to better learning outcomes. It was simply asserted as a long-held belief. To support his view that diversity leads to better educational outcomes, Powell cite only a statement from the Princeton University president that appeared in an alumni magazine.¹⁷⁸ 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."¹⁷⁹ Nevertheless, Powell accepted it 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 the creation of 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."¹⁸⁰ He argued that the First Amendment gave universities latitude to create the intellectual environment that was "most conducive to speculation, experiment and creation."¹⁸¹ Quoting a district court opinion, Powell discussed the importance of universities remaining 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.'"¹⁸²

Powell's reasoning in *Bakke* recognized that the nation's universities functioned, in part, as incubators for the next generation of decision-makers. The intellectual climate that students marinated in during their university years would have effects not only on their personal development, but also on the development of the country. Emphasizing this point, he reframed the quotation above writing, "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."¹⁸³

Yet, Powell was clear that his decision should not be read as allowing universities to take only race into account. Focusing solely on racial diversity, he said, "would hinder rather than further attainment of genuine diversity."¹⁸⁴ He went on, "the diversity that

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.'")

¹⁷⁸ *Bakke*, 438 U.S. at 312 n.48.

¹⁷⁹ *Id.* (citing Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7, 9 (Sept. 26, 1977)).

¹⁸⁰ *Id.* at 311-12.

¹⁸¹ *Id.* at 312.

¹⁸² *Id.* (quoting *United States v. Associated Press*, D.C., 52 F.Supp. 362, 372. (S.D.N.Y. 1943)).

¹⁸³ *Id.* at 313.

¹⁸⁴ *Id.* at 315.

further a compelling state interest encompasses a far broader array of qualifications and characteristics.”¹⁸⁵ The directive was clear: if universities wanted to consider the race of an applicant, they must also consider a wide range of applicant characteristics with the goal of exposing future leaders to a “robust exchange of ideas.”¹⁸⁶

iv. The Great Compromise

The dominant interpretation of *Bakke* is that Powell decided the case on the grounds of intellectual diversity as a compromise between the liberals and conservatives on the Court.¹⁸⁷ He preserved affirmative action, which satisfied liberals. But he also banned racial quotas and avoided creating a constitutional regime where racial minorities are afforded special benefits, and that at the very least tempered some of the conservative backlash to the decision. As a result, Powell’s opinion as often heralded as “Solomonic compromise.”¹⁸⁸

Even those who are critical of the decision accept that it was motivated by a desire to forge compromise.¹⁸⁹ The year after *Bakke* came down, then-professor Antonin Scalia that Powell’s opinion “strikes me as an excellent compromise between two committees of the American Bar Association on some insignificant legislative proposal, but it is thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution.”¹⁹⁰

When *Bakke* came before the Court, few knew how the individual Justices would come down. Powell did not wait for an indication before he wrote his opinion. Months before the judges met in conference, Powell had his clerk write a draft opinion that said UC Davis’s affirmative action program was unconstitutional. The only suitable justification for affirmative action, he argued, was the pursuit of diversity. Yet, he was unconvinced by Davis’s conception of diversity, which focused exclusively on the need to incorporate the perspectives of racial minorities into the academic community. Instead, he was attracted to Harvard’s more catholic conception of diversity, which was not tied to righting societal wrongs, but rather to fostering a marketplace of ideas for the next generation of leaders.

Without knowing if he would be in the majority or the dissent, and definitely not knowing that he would be writing the controlling

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 312-13.

¹⁸⁷ Wilkinson notes that it was a compromise between blacks and whites: “The solution was typically Powellian . . . above all, a compromise that majorities of both races might abide.” WILKINSON, *supra* note 35, at 302.

¹⁸⁸ *Id.* at 298.

¹⁸⁹ Scholars sometimes make a similar claim but articulate it with different language. they say that he was trying to balance competing interests. Mark Tushnet, for examples, offers the following criticism: “Powell’s desire to achieve balance meant that the law he articulated reflected the balance he struck, not a balance accessible to any fair reader of the cases.” Tushnet, *supra* note 170, at 1874.

¹⁹⁰ Scalia, *supra* note 111, at 148.

opinion, Powell decided to vote against UC Davis's affirmative action plan. His opinion would say Davis's policy was unconstitutional. But he would specify that, in his view, Harvard's practice of considering applicant demographics to achieve of intellectual diversity was a lawful consideration of race.

It was not until months later during a conference meeting, after a number of justices had formed their views, that it became clear that Powell was going to be a key vote.¹⁹¹ Noting that Powell was against Davis's quota system and its race-focused conception of diversity but endorsed Harvard's more amorphous policy, Justice Brennan—a supporter of affirmative action—suggested that Powell essentially hand down two decisions: one forbidding Davis's policy, the other allowing for Harvard's policy centered on intellectual pluralism.¹⁹²

It was in this narrow way that Powell made a compromise. The heart of his opinion never actually changed.¹⁹³ He did not decide to promote intellectual diversity to bridge the divide on the Court. To the extent he made a compromise, it was in form, not substance. Instead of voting to strike down UC Davis's policy and writing a concurrence to affirm Harvard's, he affirmed Harvard's policy while striking down Davis's. It seems that what was most important to Powell was affirming universities' pursuit of intellectual diversity on campus. His ultimate vote to preserve affirmative action was more likely the result of Brennan's intervention than Powell's commitment to racial justice.

Despite the widespread belief that Powell was a racial moderate committed to preserving racial integration, the evidence I have presented thus far demonstrates that Powell fought to preserve segregation before joining the Court, and, once he was there, he fought to slow down efforts to desegregate. Even in *Bakke*, his draft opinion shows that Powell was initially going to vote to ban affirmative action. The only thing that changed his mind was Harvard's brief, which focused on the importance of creating an intellectual diverse learning environment. In his final opinion, Powell made sure to explicitly forbid any justification for affirmative action that either took into account the discrimination suffered by racial minorities or that was centered on uplifting minority communities. Significantly, throughout the opinion he consistently signaled that he was deeply skeptical that people of color faced hardships that were different, or worse, than

¹⁹¹ JEFFRIES, *supra* note 30, at 487.

¹⁹² SCHWARTZ, *supra* note 147, at 82.

¹⁹³ Brennan confirms the opinion Powell published differed only slightly from the first memo that he produced. Chronicling the differences, Brennan wrote in his notes: "On May 9, [Powell] circulated a first opinion draft which his published opinion would closely parallel and which, with the exception of several new sections, was identical to the November 22 memorandum.67 Part I, which was new, was merely a statement of facts and history of the case and unexceptional. Part II- A, with which I fully agreed, concluded that the existence of an implied private cause of action under Title VI should be assumed without decision. Part II-B concluded that Title VI proscribes only those racial classifications violative of the Equal Protection Clause or the Fifth Amendment. The remainder of the draft differed from the earlier memorandum only in that it was punctuated with numerous subdivisions to facilitate joinder of various parts by respective groups of four." Epstein & Knight, *supra* note 155, at 356–57.

those faced by whites. Taking all of this into account, it is difficult to sustain the claim that it was Powell’s “sense of personal responsibility for racial justice” that drove his opinion in *Bakke*.¹⁹⁴ The next section offers a new interpretation of Powell’s motives by examining his deep concerns about what was happening on college campuses in the 1960s and 70s.

III. Diversity to Deradicalize

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

A. A Qualified Embrace of Interest Convergence Theory

A critical contingent of scholars have rejected the idea that that Powell’s reasoning in *Bakke* was motivated by a concern for the well-being of underrepresented minorities. Instead, they argue, affirmative action was upheld because of the Court’s belief that racial diversity is good for whites. Scholars in this camp often cite to Derrick Bell’s interest convergence theory. In what has become a key contribution to critical race theory Bell argued that, “the interest in blacks in achieving racial justice is accommodated only when and for so long as policymakers find that the interest of blacks converges with the political and economic interest of whites.”¹⁹⁵ Bell used the diversity rationale as an illustrative example. However, in doing so, he largely ignored the origins of the diversity rationale as it was articulated in *Bakke* and instead looked at how it was re-articulated 25 years later in *Grutter*, an affirmative action case the Court decided five years after Powell stepped down from the Court.

Because no other Justice joined the controlling opinion in *Bakke*, it was unclear to lower courts if *Bakke* was in fact binding precedent. In *Grutter*, a 2003 case, the Court upheld affirmative action in another 5-4 decision. Writing for the majority, Sandra Day O’Connor adopted Powell’s belief that student body diversity was a sufficiently compelling interest to justify race-conscious admissions practices. However, in accepting Powell’s justification, the majority also broadened it. Powell articulated the goal of the diversity to be purely intellectual—exposing students to different perspectives. However, the *Grutter* majority named additional goals to be served by

¹⁹⁴ JEFFRIES, *supra* note 30, at 499.

¹⁹⁵ Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1054 (2005)

a diverse student body. Some of these goals, like breaking down racial stereotypes and promoting cross-racial understanding,¹⁹⁶ were the same ones that Powell ignored when UC Davis put them forth a quarter century earlier.

But more importantly for our discussion, the majority in *Grutter* rested its endorsement of affirmative action on benefits that seemed to be focused on helping white students and predominantly white institutions. The Court wrote that schools were permitted to use race-based affirmative action to increase minority representation within their student bodies because diversity “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”¹⁹⁷ Many understandably interpreted O’Connor to mean that white students were better prepared to be professionals in multiracial society when they were exposed to people of color in college.

In addition, American businesses, military officials and universities submitted amicus briefs urging the Court to preserve affirmative action because racial diversity was essential to the success of their operations. Their pleas were effective and were ultimately referenced in the majority opinion.¹⁹⁸ Thus, shortly after *Grutter* was announced, Bell—who had created his interest convergence theory some 20 years earlier, analyzed the Court’s opinion with “a prophet’s pride” saying, “For more than two decades, I have been writing and teaching that no matter how much harm blacks were suffering because of racial hostility and discrimination, we could not obtain meaningful relief until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern.”¹⁹⁹ He went on to apply his theory directly to *Grutter*, writing that “it was diversity in the classroom, on the work floor, and in the military, not the need to address past and continuing racial barriers, that gained O’Connor’s vote.”²⁰⁰

The view that the diversity rationale emerged from a belief that racial diversity is good for white people has become quite popular. Through the evolution of the diversity rationale, it has become undeniably a part of its appeal to the Justices who support the practice. Yet, the interests that motivated O’Connor’s embrace of diversity are not necessarily the same as what motivated Powell 25 years earlier. Moreover, while Bell’s interest convergence theory is a useful analytic tool to understand the origins of the diversity rationale, the interests that Powell sought to advance are not the same ones that are commonly cited by Bell and other progressive critics of *Bakke*. There is little actual evidence to suggest that Powell wanted white students

¹⁹⁶ *Grutter*, 539 U.S. at 330.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Bell, *supra* note 22, at 1624.

²⁰⁰ *Id.* at 1625.

to learn from students of color, or that he wanted corporate America or the military to benefit from the insights of racial minorities. However, there is significant evidence that suggests that Powell thought that promoting a robust exchange of ideas on college campuses would serve key national interests.

The work of historian Mary Dudziak proves instructive to understanding Powell's motives.²⁰¹ In explaining the Court's *Brown* decision, Dudziak argues that desegregation came about not simply because the Supreme Court was concerned about the welfare of black school children in the 1950s. It was also because segregation was hurting America's reputation on the international stage.²⁰² In the Cold War era, when America was fighting to prove to recently decolonized nations that American democracy was morally superior, Communists were pointing to how America treated its black citizens to show that, in fact, the notion of America's moral superiority was a lie.²⁰³ To further the country's battle for hearts and minds abroad, U.S. government officials were committed to ending racial segregation.

Powell was similarly concerned with defeating communism. However, his fight was not simply about projecting a moral image of America on the international stage. Rather, he wanted to stop the growing embrace of communist ideologies amongst Americans themselves, particularly amongst a critical contingent of Americans: college students

In the decades leading up to *Bakke*, Powell became convinced that white and black radicals, propelled by communists, had teamed up to plot a revolution that aimed to overthrow American democracy and capitalism. He believed the revolutionaries' first step was to radicalize the intellectual climate on college campuses which, in turn, would radicalize 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.²⁰⁴

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

²⁰¹ See Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. OF AM. HIST. 32 (2004); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) [hereinafter *Desegregation*].

²⁰² *Desegregation*, *supra* note 201, at 62-63.

²⁰³ *Id.* at 67 ("Japan . . . is declaring in the Phillippines, in China, in India, Malaya, and even in Russia that there is no basis for hope that colored people can expect any justice from the people who rule in the United States . . . Every lynching, every race riot, gives joy to Japan . . . 'Look at America.' Japan is saying to millions of listening ears." (internal citations omitted)).

²⁰⁴ Attack on American Institutions, *supra* note 15, at 2.

B. 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 US, referring to the Cold War as "The Conflict We Are Losing."²⁰⁵ 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 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, Powell referred to education as was "one of the major 'battlefields' of the Cold War."²⁰⁶ In a 1962 speech to education officials explaining Soviet Cold War strategies, he identified as one of their greatest sources of strength the communists' ability to exploit the transformative power of education. Through education, not only did communist countries produce citizens who had the knowledge and skills to keep their nations competitive on the world stage, they were also able "to remold the character of the individual and inculcate a uniform pattern of prescribed beliefs, attitudes and values - all consonant with communist aims and ideology."²⁰⁷

Based, in part, on the perceived effectiveness of communist strategies, Powell argued "the most important thing" America should do prevail against its enemies was to focus on what was happening in the nation's classrooms. Speaking before the Federal Bar Association in 1960, he said that the paramount duty of American schools--both K-12 and college level--is to "work affirmatively to see that a free society is indeed preserved."²⁰⁸ 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."²⁰⁹

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 to practice. In 1960, the Richmond school board chair broke ranks with many of his board members to implement a mandatory course about

²⁰⁵ Lewis F. Powell, Jr., Address at Grace-Covenant Cathedral: The Conflict We Are Losing (Nov. 1, 1962), available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_The%20Conflict%20We%20Are%20Losing,%20September%202023,%201962_113-23.pdf.

²⁰⁶ Soviet Style, *supra* note 33, at 20.

²⁰⁷ *Id.* at 4.

²⁰⁸ *Id.* at 15.

²⁰⁹ *Id.* at 21.

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 “[t]hat 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.”²¹⁰

That same year, Powell gave a speech before the National School Board Association entitled, “What Should Our Students Understand about the Communist System?”²¹¹ He told teachers and education officials that it was imperative that students were taught that “Marx was one of the bitterist (sic) and most inhuman of all philosophers. He showed no trace of compassion for anyone . . . Like his disciples, Marx had a dictatorship complex and was a totalitarian.”²¹² 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.”²¹³

Indoctrination was not simply a strategy that communist countries used to shape the beliefs of their own citizens. Powell worried that they might also use education to win over Americans as well. More specifically, he believed that if there were to be a communist revolution in the US, the nation’s intellectuals would be one of the first groups targeted. Relaying Leninist philosophy to the National School Board in 1960, he warned “for revolution to be successful” intellectuals “must be infiltrated, propagandized and used . . . to promote communist ends.”²¹⁴

C. The Campus Revolt

Within a few years, in the thick of the war in Vietnam and the Civil Rights Movement, universities erupted with tension. Progressive and radical students staged large-scale demonstrations on their campuses in an effort 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.²¹⁵

Campuses throughout the nation were becoming sites of intense political contestation as left-leaning students protested unjust policies of both their universities and their government. At Columbia

²¹⁰ JEFFRIES, *supra* note 30, at 166.

²¹¹ Lewis F. Powell, Jr., Address to National School Boards Association Meeting: What Should Our Students Understand About the Communist System? (Apr. 26, 1960), available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_What%20Should%20Our%20Students%20Know%20%20April%2026,%201960_112-31.pdf.

²¹² *Id.* at 1.

²¹³ *Id.* at 5.

²¹⁴ *Id.* at 3. 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 the intellectuals.”

²¹⁵ See CAMPUS UNREST COMMISSION, *supra* note 18, at 3-4.

University, nearly 1,000 students occupied various campus buildings and took the dean hostage, in part, to get the university to refrain from providing weapons research to the Defense Department that would go to fight an unjust war.²¹⁶ At Harvard, administrators were so alarmed by the intensity of student demonstrations for racial inclusion that they believed that students were going to shut down the entire university.²¹⁷ At Kent State University, the National Guard was called in to disband a mass student. Officers would eventually kill four unarmed students in the process.²¹⁸

The frequency and popularity of campus protests alarmed government officials, who worried that students were becoming radicalized in college. As 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 number of students accept a radical analysis of American society and despair of the possibilities of peaceful social change."²¹⁹ Increasingly, students were beginning to regard their universities as key drivers in perpetuating societal injustices.

Powell cited UC Berkeley's Free Speech Movement as the kick off of the spate of nationwide campus protest. It is ironic that the man who would become 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 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."²²⁰ Powell suggested that, if anything, students at Berkeley had 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.'"²²¹

Given that Powell believed that there was no true restriction on speech within universities, he suspected that the protests were being

²¹⁶ 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).

²¹⁷ *See generally* STEVEN KELMAN, PUSH COMES TO SHOVE: THE ESCALATION OF STUDENT PROTEST (1970) (student account of the April 1969, describing events and evaluating causes).

²¹⁸ For an account of the Kent State tragedy, *see* CAMPUS UNREST COMMISSION, *supra* note 18, at 287-90.

²¹⁹ *Id.* at 18-19.

²²⁰ Lewis F. Powell, Jr., [Address to Virginia Retail Merchants Association: Anarchy on the Campus 15 \(May 20, 1968\)](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Anarchy%20On%20Campus.%20May%2020.%201968117-14.pdf) [hereinafter [Anarchy on the Campus](http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Anarchy%20On%20Campus.%20May%2020.%201968117-14.pdf)], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Anarchy%20On%20Campus.%20May%2020.%201968117-14.pdf.

²²¹ *Id.*

orchestrated by outside agitators with an ulterior motive. His suspicions were largely supported by the Nixon administration. Speaking at the Atlanta regional meeting of the American Bar Association of October 22, 1964--only weeks after the Free Speech Movement at had begun Berkeley began--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 façade on the nation's college campuses.'"²²²

Powell had deep respect for J. Edgar Hoover and referred admiringly to his longstanding opposition to civil disobedience.²²³ He found "prophetic" the FBI's director's views on the "black extremists'" efforts to foment revolution by inciting riots in inner cities.²²⁴ Now, Hoover had identified a new threat to national security: communist infiltration of college student groups. Powell agreed wholeheartedly 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 towards communism. They tried to convince students that the ultimate goal of communism was "unity and brotherhood"²²⁵ but, as Powell noted, this was the kind of strategic deception "that makes it so difficult for young Americans to comprehend the real meaning of communism."²²⁶ Convinced that the ideological war against America had made its way to 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."²²⁷

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."²²⁸ Powell later explained why the campus was particularly appealing to those looking to foment a revolution:

²²² Lewis F. Powell, Jr., Address at United Virginia Bankshares Meeting: End of an Era and New Horizons 6 (May 12, 1971) [hereinafter End of an Era], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_EndofanEraandNewHorizons_5-12-1971.pdf.

²²³ See, e.g., Prelude to Revolution, *supra* note 13, at 1 ("See excellent statement of Mr. Hoover - long prophetic on this subject.")

²²⁴ *Id.* at 18.

²²⁵ End of an Era, *supra* note 222, at 7.

²²⁶ *Id.*

²²⁷ *Id.* at 7.

²²⁸ Lewis F. Powell, Jr., Address to Virginia Association of Colleges: The New Left on Campus 15 (Feb. 25, 1966) [hereinafter The New Left], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_The%20New%20Left%20On%20the%20Campus%20February%202025,%201966_116-22.pdf.

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.²²⁹

In order to destabilize the current system, communists needed to influence those who would one day lead it. The university was important because it was the home of two influential contingents in American society: the future leaders of the nation, and those charged with shaping the minds of those leaders. Powell would later go on to explain how the radicalization of the campus threatened to “destroy the entire system.”²³⁰ Referring to graduates who were 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.”²³¹ Upon graduation, many assume “key positions of influence where they mold public opinion and often shape governmental action.”²³² He worried about what would happen to America when the graduates of a radical education were given “large authority” over a “system they do not believe in.”²³³

Until he joined the Court in 1972, Powell went around the country warning “sensible Americans” of the revolution being planned on the nation’s universities.²³⁴ His proselytism attracted the attention and admiration of influential figures. In response to a 1970 speech on radicalism where Powell compared campus radicals to “Hitler and his storm troopers,”²³⁵ President Nixon sent Powell a personal letter noting 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!”²³⁶ The president attached to his letter two articles about the

²²⁹ Attack on American Institutions, *supra* note 15, at 6.

²³⁰ Lewis F. Powell, Jr., Confidential Memorandum to Eugene B. Sydnor: Attack on American Free Enterprise System 2 (Aug. 23, 1971) [hereinafter Confidential Memorandum], available at https://research.greenpeaceusa.org/?a=view&d=5971&_ga=2.174088736.302619970.1540749127.181920652.1540749127.

²³¹ *Id.* at 14.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 7.

²³⁵ Attack on American Institutions, *supra* note 15, at 4.

²³⁶ Letter from Richard Nixon to Lewis Powell, Hunton, Williams, Gay, Powell & Gibson (Oct. 26, 1970), available at <http://law2.wlu.edu/deptimages/powell%20archives/PowellCorresRePoliticalWarfarePaper.pdf>.

radicalism brewing within American universities, “in view of [Powell’s] special concern for campus problems.”²³⁷

D. The Culprits

According to Powell, the revolution to overthrow American democracy was being executed on two fronts.²³⁸ While “the extremist Black Power movement” disrupted the nation’s major cities, the New Left was focused on disrupting the campus. The New Left was a leftist political movement of the 1960s, run primarily by college students, that brought together various liberal, Marxist and radical groups.²³⁹ As the principal organizations in this movement, Powell identified Students for a Democratic Society, W.E.B. Dubois Clubs, Student Non-Violent Coordinating Committee, Progressive Labor Party, “and a host of so-called peace organizations.”²⁴⁰ Noting the alliance between white radicals of the New Left and black militants, Powell said that given their “shared hatred,” “common willingness to resort to violence,” and Marxist orientation, “the New Leftist and black militancy revolutionary groups [were cooperating] together to achieve their common end - destruction of the American system.”²⁴¹

It is important to note how Powell interpreted the racial dynamics of the campus movement. He understood the college campus as the “principal base of revolution,” and this was a base that had few black members.²⁴² In the mid-1960s, elite universities--the ones Powell seemed most concerned about--had not reached more than token levels of racial integration. Thus, the student organizations in the New Left were most often run by white students. While black students did in fact play a vital role in planning and participating in the student protests of the decade,²⁴³ Powell seemed not regard them as key threats. Instead, when warning audiences of the dangerous trend towards radicalism in universities he said, “The most visible element of the revolutionary movement is basically white and campus oriented.”²⁴⁴

Powell argued that the New Left had the “ultimate goal of ‘radicalization’ of enough Americans to overthrow our system.”²⁴⁵ But it was not just any Americans that Powell was concerned about.

²³⁷ *Id.*

²³⁸ Prelude to Revolution, *supra* note 13, at 6.

²³⁹ 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. SCI. 15 (1971).

²⁴⁰ *Anarchy on the Campus*, *supra* note 220, at 17.

²⁴¹ Attack on American Institutions, *supra* note 15, at 5. The quote continued: “Although not always orchestrated by the Communist party, they receive its active support; they promote its ends and employ its techniques.” *Id.*

²⁴² *Id.* at 8.

²⁴³ See generally MARTHA BIONDI, *THE BLACK REVOLUTION ON CAMPUS* (Reprint ed. 2014) (providing an account of black student protests during the late 1960s and early 1970s).

²⁴⁴ Lewis Powell, *The Attack on American Institutions, presented at Southern Industrial Relations Conference* 5 (1970).

²⁴⁵ Radical Left Movement, *supra* note 14, at 2.

Rather, he worried that the New Left has set its sights on “the radicalization of an increasing number of white middle-class Americans.”²⁴⁶ According to Powell, campus radicals enticed non-radical students to join them by promoting seemingly sympathetic causes like racial justice and world peace. Once non-radicals were onboard, the New Left strategists would escalate the 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.”²⁴⁷

Powell saw black militants as playing a more limited but key role in radicalizing students. They were primarily outside agitators. As he noted, the tactics of the campus protests—the sit-ins, marches and other forms of nonviolent resistance—were largely copied from the “militant leaders” of the Civil Rights Movement. Moreover, students in the New Left were intellectually inspired by the analysis of radical black figures like Malcolm X and the Black Panthers, who were often invited to campuses to give lectures.

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 pedigree that made them eligible to one day run the nation. Given their high social status, they were harder to control. Black militants, on the other hand, were largely disenfranchised and could be more easily repressed by law enforcement officials. Moreover, Powell did believe that black militants enjoyed 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.”²⁴⁸ Thus, Powell did not view black people, at large, as a threat to the nation’s campuses. Instead, he was concerned with a small minority of radicals. That minority, as Powell identified it, was white and black, but mostly white.

Powell did worry, however, that the New Left and black militants were joining forces by merging their causes. The New Left organizations advocated for racial justice, participatory democracy and the end of US.. aggression in Vietnam. Powell warned audiences not to be fooled by the students’ professed causes; he believed that the core of the New Left did not actually want to achieve racial justice domestically or peace abroad. He advised that “their objective is revolution; not reform.”²⁴⁹ Picking these causes was a carefully calculated strategy intended to unite large segments of Americans against their country. Indeed, Powell suggested that extremists would

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Attack on American Institutions, *supra* note 15, at 6.

²⁴⁹ A Strategy for Campus Peace, *supra* note 14, at 11.

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.”²⁵⁰ Similarly, he argued that there was a strategic effort to depict the war in Vietnam not only as unjust but as “racist.” This too was a tactical move which aimed “to coalesce certain elements of the civil rights movement with the Vietnam peace movement.”²⁵¹

Explaining what he believed to be the true goals of the New Left, Powell said that it was to “first to disrupt and then destroy our most cherished democratic institutions - our system of higher education and our representative form of democracy.”²⁵² Democracy would then be replaced by a dictatorship. Following the molds of other communist systems Powell explained that “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.”²⁵³

While many in the New Left embraced Marxist ideology, Powell did not believe that all their members were communists. Instead, he thought that communists sat at the command center of the New Left and used unwitting students from the mainstream of American life to their own ends.²⁵⁴ 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.”²⁵⁵

E. Homogenizing the Intellectual Climate

The danger in the New Left, according to Powell, lay in its ability to get white, middle-class American college students to turn against their own country. He sought to make audiences understand that the New Left was corrupting American college students, and resultingly endangering the future of the nation. He acknowledged students had traditionally flirted with radical ideas during their college years. However, he saw the dalliance with leftist thinking as a passing phase motivated by naïveté. Before the New Left descended on campuses in the 1960s, he had been confident that with maturity, students would abandon liberal thinking and embrace the soundness of conservative and moderate values. To the extent they wanted to

²⁵⁰ *The New Left*, *supra* note 228, at 7.

²⁵¹ *Id.*

²⁵² A Strategy for Campus Peace, *supra* note 14, at 5.

²⁵³ What is “Right” about America, *supra* note 17, at 2.

²⁵⁴ *See, e.g.*, Civil Disobedience v. The Rule of Law, *supra* note 81, 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.”).

²⁵⁵ Anarchy on the Campus, *supra* note 220, at 17.

push for social change, students would do so using the pre-approved institutional channels and processes. But the New Left was changing that. It was taking young, privileged, middle-class white men and turning them 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 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!²⁵⁶

Giving the convocation address before a group of liberal arts college students in 1970, Powell wondered aloud how a small group of radicals were able to win over so many students who were “often from privileged families.”²⁵⁷ Why were students “from our finest homes” so willing “to disrupt their own educational opportunity, to embrace or tolerate coercion, and to denigrate the entire American system?”²⁵⁸

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 those on the right an opportunity to rebut the radicals’ critiques. 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.’”²⁵⁹ He went on: “On these and related issues many non-radical students and faculty members swallow the party line of revolutionaries. There is an astonishing absence of critical analysis and little concern for truth. At

²⁵⁶ *Id.* at 11.

²⁵⁷ Lewis F. Powell, Jr., Convocation Address at Longwood College: The Ideological Assault on America 12 (Nov. 17, 1970) [hereinafter *Ideological Assault of America*], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_The%20Ideological%20Assault%20On%20America,%20November%2017,%201970_118-4.pdf.

²⁵⁸ *Id.* at 13.

²⁵⁹ *Id.* at 11

times, campuses have been engulfed by mass hysteria in an almost total flight from reason.”²⁶⁰

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.”²⁶¹ Students were no longer being taught that they lived in the land of the free and home of the brave. Instead, they were being taught they lived in “a wholly selfish, materialistic, racist and repressive society.”²⁶²

What is important to note here is that Powell felt these characterizations of America were not informed by actual facts. 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.”²⁶³ The truth about America, in Powell’s eyes, was that the nation had the best economic and political system “ever conceived by man;”²⁶⁴ it was “generous and humane;”²⁶⁵ it gave its citizens more rights than any other country; it had “no caste or class system;”²⁶⁶ regardless of race or class, “every youth may be president;”²⁶⁷ and it was not imperialist, a charge he dismissed as “the Big Lie of Communists.”²⁶⁸ In short, the U.S. was a “country everyone would like to live in.”²⁶⁹ But these were not ideas that students learned in college. Instead, they learned insidious critiques of America, which combined “half-truths with fiction and even falsehood.”²⁷⁰

Powell blamed the nation’s universities for not equipping students with the critical thinking skills that would help them 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 sloganeers, to question the glib huckster, and to seek rational rather than emotional solutions.”²⁷¹ Because students did not have adequate critical thinking skills, they were easily won over by leftist lies and propaganda. Powell complained that “Radical leaders have been able consistently to inflame, confuse, exploit and

²⁶⁰ *Id.* at 12.

²⁶¹ *Id.* at 13.

²⁶² Attack on American Institutions, *supra* note 15, at 14.

²⁶³ Lewis F. Powell, Jr., Article Prepared for Perspective Section of Richmond Times Dispatch: Repression of Civil Liberties – Fact or Fiction? 14 (Jun 28., 1971) [hereinafter Repression of Civil Liberties], available at http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_CivilLibertiesRepression_8-1-1971.pdf.

²⁶⁴ Attack on American Institutions, *supra* note 15, at 2.

²⁶⁵ What is “Right” about America, *supra* note 17, at 2.

²⁶⁶ *Id.* at 1.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 2.

²⁶⁹ *Id.*

²⁷⁰ Attack on American Institutions, *supra* note 15, at 19.

²⁷¹ *Id.* at 11.

even radicalize tens of thousands of fine young Americans - almost as if they were untutored children.”²⁷²

F. Faculties

Professors provided little assistance in the effort to restore order on campuses because, Powell believed, they were intellectually aligned with the left. He assessed their political orientations as ranging from Marxist to socialist to “the ambivalent liberal critic who finds more to condemn than to commend.”²⁷³ Powell often cited examples of the radical professors on campus 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,”²⁷⁴ and a professor at NYU who “publicly characterized Vice President Humphrey and Mr. Nixon as ‘racist bastards.’”²⁷⁵

When it came to 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, Powell quoted Harvard Law School dean, Erwin Griswold, to capture his “own deeply-held views:” “The only persons for whom I have more contempt for than the student groups (which created the discord) are the faculty members that lent support to them.”²⁷⁶

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 were able to seduce 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 lectures; [and] they author many of the textbooks.”²⁷⁷ 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.”²⁷⁸

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.”²⁷⁹ This intellectual imbalance

²⁷² *Id.*

²⁷³ Ideological Assault of America, , *supra* note 267, at 4.

²⁷⁴ *Id.* at 8.

²⁷⁵ A Strategy for Campus Peace, *supra* note 14, at 16.

²⁷⁶ *Id.* at 15.

²⁷⁷ Confidential Memorandum, *supra* note 230, at 13.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

was contributing to the radicalization of students in more ways than one.

Liberal faculty determined the intellectual climate on campus not simply 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.²⁸⁰ He was outraged that Cleaver, “a black racist, and a leader of the militant Black Panther Party,” would be allowed to teach students.²⁸¹

While Powell’s *Bakke* decision suggested that he wanted people of different perspectives to share ideas on campus, 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?”²⁸² Criticizing those who cited academic freedom to argue that an influential figure like Cleaver should be allowed to share his views with students, Powell said:

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.²⁸³

According to Powell, the elevation of radical speakers mirrored a curriculum change happening in elite universities in the late 1960s. Courses geared towards upholding the state were being replaced with those that were focused on criticizing the state. A particularly sore spot for Powell was the diminished standing of ROTC on college campuses. Harvard and Yale faculty voted to demote ROTC to an extracurricular activity and strip ROTC instructors of their titles as “professors.”²⁸⁴ Other Ivy Leagues quickly followed suit. Speaking of Yale’s decision to downgrade ROTC faculty from professor to instructor, Powell complained, “one 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.”²⁸⁵

²⁸⁰ A Strategy for Campus Peace, *supra* note 14, at 16.

²⁸¹ *Id.*

²⁸² *Id.* at 18.

²⁸³ *Id.*

²⁸⁴ See *Ivy Schools Deny Credit for ROTC*, COLUM. DAILY SPECTATOR, Feb. 6, 1969, at 7, available at <http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19690206-01.2.16>.

²⁸⁵ Lewis F. Powell, Jr., Thomas Jefferson Award Speech: Alienation of the Campus from National Defense 6 (Oct. 3, 1969) [hereinafter *Alienation of the Campus*], available at

Powell believed that the downgrading of military services played right into the hands of the communists' efforts to weaken the American military. Noting the "high degree of parallelism" Communists efforts to denigrate the American national services with the logic articulated by the campus radicals, Powell said: "Communist parties throughout the world have long sought, by massive and insidious propaganda, to undermine public support for the entire U.S. defense structure."²⁸⁶ He accused campus radicals aiding communists by eroding confidence in the country's armed services.²⁸⁷

Simultaneously, the nation's most prestigious schools began responding to student protestors' demands by, in Powell's words, "accrediting new courses of the most dubious academic merit."²⁸⁸ As a particularly "chilling example," Powell cited a student organized course at Harvard called "Radical Social Change."²⁸⁹ Aimed towards producing "more and better radicals," this course featured lectures from activists both on campus and from the broader society.²⁹⁰ Unlike ROTC, the course came with full academic credit and it quickly became the second most popular on the Cambridge campus.

G. The Suppression of Non-Radical Voices

Powell argued that the intellectual imbalance on campus had been orchestrated by New Leftists, who "deliberately inhibit and destroy free and honest debate."²⁹¹ The future Justice believed that America was the freest country in the world, capitalism was the best economic model, and representative democracy was the only mode of governance for a free people. For him, these were clear truths that any educated person could easily recognize. The only reason why so many students held opposing views was because they were being denied access to the truth. If universities truly fostered a marketplace of ideas, Powell believed that young adults "from the finest families," would abandon radical ideologies.²⁹²

But, according to Powell, there was no marketplace of ideas on campuses during this era. Radicals had a monopoly on the intellectual discourse and they used force to maintain control. He complained that leftist students would "[p]icket and disrupt classes of conservative and moderate professors,"²⁹³ and "it was standard practice to submerge administration spokesmen under waves of booing, hissing and

http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_Alienation%20of%20the%20Campus%20From%20National%20Defense,%20October%203,%201969_117-25.pdf.

²⁸⁶ *Id.* at 14.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 5.

²⁸⁹ *Id.* at 6.

²⁹⁰ *Id.*

²⁹¹ *The New Left, supra note 228, at 20.*

²⁹² What is "Right" about America, *supra note 17 at 7.*

²⁹³ *Id.*

catcalling.”²⁹⁴ Instead of engaging in rational discussion, they used “coercion and violence to attain ends.”²⁹⁵ Summarizing the general trend of suppression of 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 non-radical 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.²⁹⁶

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

Those who charge repression say that dissent is suppressed and free speech denied. Despite the wide credence given this assertion, it is sheer nonsense. There is no more open society in the world than America . . . 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.²⁹⁷

H. The Fight for Diversity

Powell was determined to correct the intellectual imbalance on campus, 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

²⁹⁴ *The New Left*, *supra* note 228, at 20.

²⁹⁵ What is “Right” about America, *supra* note 17, at Part 1.

²⁹⁶ Ideological Assault of America, *supra* note 257, at 8.

²⁹⁷ Repression of Civil Liberties, *supra* note 263, at 13.

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 (emphasis his).²⁹⁸

Believing that radicals students were a small minority that had “duped” non-radical students into joining them,²⁹⁹ Powell suggested that the key to restoring order in universities was to win over the non-radicals. In a 1968 speech³⁰⁰ 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.”³⁰¹ Key to building that base was changing what students learned in the hopes of teaching them to be more supportive of their country and the rule of law.

Powell had already executed this strategy in Virginia earlier that year. As the chairman of the state’s board of education, he created a mandatory citizenship course in response to the rise of civil disobedience. The course, according to Powell, 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.”³⁰²

Among other lessons, Powell stipulated that Virginia students must be taught “the American citizen has greater personal freedom and his rights are better protected than under any other system known to history;”³⁰³ “the only alternative to our democracy is totalitarianism;”³⁰⁴ citizens have a “duty to be loyal and patriotic;”³⁰⁵ sit-ins “are not legitimate means of protest;”³⁰⁶ and citizens must “support and assist all police officers who are lawfully performing their duty.”³⁰⁷ Soon after Powell suggested the creation of this course, the board approved it,³⁰⁸ and all public school students were being taught about the importance of the rule of law and patriotism.³⁰⁹

²⁹⁸ Attack on American Institutions, *supra* note 15, at 23.

²⁹⁹ *Id.* at 8.

³⁰⁰ 1968 was a pivotal year for the New Left. As historian Winifred Breines notes, “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 up-rising; 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. OF AM. HIST. 528, 529 (1988).

³⁰¹ A Strategy for Campus Peace, *supra* note 14, at 12.

³⁰² Citizenship Education, *supra* note 19, at 11.

³⁰³ *Id.* at appendix, ii.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at appendix, iii.

³⁰⁶ *Id.* at appendix, vi.

³⁰⁷ *Id.*

³⁰⁸ See John Kinnler, *Citizenship Course Approved*, RICHMOND TIMES DISPATCH, July 21, 1968.

³⁰⁹ Powell liked the idea that local communities could act as bulwarks against the ideological corruption of their youth. It was this feature of community control that would later inform his opinion in *San Antonio v. Rodriguez*. Powell was moved by the arguments presented in an amicus brief on behalf of 30 states which relied significantly on the work of education scholar Professor James Coleman to argue that funding schools through local property taxes allowed local authorities to exert influence on what

Changing what college students learned, however, was much more difficult. Unlike K-12 education, the power to decide what students learned was not centralized. Instead, it resided with individual professors, 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.”³¹⁰ 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.”³¹¹

Moreover, a Supreme Court decision handed down the prior year only made it more difficult to put restrictions on faculty members’ ideological commitments. In *Keyishian v. Board of Regents*,³¹² the Supreme Court forbade a practice where universities forced professors to sign an oath declaring that they were not currently Communists and

ideas students learned in the classroom. See Brief of Amici Curiae in Support of Appellants, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332), 1972 WL 136551. Professor Coleman posited that when schools were run by local authorities, they tended to reinforce the culture and social norms and thus locally run schools became “agents for the maintenance of social order.” *Id.* at *36. However, when schools were run by the national government they tended to become “crucial institutions of social change.” *Id.*

Citing the precedents “in Hitler’s Germany, in Stalin’s Russia, in Mao’s China and in Castro’s Cuba,” Coleman argued that following revolutions, totalitarian regimes took control of the schools in order “to consolidate their power and break the influence from the preceding generations upon the younger one.” *Id.* at *37. These regimes used schools “to achieve, in a single generation, radical social change.” *Id.* However, it was local organizations that resisted radicalization. Coleman went on to say that “what is true in totalitarian regimes is true, to a lesser degree, in democratic ones.” *Id.* He used as his key example the push for racial integration. 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.” *Id.* Whereas, the local school districts resisted integration and thus acted as “agents for the maintenance of the social order.” *Id.* at 36.

Powell was deeply influenced by Coleman’s argument and cited him in multiple times in his opinion. He wrote a note to his law clerk about the states’ brief noting, “I must confess that the brief appeals to me because it supports and confirms tentative judgments based on my own experience with Virginia education.” Memorandum to Larry Hammond from Lewis F. Powell, Jr. 2 (Oct. 9, 1972), available at http://law2.wlu.edu/deptimages/powell%20archives/71-1332_SanAntonioRodriguezBasic3.pdf. 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.” *Id.* at 3. 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 opposition to national education, Powell wrote, “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.” *Id.* at 4.

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. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 47. Funding schools only through state funds would limit the influence of local communities. This, for Powell, would be a negative development. As he wrote in his opinion, “No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.” *Id.* at 50. By invoking the importance of a “multiplicity of viewpoints” he was referring to the presumed view of local state actors who would try to use schools to preserve culture and the view of more distant state actors who might seek to use schools to push for progressive social change. In this case, a promoting pluralism was an effort to limit the realization of liberal—or worse—radical agenda in schools.

³¹⁰ Lewis F. Powell, Jr., *Political Warfare* 16 (June 30, 1970), available at

http://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_PoliticalWarfare_6-3-1070.pdf.

³¹¹ *Id.*

³¹² 385 U.S. 589 (1967).

had never been communists.³¹³ The practice was meant to remove from the faculty “subversive persons.”³¹⁴ The Court ruled the loyalty oath unconstitutional in part because it infringed upon academic freedom.

In discussing the importance of upholding 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.’”³¹⁵

Yet, it was clear that Powell did not hold “academic freedom” in the same high regard. Instead, it was a source of frustration. In Powell’s view, “academic freedom” was used only to ensure those on the left had a presence on campus. Few cared about the freedoms of those on the right. Speaking of Harvard’s decision to demote ROTC on campus while starting classes for radicals, Powell said, “If this distorted sense 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.”³¹⁶

“Academic freedom,” Powell noted, gave radical professors a “license without limit.”³¹⁷ 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.”³¹⁸ These freedoms allowed professors to act recklessly: they could invite black militants to speak to students, call the president a “racist bastard,”³¹⁹ freely denounce “capitalist repression,”³²⁰ 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?”³²¹ The “awesome power” of academic freedom was supposed to be given only to those with “honor,” “integrity” and “responsibility.”³²² It seemed to Powell that universities were not keeping these principles in mind when choosing who would be allowed to mold students’

³¹³ *Id.* at 609.

³¹⁴ *Id.* at 612.

³¹⁵ *Id.* at 603.

³¹⁶ *Alienation of the Campus*, *supra* note 285, at 8.

³¹⁷ *A Strategy for Campus Peace*, *supra* note 14, at 17.

³¹⁸ *Id.* at 15.

³¹⁹ *Id.* at 16.

³²⁰ *Repression of Civil Liberties*, *supra* note 263, at 11.

³²¹ *A Strategy for Campus Peace*, *supra* note 14, at 17.

³²² *Id.* at 15.

minds. He offered a call to action to administrators: “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.”³²³

Powell was conflicted. On the one hand, he wanted radicals banned from campus. On the other hand, the Supreme Court had just ruled that it was unconstitutional to ban “subversives” from campuses. As one of the nation’s most prominent attorneys, known for applauding the great civil liberties that Americans enjoyed, Powell 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.”³²⁴ Yet, in the same speech, he suggested that students who engage in civil disobedience should be expelled and professors who support them should be stripped of tenure:

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.³²⁵

Within a few years, however, Powell backed away from efforts to curtail academic freedom, figuring it to be an untenable course of action. Instead, he suggested a new tactic. Rather than fighting against academic freedom, he would fight for it. Only, his fight would focus on giving conservatives and moderates a louder voice on campuses.

I. The Powell Memo

In August of 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 take an active role in combating the “broad attack” against capitalism.³²⁶ Effective combat, according to Powell, required the business community to have significant influence in the media, the courts and most importantly, the campus.³²⁷ Calling campuses “the

³²³ *Id.* at 19.

³²⁴ *Id.* at 17.

³²⁵ *Id.* at 19.

³²⁶ Confidential Memorandum, *supra* note 230, at 1.

³²⁷ In the prior year, Powell also suggested creating public interest groups to combat the ACLU, who he saw as siding with radicals. Writing a colleague on the subject, Powell said, “I feel the same frustration expressed by you as to the disruption being promoted by ACLU and similar groups and organizations

single most dynamic source”³²⁸ of the assault on capitalism, Powell offered a detailed prescription for how conservatives could reclaim the intellectual heart of universities.³²⁹

He warned against undertaking any efforts aimed at limiting free speech on campuses. Powell observed, “Few things are more sanctified in American life than academic freedom. It would be fatal to attack this as a principle.”³³⁰ “But,” he continued, “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.”³³¹ If the problem was a homogenized intellectual climate that only highlighted voices on the left, the solution, Powell argued, was to infuse the nation’s universities with conservative perspectives. Once radical ideology was openly challenged on campuses, students would come to see their ideas were hollow and embrace conservative values.

However, in order to win over students, conservatives 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.³³² However, he suggested, the Chamber of Commerce should “exert whatever degree of pressure—publicly and privately—may be necessary to assure opportunities to speak.”³³³ An effective strategy for creating that pressure, Powell advised, 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 the strategy behind citing viewpoint diversity to get conservatives onto campuses: “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.”³³⁴

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 said “perhaps the most fundamental problem is the imbalance of many faculties,” by which he meant the ideological imbalance.³³⁵ Acknowledging that changing

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.” Lewis F. Powell, Jr., Letter to Harrison Mann, Esq. (1970).

³²⁸ Confidential Memorandum, *supra* note 230, at 12.

³²⁹ The Left included radicals as well as “respectable liberals and social reformers.” *Id.* at 4

³³⁰ *Id.* at 15.

³³¹ *Id.*

³³² *Id.* at 18.

³³³ *Id.* at 18-19.

³³⁴ *Id.* at 18.

³³⁵ *Id.* at 19.

the political bent of American faculty would be “a long road and not one for the fainthearted,” he advised business leaders to be careful when pursuing this goal. 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.³³⁶ Importantly, they should frame their appeals by citing, in part, the need for intellectual “balance.” Framing it this way made the request for more conservative faculty “difficult to resist.”³³⁷

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 not only “articulate and well-informed;” they also needed to be physically attractive, as students would be more easily influenced by the beautiful.³³⁸ In addition, in light of efforts by civil rights activists and labor unions to contribute to the textbooks assigned to students, Powell said these books, “should be under constant surveillance” by pro-capitalist scholars.³³⁹ Finally, the Chamber 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.³⁴⁰

After Powell joined the Court, the memo was leaked to the press. It became hugely influential and still today it is often cited as “the beginning of the corporate mobilization to transform American law and politics.”³⁴¹ Once on the Court, Powell refrained from publicly discussing the content of the memo.³⁴² When supporters in the business community would write to him about the memo—and they did so often—he generally declined to comment citing, as he responded to one executive, “the appearance of impartiality is almost as important as the fact of impartiality.”³⁴³ Yet, occasionally, he was more upfront about his continued support for the ideas outlined in his memo. In February of 1975, he wrote to the chairman of a manufacturing company saying,

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.* at 18.

³³⁹ *Id.* at 21.

³⁴⁰ *Id.* at 22.

³⁴¹ NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT’S STEALTH PLAN FOR AMERICA* 203 (Reprint ed. 2018); *see also* STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 61 (2010) (calling the Powell Memo “[t]he most notorious indication of business’s early strategic response to legal liberalism.”)

³⁴² In September of 1972 after Powell’s confirmation hearings, journalist Jack Anderson discovered the memo and wrote about it in the *Washington Post*. He criticized Powell for presenting himself as “the model of a moderate, reasonable and judicious legalist” when in reality he was a seething counterrevolutionary. In addition, 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 deciding business interests.” KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* 161 (1st ed. 2009).

³⁴³ Letter to Mr. J. Clifford Miller (Feb. 14, 1975), available at <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellSCSFCChamberofCommerce.pdf>.

“In my own view, the memorandum is simply pro-America and the free enterprise system – a system which is beneficial to all elements of our society.”³⁴⁴ Indeed, as late as February of 1976, he was still writing to executives, telling them how they could access the memo.³⁴⁵

Two years later, Powell would uphold affirmative action in *Bakke*. 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 in order for diversity to be a compelling state interest, universities had to consider more than just an applicant’s race. He made clear that universities ought to be primarily concerned with diversifying the intellectual climate of their campuses. This opinion reads as a natural extension of his decade’s long effort to stop campus radicalism. Given this history, we can understand *Bakke* in a new light.

IV. Powell’s Peril

By way of conclusion, I explain why this history is relevant to understanding the affirmative action doctrine today. While Powell’s opinion has nourished elements of the conservative movement on college campuses, it has left affirmative action in a constitutionally vulnerable position. With the Supreme Court now dominated by a clear majority for the first time in generations, the vulnerabilities of the doctrine could usher in its demise.

The two pieces of writing for which Justice Powell is most famous are the memorandum he wrote to the Chamber of Commerce and his *Bakke* opinion. The former offers a detailed prescription for how conservatives can dominate campuses by leveraging the import of intellectual diversity. The latter, written 7 years later, allows for race-based affirmative action in higher education so long as it is meant to further the laudable goal of intellectual diversity on college campuses. Despite their similar foci, these two pieces of writing have rarely put in conversation with one another. Perhaps it is because they are seen as serving opposing constituencies: Powell’s memo serves the interests of the political right, while *Bakke* is typically interpreted as satisfying the aims of the left. This chapter is, in part, an attempt to reconcile these two seemingly divergent legacies of Powell.

Since the *Bakke* decision was announced, there has been a widespread belief that Powell’s promotion a “robust exchange of ideas” on campuses was pretextual. Supporters and opponents of

³⁴⁴ *Id.*

³⁴⁵ See, e.g., Letter to Lawrence K. Gould (Feb. 23, 1976), available at <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellSCSFCChamberofCommerce.pdf>.

affirmative action have largely interpreted his reasoning as a compromise that Powell designed to facilitate the inclusion of racial minorities while incurring the least amount of blowback from adherents to colorblindness. Given the strong arguments both for and against affirmative action, settling the case on the grounds of academic freedom seemed like such an off-shoot that many interpreted the opinion as a strategic effort to balance the competing goals of colorblind meritocracy and racial inclusion.

The evidence presented this chapter suggests that we should accept that the motives that Powell articulated in *Bakke* were, to a surprising degree, sincere. In his opinion, the Justice made very clear that he was not sympathetic to the goal of minority uplift. Nor was he committed to a diversity that was centered on facilitating cross-racial understanding. Rather, his key commitment, as he articulated it in *Bakke*, was allowing for the pursuit of intellectual diversity on college campuses.

What could not be divined from Powell's opinion is that his commitment to intellectual diversity was largely rooted in—and perhaps limited to—a desire to combat radicalism on college campuses. To the extent that he was interested in creating a marketplace of ideas within universities, it was so that patriotic, pro-capitalist ideologies could prevail over more radical ones. Powell took a principle that the Court had used a decade earlier to protect communists on campuses and re-articulated it to promote the inclusion of not just racial minorities, but also those who might provide a counterweight to radical thought on campuses: “farm boys,” “the culturally advantaged,” and “potential stockbrokers.”

Since *Bakke* was announced, conservatives have leveraged the logic in Powell's opinion to increase their representation within American universities.³⁴⁶ If affirmative action is necessary because it is important to have a diversity of viewpoints, they argue, there is no view less represented in the ivory tower than that of conservatives. Testifying before Congress in 2003, Anne Neal, co-president of The

³⁴⁶ See, e.g., Jon A. Shields, *The Disappearing Conservative Professor*, 37 NAT'L AFFAIRS (Fall 2018), available at <https://www.nationalaffairs.com/publications/detail/the-disappearing-conservative-professor> (saying “Fair-minded liberals, however, must ask themselves an important question: How seriously do they take the ‘diversity rationale’ expressed in *Regents of the University of California v. Bakke*? Citing an earlier decision, the Supreme Court in that case declared: ‘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.’” Hasn't the wisdom of *Bakke* been confirmed by the increase of gender and racial diversity in the university? And if women and blacks brought considerable intellectual diversity to academia, why couldn't Burkeans and libertarians do the same? If one believes that gender and racial diversity contribute to a ‘multitude of tongues’ in the university, on what conceivable grounds can one claim that conservative and libertarian voices do not? Any sincere commitment to diversity must include a concern for political diversity, especially at a time when conservative and libertarian professors are disappearing from our campuses.”) See also John Hasnas, *The One Kind of Diversity Colleges Avoid*, WSJ (Mar. 31, 2016), <https://www.wsj.com/articles/the-one-kind-of-diversity-colleges-avoid-1459464676>; Mark Judge, *Why Georgetown University Students Want More Conservative Professors on Campus*, NAT'L REV (Oct. 6, 2017), available at <https://www.nationalreview.com/2017/10/georgetown-conservative-professors-students-intellectual-diversity/>.

American Council of Trustees and Alumni said, “Rather than fostering intellectual diversity—the robust exchange of ideas traditionally viewed as the very essence of a college education—our colleges and universities are increasingly bastions of political correctness, hostile to the free exchange of ideas.”³⁴⁷ In 2018, more than 50 years after the Free Speech Movement started by leftist, UC Berkeley erupted with a renewed call for free speech.³⁴⁸ This time, however, the movement was led by the Berkeley College Republicans. With the endorsement of Jeff Sessions’s Department of Justice, conservatives sued the University of California for discriminating against right-wing firebrands like Ann Coulter and Milo Yiannopoulos.³⁴⁹ Their brief argues that it is important that students engage the views of because, “[t]he 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.’”³⁵⁰

Meanwhile, proponents of affirmative action are facing an uphill battle as they strain to use viewpoint diversity to promote their own ends. Powell’s *Bakke* opinion determined the parameters for the affirmative action debate that is still ongoing. While subsequent Supreme Court decisions expanded the benefits of diversity, Powell’s logic remains the centerpiece of our affirmative action jurisprudence.³⁵¹ By upholding diversity as the only constitutionally legitimate justification for race-conscious admissions practices, Powell stripped supporters of their ability to articulate what is arguably the most compelling justification for affirmative action: it is a small, yet important counterweight against the long history of systematic oppression of underrepresented racial minorities in the United States. Instead, supporters are left to voice a justification that many find weak, if not dishonest.

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

³⁴⁷ Sophia A. McClennen, *The Geopolitical War on U.S. Higher Education*, 33 *COLLEGE LITERATURE* 43, 51–52 (2006).

³⁴⁸ See, e.g., Kate Tinny, *Conservative Speakers Ask UC Berkeley: ‘Are We Killing Free Speech?’* DAILY CALIFORNIAN (Mar. 11, 2018), <http://www.dailycal.org/2018/03/11/conservative-speakers-ask-uc-berkeley-killing-free-speech/> (reporting on conservative panel on free speech); Douglas Ernst, *UC Berkeley: ‘Hard to Defend’ Free Speech of Conservatives Who ‘Incite’ Liberal Students*, WASH. TIMES (May 4, 2018), <https://www.washingtontimes.com/news/2018/may/4/uc-berkeley-hard-to-defend-free-speech-of-conserva/> (reporting on campus response to cry for freedom of speech).

³⁴⁹ First Amended Complaint for Injunctive, Declaratory, and Monetary Relief, *Young America’s Foundation v. Napolitano*, No. 3:17-CV-02255-MMC (Nov. 10, 2017), 2017 WL 6817316.

³⁵⁰ *Id.*

³⁵¹ For a breakdown of the various justifications that the Court has articulated to pursue diversity, see Devon W. Carbado, *Intraracial Diversity*, 60 *UCLA L. REV.* 1130, 1145–46 (2013) (noting that O’Connor’s opinion in *Grutter* laid out eight benefits of diversity, including: “(1) Diversity to promote speech and the robust exchange of ideas; (2) Diversity to effectuate the inclusion of underrepresented students; (3) Diversity to change the character of the school; (4) Diversity to disrupt and negate racial stereotypes; (5) Diversity to facilitate racial cooperation and understanding; (6) Diversity to create pathways to leadership; (7) Diversity to ensure democratic legitimacy; (8) Diversity to prevent racial isolation and alienation”).

action because of its educational benefits, many people simply do not buy it.³⁵² This sense of deception invites heightened scrutiny and almost routine legal attacks on the policy.³⁵³ If the real goal of affirmative action is ensuring that students are exposed to a diversity of viewpoints, skeptics ask, why can't professors just assign texts that represent a range of perspectives on a given issue?³⁵⁴ Why assume that students of color have different thoughts just because they have different skin tones or hair textures?³⁵⁵ Or is it, as Justice Thomas once wrote, that universities are more interested in cultivating certain "racial aesthetics" than they are in promoting a robust exchange of ideas?³⁵⁶

Powell's opinion left affirmative action proponents struggling to answer questions that would once have been considered besides the point. In *Fisher*, when the counsel for University of Texas began articulating the well-rehearsed goals of diversity, Chief Justice 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 are the unique benefits of diversity in that situation?"³⁵⁷ The real answer—one that counsel could never articulate in this legal environment, but one that would have been common sense 40 years earlier—is that the point of affirmative action is to help the minority student. There may indeed be benefits of having racial diversity in a hard science class, but even if there is not, there is benefit in marginalized groups having access to selective universities.

Despite the inherent weaknesses of the diversity argument, affirmative action has stayed alive thanks to a consistent 5-4 majority. One gets the sense, however, that even the more liberal justices have not been especially won over by the sheer strength of the diversity argument. Instead, like many proponents of affirmative action, they recognize that there is a more vexing problem that the policy is trying to address. Now, however, it is unclear how much longer diversity will win the day. With a new round of affirmative action potentially

³⁵² As Jed Rubenfeld 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 Law Journal 427, 471 (1997).

³⁵³ *Id.*

³⁵⁴ See Brief of National Association of Scholars as Amicus Curiae in support of Plaintiffs' Motion for Partial Summary Judgment, at 8, *Gutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928)

³⁵⁵ 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. 1995) ("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 on the blood type of applicants.").

³⁵⁶ *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir. 1995)

³⁵⁷ Libby Nelson, *Chief Justice Roberts Asked Why Diversity Matters in a Physics Class. Here's an Answer*, VOX.COM (Dec. 10, 2015), available at <https://www.vox.com/policy-and-politics/2015/12/10/9886088/roberts-affirmative-action-physics> (reporting on oral arguments in *Fisher*).

making its way through the courts and a new conservative majority on the Supreme Court, the weaknesses that have always characterized Powell's opinion may finally prove fatal.

Chapter 3 | Race as Unintellectual

For the past forty years, efforts to racially integrate the nation's most selective universities have cohered around a central idea: underrepresented minorities have unique perspectives, and universities are unable to provide the highest quality of education without incorporating those perspectives into the classroom.¹ It was in its affirmative action jurisprudence that the Supreme Court first legitimated the goal of “obtaining the educational benefits that flow from a diverse student body.”² Today, however, the “diversity rationale” has transcended the affirmative action debate.³ Schools with race-blind and race-conscious admissions practices alike articulate the need for a “robust exchange of ideas” as their primary motivation for seeking racial diversity within their student bodies.⁴ When specifying the unique intellectual contributions that students of color offer, universities most often cite these students' ability to introduce important racial perspectives into the campus community.⁵ These perspectives are thought to promote cross-racial understanding,⁶ create lively classroom discussion,⁷ and cultivate more socially conscious leaders.⁸

¹ See, e.g., Ellen C. Berry, *Why Diversity Became Orthodox in Higher Education, and How It Changed the Meaning of Race on Campus*, 37 CRITICAL SOC. 573, 574 (2011) (discussing the emergence of the diversity rationale in the late 1980s). Critical race scholars have persuasively argued that the diversity rationale is implicitly premised on how white people and white-dominated institutions are improved by being exposed to people of color. See, e.g., Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003) (arguing that diversity is serious distraction from the racial justice aims that affirmative action sought to address); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013) (arguing that Powell's Bakke decision has framed diversity as a means to improve the educational experience of white students); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 211–17 (2004) (concluding that the *Grutter* decision appears to benefit white students over students of color).

² *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 306 (1978).

³ Powell's opinion in *Bakke* and Justice O'Connor's opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), are known as the “diversity rationale.”

⁴ See *infra* Part I.

⁵ See *id.*

⁶ See *Grutter*, 539 U.S. at 330 (finding that diversity promotes “cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races” (internal citations and quotations omitted)).

⁷ See *id.* (“[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” (internal citations and quotations omitted)); see also RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 104 (2013) (“I have seen firsthand the intellectual deprivation suffered by white students consigned to racially homogeneous classes. In the absence of black and Latino students, discussions regarding large swaths of the law were obviously and painfully impoverished.”).

⁸ See, e.g., Brief for Amici Curiae Association of American Medical Colleges et al. in Support of Respondents, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 7635845, at *14 (“For most medical schools, these goals include producing culturally-competent physicians who are well-adapted to serve patients from across the varied racial and ethnic makeup of the Nation.”); see also Somnath Saha et al., *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in US Medical Schools*, 300 JAMA 1135, 1135 (2008) (finding that non-minority students attending more racially diverse medical schools exhibited greater preparedness to care for minority patients and stronger attitudes about equitable access to health care).

As the diversity rationale has proliferated,⁹ opponents have remained steadfast in their skepticism. They have called the universities' arguments a "sham"¹⁰ and accused administrators of being more interested in creating a particular "racial aesthetic" than in truly promoting cross-racial exchanges.¹¹ Yet, for as long as the diversity debate has raged on and as many empirical studies as it has produced, little research has been focused specifically on capturing the perspectives of underrepresented students, the presumed drivers of diversity.¹² What do they feel about their institutions' commitment to fostering the kinds of intellectual pluralism that racial diversity is supposed to produce? And how do their perceptions affect their willingness to contribute to the intellectual diversity on their campuses?

Based on an interview study of black law and social science graduate students in an elite, predominantly white institution (PWI), this chapter reveals a widespread but understudied perception that prevents students of color from fully contributing to the "robust exchange of ideas" on their campuses.¹³ Although black students commonly report both a desire to talk about race and a belief that discussing race and racism is essential to understanding course materials, they are deeply reluctant to bring up either topic in class discussions. When explaining their reticence, they cite a widespread view that talking about race diminishes their intellectual standing. Across the law school and various social science departments, black students identify three dominant perceptions that make them hesitant to share their racial views: (1) The impulse for black students to use race as an analytic frame is driven by emotion rather than reason; (2) Race is a distraction from the most important lenses through which students should understand legal, social and political developments; and (3) Black students resort to racial analysis in order to mask their inability to engage with more intellectually demanding subjects. Perceiving racial analysis to be devalued within their respective departments and sensitive to the longstanding stereotype that black

⁹ This rationale has also become the dominant justification for racial integration in businesses. *See generally* SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2008); LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (2016).

¹⁰ *See* Grutter, 539 U.S. at 383 (Rehnquist, J., dissenting) (calling the arguments that universities need a critical mass of minority students "a sham").

¹¹ *See id.* at 364 (Thomas, J., concurring) (characterizing the majority's opinion as deference to a school judgment that "racial aesthetic" leads to educational benefits).

¹² There has been, however, significant research focused on the experience of white students' experiences and views on diversity. *See, e.g.,* NATASHA K. WARIKOO, *THE DIVERSITY BARGAIN AND OTHER DILEMMAS OF RACE, ADMISSIONS, AND MERITOCRACY AT ELITE UNIVERSITIES* (2016); Victoria C. Plaut et al., "What About Me?" *Perceptions of Exclusion and Whites' Reaction to Multiculturalism*, 101 J. OF PERSONALITY & SOC. PSYCH. 337 (2011); Somnath Saha et al., *supra* note 8; Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RESEARCH IN HIGHER EDUC. 529 (2004).

¹³ Bakke, 438 U.S. at 312.

people lack intellectual ability,¹⁴ black students fear that talking about race helps to confirm a suspicion that they are less intelligent than their classmates.¹⁵

These students' perceptions differ markedly from those in two different comparison groups: black students in corresponding departments at a historically black university (HBU) and white students within the same departments at the PWI. In order to discern whether the norms that black students reported were the norms of the particular departments they were enrolled in, or the norms of the broader discipline the students were being inducted into, the study includes a comparison group of black graduate students in the law school and social science departments of a premier, historically black university. These students, working in the same disciplines as their peers in the predominantly white university, report feeling encouraged to articulate their racial perspectives because understanding race, within their institution, is regarded as central to understanding broader societal phenomenon. Moreover, in stark contrast to their black peers at the predominantly white university, students at the HBU report a prevailing perception that the articulation of progressive racial analysis is key to credentialing oneself as an intellectual within their respective departments. This suggests that the stigma against discussing race that black students perceive within the PWI reflect institutional rather than disciplinary norms.

As a second comparison, the study includes a smaller group of white students at the PWI who identify race is one of their primary academic interests. In contrast to their black classmates, these students largely report feeling encouraged to discuss race in class and in their writing. Moreover, they do not report a perception that talking about race leads their classmates or professors to believe they are less intelligent than their peers who do not engage in racial analysis. The divergent perceptions of black and white students within the same departments suggests that talking about race comes with specific sanctions for black students, sanctions that white students appear insulated from, and of which they are largely unaware.¹⁶

A key assumption embedded in the diversity rationale is that the integration of students of color will change the intellectual culture of predominantly white universities.¹⁷ But what effect does the intellectual culture have on students of color? Black students report that the norms in their departments—particularly the perceived

¹⁴ For a more in-depth exploration of this perception, see IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2017).

¹⁵ For a conversation of how stereotype threat affects black university students, see *infra* Parts III & IV.

¹⁶ See *infra* Part III.G.

¹⁷ Those assumptions have proven true in many respects. For explorations of how black students have significantly reformed predominantly white universities, see MARTHA BIONDI, *THE BLACK REVOLUTION ON CAMPUS* (2014); IBRAM X. KENDI, *THE BLACK CAMPUS MOVEMENT: BLACK STUDENTS AND THE RACIAL RECONSTITUTION OF HIGHER EDUCATION, 1965-1972* (2012); STEFAN M. BRADLEY, *UPENDING THE IVORY TOWER: CIVIL RIGHTS, BLACK POWER, AND THE IVY LEAGUE* (2018).

stigmatization of discussions of race and racism—compel them to significantly modify their behavior. Their adaptive strategies include limiting or avoiding discussions of race, using intentionally imprecise language when discussing race, and talking about race and racism in ways that they believe will not disturb the “racial comfort” of their white peers and professors.¹⁸

The findings of this study are legally significant. With another round of affirmative action litigation making its way through the courts, and with the highest court now dominated by justices hostile to race-based affirmative action, the policy will likely come under greater scrutiny than ever before. It may no longer be sufficient to show that racial diversity has the *potential* to improve the learning environment. Instead, universities might be asked to provide convincing evidence that they are in fact reaping the educational benefits of racial diversity. A prerequisite to reaping those benefits is the creation of an inclusive learning environment where students feel comfortable expressing their views. The fact that black students within a large, elite—and reputedly liberal—university believe that their departments are hostile towards or dismissive of their racial views is not simply a pedagogical concern; it is also legal vulnerability. To the extent that similar dynamics exist at other selective universities—and evidence suggests that they do—the findings presented in this chapter call into question whether universities are actually using diversity to cultivate a “robust exchange of ideas” or if, as skeptics have long suspected, universities’ interest in diversity only goes skin deep.”¹⁹

Part I of this chapter tracks elite universities’ claim over a 40-year period that racial diversity leads to better learning outcomes and explains how the Court has built affirmative action jurisprudence around that argument. Key to the universities’ claim is that cross-racial dialogue is necessary to educate the nation’s future leaders and that students of color—and especially black students—have unique racial insights from which the campus community benefits. Part II explains the study’s research question and its methodology. Part III details the studies’ results. Foregrounding the voices of students from predominantly white and historically black universities, their responses reveal the different—and often contradictory—ways that these groups of students believe that talking about race impacts their intellectual standing. Part IV highlights the various strategies that black students use to navigate intellectual cultures that they believe to be unreceptive to explicit racial discourse.

¹⁸ Devon Carbado and Mitu Gulati use the term “racial comfort” to describe strategies that people of color use to alleviate the racial anxiety of whites, *see* DEVON W. CARBADO & MUTI GULATI, *ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA* (2013).

¹⁹ As Jed Rubenfeld writes, “Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued.” If it were, “[w]hy no preferences for fundamentalist Christians or for neo-Nazis?” Jed Rubenfeld, *Affirmative Action*, 107 *Yale L.J.* 427, 471 (1997).

By juxtaposing the intellectual engagement that universities purport to value against how students of color experience the academic norms of their institutions, this chapter aims to reinvigorate, rather than provide reason to abandon, the diversity rationale. To cultivate genuine diversity, universities need to focus not only on admitting underrepresented minorities, but also on creating a broader culture that is conducive to fostering the kinds of intellectual diversity that will help to promote cross-racial exchange. In creating this culture, faculty and administrators should pay special attention to uplifting the perspectives that have been historically marginalized both inside and outside of academia. Part V offers student-generated recommendations for how universities might create more inclusive intellectual communities—where students of color will feel comfortable sharing their racial views, and where universities may reap more fully “the educational benefits that flow from a diverse student body.”²⁰

I. RACIAL AWARENESS AS AN EDUCATIONAL BENEFIT OF DIVERSITY

Today “the educational benefits of diversity” is the only sanctioned legal justification under for considering race in admissions.²¹ Culturally, however, the diversity rationale is much more than just a legal justification. It has become a primary goal of admissions more generally. Universities both with and without affirmative action cite the importance of intellectual pluralism when articulating the need for racially integrated student bodies. Diversity has become embedded in American culture as a value in and of itself.

²²

This section traces the emergence and proliferation of the diversity rationale as the primary justification to pursue racial integration in institutions of higher education. Using statements from elite universities presented both to the public and in amicus briefs to the Supreme Court, I show that institutions of higher education have identified intellectual diversity as the primary goal that racial diversity is intended to further. More to the point, when universities specify the intellectual contributions that underrepresented students offer, they most frequently cite these students’ ability to offer unique *racial* perspectives.

A. *The Diversity Rationale Before Affirmative Action Litigation*

²⁰ Bakke, 438 U.S. at 306.

²¹ Bakke, 438 U.S. at 311–12.

²² See Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195 (2002) (problematizing the diversity rationale as the primary justification to uphold affirmative action and integration).

The diversity rationale is most commonly associated with affirmative action and racial integration.²³ As philosopher Elizabeth Anderson writes, undergirding the diversity rationale is a belief that “blacks, by virtue of their historical and cultural differences from other groups, have diverse ideas and perspectives from other racial groups.”²⁴ Yet, the diversity rationale was not always about race. Many elite universities structured their admissions philosophies around achieving student body diversity long before the existence of affirmative action and even before desegregation.²⁵

The pursuit of student body diversity on college campuses originated in the early twentieth century as a means to minimize Jewish enrollment in the nation’s most prestigious universities.²⁶ Worried that a reliance on grades and test scores to determine student admission had ushered in a “Jewish invasion,” college administrators at elite universities began to search for more “diversity” within their student bodies.²⁷ At some universities, for instance, this resulted in a pursuit of more “geographic diversity,” which in practice meant recruiting from areas where the Jewish population was known to be relatively small.²⁸

Over the next few decades, as explicit antisemitism at elite universities began to decline, the pursuit of diversity remained a means of cultivating a more desirable student body. Afraid of creating a campus full of academically brilliant, yet socially inept “eggheads,” school officials began to deemphasize grades and test scores when deciding who to admit. For instance, in the 1940s, concerned that its Crimson campus would be overrun by “sensitive, neurotic boy[s],”²⁹ administrators at Harvard began to argue for more student body diversity—one that included “rich men’s sons and poor, serious scholars and frivolous wasters, saints and sinners, Puritans and papists and Jews and Gentiles.”³⁰ They believed that admitting students with a mix of personalities and from various backgrounds would create an environment where students could “learn from friendly contact what cannot be learned from books.”³¹

²³ ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 136 (2010) (“The principal legal foundation of [the diversity] rationale is Justice Powell’s opinion in the Regents of University of California v. Bakke, supporting race-based affirmative action in college admissions.”).

²⁴ *Id.* at 135.

²⁵ For a detailed history of the life of the diversity rationale before the affirmative action litigation, see Lisa M. Stulberg & **Anthony S. Chen**, *A Long View on “Diversity”: A Century of American College Admissions Debates*, in *DIVERSITY IN AMERICAN HIGHER EDUCATION* 51 (Lisa M. Stulberg & Sharon Lawner Weinberg eds., 2011).

²⁶ See generally MARCIA GRAHAM SYNNOT, *STUDENT DIVERSITY AT THE BIG THREE: CHANGES AT HARVARD, YALE, AND PRINCETON SINCE THE 1920S* (2013);

²⁷ JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 364 (2005).

²⁸ *Id.* (noting that “Yale’s historic emphasis on ‘geographic diversity’ had been rooted in no small part in its desire to limit the number of Jewish students”).

²⁹ KARABEL, *supra* note 26, at 185.

³⁰ *Id.* at 184.

³¹ *Id.*

Over the next twenty years, it became accepted wisdom among college administrators that universities should not admit students based solely on grades and test scores.³² Diversity and academic achievement became twin pursuits. In 1961, for instance, the University of Pennsylvania laid out its criteria for admissions as follows: “The admission policy of the University should be designed to produce a student population having the highest possible diversification as to (1) intellectual interests, (2) special talents, (3) social and economic background, and (4) cultural characteristics.”³³

Yet, even as university officials began to embrace student body diversity, racial minorities were still largely excluded.³⁴ Well into the 1960s, the nation’s most elite universities remained virtually all white enclaves.³⁵ Efforts towards achieving racial diversity began in the middle of this tumultuous decade as college administrators, jolted by the civil rights movement and a spate of campus uprisings, formalized their efforts to recruit more black students.³⁶ Black college-aged students during this time, however, had been educated in segregated, under resourced schools. Given this, many did not have the academic qualifications of the typical white student traditionally admitted to the nation’s top universities.³⁷ Acknowledging this disparity of educational opportunity, universities began to initiate race-based affirmative action programs in order to reach those black students who were promising but underdeveloped.³⁸

Although the admissions of African Americans had a distinct historical context, some university administrators articulated the new goal of racial integration as simply an off-shoot of the pre-existing goal of creating student body diversity.³⁹ Many argued that in the midst of a nation rocked by racial unrest, black students had vital perspectives that white students needed to hear.⁴⁰ This justification for affirmative action, however, was initially rehearsed alongside a

³² See Stulberg & Chen, *supra* note 25.

³³ DAN M. MCGILL ET AL., ADMISSIONS POLICY FOR THE UNDERGRADUATE SCHOOLS OF THE UNIVERSITY OF PENNSYLVANIA 7 (1967).

³⁴ CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 159 (2006) (showing that, in 1967, black students made up on average just 1.8% of the student body at a sample of private universities including Columbia, Duke, Emory, Northwestern, Princeton, Tufts, Tulane, University of Pennsylvania, Vanderbilt and Yale).

³⁵ In 1967, white students made up 96.9% of the student bodies in the same sample of private universities. See *id.*

³⁶ KARABEL, *supra* note 26, at 379–408.

³⁷ See *id.* at 382–83 (“The problem for well-intentioned institutions like Yale was that the supply of ‘qualified’ blacks was extremely limited, given the prevailing definition of merit. According to a study conducted in the mid-1960s by Humphrey Doermann, Harvard’s director of admissions, only 1.2% of the nation’s black high school graduates school be expected to score as high as 500 on the verbal section of the SAT and a mere three-tenths of one percent as high as 550.”).

³⁸ *Id.* at 383.

³⁹ *Id.* at 403 (noting that “[t]hrough no official policy change was announced,” Harvard altered its admissions criteria in order to increase its black applicants. Admissions officials began to argue that the presence of black students “would make the campus both more diverse and more intellectually stimulating. Diversity, both racial and social, was thus not only a social necessity but an educational one.”).

⁴⁰ *Id.*

number of other justifications, most of which centered on uplifting racial minorities and achieving broader societal equality.⁴¹ The affirmative action litigation would isolate and elevate the idea that students of color contributed to a robust exchange of ideas as the primary justification for efforts to achieve racial diversity within elite universities.

A. *Bakke's Robust Exchange of Ideas*

The Supreme Court first ruled on affirmative action in 1978, little more than a decade after elite universities began to make focused efforts to admit students of color.⁴² The diversity rationale set forth in *Regents of the University of California v. Bakke* explicitly rejected arguments for affirmative action that rested on the uplift of racial minorities and established the “educational benefits that flow from an ethnically diverse student body” as the only constitutionally legitimate justification for race-conscious admissions practices.⁴³ Allan Bakke, a white applicant, was denied admission to the University of California’s medical school.⁴⁴ He sued the university alleging that it had engaged in racial discrimination.⁴⁵ University of California had an explicit affirmative action program that reserved sixteen of its 100 seats for students of color.⁴⁶ Within that subsection of sixteen seats, applicants were routinely admitted with lower test scores and grades than those accepted from the larger admissions pool.⁴⁷ Bakke argued that the practice of reserving seats for racial minorities and subjecting them to different admission standards violated equal protection law.⁴⁸

In order to overcome the presumption that it had unlawfully discriminated against white applicants on the basis of race, the University of California had to show that treating applicants differently was necessary to achieve compelling, state-recognized goals.⁴⁹ Most of the goals that the university articulated in its brief to the Court were centered on uplifting racial minorities.⁵⁰ The university said that affirmative action helped to compensate for the societal discrimination against those African Americans who had seen “the

⁴¹ See Brief for Petitioner, *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187977.

⁴² See *Bakke*, 438 U.S. at 265.

⁴³ *Id.* at 306; see also *id.* at 310 (“[T]he purpose of helping certain groups whom the faculty . . . perceived as victims of ‘societal discrimination’ does not justify” affirmative action.); *id.* at 311-12 (“[A]ttainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institutional of higher education.”).

⁴⁴ *Id.* at 276.

⁴⁵ *Id.* at 277.

⁴⁶ *Id.* at 274–75.

⁴⁷ *Id.*

⁴⁸ *Id.* at 277–78.

⁴⁹ See *id.* at 305.

⁵⁰ See Brief for Petitioner, *supra* note 41.

hope but not the promise of *Brown*.”⁵¹ Moreover, officials noted that communities of color often had inadequate healthcare in part because there was a shortage of white doctors willing to work in low-income minority communities.⁵² The medical school’s race-conscious admissions program, the university argued, would help to alleviate that shortage by producing doctors of color who might be more willing to treat underserved populations.⁵³

The medical school also articulated a goal that focused specifically on how white students benefited from affirmative action. Invoking the merits of intellectual pluralism, the university argued that it was important to have students of color represented in the student body because “minorities will bring with them a concern for the problems and needs of disadvantaged areas from which they come.”⁵⁴ This was important, the university explained, because white students with whom students of color interacted would “be influenced and enriched by that contact.”⁵⁵

A number of educational institutions homed in on how students of color could offer unique perspectives informed by living as racial minorities in a society that continued to struggle with racial inequality. In an amicus brief, the American Association of Law Schools wrote of the importance exposing future white lawyers to the viewpoints of people of color:

As a consequence of our history, race accounts for some of the most important differences in our society. Precisely because race is so significant, prospective lawyers need knowledge of the backgrounds, views, attitudes, aspirations, and manners of the members of racial minorities.⁵⁶

The brief went on to detail the ways that exposure to the perspectives of black students would disabuse white students of their racial misconceptions: “Well intentioned whites, no less than bigots, need to learn that there is not a common ‘black experience’ and to appreciate the oversimplification of such statements as ‘blacks want (believe, need, etc.)’”⁵⁷

A number of universities echoed these sentiments, but it was an amicus brief submitted by Harvard, Columbia, Stanford, and the University of Pennsylvania that proved most influential in molding the Court’s affirmative action jurisprudence. The universities argued that

⁵¹ The brief noted that “[m]inority students entering medical schools in the 1970’s are from the generation of minority students who have seen the hope but not the promise of *Brown*.” *Id.* at *17.

⁵² *Id.* (“The most significant fact about doctors from minority groups is that they are so few, and the most significant fact about health care for such groups is that it is scarce and inferior.”).

⁵³ *Id.* at *31.

⁵⁴ Reply Brief for Petitioner, *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187980, at *12.

⁵⁵ *Id.*

⁵⁶ Brief Amicus Curiae for the Association of American Law Schools in Support of Petitioner, *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (No. 78-811), 1977 WL 187968, at *51.

⁵⁷ *Id.*

educators, rather than judges, needed to have the discretion to determine the best academic environment for its students.⁵⁸ It was their estimation that the most intellectually stimulating campus was one where students would be exposed to and learn from people from different backgrounds.

Harvard, in particular, argued that race-based affirmative action was simply a means to more fully realize its longstanding admissions philosophy. Writing that although the university had long pursued student body diversity, it used to define “diversity” narrowly. Essentially, Harvard’s pursuit of pluralism had been confined to the white, college-aged population. This limited scope allowed them to admit “students from California, New York . . . city dwellers and farm boys; violinists, painters and football players,” yet very few racial minorities.⁵⁹ But the Civil Rights Movement sparked an awareness that if Harvard were “to continue to offer a first-rate education to its students,” admissions officers needed to expand their definition of diversity to include non-whites.⁶⁰ Students of color, administrators argued, were uniquely positioned to “introduce into the university community important perceptions and understandings” that arose out of their experiences of being racial minorities in a society consumed by race.⁶¹ In its brief, the storied institution noted:

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. Minority students add such points of view, both in the classroom and in the larger university community.⁶²

The integration of racial minorities, university officials argued, would educate white professors as well. Relying on anecdotal data, the brief noted, “It has been the experience of many university teachers that the insights provided by the participation of minority students enrich the curriculum, broaden the teachers’ scholarly interests, and protect them from insensitivity to minority perspectives. Teachers have come to count on the participation of those students.”⁶³

The Court was deeply divided in coming to its decision. On one end, four justices argued that the remedial goals centered on uplifting racial minorities justified treating applicants differently on the basis of race. On the other end, four justices argued that none of

⁵⁸ See Brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae, *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188007.

⁵⁹ *Id.* at *2.

⁶⁰ *Id.*

⁶¹ *Id.* at *8.

⁶² *Id.* at *12-*13; see also *id.* at *9 (“[T]he differences in experience that arise out of growing up black, or Chicano, or Puerto Rican, or Native American, enable students who are members of those groups to introduce into the university community important perceptions and understandings.”).

⁶³ *Id.* at *13.

the goals offered by the University of California justified subjecting white applicants to a different admission standard than those used to admit racial minorities. Justice Lewis Powell, who took neither position, wrote the controlling opinion. Subjecting affirmative action to strict rather than intermediate scrutiny, Powell found that the goals intended to further racial equality were neither sufficiently compelling nor narrowly tailored to meet the constitutional standard.⁶⁴

The “educational benefits of diversity” was the one argument that Powell found compelling enough to pass the strict scrutiny test. The lone justice endorsed the diversity rationale, writing that a diverse student body helped to create “the atmosphere of speculation, experiment and creation—so essential to the quality of higher education.”⁶⁵ Diversity on campuses was compelling because “the Nation’s future depends upon leaders trained through wide exposure to a robust exchange of ideas.”⁶⁶ Yet, racial diversity, Powell contended, was a “single though important” aspect of what constituted a genuinely diverse student body.⁶⁷ While striking down universities’ ability to reserve a specific number of seats for racial minorities, Powell allowed schools to continue affirmative action programs so long as the goal of those programs was to create a diverse student body.⁶⁸ Powell’s opinion significantly shaped both the goals of affirmative action and the organizational logic of universities⁶⁹ as he ushered in a preoccupation with diversity.⁷⁰

B. *Grutter*

Because no other justice joined the controlling opinion in *Bakke*, it was unclear to what extent Powell’s opinion was binding precedent.⁷¹ This ambiguity caused the Court to revisit the constitutionality of affirmative action twenty-five years later. In 2003’s 5-4 *Grutter* decision, written by Justice Sandra Day O’Connor, the Court upheld the affirmative action practices of the University of Michigan’s Law School.⁷² Explaining the importance of racial diversity in classrooms, the University of Michigan argued that it was critical to have students

⁶⁴ *Bakke*, 438 U.S. at 306–15.

⁶⁵ *Id.* at 312 (internal citations and quotations omitted).

⁶⁶ *Id.* (internal citations omitted).

⁶⁷ *Id.* at 315.

⁶⁸ *Id.* at 317 (noting that “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats”).

⁶⁹ Berrey, *supra* note 1, at 578 (noting that “Powell’s opinion signaled to college administrators that they could consider race in their admissions decisions within certain parameters and that they should frame their admissions objectives in terms of diversity. Administrators followed his lead.”).

⁷⁰ See Leong, *supra* note 1, at 2152 (arguing, in part, that Powell’s opinion helped to fuel “a social preoccupation with the notion of diversity, which encourages white individuals and predominantly white institutions to engage in racial capitalism by deriving value from nonwhite racial identity”).

⁷¹ See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1995) (finding that racial diversity was not a compelling state interest in spite of Powell’s opinion in *Bakke*).

⁷² *Grutter*, 539 U.S. at 328.

of color present in the classroom because they were able to contribute unique racial perspectives that will enrich the education for all students.⁷³ In its brief to the Court, school officials explained: “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.”⁷⁴ Further explaining how black students in particular were uniquely positioned to offer racial insights, the administrators noted, “[T]o be born white is to be free from confronting one’s race on a daily, personal, interaction-by-interaction basis.”⁷⁵ By contrast, “to be born black is to know an unchangeable fact about oneself that matters every day.”⁷⁶

Acknowledging its role in training the next generation of leaders, Michigan argued:

Law schools need the autonomy and discretion to decide that teaching about the role of race in our society and legal system and preparing their students to function effectively as leaders after graduation, are critically important aspects of their institutional missions . . . And it hardly requires extensive proof that pursuit of those goals is greatly enhanced by the presence of meaningful racial diversity among the law school’s student body—enhanced in ways that white students alone, no matter what their viewpoints are or even what their experiences have been, cannot possibly supply.⁷⁷

The Court ultimately endorsed “the educational benefits of diversity” that Justice Powell laid out a quarter century earlier. Explaining the importance of having students of color present in law schools, O’Connor echoed Michigan’s argument about racial minorities being able to introduce unique racial perspectives: “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”⁷⁸ “Diversity,” O’Connor wrote, “promotes ‘cross-racial understanding,’ helps students break down racial stereotypes, and ‘enables students to better understand persons of different races.’”⁷⁹ The benefits of racial diversity were praised as “important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and

⁷³ See Brief for Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236.

⁷⁴ *Id.* at *30 (emphasis in original).

⁷⁵ *Id.* at *23.

⁷⁶ *Id.*

⁷⁷ *Id.* at *25.

⁷⁸ *Grutter*, 539 U.S. at 333.

⁷⁹ *Id.* at 330 (quoting district court opinion).

interesting when the students have the greatest possible variety of backgrounds.”⁸⁰

Conservative justices were deeply skeptical of the majority opinion. Their skepticism was articulated on two registers. First, they did not believe that “the educational benefits of diversity” was a sufficiently compelling goal to pass strict scrutiny. Second, they were doubtful that universities were actually using racial diversity to facilitate educational benefits. Justice Clarence Thomas dismissed the University’s interest in diversity as simply a desire to create a particular “racial aesthetic” in its student body.⁸¹ Suggesting that Michigan Law School was more interested in looking diverse than actually promoting a diversity of thought, Thomas wrote that “the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of students sitting in them.”⁸²

In a similar vein, Justice Scalia wrote that universities “talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses.”⁸³ He noted the existence of “minority-only organizations, separate minority housing opportunities, separate minority student centers, [and] even separate minority-only graduation ceremonies.”⁸⁴ Scalia suggested that allowing for this kind of segregated campus life, which limited cross-racial interaction, was evidence that universities were not actually committed to realizing the benefits of cross-racial exchange.⁸⁵

C. *Fisher*

A little more than a decade after *Grutter*, the Supreme Court revisited the constitutionality of affirmative action in *Fisher v. Texas*.⁸⁶ The University of Texas had a policy whereby it would admit any in-state student who graduated in the top 10% of her high school class.⁸⁷ In filling the remainder of its incoming class, the university aimed for a more holistic review. Aiming to create a diverse student body, admissions officials took account of a number of ‘soft factors,’ including an applicant’s race.⁸⁸ Abigail Fisher, a Texas resident who was not in the top 10% of her high school class, sued the university

⁸⁰ *Id.*

⁸¹ *Id.* at 355 (Thomas, J., dissenting).

⁸² *Id.* at 355 n.3 (Thomas, J., dissenting).

⁸³ *Id.* at 349 (Scalia, J., dissenting).

⁸⁴ *Id.* (Scalia, J., dissenting).

⁸⁵ This suggestion carried appeal for several earlier courts. *See, e.g.*, *Hopwood*, 78 F.3d at 945 (“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 on the blood type of applicants.”).

⁸⁶ 136 S. Ct. 2198 (2016).

⁸⁷ *Id.* at 2205–06.

⁸⁸ *Id.* at 2206.

for violating the Equal Protection Clause by treating applicants differently on the basis of race.⁸⁹

The University of Texas argued that it needed to consider race in order to obtain the educational benefits of diversity. Failure to consider race in admissions resulted in a virtual exclusion of black students from most of the university's classrooms.⁹⁰ An internal study of the university found that there "were zero or one African American student in 90% of undergraduate classrooms of the most typical size."⁹¹ Because underrepresented students of color were largely absent, they were unable to "[bring] unique and direct perspectives to the issues and topics discussed and debated in the classroom."⁹² Responding to the criticism that the university could have a range of perspectives represented even when minority students were severely underrepresented, administrators called it "an affront to individuality, and to reality" to assume that African-American and white applicants from the same community have the same perspectives. Black students were more likely than whites to have "experienced discrimination, racial isolation, or simply minority status." To "[ignore] that an individual's race may shape his experience and viewpoints," the university argued, "demeans his dignity."⁹³

In an amicus brief, the University of California made a similar observation. "The 'unique experience of being a racial minority in [our] society,'" campus administrators wrote, "has the potential to enrich classroom and dormitory discussion and the exchange of ideas within a university and to affect what research is performed and which solutions are considered."⁹⁴ More specifically, the UC officials argued that minority students' experiences with racial discrimination made them uniquely capable of offering vital perspectives on race and racism in America. In a section of the brief entitled, "Students of Different Races and Backgrounds Contribute Diverse Viewpoints and Perspectives," the UC President and Chancellor wrote:

Because race still matters in so many spheres of life, it is not surprising that a person's race tends to inform his or her identity, experiences, and perspectives. Minority youth - particularly African-American and Latino children - are disproportionately likely to attend segregated schools, suffer more severe school discipline, live in poverty, and have

⁸⁹ *Id.* at 2207.

⁹⁰ *See id.* at 2212 ("In 2002, 52 percent of undergraduate classes with at least five students had no African-American students enrolled in them, and 27 percent had only one African-American student. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African-American student enrolled." (internal citations omitted)).

⁹¹ Brief for Respondents, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6467640, at *26.

⁹² *Id.* at *5.

⁹³ *Id.* at *36.

⁹⁴ Brief of the President and the Chancellors of the University of California as Amici Curiae in Support of Respondents, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6735847, at *7.

relatives in the criminal justice system. These trends, and the stereotypes they foster, render minority youths - even those who have not experienced such hardships - more likely than others to be sensitized to racial disparities in society.⁹⁵

A slim majority on the Court was persuaded by the arguments of the elite universities.⁹⁶ Once again upholding the educational benefits of diversity, the majority accepted that race was a proxy for the kinds of viewpoints that students would bring into the classroom. Justice Kennedy, writing for the majority, explained that “[a]lthough demographics alone are by no means dispositive, they do have some value as a gauge of the University’s ability to enroll students who can offer unrepresented perspectives.”⁹⁷

D. The Diversity Rationale in the Afterlife of Affirmative Action

For four decades, universities have won by a single vote each time affirmative action has come before the Court. Now, with conservative justices holding a clear majority on the Supreme Court, the fate of affirmative action is unclear. Yet, the diversity rationale appears to be here to stay, even if race-conscious admissions practices are deemed unconstitutional. As evidence of this, one need only look at the logic articulated by universities within states that have banned affirmative action. These universities continue to promote intellectual diversity as the primary motivation behind their efforts to increase racial integration on their campuses.⁹⁸ Banning affirmative action does not alter universities’ belief that there are educational benefits of diversity. It only takes away a key means of achieving said diversity.

Take, for example, the University of California. Though it has practiced race-blind admissions practices since Prop 209 deemed affirmative action unconstitutional in 1996, the university continues to use the diversity rationale to frame its efforts to increase the presence of racial minorities on its campuses.⁹⁹ In 2018, the Chancellor of UC

⁹⁵ *Id.* at *6-*7.

⁹⁶ Other universities made similar arguments. An amicus brief signed on by all the Ivy league schools and a considerable number of elite universities argued that they had based their admissions practices “on the principle that, in a free society, inquiry proceeds best when views must withstand examination from the widest possible range of perspectives.” Brief of Brown University, University of Chicago, Columbia University, Cornell University, Dartmouth College, Duke University, Harvard University, Johns Hopkins University, Massachusetts Institute of Technology, University of Pennsylvania, Princeton University, Stanford University, Vanderbilt University, and Yale University in Support of Respondents, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 11-345), 2012 WL 3527821, at *9.

⁹⁷ *Fisher*, 136 S. Ct. at 2212.

⁹⁸ See Berrey, *supra* note 1, at 579 (“Strong isomorphic tendencies exist among universities and colleges; as Stevens (2007:149) explains, ‘Instead of taking big risks through innovation, organizations more often hedge their bets through imitation. They keep their eyes on what other organizations . . . are up to, and then model their practices in the direction of where the big players seem to be headed.’ The implication here is that Michigan did not just copy law. It also copied other universities.”).

⁹⁹ See CAL. CONST. art. 1, § 3(a).

Berkeley announced a new initiative to increase the number of underrepresented minorities within the student body.¹⁰⁰ In explaining “the case for diversity,” she essentially articulated the Court’s diversity rationale: “Racial, ethnic and socioeconomic diversity has a clear impact on our educational mission and student outcomes. Our students’ exposure to peers of diverse backgrounds enhances their learning.”¹⁰¹ She further explained that “experiences with individuals different from ourselves challenges our thinking and leads to cognitive growth.” Echoing O’Connor’s opinion in *Grutter*, the chancellor explained that racial diversity also serves business needs:¹⁰² “Employers seek students who can work with diverse colleagues and across cultural lines. Learning in a diverse community helps train future leaders to be creative, collaborative and to thrive in multicultural environments.”¹⁰³

Similarly, Michigan banned race-conscious admissions in 2006.¹⁰⁴ Yet, ten years later, the University of Michigan administrators explained that they value diversity “for one crucial reason: Decades of experience, confirmed by overwhelming empirical research, have persuaded the University of the compelling educational benefits of maintaining a broadly diverse student body.”¹⁰⁵ Noting research that showed that “[w]hite students in particular tend to have minimal interaction with people of other racial backgrounds before college,” the university framed the decrease of underrepresented enrollment not as a harm incurred to marginalized communities but rather to the university itself.¹⁰⁶ Michigan administrators concluded that the “loss of racial and ethnic diversity undermines the University’s efforts to expose students to a broad diversity of perspectives, to dispel racial stereotypes, and to promote broad classroom participation by reducing feelings of racial isolation.”¹⁰⁷

The diversity rationale has transcended the affirmative action debate. Universities with race-blind and race-conscious admissions practices articulate the value of racial diversity with similar language and logic. While the means to achieve racial integration have been significantly limited in anti-affirmative action states, the stated goal of

¹⁰⁰ Carol Christ, *Announcing the Undergraduate Student Diversity Project*, UC BERKELEY: DIVERSITY (Dec. 6, 2018), <https://diversity.berkeley.edu/news/announcing-undergraduate-student-diversity-project>.

¹⁰¹ *Id.*

¹⁰² O’Connor wrote that diversity helps to provide “the skills needed in today’s increasingly global marketplace” by “exposing students to widely diverse people, culture, ideas and viewpoints.” *Grutter*, 539 U.S. at 330.

¹⁰³ Christ, *supra* note 100 (“Research also indicates that, in a place where a race or ethnicity is severely underrepresented, those who are underrepresented may experience isolation that can severely undermine their educational outcomes, not to mention their sense of belonging and well-being.”).

¹⁰⁴ MICH. CONST. art. I, §26 (prohibiting all state colleges and universities from “discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public education”).

¹⁰⁵ Brief for the University of Michigan as Amicus Curiae in Support of Respondents, *Fisher v. Univ. of Tex.* at Austin, 136 S. Ct. 511 (2016) (No. 14-981), 2015 WL 6748811, at *2.

¹⁰⁶ *Id.* at *12.

¹⁰⁷ *Id.* at *35.

integration for race-blind universities remains the same: the educational benefits of diversity.¹⁰⁸

II. RESEARCH QUESTION AND METHODOLOGY

Universities seek a critical mass of students of color in large part because they have unique viewpoints from which the broader campus community can benefit. Yet, for all the work that universities expect students of color to do to educate both their peers and professors, very little research has focused specifically on how underrepresented minorities navigate the expectation that they contribute insights cultivated from living as “a racial minority in a society, like our own, in which race unfortunately still matters.”¹⁰⁹ I conducted an interview study to answer the question: How do black students within an elite, predominantly white university interpret and respond to their departments’ appetite for racial discourse?¹¹⁰

A. Research Design

My study compared students’ experiences across race, disciplines, and institutions. While the study primarily focused on the experience of black students, a racial comparison was necessary to be sure that the experiences of black students who talk about race were different from the experiences of those who make up the racial majority.¹¹¹ For example, it may be that both black and white students feel encouraged or discouraged to talk about race, which would suggest that something about the topic affects their treatment. Alternatively, it could be that black and white students have

¹⁰⁸ See, e.g., *id.* at *32 (“The University of Michigan has concluded that while targeted recruiting and outreach efforts, combined with emphasis on socioeconomic factors in admissions, are helpful in increasing attendance by underrepresented minorities, such measures are not themselves enough to secure the educational benefits of student-body diversity.”).

¹⁰⁹ Grutter, 539 U.S. at 333. Existing studies of black students on predominantly white campuses tend to focus on undergraduate students and look at their feelings of social belonging academic performance. See, e.g., Walter Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26 (1992); JOE R. FEAGIN ET AL., *THE AGONY OF EDUCATION: BLACK STUDENTS AT WHITE UNIVERSITY* (1st ed. 1996); W.R. Allen, *The Education of Black Students on White College Campuses: What Quality the Experience?*, in *TOWARD BLACK UNDERGRADUATE STUDENT EQUALITY IN AMERICAN HIGHER EDUCATION* 56 (Michael Nettles ed., 1988).

¹¹⁰ I focused on black students because universities routinely refer to this group as those who—because of racial dynamics within the US—possess unique racial insight from which the campus community can benefit. See *supra* Part I. In addition, calls for diversity are often calls for an increase presence of black people. Speaking of how diversity is used buzzword, Ellen Berrey writes, “Often, it simply implies the presence of racial minorities, often just African Americans.” ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* 26 (2015).

¹¹¹ In order to maintain analytical distinctiveness, I did not include all racial minorities in this study. See Neil Gotanda & Peter Irons, “*Other Non-Whites*” in *American Legal History: A Review of “Justice at War,”* 85 COLUM. L. REV. 1186 (1985) (arguing that, given the nature of US race relations, non-black racial minorities should be interpreted under a distinct form of analysis from the one used to understand blacks). For an exploration of the racial experiences of Asian-American and Latinx law students, see YUNG-YI DIANA PAN, *INCIDENTAL RACIALIZATION: PERFORMATIVE ASSIMILATION IN LAW SCHOOL* (2017).

significantly different experiences when talking about race, which might suggest that it is not the topic of race in isolation that drives their experiences but the combination of the topic and the identity of the speaker.

A cross-disciplinary comparison was necessary to be sure that there is not something about a particular discipline that drove responses to intellectual discussions about race. Law school, for example, is notorious for stripping the social context from discussions of law, whereas inequality is a major topic of study in the social sciences.¹¹² It may be that intellectual discussions about race are discouraged in law but encouraged in the social sciences. Alternatively, a broader, more meta social narrative about race may permeate both disciplines.

Finally, a cross-institutional comparison was necessary to determine whether students' experiences are driven by their identity, or their identity within a particular educational context. What is considered intellectual discourse, and who has the privilege of engaging in that discourse, may vary within the context in which it occurs. Institutional comparison is similar to cross-disciplinary comparison but takes into account the mission and characteristics of the institution as a whole. Black students might have a different experience talking about race in an institution where the majority of the students and faculty are white than in an institution where the majority are black.

The study focuses exclusively on graduate students. In explaining the need for racial diversity, universities often cite the importance of creating professionals with cross-cultural competency.¹¹³ It is the express mission of graduate education to socialize students into their professional identities.¹¹⁴ Accordingly, it is in these programs where one might most expect to see universities' commitment to producing culturally competent professionals.

Focusing on graduate students has an extra benefit of allowing me to get information about their experiences in a number of different colleges and universities. A PhD candidate in the social sciences, for instance, might have received her undergraduate degree at one university and her master's degree from another before she came to the PWI to pursue her doctorate degree. Interviewing students with a range of institutional experiences allows me to discern whether the diversity norms of this particular university are atypical.

¹¹² For conversations about how legal education encourages students to take social context from the law, see ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 43–140 (2007); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. OF LEGAL EDUC. 591 (1982).

¹¹³ See *supra* note 8 and accompanying text.

¹¹⁴ For a conversation on the role of graduate and professional school into students, see JOHN C. WEIDMAN ET AL., *SOCIALIZATION OF GRADUATE AND PROFESSIONAL STUDENTS IN HIGHER EDUCATION: A PERILOUS PASSAGE?* (2001).

B. The Universities

The predominantly white institution (PWI) is one of the nation's most selective research universities. US News routinely ranks its law school and social science departments among the top 10. Its law students go on to work in the top international law firms, public interest organizations, and at the highest levels of government. Its social science graduate students commonly become professors within the nation's most prestigious universities. The student body and faculty are predominantly white. Among the student body, Asians are the dominant racial minority group, followed by Latinos, then African Americans/Blacks, and finally Native Americans.

At the PWI, the range of proportion of minority students in the social sciences was large, from 1% to over 90% (African American Studies). Accordingly, reporting how many interviews were conducted in each department presents significant challenges for maintaining the confidentiality of respondents, some of whom were the sole, or one of two or three black graduate students in their department. To solve this problem and comply with Internal Review Board requirements, I rely on broad comparisons between the law and social sciences more generally in the table below.

Table 1

Institution	Black Law Student	Black Social Science Student	White Law Student	White Social Science Student	Total
PWI	21	20	7	9	57
HBCU	23	17	3	2	45
Total	44	37	10	11	102

The historically black university (HBU) is considered among the most prestigious of the black research universities. It has a storied history of producing some of the nation's most prominent black leaders. Like their peers at PWI, the HBU law students go on to work at the top international law firms, public interest organizations, and in the highest levels of government. It is not as common, however, for the social science graduate students to go on to become professors within the nation's most prestigious universities. Many become professors at other historically black universities or small liberal arts colleges or work outside of academia. The student body and faculty are predominantly black. Among the student body, Asians are the most dominant minority group, followed by whites, then Latinos and finally Native Americans.

C. The Departments

The interviews were conducted with graduate students in the law schools and social science departments. The social science departments represented in the sample include sociology, political science, public policy, economics, psychology and history. As a comparison, I also interviewed students in the African American Studies department at the PWI. Given that African American studies is an interdisciplinary field, for the sake of consistency, I interviewed only those students in the department who worked in the social sciences.¹¹⁵

One could have focused on any number of departments as diverse racial perspectives are pertinent to many fields. I chose to focus on law and social science students because race is central to understanding the legal and social landscape of the US. These fields, broadly speaking, naturally lend themselves to conversations about race. As a result, the educational benefits of learning in a racially diverse environment might be more easily realized in these departments.

Taking seriously the professed desire of universities to produce leaders with the cultural competency necessary to function in and hopefully change the broader society, students in these departments will likely have significant influence: the law students through their advocacy and leadership, and the social science students through their knowledge and teaching. Law schools train a disproportionate amount of the nation's leaders in government, business, and academia.¹¹⁶ Exposing law students to racial perspectives could have a far-reaching impact.¹¹⁷ Social science students, for their part, are responsible for explaining our social reality. Their education will affect what social and legal policies are pursued and how the next generation of social scientists are trained.

¹¹⁵ This meant, for instance, that I did not interview students who focused on literary analysis or philosophy. I did, however, interview students were training to be historians, sociologists and anthropologists.

¹¹⁶ See, e.g., *Leading Edge: Anthony Thompson Examines How Improvements in Legal Education Can Prepare Lawyers to be Better Leaders*, NYU LAW (Jan. 8, 2019), <https://www.law.nyu.edu/news/ideas/Anthony-Thompson-Dangerous-Leaders-leadership-for-lawyers-diversity-legal-education> (More than half of US presidents have been lawyers, as well as more than half of current US senators and more than a third of the current members of the US House of Representatives. In the private sector, 46 of Fortune 500 CEOs were attorneys in 2012, according to *U.S. News & World Report.*"); Tara J. Yosso & Daniel G. Solórzano, *Conceptualizing a Critical Race Theory in Sociology*, in *THE BLACKWELL COMPANION TO SOCIAL INEQUALITIES* 117, 117 (Mary Romero & Eric Margolis eds., 2005) ("Discussion of race and racism in the social sciences has a long tradition."); Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511, 1515 ([B]ecause of certain salient features of American legal history [law professors] should find [themselves] paradoxically advanced in [their] ability to reach provisional agreement on a crucial matter still deeply divisive for our nonlegal colleagues: the centrality of racial texts, racial issues, and racial disputes . . . If the history of the United States Constitution and the American legal system teaches us anything, surely one of its core messages is that race has played a key role at many critical and formative junctures of our development.")

¹¹⁷ See WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS AND RACIAL INEQUALITY 2* (2007) ("The connection between law schools as elite institutions and the broader social and political realms of power in American society makes these institutions important sites for examining race and racism.")

D. Recruitment

Respondents were recruited through a variety of methods. For the social science students, I first went through the student profiles on the department websites to identify those who were visibly black and followed up with each by sending an email requesting an interview. I also immersed myself in areas black graduate students frequented. For example, I attended black graduate student meetings, worked in the black student lounge on campus, and attended social events organized by black graduate students. This immersion allowed me to both recruit respondents and to connect with the leaders of the various black graduate student groups who, in turn, emailed their respective listservs on my behalf. Respondents also introduced me to other black graduate students.

In recruiting white students, I focused on those students who identified race as a primary academic interest. For graduate students in the social sciences, I identified those students who either planned to or were currently writing on racial issues. For white law students, I chose those individuals who were either currently working on racial justice initiatives through clinical work, were members of racial justice journals, or who planned to focus on addressing racial inequality in their post-graduation work. For each student I confirmed that race was one of their primary academic and professional interests.

E. The Interviews

Interviews lasted on average for about two hours. The questions were semi-structured, allowing me the flexibility to follow-up on interesting points that students brought up. I intentionally used open-ended interview questions so that students had space to discuss what was important to them. I only asked students about talking about race if they did not bring these experiences up on their own by the end of the interview. Every black student at the PWI, however, brought up the difficulty of talking about race without having to be asked explicitly. Black students at the HBU and white students at the PWI had to be asked explicitly to address this question, as it appeared that it was not a central difficulty of their graduate school experience.

I began the interview by asking students why they decided to come to graduate school generally and their university in particular. From there, I asked about their prior experience at other colleges and universities. I then asked about the pros and cons of their experiences in graduate/law school. Of the cons, black students at the PWI typically voiced complaints about the low number of other black students in their departments, the prevalence of racial

microaggressions and the insufficient attention given to race within their department's curriculum. About midway through the interview, I asked if there were any subjects that felt difficult or uncomfortable to discuss in their departments. The bulk of the findings from this chapter emerge from black students explaining why race is difficult or uncomfortable for them to discuss within their respective departments.

III. RACE AS UNINTELLECTUAL

A. Race Centrality and Stereotype Threat

The responses of black students in the study affirm assertions by elite universities that students of color have unique racial insights that can improve their classmates' educational experiences. The great majority of black students interviewed at both institutions expressed a deep interest in race—one that was informed by navigating society as racial minorities. For many, that interest both motivated their desire to pursue post-secondary education and shaped their interpretations of the materials they study. One black social science student at the PWI explained why her academic interests center around race as follows: *"It's so essential to everything. I mean, how can I write about anything and not see race there? It's everywhere. It's the lens through which I see everything. I cannot not see it."*¹¹⁸ Similarly, explaining why so many students in her department are interested in studying racial issues, one political science student at the HBU noted: *"I think it's actually very difficult to be an educated black person in America and not think about race almost every day. It affects so many of our daily interactions...It's always somewhere in the background of my mind."*¹¹⁹

Yet, despite both believing that race is central to understanding course materials and expressing a strong desire to discuss race, most black students at the PWI reported hesitating and often altogether avoiding engaging race in classroom discussions. To understand why, it is important to foreground stereotype threat theory. Originally coined by social psychologists Claude Steele and Joshua Aronson to explain the underperformance of black college students,¹²⁰ stereotype threat posits that black students who are aware that a negative stereotype exists about the intellectual ability of people in their group will "bear an extra cognitive and emotional burden not borne by people for whom the stereotype does not apply."¹²¹ Stereotype threat for black students is most likely to be activated during times when

¹¹⁸ Interview with Black Female, Sociology Dep't, PWI (Interview No. 265206)

¹¹⁹ Interview with Black Female, Political Science Dep't, HBU (Interview No. 445201).

¹²⁰ See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. OF PERSONALITY & SOC. PSYCHOL. 797 (1995).

¹²¹ Joshua Aronson et al., *Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence*, 38 J. OF EXPERIMENTAL SOC. PSYCHOL. 113, 114 (2002).

intellectual ability is relevant.¹²² For example, when speaking in a law school class dominated by white students, many black students will worry that their comments will confirm negative stereotypes about black intellectual ability.¹²³ As Steele notes, stereotype threat can be activated even when students believe that the stereotype about black intellectual inferiority is false.¹²⁴

Applying stereotype threat theory to the present case study, most black students at the PWI reported believing that their professors and fellow students viewed them as less intelligent than their peers and they worried about confirming that perception. Capturing a popular sentiment, a graduate student in the history department explained that black students face a presumption of incompetence, despite gaining admission to one of the world's premier research institutions:

Typically, when you make it to [this university], the presumption is that you're intelligent. I don't think we get that presumption. They think we're not that bright until we prove otherwise. And once people have it in their heads that you're not smart, it's really hard to disprove it.¹²⁵

Although conservative critics have argued that it is the existence of affirmative action that makes black students feel inferior, students in this sample largely disagreed with that assertion.¹²⁶ Many believed that the stigma would still exist absent race-conscious admissions practices. One law student explained that the perception that she is intellectually inferior has followed her throughout her time in predominantly white schools—irrespective of whether the schools had affirmative action policies. After hearing her say that her professors and classmates assume that she is less intelligent than her peers, I asked if she thought that has anything to do with affirmative action. She responded:

No, it's not because of affirmative action, it's because of racism. When I was in grade school, the white kids thought they were smarter than me. There was no affirmative action there. In my high school, the white kids thought they were smarter than me. There was no affirmative action program there either. I was actually

¹²² Steele & Aronson, *supra* note 120, at 796 (“[W]henver African American students perform an explicitly scholastic or intellectual task, they face the threat of confirming or being judged by a negative societal stereotype—a suspicion—about their group’s intellectual ability or competence.”).

¹²³ Claude Steele alludes to the idea that speaking in class can trigger stereotype threat for black students, noting that “if the threat is experienced in the midst of a domain performance—classroom presentation or test-taking, for example—the emotional reaction it causes could directly interfere with performance.” Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997).

¹²⁴ *See id.* at 618 (noting that “to experience stereotype threat, one need not believe the stereotype nor even be worried that it is true of oneself”).

¹²⁵ Interview with Black Male, History Dep’t, PWI (Interview No. 240134).

¹²⁶ For an insightful exploration of arguments analyzing the relationship between racial stigma and affirmative action, *see generally* Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First-- Stigma or Affirmative Action*, 96 CALIF. L. REV. 1299 (2008).

the valedictorian of my high school, and they still thought they were smarter than me (laughs). I think the only difference now [in higher education] is that affirmative action gives them a non-racist way to justify their racism.¹²⁷

Even though black students at the PWI largely believed that assessments about their inferiority are rooted in racism rather than reality, they still reported feeling deeply anxious about confirming those assessments. A black student in sociology, who at the time of her interview had just received a tenure-track job offer from a top sociology program, recalled the paralyzing pressure she felt during class discussions in the early years of her PhD program:

I felt like I couldn't make mistakes and work through coming into my voice as a sociologist and not be sort of cast off as like, "Oh, well, that's because you're a person of color and you're not really as smart or able"...It felt like every time I opened my mouth everything was at stake.¹²⁸

How does the desire to disconfirm negative stereotypes about their intelligence relate to racial analysis? A key finding that emerged from the interviews is that black students in predominantly white departments feel that talking about or studying race helps to confirm negative beliefs about their intellectual limitations. Take, for example, what a black woman in the economics department said about how she is perceived by students in her department: "*I know [the people in my department] don't think I'm smart. They assume that I can't do numbers. They think I'm only good at interpersonal stuff, that I only study race.*"¹²⁹ Notice the connection between not being smart and studying race. This student believes that the idea that she "only studies race" is interpreted as evidence that she lacks intellectual capability.

The link between discussing race and diminished intellectual capacity emerged regularly in interviews of the black students at the PWI. Take this political science student's observation:

I feel this is probably just ingrained bias or just backwards thinking, but [here in the department], people don't think you're really smart if you can talk intelligently about race. But they think you're really smart when you can talk intelligently about economics or philosophy...I don't know, there's something there, but I don't know. It sometimes feels like that knowledge isn't valued or appreciated, and it makes it feel like there's hierarchies of what's smart and what's

¹²⁷ Interview with Black Female, Law School, PWI (Interview No. 1489310).

¹²⁸ Interview with Black Female, Sociology Dep't, PWI (Interview No. 252010).

¹²⁹ Interview with Black Female, Economics Dep't, PWI (Interview No. 230913).

important, and here it feels like race is neither smart nor important.¹³⁰

A law student—who aspires to become a law professor—spoke of how her professors view black students who regularly bring race into their analysis of the law:

They don't take you seriously intellectually or academically. I think they don't see you as a legitimate legal scholar or someone who can engage in legal analysis in a complex way. I think there's just that automatic shadow of you're not intelligent, your analysis is not intelligent. You just bringing up race, in general, I feel like it completely delegitimizes your stance in their mind.¹³¹

Later in the interview, I asked how professors view black students who regularly contribute to class discussions but avoid the subject of race. She responded, "*It depends on the professor. But I think the average white professor loves those kinds of black students. They take more of an interest in them. They'll ask them to RA for them. They mentor them. I think they see them as real intellectuals.*"¹³²

At the HBU, students reported a different relationship between talking about race and being perceived as intelligent. There, engaging in sophisticated racial analysis was often described as a prerequisite to being regarded as a "real intellectual" by faculty and peers. A psychology student at the historically black university reflected on the anxiety he felt during his first year as a graduate student:

I had been educated in PWIs my whole life, so I didn't know much about race. I knew black people were slaves and then Martin Luther King had a dream we were free (laughs). So, when I got here and people were comparing Fanon's racial philosophy to Eldridge Cleaver's, I couldn't keep up. I felt really insecure because I think a lot of people thought I was kind of stupid.¹³³

Similarly, in discussing the "one-upsmanship" between first year students, a second semester 1L at the HBU said, "*I feel like sometimes here there's a competition to show who's the smartest, wokest, most race-conscious person in the class.*"¹³⁴ Students at the two universities perceived racial analysis as serving two very different functions in service of one's intellectual reputation. At the HBU, engaging in racial analysis—particularly progressive racial analysis—was often seen as key to credentialing oneself as an intellectual. By contrast, at the PWI,

¹³⁰ Interview with Black Male, Political Science Dep't, PWI (Interview No. 129420).

¹³¹ Interview with Black Female, Law School, PWI (Interview No. 125205).

¹³² *Id.*

¹³³ Interview with Black Male, Psychology Dep't, HBU (Interview No. 429523).

¹³⁴ Interview with Black Female, Law School, HBU (Interview No. 314910).

black students generally felt that focusing on race calls into question their intellectual capability.

Why do black students in predominantly white departments believe that engaging in racial discourse helps to confirm a belief that they lack intellectual ability? Across departments, these students indicated that a variety of interactions with both peers and professors have signaled to them that racial analysis is devalued, particularly when it is articulated by a person of color.¹³⁵ Below are the most recurring themes that black students identify when explaining why they are reluctant to talk about race.

B. Racial Analysis is Emotional, not Intellectual

Black students at the PWI cited a prevalent view that when they brought racial analysis into their work or classroom discussions, their peers and professors saw the impulse to discuss race as driven by emotion rather than reason. An economics grad student noted the cost of discussing race as a black student in a predominantly white setting: *“For some reason people think that if you are conscious about race or discrimination or oppression, that somehow you can’t be logical and reasonable and objective, and that really concerns me.”*¹³⁶ A black graduate student in psychology noted a similar perception, *“I think when I talk about race, they think I’m just talking about my feelings. But really, I’m trying to point out that there’s an important factor that we aren’t considering, and because we’re ignoring the importance of race, we end up drawing the wrong kinds of conclusions.”*¹³⁷

1. Anger

The idea that talking about race makes a black student appear “angry” came up repeatedly in interviews. When asked to identify the pros and cons of her experience in law school, a black student identified as a primary con “constantly having to censor what I have

¹³⁵ This perception is longstanding among graduate students of color. See Eric Margolis & Mary Romero, *The Department is Very Male, Very White, and Very Conservative*: *The Functioning of the Hidden Curriculum in Graduate School Sociology Departments*, 68 HARV. EDUC. REV. 1, 15 (1998) (reporting the following remarks from a sociology graduate student of color speaking on how the work of students of color were received in her department: “Whenever it had to do with race or ethnicity, then it wasn’t seen as valuable or as important.”).

¹³⁶ Interview with Black Female, *supra* note 129. Kimberlé Crenshaw has argued that in law school minority students learn that “any failure to observe the constructed dichotomy between the rational--read non-racial and non-personal--and the emotional--read racial and experiential--may elicit derision or disregard. . . . This dichotomy between rational, objective commentary and mere emotional denunciation is often a false one, maintained by the belief that when minority students step outside the bounds of rote rule application to express their criticisms or concerns, they are violating classroom norms by being racially biased.” Kimberlé Williams Crenshaw, *Towards a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1, 5 (1988).

¹³⁷ Interview with Black Male, Psychology Dep’t, PWI (Interview No. 252391).

to say.”¹³⁸ In response, I asked: “When do you feel the need to censor yourself?” She replied:

I think it comes up where it’s either we’re talking about a case or something that is related to political and social issues, where race is clearly doing a lot of work but no one is talking about it. So it’s like, “Am I the black person that’s gonna stand up and say it?” But then I know that they’re gonna think I’m like the angry black woman.¹³⁹

It is interesting to note here is that her racial analysis is not seen as driven by emotion generally, but by anger specifically. One could imagine that if a student wanted to inject an economic analysis into a discussion of law, she would not be seen as “angry” for doing so.

Why is anger associated with black students’ racial interventions? Existing empirical work helps to provide insight. A discourse analysis of a group of interracial college students engaged in racial conversations reveals that when students of color talk about racism and white privilege, white students interpret their comments as personal attacks.¹⁴⁰ As a result, when describing these racial discussions white students commonly employ language that implies that they were the victims of violence meted out by students of color—they describe themselves as having been “attacked,” “beaten up,” or “slammed.”¹⁴¹ This language constructs people of color who discuss the existence of racism as perpetrators of violence. The authors argue that “the discourse of violence ultimately functions to protect and reproduce White supremacy, specifically in a context in which the goal was to interrupt White supremacy.”¹⁴²

The fear that talking about race or racism will make a black student appear angry or aggressive can cause those students to refrain from discussing racial dynamics, even when they believe them to be essential to understanding course material. A black graduate student in public policy explained why, after struggling to get his professors and fellow students to acknowledge the importance of race during his first year, he has decided to no longer speak about race in class:

For some reason, they think that when I say a policy is racist that I’m personally attacking them. And I’m like, “I don’t know how to get you to detach from that perception, to depersonalize it. I’m not saying you’re racist, or that you’ve personally thought up this racist program in some way, or even that you are particularly benefiting from the program. I’m just saying that it’s

¹³⁸ Interview with Black Female, Law School, PWI (Interview No. 129412).

¹³⁹ *Id.*

¹⁴⁰ Robin DiAngelo & Özlem Sensoy, *Getting Slammed: White Depictions of Race Discussions as Arenas of Violence*, 2012 RACE ETHNICITY & EDUC. 1 (2014).

¹⁴¹ *Id.* at 2.

¹⁴² *Id.* at 1.

racist.” But I realized that trying to get them to see that is more trouble than it’s worth.¹⁴³

Some black students believe that race is perceived as emotional because it evokes strong emotional responses from whites that are, in turn, projected onto them. Aware that discussing race can incur a backlash from their peers and professors, black students in predominantly white departments often reference the need to strategically manage the emotional reaction of their classmates when talking about race. Ironically, they believe that failure to properly manage the emotional response of white students can result in black students being labeled as emotional, or more specifically, angry.

A graduate student in the sociology department, who identifies as queer, spoke of what he calls a “pivotal” experience he had while taking a course in his first year of graduate school.¹⁴⁴ The experience made him reluctant to bring up race during class discussions even though he came to graduate school to become a race scholar. During a seminar discussion where students were analyzing a text that examined how gay rights activists mobilized resources in order to achieve marriage equality, he suggested that the author should have identified “whiteness” as one of the resources that activists were able to successfully mobilize. Specifically, he believed that by using white gays and lesbians as the faces of the movement, organizers were able to garner more sympathy and support from the white mainstream than had they used gay, lesbian or transgender people of color. When he presented his critique to the seminar participants, he perceived the students to be dismissive, assuming that his contribution was motivated by anger rather than a close reading of the text. He discusses the struggle to get his classmates to engage with his comments intellectually rather than emotionally:

I even told some of my colleagues, “Look, it would be intellectually lazy to not even consider the role that race played here. I’m not upset or offended that [the author] didn’t include race in the book, but I still think it’s worth talking about.” I tried to take all the emotion out of it. And so that’s another thing, too. People think you’re coming from this place of “I’m angry.” Or because what you said upset them, they think you’re upset. So they almost want to apologize to you. I’m like, “Look, let’s be professional. No need to apologize. I don’t need for you to feel bad. None of that. Let’s be intellectuals. Listen to my critique and evaluate it on the merits.”

And so, it’s a balancing act. If you talk about race, you have to make it as intellectual as possible. The moment

¹⁴³ Interview with Black Male, Public Policy, PWI (Interview No. 200115).

¹⁴⁴ Interview with Black Male, Sociology Dep’t, PWI (Interview No. 245232).

they think it has something to do with how you feel, your credibility is just completely...it dissolves. And it starts to open up the door for them to try and placate you, but they're really just placating themselves. "Oh, I'm sorry that you feel this way." No, baby, don't try to get out of responding to my argument by going into your role as a sorry white person. No, no, no, no, no, let's talk about the issue. I tried to point out to them that this topic isn't just emotional for me. And I did that by making it not emotional for me, completely unemotional for me, and pointed out that it's emotional for them, such that they would not listen...The people who call themselves scholars are not listening.¹⁴⁵

Why would his classmates feel compelled to apologize to him because an author with whom the students had no personal affiliation had ignored the role of race in the marriage equality movement? Whiteness studies scholar Robin DiAngelo argues that because whites generally exist in environments that insulate them from having their racial understandings challenged by people of color, by the time they enter college many "have not had to build the cognitive or affective skills that would allow for constructive engagement across racial divides."¹⁴⁶ The insulation makes some whites defensive when racism or white privilege are explicitly discussed, which for many, happens first in university classrooms. Unable to withstand "race-based stress," DiAngelo has observed that whites will often perform a "range of defensive moves" when race is introduced into conversations.¹⁴⁷ These moves include "the outward display of emotions such as anger, fear and guilt, and a range of behaviors such as argumentation, silence and leaving the stress-inducing situation."¹⁴⁸ The defensive moves work to "reinstate white racial equilibrium," where the person of color, fearful of potential negative responses, will be incentivized to censor their racial commentary and thereby refrain from creating racial anxiety for whites.¹⁴⁹

Applying DiAngelo's theory to the situation at hand, when the black sociology student argued that the gay rights movement was able to prevail by leveraging whiteness, he believed that he was making an important intellectual contribution and was hoping that his classmates will engage with his comments as they presumably would with any other student's comments. Instead of responding intellectually, however, they expressed remorse, which he interpreted as a defensive move which functioned to cast themselves as innocent, "sorry white people" and construct him and his contribution as driven by racial

¹⁴⁵ *Id.*

¹⁴⁶ Robin DiAngelo, *White Fragility*, 3 INT'L J. OF CRITICAL PEDAGOGY 54, 57 (2011).

¹⁴⁷ *Id.* at 57.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

anger. Once his comments have been recast as emotionally-inspired, they could be dismissed through an apology rather than being engaged with intellectually. What began in this black student's mind as an important academic contribution ended with him being regarded as "angry" and perceived as having, in his words, "some sort of emotional tantrum."¹⁵⁰

It is important to note that this student's perceptions may not be correct. There is a possibility that white students did in fact see his contribution as an astute analysis and simply did not know how to properly engage with it. Yet, perceptions need not be accurate in order for them to affect the behavior of the perceiver. This student notes that after this experience he became reluctant to talk about race in class and has rarely done it since.

2. *Non-whiteness as an Impediment to Objectivity*

In articulating the diversity rationale, universities argue that the experience of growing up as a minority in a racially stratified society makes black students especially attuned to racial issues.¹⁵¹ The implication is that their lived experiences endow the average student of color with a higher level of racial awareness than the average white student who, given the context of US race relations, is less likely to have had to grapple with race as a personal matter. The idea that lived experience can provide an indispensable source of knowledge might be true as a factual matter, but it conflicts with other norms that governs academic inquiry: objectivity.¹⁵² Detachment and neutrality are often viewed as pillars of rigorous intellectual engagement.¹⁵³ Education scholars have argued that an implicit demand of university education is that students "show a business-like and detached attitude

¹⁵⁰ Interview with Black Male, *supra* note 144.

¹⁵¹ See *supra* Part I.

¹⁵² See Crenshaw, *supra* note 136, at 2–3 (arguing that "[d]ominant beliefs in the objectivity of legal discourse serve to suppress . . . conflict by discounting the relevance of any particular perspective in legal analysis and by positing an analytical stance that has no specific cultural, political, or class characteristics. I call this dominant mode 'perspectivelessness.' This norm of perspectivelessness is problematic in general, and particularly burdensome on minority students. While it seems relatively straightforward that objects, issues, and other phenomena are interpreted from the vantage point of the observer, many law classes are conducted as though it is possible to create, weigh, and evaluate rules and arguments in ways that neither reflect nor privilege any particular perspective or world view. Thus, law school discourse proceeds with the expectation that students will learn to perform the standard mode of legal reasoning and embrace its presumption of perspectivelessness. When this expectation is combined with the fact that what is understood as objective or neutral is often the embodiment of a white middle-class world view, minority students are placed in a difficult situation.").

¹⁵³ Discussing his rocky socialization into the field of sociology, Chicano sociologist Alfredo Mirandé notes, "[I]nterest in sociology was first sparked by a sociology class which I took as a junior in high school, although I was to learn, subsequently, that, like many others, I had entered sociology for all of the 'wrong' reasons. My initial conception of the discipline was that it entailed the study of society with the aim of alleviating societal ills, social inequality, and racism. In graduate school, however, I learned that what I had thought was sociology was social work and/or political activism, not sociology. Sociology, according to my mentors, was the detached scientific study of society; objective, value neutral, and universal." Alfredo Mirandé, *I Never Had a Mentor: Reflections of a Chicago Sociologist*, 19 AM. SOCIOLOGIST 355, 356 (1988).

with respect to the subjects of study.”¹⁵⁴ To the extent that students express emotions in relation to a particular matter, it can be interpreted as evidence that they have “insufficient distance and lack of a clear and balanced view.”¹⁵⁵

In an academic context, the perception that one has personal experience with a subject might work to delegitimize her contributions. Some speakers, by virtue of the identities they possess, are more likely to be presumed biased, while others are presumed neutral. Those with normalized identities (male, white, heterosexual) tend to be granted the presumption of neutrality.¹⁵⁶ Those who have identities that have been marginalized (women, racial minorities, members of the LGBT community), however, face a higher risk that their contributions will be perceived as tainted by bias, especially when discussing the source of their marginalization.¹⁵⁷

Kimberlé Crenshaw argues that when students of color speak on racial issues, their white classmates often assume that “since race figures prominently in the discussion, the minority students—unlike themselves—are expressing biased, self-interested, or subjective opinions.”¹⁵⁸ In order to position themselves as objective speakers, Crenshaw argues, minority students are often forced to “stand apart from their history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the ‘they’ or ‘them’ being discussed is from their perspective ‘we’ or ‘us.’”¹⁵⁹ A black third year law student captured this dynamic when recalling the day his constitutional law class debated affirmative action while he was the only black student in the class:

I felt a lot of anxiety. I didn’t want to participate in the conversation, but at the same time I didn’t want to just sit there and listen to these white people talk about it either because even if they support affirmative action, their reasons for supporting it can be patronizing...It’s particularly difficult when you’re the only black student in the class and people are essentially debating, “Should black people be here?”...I feel like white students are very sort of emotionally uninvolved and that’s because it doesn’t affect them. And because it doesn’t affect them, they’re seen as objective. They get to speak with authority. I’m seen as too biased to speak with authority. They think I’m just talking about my

¹⁵⁴ G. Bergenhenegouwen, *Hidden Curriculum in the University*, 16 HIGHER EDUC. 535, 536 (1987).

¹⁵⁵ *Id.*

¹⁵⁶ For a discussion on perspectivelessness and how it discredits the perspectives of students of color, see *supra* note 152 and accompanying text.

¹⁵⁷ *Id.*

¹⁵⁸ Crenshaw, *supra* note 136, at 3.

¹⁵⁹ *Id.*

feelings, and on some level I am talking about my feelings, but that doesn't make what I'm saying any less valid.¹⁶⁰

By way of contrast, a black student at the HBU compared her experience in her current PhD program to getting her masters at an elite, predominantly white institution. At her PWI, she says, showing that she cared—personally, and not just academically---about the police killings of unarmed black people worked to discredit her as a criminology scholar. At her HBU she feels better able to integrate her personal and academic concerns:

I like that I can bring my whole self into the classroom here. I don't have to pretend to be unaffected by what's happening to my community. At [the PWI], I would almost get in trouble for showing that I was emotionally invested in my work...For example, I took a criminology class at [the PWI]. This was at the height of people posting videos [on social media] of black people being murdered by the police. So everyday I'd wake up and see videos of black men being murdered by the police. Men who look like my husband, or my father or any of my cousins. It took a toll on me. And so sometimes when I came to class I would get emotional talking about police and racism. Eventually, the professor came up to me and said, "I want your contributions to be more about the text and less about how you feel. This is an intellectual space." It made me feel small, like I wasn't being scholarly enough. So I tried to discuss black murders in a completely detached, scholarly way. But [doing so] almost required me to become like, I don't know...a sociopath. I couldn't just be like, [begins speaking in a British accent] "African Americans are being slain by state agents at alarming rates. What an interesting sociological phenomenon! This will be terrific fodder for my research!" (laughs)

...But then, what really pissed me off is when Donald Trump won the election, that same professor came to class and [talking to the class] said, "I know that today is a tough day so I just want to give you a space to talk about how you feel." The white students started crying, the professor even got choked up. And it really pissed me off because I'm like, "Oh, so we can be emotional in this space, but only about things that impact your life."¹⁶¹

¹⁶⁰ Interview with Black Male, Law School, PWI (Interview No. 105463).

¹⁶¹ Interview with Black Female, Sociology, HBU (Interview No. 446771).

C. Race as a Distraction

The idea that race is a distraction from the “real” issues at hand contributed to the perception that race is devalued within the sampled departments. Critical scholars have long argued that race and racism receive insufficient attention in both mainstream law and social science scholarship.¹⁶² Some have argued that race tends to be “ghettoized” or marginalized to the periphery of the disciplines.¹⁶³ Because race is not regarded as germane to these fields, students who insist on discussing race can be seen as taking the conversation off course.

Black students at the PWI reported that their departments communicate the idea that race is a distraction through both explicit and implicit means. On the explicit front, a number of students explained that when they try to use race as a lens to explain social or legal phenomenon, they are corrected by their professors. Across disciplines, students recalled instances when they tried to use a racial frame to discuss a social or political phenomenon only to be told that the phenomenon being discussed was primarily driven by class.¹⁶⁴ Capturing a common experience, one sociology graduate student said:

I had this one class where there were two other black students. I was excited because that almost never happens. But whenever one of us would try to talk about an issue from a racial perspective, the professor would interrupt and say, “This is not just about race, it’s also about class.” But when a white student talked

¹⁶² See, e.g., Laura E. Gómez, *Looking for Race in All the Wrong Places*, 46 LAW & SOC’Y REV. 221, 225 (2012) (arguing in her presidential address to the Law and Society Association, “I contend that we need to do much more to incorporate race and racism into the core of what we think and write about as law and society scholars.”); Rogers M. Smith, *The Puzzling Place of Race in American Political Science*, 37 PS: POL. SCI & POL. 41, 41 (2004) (arguing that American political scientists “may be failing to explore fully the role of politics in creating racial identities and racial conflicts—which in turn may mean that we are also failing to explore the role of racial politics in shaping many political patterns, identities, institutions, and developments that do not appear to have much to do with race when race is conceived in these others, less political [and more biological] ways”); see also Eduardo Bonilla-Silva, *What We Were, What We Are, and What We Should Be: The Racial Problem of American Sociology*, 64 SOC. PROBLEMS 179, 183 (2017) (speaking of the field of sociology, “For reasons that are not clear, the major blind spot we seem to have is on the significance of racism in America.”). See also generally WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY (Tufuku Zuberi & Eduardo Bonilla-Silva eds., 2008); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 41–42 (1991) (“Most legal scholars, judges and law students do not know that they approach the perspective of law from a perspective that excludes black concerns.”).

¹⁶³ Jennifer Puentes & Matthew Gougherty, *Intersections of Gender, Race, and Class in Introductory Textbooks*, 41 TEACHING SOC. 159, 161 (201) (reviewing studies that have examined how race is taught in introductory sociology textbooks and noting that, “[a]long with gender, the topic of race is frequently ghettoized to a specific chapter with introductory sociology textbooks”).

¹⁶⁴ This view that race is a function of class has been present in the larger field of sociology. In a study of the top four sociology journals, researchers found that articles that deal with race “tend to explain racial and ethnic phenomenon as by-products of broader social forces (such as class-based stratification).” See Douglas Hartmann, Paul R. Croll & Katja Guenter, *The Race Relations “Problematic” in American Sociology: Revisiting Niemonen’s Case Study and Critique*, 34 AM. SOCIOLOGIST 20, 30 (2003).

about a problem from a class perspective, the professor would never say, “This is also about race.” It’s like the less you talked about race, the more sophisticated he thought you were being.¹⁶⁵

This form of explicit correction was not limited to classroom discussions. One law student said that while her white instructors generally remained silent when she talked about race in the classroom, some corrected her when she incorporated it into her written assignments:

So I feel like when you talk about race...A lot of professors, they’ll write things on your paper like, “This is policy. This is a policy analysis.” And that’s their way of relegating any sort of legal analysis that involves race. So they’ll say, “This is policy. This is not law. We’re in law school.” I’ll get stuff like that on my paper.¹⁶⁶

Most black law students disagreed with the view that law can be learned outside of the context in which it was created and without discussing the people it will impact. They regarded the focus on blackletter law to be myopic. Despite this, some worried that bringing in the broader context, especially around racial issues, would lead to the perception that they are taking the class off topic. A 3L worried that when she talked about race she was feeding into the perception that she was “not really here to learn the law.”¹⁶⁷

And yeah, I guess just from my talks with some of my classmates, there was this idea that in law school, and especially the 1L curriculum, you should only be talking about black letter law, that’s it. These racial conversations need to be had in other spaces ‘cause that’s taking away class time. And that’s just incredibly troubling to me. So yeah, I guess it’s this fear that [if I bring up race, people will begin to think], “Oh, I’m not...I’m not really here to learn the law, I’m just trying to insert some left, liberal agenda into the law.” Even though we all know these laws are not applied fairly. We all know the context of how these [inequities] have manifested. So I think that’s it. I probably have to think a little bit more about it, but I think that’s one of my

¹⁶⁵ Interview with Black Female, Sociology Dep’t, PWI (Interview No. 442231).

¹⁶⁶ Interview with Black Female, Law School, PWI (Interview No. 175230).

¹⁶⁷ This perception that race is a distraction from a legal education is longstanding. In a study of law students at Boalt Hall in the late 1990s, Rachel Moran found that when the relevance of race was acknowledged in the discussion of cases, some students “feared that they were not getting a standardized, black letter law course. Although students expressed annoyance with professors who elevated philosophical or economic theory over doctrine, they did not view these abstract approaches as a threat to getting a good legal education. Presumably, these theoretical perspectives were a sufficiently pervasive feature of the curriculum to win grudging respect, while race and gender were unusual enough to remain suspect.” Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2294 (2000).

fears...What's been signaled here is that I don't need to understand race, racism, privilege, oppression, disadvantage. I don't need to understand those concepts to understand law, even though we all really do. But because that's not taught, because that's not communicated, then I feel like that has to be put at the back burner because I'm supposed to be learning X, Y, Z.¹⁶⁸

Students in other departments noted a similar phenomenon: there were kinds of knowledge that were considered central to the field, and then there was race. A sociology student observed how the valorization of “dead white men” and the marginalization of scholars of color in her department makes it difficult to talk about race in many of her courses without seeming as though she is “taking the class off track”:¹⁶⁹

I think what's valued in [our department] is this grand theory. Capital T theory. Like Marx, Weber, and Durkheim are our founding fathers according to...whoever, I don't know. I think you are presumed to be really smart when you engage with these dead white men. Even though DuBois is the founder of modern sociology, you'll be really lucky if you're ever assigned his work in a sociology class. And I think if you're engaging primarily with his ideas in your writing, you won't be seen as as intelligent as if you use Durkheim or one of those other white men.

And so yeah, that's how I feel like sociology is kinda set up from the jump. It's hard to talk about race because race doesn't show up in the readings, and that's because scholars of color are marginalized. Our modern theory class, for example, the syllabus was put together based on citations. [The professor] picked the most cited works across certain areas. But that just reinforces inequality because white men tend to get cited more. And we're then just reading about the ideas of white men, so when we begin to publish articles ourselves, we end up citing these same white men we learned about in graduate school. I think in some ways,

¹⁶⁸ Interview with Black Female, *supra* note 166.

¹⁶⁹ In their interview study of women of colors sociology graduate students, education scholars Margolis and Romero noted, “Various policies and practices establishing graduate curricula produce and reproduce knowledge while simultaneously reproducing inequality. By not incorporating the writings of scholars of color or acknowledging the importance of the study of race relations, Ph.D. programs maintain an implicit hierarchy of knowledge. . . . Hidden curricula socialize students to norms that devalue certain kinds of research questions and approaches. The most common observation that arose in the interviews was a deafening silence—the absence of race and gender in the curriculum. . . .The silence of race and ethnicity in the curriculum inculcates students with significant beliefs and values of what constitutes legitimate knowledge and fields to study.” Margolis & Romero, *supra* note 135, at 19.

it was hard for me to introduce anything new to that conversation. If race wasn't part of what was going on in the writing, it was hard for me to be like, "Well, what about race?" and not seem like I was taking the class off track.¹⁷⁰

Similarly, when explaining why it is difficult to have race conversations in class, a black political science student noted that the way professors construct courses can sometimes foreclose opportunities. Despite the student's belief that race plays a central role in the US political system, he says that his first year "Introduction to US Politics" professor set up the class as though race was a "distraction:"

If you take Intro to US Politics in my department, or probably any top poli sci department for that matter, it is just...you might actually become dumber. You might actually know less about how US politics works from taking the class. Instead of treating race as a dominant form of political conflict, the professor relegates it to half of one class towards the end of the semester. And you know he only did that begrudgingly because some students of color wrote in their course evaluations that he should talk more about race...Race is the dominant form of American political conflict and [the professor] treats it like it's a distraction from what we're really here to study.¹⁷¹

By contrast, students at the HBU routinely expressed that race was discussed regularly in their courses. While they were clear to note that race was not the only thing they talked about, many said that, given the prominent role that race has played in structuring US society, it also played a prominent role in their courses. Compare the quotation above from the political science graduate student at the PWI with one

¹⁷⁰ Interview with Black Female, Sociology Dep't, PWI (Interview No. 255188). The interviewee specifically asks that I credit Aldon Morris for that claim. For more information on DuBois's role as the father of modern sociology, see ALDON MORRIS, *THE SCHOLAR DENIED: W.E.B. DU BOIS AND THE BIRTH OF MODERN SOCIOLOGY* (2015).

For a great exploration of how scholars are marginalized even in civil rights literature, see Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). For an updated version, see Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992). For a conversation about how white men are cited more in history, see Andrew Kahn & Rebecca Onion, *Is History Written About Men, By Men?*, SLATE (Jan. 6, 2016), http://www.slate.com/articles/news_and_politics/history/2016/01/popular_history_why_are_so_many_history_books_about_men_by_men.html#methodology. for a similar discussion in the legal field, see LawProfBlawg, *Why are Most of the Amazing Scholars White Men?*, ABOVE THE LAW (AUG. 21, 2018), <https://abovethelaw.com/2018/08/why-are-most-of-the-amazing-scholars-white-men/>. For geography, see Carrie Mott & Daniel Cockayne, *Citation Matters: Mobilizing the Politics of Citation Towards a Practice of 'Conscientious Engagement'*, 24 GENDER, PLACE & CULTURE 954 (2017) (arguing that citation trends in Geography is a problematic technology that contributes to the reproduction of the white heteromascularity of geographical thought and scholarship) For a conversation of how male scholars generally are more likely to cite themselves, see Molly M. King et al, *Men Set Their Own Cites High: Gender and Self-Citation Across Fields Over Time*, 3 SOCUS 1 (2017).

¹⁷¹ Interview with Black Male, Political Science Dep't, PWI (Interview No. 41123).

from a political science graduate student at the HBU. When asked how often race comes up in his political science courses, he responded:

A lot. I mean, we don't only talk about race but I would say it comes up in some form in most classes. But it's not like we're obsessed with race. The US is obsessed with race, and so the US political system is built around race and racism. So I think it's hard to have a conversation about American political development without talking about race pretty frequently.¹⁷²

A law student at the HBU made a similar observation. When asked how often race comes up in her classes, she responded:

I would say that race is almost in everything we do, but certain classes, of course, more than others. When I took property law it came up when we were talking about racial and housing discrimination. It comes up there a little bit in torts. Our contracts professor...she's very, very pro-black, so even when a situation may not call for it, she finds a way to get it in there (laughs). So definitely more classes than others, but race is a thing that's part of the culture. So, it's a conversation going on almost at all times, even within your own social circles, in your own cliques.¹⁷³

D. Race as an Intellectual Crutch

Some black students at the PWI expressed a belief that classmates and professors believe that black students rely on racial analysis in order to avoid having to engage with what they believe to be more serious forms of analysis. One student in sociology discussed how his professors interpret his focus on racial issues: "*People do see it as stopping [black students] from really learning. They think, you know, somewhat they think you're using it as a crutch to not learn, and that you don't really understand what's being discussed.*"¹⁷⁴

Some students expressed a concern that their peers and professors would begin to think they were unable to engage in other forms of analysis if they discussed race in class. A 2L who is an editor on the law review expressed what motivated her fear of speaking about race in class:

When I talk about race in class, it's that they kind of can't see me outside of that. They can't see that I have interests, or that I am passionate about other things outside of race. It's just that obviously because I'm a black woman it's hard for me not to think about race in

¹⁷² Interview with Black Male, Political Science Dep't, HBU (Interview No. 489053).

¹⁷³ Interview with Black Female, Law School, HBU (Interview No. 33107).

¹⁷⁴ Interview with Black Male, Sociology Dep't, PWI (Interview No. 249904).

every context that I'm in. But I am just as nerdy. I love moot court. I love being on law review. Those are passions of mine. But where I clearly see that race is important to understanding an issue, that's going to drive me to want to talk about it or address it. And so I guess for me, I just want my classmates to see me outside of that. I want them to see that I have more to contribute than just my ability to discern whether a statement is racist.¹⁷⁵

Similarly, a black student in her last year in the sociology department talked about the one time she “mustered up the courage” to talk about race when she was a second-year student in a foundational seminar course.¹⁷⁶ Now an advanced student, she has acquired a language and a theoretical lens to discuss race. She said that she did not get that from her coursework, but through independent study. As a first-year student, she knew that race was important to the issues discussed in class. Because she had just begun her graduate school career and had not yet been trained in racial theory, however, she did not have the language to voice her concerns in an academic register. When she did bring race up in class, she felt her inability to discuss it in a scholarly fashion gave credence to the notion that she was relying on racial analysis because she was intellectually incapable of discussing other topics:

I brought it up once, it wasn't received well. I'm not going to bring it up again because then I'm that person that always brings up race. But at the same time, I'm not trained enough to be able to address it in a way that's more sophisticated, that's not just like, “What about race?” I felt like there's levels to it and this is my own...Well, I think it's the burden. It's the burden of trying to talk about race in settings where people don't understand it as a complex social system that's created and we're all recreating. They don't have the tools to talk about it as a social structure and to see how things that are normative are really constructed. You have to start there and then move up with people and to be in a classroom where you're like, “But race matters” but not be able to really break it down more deeply than that, felt to me like I wasn't ready to address it. I wasn't ready because I didn't know how to do it deeply enough that people could move past their association of me as the one who brings up race all the time, the

¹⁷⁵ Interview with Black Female, *supra* note 138.

¹⁷⁶ Interview with Black Female, Sociology Dep't, PWI (Interview No. 283214).

person who couldn't do anything else but talk about race.¹⁷⁷

E. Race as Compared to Other Identities

One might conclude that it is the experience of being racialized as the “other” that compels black students to want to focus on race. However, students in the sample included those who have been othered in various ways—for example, through their gender identity, sexual orientation, and disability status. At the PWI, black students with multiple marginalized identities generally understood race as particularly salient to understanding American life and understood race to be an especially difficult subject to address within their departments. A black male 1L who identifies as gay said:

I mean, I think it's sometimes helpful to talk about sexual orientation in order to understand some aspects of the law, but at the end of the day, not understanding [sexuality] is not going to fundamentally impair your ability to understand the law. Race is different. You cannot have a deep understanding of the law without thinking about race. Criminal law won't make sense. Constitutional law won't make sense. Even property. Race is everywhere.¹⁷⁸

Comparing which identities were okay to bring up and which delegitimated her position, a queer black woman in the sociology department at the PWI said:

You can talk about gender, you just can't talk about black women. The minute you start talking about black women, you lose credibility. I can talk about gender and still be seen a scholar. But if I, as a black woman, start talking about black women, I'm seen primarily as an advocate, and a disgruntled one at that (laughs).¹⁷⁹

A black, straight woman in the law school also noted the differences between talking about race and talking about gender. She noted that, because women make up a slight majority of her classmates, she has more support to voice her concerns about gender. After she spoke about her discomfort with talking about race in class,

¹⁷⁷ *Id.*

¹⁷⁸ Interview with Black Male, Law School, PWI (Interview No. 166523).

¹⁷⁹ Interview with Black Female, Sociology Dep't, PWI (Interview No. 407529). For a critique on how racial discussions can lead to the “kiss of death” for a sociologist, see Bonilla-Silva, *supra* note 162, at 182 (“Accordingly, talking about race too much in classes or departmental meetings, asking for racial and intellectual diversity in a department’s colloquium, or pushing for more students and faculty of color lead to the labeling of those making these claims as ‘political’—this is the kiss of death in a discipline that sees itself as ‘scientific’ and, thus, beyond politics. Assimilation into the sociological (white-oriented) mainstream is the goal, which leaves many students of color desperately searching for options.”).

I asked her whether there were other identities she felt uncomfortable discussing. Her reply was a common one:

No, I think it's specific to race. I think I wouldn't feel the same way about gender, just because there's so many white women here and they love talking about gender. So I feel like I would have support if I said, "Women are being oppressed." Race is different. Besides the black people in my class, which might be zero, [my classmates] are probably not gonna back me up if I have a racial critique. Maybe some of them will. I'm not gonna say all of them. But if I say something like, "Oh well, in this case I felt like the judge was being incredibly racist. This is the language he used, the ruling was racist," people would just not be as willing to support me. But I definitely feel that with gender I would have way more backing than with race. Because just like, in a so-called progressive school like this, everyone wants to be behind women, but not everyone wants to be behind black people.¹⁸⁰

However, a few black women identified both race and gender as taboo topics in their departments. The sociology student mentioned above—who initially felt as though she did not have the proper language to talk about race—explained:

I think [race] is particularly hard to bring up. People are much more comfortable talking about class differences. Gender is also really hard to bring up in my department and I'm not sure why that is. (Pauses). I know exactly why that is. It's because gender is not thought of as a rigorous enough thing to study on its own, and that's because it's mostly women and queer people who do work on gender. So because we're not seen as rigorous, the topics that we're interested in, by extension, are not seen as rigorous. The same is true for people of color interested in race.¹⁸¹

F. Who Can Speak on Race?

While black students at the PWI understand that there are significant consequences to engaging in racial analysis, many do not believe these consequences are universal. Specifically, they believe that white students who discuss or write on racial issues are generally seen in a favorable light. Speaking of how professors and students

¹⁸⁰ Interview with Black Female, Law School, PWI (Interview No. 115346).

¹⁸¹ Interview with Black Female, *supra* note 176.

respond differently when students of color talk about race as compared to when white students do the same, one black sociology student said:

People are less willing to listen to a person of color because I think they have it in their minds that what you're saying is coming from somewhere other than intellectual. Other than the intellectual. I think people think when white folks say it, it's smart and moral. When we say it, it's self-indulgent and accusatory. I mean, that's not surprising, right?¹⁸²

This perception was true for black students across departments. A history graduate student observed of his colleagues in the department, "*I see white people talk about race and when they do, there are never any problems. They're still seen as smart and capable, even when the analysis doesn't go that deep.*"¹⁸³ A black law student agreed. She marveled at the freedom white students seem to exhibit when talking about race:

I don't feel like they're emotionally taxed in the same way because they're affirmed and they don't have to worry about there being consequences. I don't at all think there's that same emotional stressor on them when they talk about race. I feel like they feel emboldened and affirmed and confident and almost happy.¹⁸⁴

Much of the perception of who can speak on racial matters turns on who is considered objective. Because whiteness often stands in as the default racial category, white students are often presumed to be unbiased by their racial identity.¹⁸⁵ Black students, however, tend not to be afforded the same presumption.¹⁸⁶ One psychology student explained who has license to talk about race, "*People who are objective can talk about it, and that is loaded with all types of issues. Who gets seen as objective almost always has a racial component.*"¹⁸⁷

The notion that being a racial minority makes a student a less credible source on matters of race and racism was a recurring theme across departments. A sociology student compared the differences in the way that black and white race scholars are perceived in her department. She explained that when a black person conducts research on race:

¹⁸² Interview with Black Male, *supra* note 144.

¹⁸³ Interview with Black Male, *supra* note 125.

¹⁸⁴ Interview with Black Female, *supra* note 131.

¹⁸⁵ See Crenshaw, *supra* note 136, at 6 (arguing that "majority as well as minority students view the world through a consciousness constructed in part through race. The appearance of perspectivelessness is simply the illusion by which the dominant perspective is made to appear neutral, ordinary, and beyond question. As a result, while the perspectives of minority students are often identified as racial, the perspectives of their majority classmates are not.").

¹⁸⁶ *Id.*

¹⁸⁷ Interview with Black Male, Sociology Dep't, PWI (Interview No. 455321).

It's mesearch. I must just be doing "me-research." But when a white sociologist does anything regarding race, there's always a buzz. We have speakers come in every week for our colloquium. It's always this fascination, and intrigue that white scholars were able to cross those cultural lines. A black person, or a person of color comes in, and if they are studying other people of color, it's like: "Oh, this is just what you do. You're doing this out of a personal drive. You're too..." What's the word? "You're not objective enough." There's no way I could be objective enough when studying race, compared to a white person.¹⁸⁸

The student went on to explain that the idea that a researcher is too close to a subject to objectively interrogate it is not equally applied to all students and all subjects.¹⁸⁹ She noted that a white student in her department who worked in the tech-industry before coming to graduate school is now writing his dissertation on tech start-ups. Unlike her, however, he is not seen as too close to his subject to be able to evaluate objectively. Rather, his personal experience in the field is thought to give him valuable ethnographic insight that adds to his scholarly credibility. She explained: "[T]he faculty never asked him if his time [working] there could have influenced his work...It was never, never questioned if he was doing mesearch at all."¹⁹⁰ When I ask why she thinks he was not questioned, she responds: "He's a white man. He can do whatever he wants."¹⁹¹

Students believed that the perception that whiteness confers objectivity also helped white students to overcome the presumption their racial analysis was rooted in anger. A bi-racial law student who identifies as black but often passes for white explained that being perceived as white allows him to talk frankly about racism without incurring the same ramifications that would befall his peers who are more easily identified as black:

If I'm honest, I would say that it's a little easier for me to get away with talking about race. Because I'm read as white, what I say is seen as more legitimate. White people don't see the criticism as coming from an

¹⁸⁸ Interview with Black Female, *supra* note 176.

¹⁸⁹ Noting how the term "mesearch" is typically applied to disparage the work of scholars of color, Sociology Professor Victor Ray argues, "White scholars do mesearch all the time. In many disciplines, that is simply called the canon. Claiming that mesearch is a particular issue for scholars of color demonstrates a profound lack of self-awareness on the part of researchers in the social sciences and humanities." Victor Ray, *The Unbearable Whiteness of Mesearch*, INSIDE HIGHER ED (Oct. 21, 2016), <https://www.insidehighered.com/advice/2016/10/21/me-studies-are-not-just-conducted-people-color-essay>. He continues, "[W]hiteness maintains its power partially through its relative invisibility. White norms and culture are projected as universal standards, but it's only whites' socially dominant position that allows this work to be considered universal. Relations of dominance are built into what we think of as legitimate topics of study." *Id.*

¹⁹⁰ Interview with Black Female, *supra* note 176.

¹⁹¹ *Id.*

outsider. They don't see it as an attack...and that makes it easier for them to digest it. It's almost like if a stranger criticizes someone in your family, even if what they're saying is true, you'll probably get defensive and dismiss what they're saying. But if your sister says the same thing about your brother, you might be more likely to step back and say "Well...you know, you do have a point there."¹⁹²

G. White Students

White students had markedly different perceptions than their black peers.¹⁹³ Asked if there were any topics they felt uncomfortable discussing in class, nearly every black student at the PWI identified race. When asked the same question, white students generally reported that their departments were open to all different kinds of ideas. In one department where every black student expressed a perception that their department was hostile towards or dismissive of racial analysis, one of their white peers—an advanced student who studies race—had a completely different experience. When asked if her professors and peers have been supportive of her interest in race, she responded enthusiastically: "*Yeah, yeah, yes, absolutely. I think race work is super well-respected here. I've gotten a tremendous amount of support from my advisors, and my cohort for that matter.*"¹⁹⁴ Another white student in the same department recalls a time when a white faculty member encouraged her to study race because it would be good for her career. "*One professor told me,*" she says, "*You should write on Latinos. They're the hot minority group right now.*"¹⁹⁵

Most often white students assumed that the perception of intellectual inclusivity was shared by all students in their departments. When I asked an advanced sociology student whose work focuses on racial inequality in education if there were any subjects that felt uncomfortable or difficult to discuss in class, she responded:

I guess I feel like as sociologists, we're sort of here for those difficult topics...I don't think there were issues of it being difficult to raise certain concerns that students had. There were sometimes hard-headed professors who hear a debate that they've been having for 30 years instead of a comment that you were actually trying to make (laughs). But the other thing

¹⁹² Interview with Black Male, Law School, PWI (Interview No. 101536).

¹⁹³ In a study of graduate students in a sociology department, Margolis and Romero noted that women of color were told by their advisors that they risked not being perceived as a "serious scholar" if they did research on race and gender. However, when white males in the department took up those topics, "such research suddenly became a legitimate area of study." See Margolis & Romero, *supra* note 135, at 23.

¹⁹⁴ Interview with White Female, Department Concealed, PWI (Interview No. 40004).

¹⁹⁵ Interview with White Female, Sociology Dep't, PWI (Interview No. 20081).

about classes, in the first year especially, is that you're taking them all with your incoming cohort pretty much so it's 16 of you who've gotten to know each other really well, and you feel like you're in it together. At least for us because we happened to be a really cohesive cohort, I don't think those problems presented themselves too much.¹⁹⁶

While the HBU is mostly made up of black students, they have a minority of students of other races. A white, gay 2L spoke of his reason to attend law school at a predominantly black university: "*I wanted to be in a space, frankly, that was critical of whiteness, particularly, and critical of our racist society more generally. I think it would have been hard for me to get that at a PWI.*"¹⁹⁷ When asked if he ever feels uncomfortable articulating his racial views in classes, he responded firmly:

I have never felt more welcome or more part of something. I've never felt like I can't talk about how I feel or my thoughts on something. Which is funny, 'cause, frankly, I had a lot of my friends before I came to [this university] saying, "You are gonna be hated, or just questioned." Which sure, I'm sure people inherently question me and if people aren't okay with me, I don't hear it. But no, I've never felt more welcomed or a part of something, truly.¹⁹⁸

Almost every non-black student interviewed at the PWI said at some point that they feel like they are "part of a family," and that this sense of kinship made them feel comfortable sharing their views on race. However, one white law student at the HBU felt differently. While he believed that his professors were "awesome" and sought to nurture him, he had a more complicated relationship with other students.¹⁹⁹ Unlike the white student above who intentionally chose to attend a historically black university, this student did not realize that his law school would be, as he puts it "99.99% black," until orientation day.²⁰⁰ He chose the school primarily because of its geographic location. His experience being a racial minority for the first time made him believe that HBUs need to be more racially diverse. Specifically, he said: "*I think we should get more people, white people, and probably other minorities too.*"²⁰¹

Describing himself as formerly an active participant in class discussions at his majority white undergrad, he acknowledged that he faced stereotype threat at the HBU and that he was afraid his

¹⁹⁶ Interview with White Female, Sociology Dep't, PWI (Interview No. 22331).

¹⁹⁷ Interview with White Male, Law School, HBU (Interview No. 400003).

¹⁹⁸ *Id.*

¹⁹⁹ Interview with White Male, Law School, HBU (Interview No. 40019).

²⁰⁰ *Id.*

²⁰¹ *Id.*

comments would confirm the perception that he was racist. As a result, he rarely participated in class discussions. He explained: *“I don’t talk in class much because it’s always very clear that my worldview is often the one that’s being fought against, and not necessarily like, ‘Oh, I am an embodiment of the oppressive white ideology’ but I just embody the perspective of a white, straight, middle-class man.”*²⁰²

He described an experience in a small seminar class of about ten people where he sat as the only white student when the topic of conversation veered into the “the social biases of white America.” After about a half hour into the conversation a black student asked him, “Do you take offense to any of what’s been said?” He recalled:

It took me a long time to respond but I was beginning to say that I understand that just because you have a critique against something, it doesn’t mean that you’re aiming the critique towards every individual manifestation of that thing. Me, as white, I don’t have to take offense at every critique, that I also hold against other white people. But I couldn’t get that out because as I was starting to try to explain, another student interrupted me, and said, “Well, this is an HBCU, not a PWI. If you wanted white coddling, this is the wrong place. You knew what you were getting into.” I was just so taken aback. I’m like, “You’re so…” I would have thought that people here would be more aware of how it feels to be the minority, since most of the students here come from places where they were.²⁰³

He is quick to note that this particular experience was atypical. He explained how he processed the interaction:

I had to parse through my feelings. As an individual, something like that is offensive, and kind of emotionally hurts, but at the same time you have to be rational and understand that one vocal person doesn’t speak for [the whole class]. Still, that was a turning point for me. I kind of stop talking in classes after that.²⁰⁴

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

Chapter 4 | Black Students Reaction to Diversity

This chapter directly addresses how black students interpret and respond to their institution's construction of diversity. The chapter is divided into three parts. The first part follows up on the dynamic revealed in Chapter Three by focusing on how black students navigate institutions that celebrate racial diversity but—as they interpret it—are hostile to many black students' racial viewpoints. The second part challenges a notion offered by the Court and universities—that diversity is beneficial to everyone's education. As I show, black students feel that it is white students and white institutions who primarily accrue the benefits of racial diversity. Finally, I end by foregrounding the structural conditions under which black students and predominantly white institutions alike might better experience the educational benefits of diversity.

I. RESPONDING TO THE INTELLECTUAL CLIMATE

How do black students respond to an intellectual environment that they believe to be unwelcoming of racial discourse? This section illustrates the various strategies that students in the PWI deploy to navigate departments where racial analysis is stigmatized.

A. *Racial Avoidance*

Some black students reported that after either having a negative experience themselves or witnessing a fellow classmate have a negative experience trying to talk about race in class, they decided to avoid the issue. For these students, racial avoidance is a key strategy of getting through the institution. A second-year law student noted that although she continues to see race as relevant, "*I don't bring it up anymore. I already have enough on my plate. I don't have the mental energy to fight the class whenever I think race is relevant to a conversation...I'm not getting paid to teach these people.*"²⁰⁵

²⁰⁵ Interview with Black Female, Law Student, PWI (Interview No. 142340). This view echoes that of a black Yale sophomore in the 1960s who said "I came here to be a student, not to educate whites about blacks. I'm tired of being an unpaid, untenured professor teaching these guys the elementals of humanity." BIONDI, *supra* note 17, at 20.

The majority of students, however, took a more nuanced approach. Instead of altogether avoiding race, they opted to limit the frequency of their racial commentary. Capturing a common strategy of black students across departments in the PWI, a public policy student noted, “*In a particular class, I might bring [race] up once a semester...maybe twice. More than that and you lose credibility. So you have to be really strategic when deciding when to talk about it.*”²⁰⁶

B. Intentional Imprecision

Speaking about race euphemistically was the most common strategy that students reported using. As one law student said, “*If you want to talk to white people about race, you have to be kind of vague.*”²⁰⁷ Across departments, students reported being intentionally imprecise with their racial language. Imprecision, they believe, is key to having their racial ideas heard and accepted. A psychology student noted:

I tend to talk about race in terms of diversity. White people—well, white liberals—they love talking about diversity, but they don’t love talking about race. So [in class] I’ll say “diverse communities,” or “diverse people,” when I really just mean black people...I’ve found that they are more receptive to that kind of language. It works. I don’t know why, but it works.²⁰⁸

Similarly, a political science student noted:

If I’m with my black friends, I would be direct and say, “white people do x or y,” but if I’m in class, I wouldn’t say “white people” because then the white people will feel attacked and either sort of lash out or shut down. So, I’ll cushion it and say something like...“majority culture” (laughs)...Yeah, “majority culture.” What else? “Non-people of color,” “non-minorities” (laughs)...I mean, it’s crazy the lengths you have to go to to avoid naming whiteness.²⁰⁹

Believing that their departments are more amenable to discussions of class than race, students across departments reported

²⁰⁶ Interview with Black Male, Public Policy Dep’t, PWI (Interview No. 288532).

²⁰⁷ Interview with Black Female, Law School, PWI (Interview No. 135346).

²⁰⁸ Interview with Black Female, Psychology Dep’t, PWI (Interview No. 433453).

See also Ellen Berrey, *Diversity is for White People: The Big Lie Behind a Well-Intended Word*, SALON (Oct. 26, 2015)

https://www.salon.com/2015/10/26/diversity_is_for_white_people_the_big_lie_behind_a_well_intended_word/ (noting that “diversity is how we talk about race when we can’t talk about race. It has become a stand-in when open discussion of race is too controversial or — let’s be frank — when white people find the topic of race uncomfortable. Diversity seems polite, positive, hopeful. Who is willing to say they don’t value diversity?”).

²⁰⁹ Interview with Black Female, Political Science Dep’t, PWI (Interview No. 274565).

consciously substituting the language of race for that of class. A black law student explained:

Sometimes I'll say something like "low-income communities" as a stand-in for Blacks and Latinos. Like, the other day in class I started talking about police misconduct in low-income communities. But I really didn't mean low-income. I meant police abuse of Black people and Latinos. I don't think that there are a lot of poor, unarmed whites being gunned down by the police...Also, the police don't know what class we're in when they approach us...Last year, the police broke my cousin's arm and both of his parents are doctors. So it's not so much of a class thing, as it is a race thing.²¹⁰

When I asked why she says low-income instead of Black and Latino, she responded:

I don't know. I don't think they feel threatened by class in the same way they feel threatened by race. If I said black, they would think, "Oh, here she goes talking about race again, talking about herself again." But when I talk about things in terms of class, that framing feels more distant and because it's distant, I think they read it as being a little more legitimate. More intellectual and less personal, if that makes sense.²¹¹

A student in the sociology department—the same student who argued with his class about the role of race in the gay marriage movement—offered a different reason for why he uses the language of class to discuss race. Explaining the rules of talking about race in white spaces, he referred to using an "All Lives Matter" strategy:

I think one of the main rules of the game is to lessen differences among people, to not use differences among people as your rhetorical hook. But using similarity among people is a way to get people on your side. It's kind of an "All Lives Matter" strategy. It's better to use a really blanket category like all low-income Americans, or all marginalized Americans or peoples, rather than saying black queers, or black men, or black women or...You know what I mean? So just not emphasizing so much difference. But honestly, I think that's a problem. Because again, if it takes ignoring difference to get people to listen to you, it also means that you have to keep ignoring difference to sustain their attention, to sustain their interest, to

²¹⁰ *Id.*

²¹¹ *Id.*

sustain their funding, to sustain their support. And to me, that's the problem that we are in.²¹²

C. *Diminishing the Role of White Racism*

Some students discuss race in ways that are intended to provide racial comfort to their white peers and professors. They do so both to limit the amount of racial backlash they receive and also to be regarded as intellectual. A common means of providing racial comfort is diminishing the existence of white racism. When talking to a black law student about her experiences participating in class conversations, she referred to there being “rules” about how to talk about race in a predominantly white classroom. When I asked her to explain the rules, she stated:

Well first, don't make white people seem racist...Try to buttress your argument in as much legal jargon as possible. Combat that view that you already know they're gonna have, which is that this is not legal. Yeah, it's more like silencing yourself, or making it so that the entire analysis isn't rooted in race. Someone like me, I'm still gonna mention race just because: (1) I don't feel like I'm being honest, and (2) I don't feel like my analysis would be complete without acknowledging race and how it's playing into this narrative or this situation or opinion, whatever. So I'm still gonna talk about it but I'm just gonna be aware that, “Okay, I can't make white people seem racist.”²¹³

By way of comparison, a black student in the sociology department at the HBU noted the difference between her time studying sociology as an undergrad at a PWI and her time as a grad student at the HBU. Speaking of the intellectual freedom she experiences at the historically black university, she observed:

I guess I would say here my writing can be as black as it wants to be. And it wasn't that way at [my PWI]. I was allowed to say certain things, but also I had to constantly pull back because I had to consider, “Is a white person going to be reading this? Who's grading it? Who's the chair of the department?” Here, I feel like the majority is the minority. So I'm not worried about those things. I'm worried about smaller, student-things like the flow of my argument and making sure I cite the right way. Not making sure that people are interested or not offended. Here, I can say something, I don't

²¹² Interview with Black Male, *supra* note 144.

²¹³ Interview with Black Female, *supra* note 131.

wanna say anti-white, but I can say “White people do this,” and even my white professors won’t be offended. They understand. As long as it’s not off the wall crazy, they understand.²¹⁴

D. Direct Racial Engagement

A small minority of black students said that they recognized that their departments were uncomfortable with racial discourse, but they still consciously chose to speak frankly about race. Those students, however, tended to be doubtful of the impact they made. Many believed that their contributions were most often dismissed by students and professors.

One student in the African American Studies department at the PWI came to grad school to study the intersection of race and gender. She initially began graduate school in the sociology department of a different predominantly white institution before transferring to the African American Studies department, which she found significantly more receptive to her racial interests. A formative experience in her sociology program involved witnessing an advanced black graduate student trying to get a white professor to integrate the experiences of women of color into a gender studies course about women in the workplace. She says of the course, “[I]t did not acknowledge the existence of women of color whatsoever.”²¹⁵

The student recalled the advanced black graduate student telling the professor:

We need to think about how women of color are also included in this conversation. Or how we are overlooking them and then making assumptions about how all women wanted to get out the home and into the workforce. It’s like, who replaced white women, though, in their homes? For which women did the workplace represent liberation and for which did it represent the same old subjugation?²¹⁶

The white professor responded to that intervention in a way that the graduate student would later come to understand as the normal way white professors respond to black students’ racial contributions, a strategy that she calls “dismissal through silence”:

The professor was never like, “Oh, well, maybe we can change our conversation. Next week, we’ll read about women of color.” There was no kind of flexibility. It was just like, “Okay, hear you. Thank you, you taught me a lot. Moving on.” She didn’t actually care. It felt

²¹⁴ Interview with Black Female, Sociology Dep’t, HBU (Interview No. 423252).

²¹⁵ Interview with Black Female, African American Studies Dep’t, PWI (Interview No. 52342).

²¹⁶ *Id.*

like one of those situations that we always kind of fall into. It's our job to teach folks about race or gender and then it's for them to just consume or disregard. And I think most times they just disregard what we say.²¹⁷

II. Diversity for Whom?

The Supreme Court, through its affirmative action jurisprudence, communicates that racial diversity is a universal good. Everyone's education, the Court asserts, is enriched by being exposed to racial diversity. Yet, critical scholars have argued, that the Court's framing implicitly positions students of color as the drivers of diversity and white students as the recipients. In line with that research, Black students in predominantly white departments in this study tended to express an ambivalent relationship with diversity. Most commonly, they believed that white institutions and white students were the primary beneficiaries of the benefits of diversity. As one student in African American Studies at PWI said: "Diversity, as a term, more so encompasses a white institutional endeavor. It's like, 'We need more people of color because we look real racist. We need more of you. Come in, boost our numbers.'"²¹⁸

Beyond viewing diversity as a commodity, most black students were skeptical that they accrued educational benefits from learning in predominantly white environments. As research has shown, black students who make it into elite universities are likely to have gone to integrated or predominantly white k-12 schools and lived in integrated neighborhoods.²¹⁹ The same is not true for white students. While elite universities are often the first time that white students learn alongside a critical mass of people of color, attending school with predominantly white peers has been a standard experience for most of the black students in the sample. Moreover, a majority of these students reported growing up in predominantly white neighborhoods. As a result, black students in the sample tended to express a belief that they were intimately familiar with the perspectives of white students well before they reached college.

I asked a student who attended the HBCU for law school after an attending IVY league undergraduate institution and a predominantly white k-12 institution to assess the argument that racial diversity in the classroom is beneficial for all students because it exposes everyone to different points of view. She responded:

²¹⁷ *Id.* A similar critique was made by a black student at Wellesley in the mid-1960s. Speaking of her time at time in college she said, "It was very much a one way street, in that there was no recognition of the African American experience. This was our opportunity to become like them, not for Wellesley to become more like us or learn from us. That kind of idea just didn't exist." BIONDI, *supra* note 17, at 21.

²¹⁸ Interview with Black Female, African American Studies Dep't, PWI (Interview No. 51215)

I don't think so, and honestly, I kind of think that argument works better for white people. They might get a more diverse environment because they get to be around us. But I don't think the same is true [for black students] because we're never just, at least I've never been in my own insular community without white people so it's not like I would have never gotten exposure to their viewpoints. To me, I don't think that's a really good argument for black students.²²⁰

The student picked up on a key asymmetry of racial experience between white and black students at elite universities. The diversity rationale imagines that all races are isolated from one another. It might be true that lower-income black people are more likely to live in racially segregated neighborhoods and attend racially segregated schools. However, the black people who attend elite universities have gotten there, often, because they have been in resource-rich environments, which because of the connection between race and class in the US, tend to be dominated by whites.

Even for those black students who did not grow up in predominantly white neighborhoods or attend predominantly white schools, they are exposed to other racial viewpoints by simply by living in a society that has been constructed and dominated by whites. A sociology student at the historically black university who has attended black schools her entire life remarks that her education has not suffered from being in racially homogenous environments. When asked how being in an all black department affects her ability to understand different racial perspectives, she remarked:

I don't feel like I'm missing out on anything because what you see in the media, what you see portrayed on a daily basis, what we're taught, it was created most likely by a white male. And basically, the way that we walk, the way that we talk, everything that we do even down to how we're supposed to dress professionally, how we're supposed to act, those standards are held to almost like white male standards, even white female standards in a sense. And so the way that we view things, I think just at the very base level, we know what we're almost supposed to think, or we have an idea of what we're supposed to think. Just because we've grown up in a society that is dominated by white culture, dominated by white European standards, European standards of beauty, European standards of education, intelligence, whatever you wanna call it.²²¹

²²⁰ Interview with Black Female, Law School Department, HBCU (Interview No. 6342).

²²¹ Interview with Black Female, Sociology Department, HBCU (Interview No. 2123)

For the students who view predominantly white spaces as sites that demand racial assimilation, the racial homogeneity of the HBCU represent sites of both intellectual and personal freedom. The word “utopia” often came up when students were describing the institution. A student in the law school who had attended PWIs her entire academic career said that she had always been too shy to speak in class but at the HBCU she felt free to contribute, in part because she did not feel the pressure to represent her race:

Coming to [the HBCU] was completely different because I think especially in the classroom setting, in high school I always had to worry about what I was gonna say ‘cause I always felt like people thought, “Oh, well she's just black and so of course that’s what she’s going to say.” But [here] that whole element of being nervous about saying something because of my race was completely wiped out and I could just speak freely which I feel like [this school] does a good job of letting you express yourself. But they also let you know this is kind of like a utopia, almost. And so when you leave [here] know that this is as good as it gets. It’s not always gonna be like that.²²²

Given the view that for many students black departments represent sites of liberation, they view attempts to diversify them as threats. When I asked a student in African American Studies at the PWI how she felt about non-black students joining her department, she replied:

It’s so hard, because—should it only be black people? And part of me is like yes, because [chuckle] there are so many other departments non-black people can join. I think where black people are situated in the world is always in a state of displacement. This department was started because the larger university was hostile to black people. This is a site of political and intellectual refuge for us. So do I believe we should open up to a large group of people? No. Is that legal? Of course not (laughs).²²³

Another student in African American Studies spoke of her complicated relationship with diversity. While she accepts that it is positive in the abstract, in practice she finds that diversity limits the productivity of intellectual conversations around race. She said:

Diversity is a good thing, right? Being around people with different backgrounds, colors, races is a good thing, I guess. But I’m kind of in the middle. I’m in the middle ground. I think it’s good to have conversations with people with different

²²² Interview with Black Female, Law School, HBCU (Interview No. 62313).

²²³ Interview with Black Female, African American Studies Dep’t, PWI (Interview No. 73413)

perspectives and understandings. At the same time, I don't think black people get as much out of diversity as white people. Like, if we're in a class with white people talking about race, black students will have to expend a lot of intellectual and emotional labor to prove that black people are essentially human beings, that racism exists, that black people's position in the US is not the result of some inherent laziness or character defect but instead because of racist policies. I think when [these cross-racial conversations] are successful, a white student will come out of that class and think about things differently. They'll be enlightened. But black people won't be better off for having those conversations. We walk away feeling drained and bitter and intellectually unfulfilled. We were just kinda there for their moral and intellectual improvement. But in classes where everyone is black, we don't have to prove that black people are human. Everyone already accepts that as a given. So the conversations are much more sophisticated and nuanced. I get much more out of those conversations than I do in a typical conversation with a white person where I'm trying to explain why it's not racist to have a black history month, or something ridiculous like that (laughs).²²⁴

III. REAPING THE BENEFITS OF DIVERSITY

The findings of this suggest that there is more work to be done to cultivate “genuine” rather than “aesthetic” diversity in some of the nation's most elite universities. The students' experiences highlighted in this chapter suggests at least two things: (1) there is a wealth of untapped knowledge in the classrooms, and (2) attaining the educational benefits of diversity requires universities to not only consider who they admit but also to look beyond admissions to ensure that students—particularly those who have been historically excluded from elite universities—feel that their perspectives are valued once admitted.²²⁵ Using the experiences of black students in predominantly white departments, this section suggests steps that department administrators and faculty can take to create a more inclusive learning environment, where marginalized students feel comfortable sharing their authentic views.

²²⁴ Interview with Black Female, African American Studies Dep't, PWI (Interview No. 34213).

²²⁵ Yet, it is also important to look at the admission process to see how black people are being discriminated against intra-racially. A recent audit study found where white admissions counselors were sent emails from fictitious black high school students who presented as more or less racially salient found that “white admissions counselors are more responsive to black students who present as deracialized and racially apolitical than they are to those who evince a commitment to antiracism and racial justice.” Ted Thornhill, *We Want Black Students, Just Not You: How White Admissions Counselors Screen Black Prospective Students*, 2018 SOC. OF RACE & ETHNICITY 1, 1 (2018).

In analyzing the racial and gender dynamics in her large classes, one black law student marveled at how uncensored her white male colleagues seemed to be during classroom conversations. She observed:

Law school is a playground for the white man's imagination. That's essentially what I've gathered. They go on these long hypotheticals that have nothing to do with what we're discussing. They don't care about how much space they take up. They really view this as their domain. I would never think to take up as much space as white men do. I would never feel comfortable taking up that much space.²²⁶

The goal is to make all students feel as though the classroom is their domain. When groups that have historically been excluded from academic conversations begin to feel empowered to "take up space," it benefits everyone's education. To reap these benefits, however, broader, institutional changes are necessary.

Education scholars have long argued that numerical representation of racial minorities is necessary but insufficient to attain the educational benefits that flow from a diverse student body.²²⁷ Universities need to focus not just on admitting black students but also on creating the conditions whereby once they are enrolled they feel free to fully participate in the intellectual life of the university. Failure to do so gives credence to the conservative critique that universities' interest in diversity is little more than in interest in producing a certain aesthetic.

In each of the interviews I conducted with black students, after they discussed their discomfort talking about race, I asked them when they had felt most comfortable discussing race. From their answers, recurring themes emerged. I list the prevalent themes below in order to offer productive suggestions for those universities and professors that aim to foster honest and inclusive dialogue on issues of race and racism.

a. Critical Mass of Black Students

Despite the general consensus around the importance of diversity on college campuses that has emerged over recent years, admissions practices in many of the nation's most prestigious

²²⁶ Interview with Black Female, *supra* note 166.

²²⁷ Education scholars call numerical representation of underrepresented minorities "structural diversity." See Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 333 (2002) ("Although structural diversity increases the probability that students will encounter others of diverse backgrounds, given the U.S. history of race relations, simply attending an ethnically diverse college does not guarantee that students will have the meaningful intergroup interactions that . . . are important for the reduction of racial prejudice.").

universities do not reflect a commitment to racial diversity.²²⁸ Over the last thirty-five years, Black and Latino students have become significantly more underrepresented on the nation's top college campuses.²²⁹ Isolation breeds insecurity and silences students' voices. Scholars have long known this and have argued that this is one of the reasons it is important to have a critical mass of minority students. Critical mass, as one education scholar argued, is having "enough students to overcome the silencing effect of being isolated in the classroom by ethnicity/race/gender. Enough students to provide safety for expressing views."²³⁰

Black students often said they felt most comfortable in classes where there were other black students. In those spaces, if a student or professor attempted to dismiss or attack their contribution, they felt as though one of their black peers would defend them. One student observed:

When I'm the only black person in class, I feel...I don't know...like I can't speak on racial issues because I know there's going to be a backlash and it's too much to take on by myself. But when there's a group of us, I feel more free saying what's on my mind because I know someone will back me up. It's like we're sharing the burden.²³¹

Yet, most black students said that it was rare for them to have enough black students in the class to share the racial burden. For most, the experience of being the token black person in the classroom was normal.²³² In those spaces, students' ability to participate in discussion can be significantly impaired. As one political science student said, "*Because I'm usually the only black student in my class, I think I*

²²⁸ See Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985 (2007) (coining the term "diversity consensus" to explain American universities widespread embrace of racial diversity since the 1960s).

²²⁹ See Jeremy Ashkenas, Haeyoun Park, & Adam Pearce, *Even With Affirmative Action, Blacks and Hispanics are More Underrepresented at Top Colleges than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html>. In her ethnographic study of graduate school admissions committees, Julie Posselt found that even though faculty talked generically about promoting diversity in the incoming class: "Even in closed-door conversations, race, gender and other student identities came up rarely. When considered at all, race was a 'factor of a factor of a factor,'" as Justice Ginsburg concluded." JULIE R. POSSELT, *INSIDE GRADUATE ADMISSIONS: MERIT, DIVERSITY, AND FACULTY GATE KEEPING* 48 (2016).

²³⁰ Roxanne Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 251, 268 (Gary Orfield & Michal Kurlaender eds., 2001).

²³¹ Interview with Black Male, Psychology, PWI (Interview No. 20089).

²³² For an overview of the effects of tokenism, see Chalsa M. Loo & Garry Rolison, *Alienation of Ethnic Minority Students at a Predominantly White University*, 57 J. HIGHER EDUC. 58 (1986); Sylvia Hurtado et al., *ENACTING DIVERSE LEARNING ENVIRONMENTS: IMPROVING THE CLIMATE FOR RACIAL/ETHNIC DIVERSITY IN HIGHER EDUCATION* 25–27 (1999) (reviewing literature on psychological impacts of being racially isolated in higher education); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965 (1977) (describing the negative effects of tokenism on women in predominantly male spaces).

become overly concerned with how I'm being perceived and it becomes harder for me to just be myself."²³³

b. A Critical Mass of Professors of Color

As underrepresented as Black and Latino students are, in most elite universities, faculty lag even further behind. Black professors, for example, make up between 2-4% of the faculty at many of the nation's most selective universities.²³⁴ Latinos are even less represented.²³⁵ This underrepresentation impacts black students' sense of belonging. Consistent with prior work, black students in this study reported that professors of color were often their primary source of support.²³⁶ Students expressed that they believed minority professors are more likely to see the relevance of race in the topics being discussed and, as a result, are more likely to affirm students of color when they discuss it.

A 2L noted the synergy that can occur when there are both a critical mass of black students in a class and a black professor leading the discussion. When asked if there were any classes where she felt free to talk about in a race in a way that felt honest and meaningful to her, she responded, "*Yeah, only one class. That was Professor Washington's class.*"²³⁷ She further explained:

I've never been in a class where they had other blacks in the class who were willing to talk about race. I've been in classes where there were even more blacks, but they weren't willing to talk about race in any way that might compromise or jeopardize their own position in law school socially. But yeah, I felt like there are black people in that class who are more politically-minded, who are more racially aware and willing to talk about it, and I was too. And I felt like I could tell that we emboldened each other. And we were aware that our

²³³ Interview with Black Female, *supra* note 209.

²³⁴ See Matt Krupnick, *After Colleges Promised to Increase it, Hiring of Black Faculty Declined*, HECHINGER REPORT (Oct. 2, 2018), <https://hechingerreport.org/after-colleges-promised-to-increase-it-hiring-of-black-faculty-declined/>; see also Diyi Li & Cory Koedel, *Representation and Salary Gaps by Race-Ethnicity and Gender and Selective Public Universities*, 46 EDUCATIONAL RESEARCHER 343 (2017).

²³⁵ Matt Krupnick, *Colleges Promised to Hire More Black Professors, but so far It's Been Nothing But Talk*, ROOT (Oct 2, 2018), <https://www.theroot.com/colleges-promised-to-hire-more-black-professors-but-so-1829435368>.

²³⁶ See Juanita Johnson-Bailey et al., *Lean on Me: The Support Experiences of Black Graduate Students*, 77 J. OF NEGRO EDUC. 365 (2008). A sample of 586 black graduate students in a predominantly white university found that students most often cited black faculty and black peers as their primary sources of support in helping them to navigate graduate school. *Id.* The importance of black teachers in black students educational success has also been shown in earlier grades. See generally Seth Gershenson et al., *The Long-Run Impact of Same-Race Teachers* (NBER, Working Paper No. 25254, Nov. 2018) (finding "that black students randomly assigned to a black teacher in grades K-3 are 5 percentage points (7%) more likely to graduate from high school and 4 percentage points (13%) more likely to enroll in college than their peers in the same school who are not assigned a black teacher").

²³⁷ Interview with Black Female, Law School, PWI (Interview No. 183214). The name of the professor has been changed to maintain confidentiality.

professor cared about making sure that our opinions were heard and that we could speak it freely. And we knew that even if we didn't always agree with him, he was another black person and he was more racially aware, genuinely cared about us as people outside of the classroom dynamic. So yeah, that was a class where I felt the most free and it felt very affirming to talk about race.²³⁸

The law student who said that “[l]aw school is a playground for the white man’s imagination” first articulated this observation in her constitutional law class while discussing the *Grutter* decision. Although she is normally reticent to talk about race in class, she said that because the professor was a Latino who often talked about race himself, she felt comfortable sharing her thoughts:

I really didn't care because I knew he would back me up. And he literally did. When I said it, he didn't skip a beat. He was just like, “Yeah, X, Y, Z” versus if I said it in a white professor’s class there would probably be a long, awkward pause. They'd become flustered and quickly change subjects.²³⁹

Despite the perceived minefields of being a black student who focused on race, most social science students at the PWI wrote on racial issues. Key to their decision was finding a faculty mentor who they believed would be receptive their interest in race. For many students this involved partnering with a faculty member of color, whether or not the faculty member had similar academic interests as the student.²⁴⁰ One sociology student explained her decision to ask a black faculty member to chair her dissertation committee, even though the faculty member did not work in the same field:

I think part of [my reason] was also because the idea of going to office hours of other professors, especially white professors and trying to articulate this project on race, and have them understand it, and wanna work with me was really terrifying. I knew that [my dissertation chair] wasn't necessarily in my field but at least I knew that she wouldn't push me to minimize the

²³⁸ *Id.*

²³⁹ Interview with Black Female, *supra* note 166.

²⁴⁰ See Anne S. Pruitt & Paul D. Isaac, *Discrimination in Recruitment, Admission, and Retention of Minority Graduate Students*, 54 J. OF NEGRO EDUC. 526, 534–35 (1985) (“Because most graduate schools have low minority enrollments and few if any minority faculty members, minority students are apt to find themselves isolated in situations that lack both formal and informal support systems. Often the expectations and attitudes of white faculty lead minority students to feel stigmatized. Some students feel that they would not be enrolled except for affirmative action requirements. They feel that they must continue to prove themselves. Dissertation topics that focus on minority issues are not well received. White faculty commonly characterize such interests as unworthy, an attitude that, when added to the usual environmental pressures, makes graduate school intolerable. Some students withdraw psychologically and ultimately drop out.”).

race angle in my project or tell me that race wasn't important.²⁴¹

c. When Professors Legitimate Race

Because students take cues from professors about which ideas are important and worthy of discussion, professors should explicitly position race as an important analytic that can help students better understand course material. This can be done, for example, by putting race readings on course syllabi and discussing race during class lectures. By having a respected figure of authority in the classroom engage race, the topic is more likely to be seen as a legitimate topic of inquiry that aids in, rather than distracts from, understanding course materials.²⁴²

Take, for example, the experience of a black political science student at the HBU. Although she said that pursuing her master's degree as a token black student at an elite northeastern university was "one of the most miserable times of my life," she credited a white female professor with being the sole reason that she did not drop out of the program.²⁴³ Speaking of the professor's intervention, she said:

In my other classes, I always had to fight to talk about racial issues. The other students would be really condescending and dismissive whenever I started talking about racism. Sometimes the professors would be too. But Professor Brown took it upon herself to bring it up. She assigned all these readings on race and would constantly incorporate it into the discussion.... Because she had already primed students, they were receptive when I made a comment about race. I didn't have to fight to be heard. I wasn't seen as an angry black woman in that space. She took a lot of the load off of me and I really appreciated her for that."²⁴⁴

Students understand that some professors do not talk about race because they fear unintentionally offending students. To those professors, this law student offers encouraging words. After hearing him say that his white law professors tend not to discuss race as often as his professors of color, I asked him why. He responded:

I think it's two things: I think some professors don't think it is that important, and also feel a little bit

²⁴¹ Interview with Black Female, *supra* note 176.

²⁴² When professors talk about race it helps students overcome the thinking the race is a taboo topic to discuss. Beverly Tatum writes, "In predominantly White college classrooms, I have experienced at least three major sources of student resistance to talking and learning about race and racism." Beverly Tatum, *Talking About Race, Learning About Racism: The Application of Racial Identity Development Theory in the Classroom*, 62 HARV. EDUC. REV. 1, 5 (1992). She notes that the first source of resistance is that "[r]ace is considered a taboo topic for discussion, especially in racially mixed settings." *Id.* However, that is "an essential obstacle to overcome" in order to have a productive classroom discussion. *Id.*

²⁴³ Interview with Black Female, Political Science Dep't, HBU (Interview No. 411238).

²⁴⁴ *Id.* The name of the professor has been changed to maintain confidentiality.

uncomfortable talking about it. I think part of it is that they don't know how to do it in a way that would be not offensive. But I feel like they're scared for no reason. I appreciate the fact they don't wanna offend people by saying something mistaken, but their fear is misplaced because black students appreciate the effort. It's like when you travel abroad and you try to speak a little bit of the language, the people in the country you're visiting will be flattered by your attempt to learn. Apparently, except for in France where if you don't pronounce it absolutely perfectly, they get mad. I feel like some of the white professors here think that they're living in France with regards to their ability to communicate about racial issues. They think that if they do it imperfectly, then there will be this backlash against them. Where in reality, [this law school] is more like Italy where people are like, "Oh, you said 'Buongiorno?!' Wow! Have all this free stuff!"²⁴⁵

²⁴⁵ Interview with Black Male, *supra* note 160.

Chapter 5 | Conclusion

This dissertation concludes by addressing the normative implications of the two main issues surfaced in this dissertation: (1) that diversity—the primary lens through which we justify racial integration today—was legitimated by the Court through factors that were extrinsic both to affirmative action and racial integration. I begin by answering what impact—if any—should Powell’s motivations for endorsing diversity have on affirmative action and “diversity discourse today, (2) Despite universities’ consistent argument that they value and rely on black students’ racial perspectives, these students feel disciplined for talking about race in class. I identify the harms of this sort of discourse policing. As I argue, this dynamic both creates a legal vulnerability and also a societal one.

I. Powell’s Peril

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 benefits of diversity do not reach the high bar of a compelling state interest, and even if it did, they are skeptical that race-based affirmative action helps to cultivate educational benefits. Proponents, on the other hand, argue that the promotion of racial equality is the true compelling interest that affirmative action is intended to further. The history outlined in the first chapter of this dissertation provides historical context for why diversity seems to be so ill-fitting to address the societal problems that affirmative action were meant to remedy.

A key question has long haunted the diversity rationale: Of all the societal issues that affirmative action was meant to address, why is “diversity” the one interest that is sufficiently compelling to justify race-conscious admissions practices? As Professor Vincent Blasi asked the year after *Bakke* was announced, “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?”¹ As I show, however, the goal of diversity on college campuses was not simply to enrich academic dialogue. It was to protect American democracy and the capitalist system by shaping the ideological orientation of its future leaders. Put another way, exposing future leaders to a robust exchange of ideas was, at root, motivated by a desire to protect national security.

1

Understanding the link between diversity and national security, in Powell's eyes, also helps to respond to a critique raised by opponents of affirmative action. 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 has recognized as compelling state interests "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence." But this history shows that anarchy is exactly what worried Powell, and diversity was 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. Viewed in this light, *Bakke's* "diversity rationale" could be read as in line with—rather than a departure from—the strict scrutiny standard.

The narrative presented in this dissertation also brings up a larger normative question. If one accepts that Powell's legitimation of diversity was likely motivated by factors that were extrinsic to the issues presented before the Court in *Bakke*, should that awareness impact how we view affirmative action or "diversity" today? Scholars have long debated the extent to which judges should factor in the intentions of legislators when interpreting a statute. But what is the relationship between a *judge's* intentions and how we interpret a judicial opinion? To answer these questions with respect to affirmative action, it is helpful to distinguish the effects that Powell's opinion has had on the legal doctrine from the effects it has had on society.

A. Legal Impact

First, I'll discuss the effects on law. Knowing this history should not upend affirmative action doctrine for at least three reasons. As an initial matter, while this particular reading of Justice Powell's motives in *Bakke* sheds new light on the doctrine, it is well-known that judges' political commitments motivate their decisions. That idea is at the heart of the legal realism movement that dates back nearly a century. Once a controversial stance, today all but the strictest adherents of legal formalism acknowledge that judges' decisions are affected by their lives off the bench. Empirical studies show, for instance, that judicial decisions are affected by judges' political ideologies, their race, their gender, their sexual orientations and even factors as trivial as the amount of time that has lapsed since they ate their last meal. To upend the law whenever we discover that a judge's decision was influenced by factors outside of the confines of the case would

fundamentally destabilize the common law system as few decisions are arrived at in a completely neutral, detached manner.

Furthermore, to the extent that external influences on judicial decision-making are unavoidable, they are also sometimes desirable. Suppose the history revealed in this dissertation were different. What if Powell had instead endorsed a remedial justification of affirmative action because he and his wife adopted a black child and through raising the child, he was able to witness firsthand how black people continued to struggle with an especially pernicious form of racial discrimination, one that was different both in kind and intensity than that faced by white ethnics? Would the fact that Powell considered his black child's experiences make his endorsement of remedial justifications illegitimate? Perhaps your answer will track your general stance on affirmative action and constitutional colorblindness, but for many supporters of affirmative action, having personal insight into the struggles of communities of color would make Powell all the more qualified to weigh in on racial policies. To the extent that one is uncomfortable with external commitments driving the outcome of the *Bakke* case, it may well be that it is Powell's particular commitment—the dilution of liberal and radical viewpoints on college campuses—that they are uncomfortable with, rather than the knowledge that a judge was influenced by their personal beliefs.

Consider a real-life example outside of the purview of affirmative action. Powell's biographer shows that a firsthand experience with abortion informed his opinion in *Roe v. Wade*. One of Powell's teenaged male employees tried to help his girlfriend have an abortion without the help of a doctor. Because the couple did not have the expertise to safely perform the procedure, the girlfriend bled to death. Fearing the criminal implications of being involved in his girlfriend's death, the boyfriend ran to Powell for legal assistance. While Powell was able to prevent his employee from going to jail, the experience led the future justice to conclude that women ought to have access to safe and legal abortions. If not for that experience, Powell—a social conservative who worried about the loosening of sexual morality and complained about the widespread availability of contraceptives on college campuses—may not have voted to make abortion a constitutional right. Yet, knowing that it was this personal history—rather than a strict reading of the constitution—that helped to inform his vote should not call into question the legal standing of *Roe v. Wade*.

Secondly, this history should not upend affirmative action doctrine because the doctrine, as it stands today, is no longer the sole brainchild of Justice Powell. For a quarter century, Powell reigned as sovereign of affirmative action doctrine, solely dictating the logic that would

govern the policy. Since 2003, however, the doctrine reflects the views of a majority of Justices on the Court. A modern Court has expanded the doctrine considerably. Today the “robust exchange of ideas” is but a single, though critical, benefit of diversity that the Court recognizes as compelling. In *Grutter*, the Court added to Powell’s discourse benefits a number of other constitutionally recognized benefits of diversity including the lessening of racial isolation, disrupting racial stereotypes, preserving the legitimacy of the nation’s leaders and opening the pathways to leadership.² Though Powell was the first Justice to legitimate viewpoint diversity as constitutionally compelling, perhaps for his own reasons, now a majority of the Court have upheld it for their own reasons.

Finally, the fact that Powell had surprising motives for endorsing diversity does not make the justification, on its own, less compelling. Powell did not create the diversity argument. He only elevated it as the key compelling interest that would allow for race-conscious selection processes. Long before *Bakke* reached the Court, elite universities strove to attain diverse student bodies because they believed that there were important educational benefits embedded in diversity.³ In an admissions philosophy dating back to the early 20th century, university officials chose not to simply admit students based on grades and test scores alone. Instead, believing that students’ educations suffered in homogenous environments, they aimed to assemble incoming classes where students were different from one another. In 1946, for instance, Harvard admissions officials wrote in a report that they hoped to build a college where “rich men’s sons and poor, serious scholars and frivolous wasters, saints and sinners, Puritans and papists, Jews and Gentiles will meet in her Houses, her Yard, and her athletic fields, rubbing off each other’s angularities and learning from friendly contact what cannot be learned from books.” While it was not until the 1960s that elite universities began to include racial minorities in their pursuit of pluralism, the belief that diversity produced educational benefits animated admissions policies for decades before *Bakke*. Simply because Powell might have had his own motives for embracing it does not mean that diversity, on its own, is no longer compelling.

B. Societal Impact

For the aforementioned reasons, understanding the connection that Powell made between diversity and deradicalization should not

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³ Cite Chen

unsettle affirmative action jurisprudence. But Powell's opinion has influence far outside the bounds of constitutional law. As scholars have long argued, law does not simply establish rules; it also creates social meanings.⁴ 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 what affirmative action—and arguably, racial integration more generally—are meant to accomplish.

With Powell's push, our society has arrived at what one scholar has called, "a diversity consensus." Diversity is not simply a new way to discuss the old problem of segregation. As sociologist Ellen Berry writes, the turn to diversity is "the taming of the civil rights movement's provocative demands for integration, equality and full citizenship."⁵ 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.⁶ The educational benefits of diversity, on the rare occasions that it was mentioned—was simply a bonus benefit of the policy. Today, however, the inverse is true: the institutional benefits of diversity has become *the* goal of racial inclusion, and racial equality—on the rare occasions when it is mention—is merely a bonus benefit. While Powell's opinion is not solely responsible for this shift, its effect on our shared cultural understanding can hardly be overstated.

When the *Bakke* decision was announced, there was little empirical evidence that suggested that student body diversity produced educational benefits. Powell cited a single speculative assertion from the President of Princeton University that diversity could lead to better learning outcomes. Even in that statement, however, the president acknowledged that, "In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs." Given such weak evidence for what the Court ultimately determined was practically the only compelling justification for affirmative action, scholars set out to prove that Powell's insight was right. Indeed, they found that diversity was good for education, for leadership development and for society. In effect, they legitimated Powell's speculation with social science evidence.

⁴ Cass Sunstein, *Expressive Function of the Law*

⁵ Ellen Berry, *Enigma of Diversity*, pg. 9

⁶ Anthony Chen

During a time of racial retrenchment—ushered in with Powell’s help--as the victories of the Civil Rights Movement were being rolled back, diversity became the safe way to push for racial inclusion. In an effort to depoliticize integration, many proponents of race consciousness ceased articulating remedial justifications that acknowledged the legacies of discrimination that produced racially homogenous institutions in the first place. Instead, they turned to the Supreme Court-approved logic of “diversity benefits.” In this way, Powell placed key constraints on the racial integration debate. Constraints that many of us abide by today, even in circumstances when we are not legally bound to adhere to the diversity rationale.

As an example, consider the fight to desegregate New York City Schools. In response to a study that found the New York City schools are the most segregated in the nation, in 2017 a task force of civil rights activists and academics released a report about the importance of integrating the city’s public school system. As the taskforce reasoned, the primary importance of integration was not providing educational opportunity to the black and Latino 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. It 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.” Further mimicking Powell’s language on how diversity prepares future leaders to function in society, the taskforce noted “all students benefit from experiences that prepare them for an increasingly diverse society.”

The logic of diversity now also governs efforts to increase employment opportunity. Take for example how Google frames its efforts to build a racially inclusive workforce. “Google is committed to creating a diverse and inclusive workforce,” the megacorporation affirms on its website. 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.” Or consider Monsanto’s articulation of why a diverse workforce is important: “Diverse perspectives help us to see farmers’ challenges in new and different ways, supporting our efforts to create innovation and agricultural solutions.” Diversity in viewpoints, rather than equality in outcomes, has become the most commonly articulated goal of racial integration.

Importantly, diversity is not just about race: it is also about a person's political leanings, their hometown, their hobbies, even whether they are left or right brain. With such a broad definition of diversity, even those organizations with very few people of color can lay a credible claim to being "diverse." By using the goal of diversity of ideas to justify a policy that was intended to alleviate racial subordination, Powell made it more difficult to even acknowledge the primary problem—the stubborn persistence of racial discrimination—let alone pursue adequate solutions.

As has long been argued by scholars the diversity rationale lacks moral force, is divorced from the original aims of affirmative action and is far from the most compelling interest served by race-conscious admissions practices. Diversity has become our dominant paradigm not through a process of disciplined legal interpretation, sound logical reasoning or even a commitment to racial equality. Rather, to a surprising degree, diversity has a hegemonic hold on racial integration efforts because it happened to resonate with one justice who believed that intellectual pluralism would temper efforts to achieve a political and economic revolution. Knowing this history of how the diversity rationale came to be should provide more reason why, as a society, we should be skeptical of articulating "the benefits of diversity" as our primary justification for racial integration.

II. THE POWER OF FREE EXPRESSION

Despite Powell's motives for endorsing it, at root, diversity is a concept with radical potential. First, diversity, as Powell articulates it, pushes back against objectivity by acknowledging that there is a connection between a person's identity and their ideas. Second, in order for the diversity rationale to work, universities need to not simply admit students from various background, they must also value their voices once they are inside. In this way, the diversity rationale is arguably more radical than remedial justifications for inclusion. Remedial justifications say that universities should take affirmative steps to admit historically excluded members, but they say nothing of what should happen once they are admitted. The diversity rationale, on the other hand, says historically subordinated groups need not only be admitted but also given a voice. In institutions that have been structured (1) on the basis of racial exclusion and (2) on belief that the true knowledge is obtained through objectivity and detachment, the diversity rationale has the potential to be a radical departure towards a more inclusive society.

There is harm in students of color not bringing their authentic selves into the classroom—harm that extends beyond the campus community and goes deeper than the constitutionality of affirmative action. Elite universities are incubators for the next generation of leaders. In graduate schools, these future leaders are not simply learning the formal knowledge of their discipline, they are also being socialized into their professional identities. They are learning how they should behave, how they should talk, and what they should discuss as professionals in their field. Many students are aware of this socialization process and are critical of the implicit messages they are receiving from their institution. One law student who had previously majored in African American studies as an undergrad noted that by stigmatizing racial discourse, her law school was socializing black students to become “*respectable Negroes who don’t make white people mad, don’t compromise their position of power and don’t make them feel uncomfortable.*”⁷

These sentiments were echoed by a black law student at the HBU as she reflected on her time in undergrad at an Ivy League university. She explained:

I think at [my undergrad] they very much want you to be the person that doesn’t scare white people in the elevator, whatever that person is. They are concerned with making you into a more palatable person. Whereas here [at the HBU] they’re more interested in turning you into the kind of person that is going to uplift other people of color.⁸

The socialization around how to behave and what to say as black professionals could potentially compromise students’ ability to advocate for important issues once they become professionals.⁹ A 3L at the PWI noted:

One thing I took away from my experience here is that if you can’t talk about race, even among supposedly enlightened white liberals in a university that prides itself on being progressive, there’s no chance I’m going

⁷ Interview with Black Female, *supra* note 131. Karabel notes that one of the impulses behind admitting black students into elite schools was to create a group of politically moderate leaders in the 1960s when black leadership was increasingly calling for the more radical demands of Black Power rather than integration. KARABEL, *supra* note 26, at 408.

⁸ Interview with Black Female, Law School, PWI (Interview No. 549210). Black students have long criticized elite white universities for attempting to socialize them into racially palatable blacks. Black women at protesting Vassar in the mid-1960s wrote this as a preamble to their demands: “We refuse not only to waste four years of our lives, but to jeopardize four years of our lives becoming socialized to fit a white dominant cultural pattern. For the Black student to be asked to submit to such acculturation is to ask the student to willingly accept his own deculturalization—his own dehumanization. We refuse to have our ties to the black community systematically severed; to have our life styles, our ambitions, our visions of our *selves* made to conform solely to any white mold.” BIONDI, *supra* note 17, at 22.

⁹ For a broader conversation about the socialization process of law students at elite universities, see DEBRA SCHLEEF, *MANAGING ELITES: SOCIALIZATION IN LAW AND BUSINESS SCHOOLS* (2005); ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* (1992).

to bring up racial issues in my lily-white conservative law firm.¹⁰

The harm of minority censorship is not only felt by minorities. The diversity rationale, for all its potential to instrumentalize students of color, does acknowledge practical realities.¹¹ White students need to exposure to the perspectives of their peers of color for their sake, but also for the sake of marginalized groups. Because of the way that race, wealth, and elite institutional affiliation confer significant power, white students attending prestigious universities will be disproportionately responsible for creating policy that affects communities of color. When black students are silent or heavily edit their racial views, it prevents cross-racial understanding and can lead white students to believe there is a liberal consensus on key racial issues, when perhaps there is not. This impedes effective leadership in a nation that is increasingly divided along racial lines.

The “educational benefits of diversity” have long been critiqued by critical scholars on the political left.¹² The embrace of diversity is said to be an abandonment of the racial justice mission that once motivated racial integration efforts.¹³ Rather than foregrounding what is best for the historically disenfranchised segments of our society, diversity is concerned with what is best for elite universities, corporations and implicitly white people. “The concept of diversity,” Derrick Bell once wrote, “is a serious distraction in the ongoing efforts to achieve racial justice.”¹⁴ He argued that our focus on achieving diversity rather than equality subjugates minority interests to that of the ruling class and in the process relegates marginalized minorities as the “fortuitous” beneficiaries of a court ruling that little to do with furthering their interests.¹⁵

I agree with these critiques. Yet, over the course of conducting over one hundred interviews for this study I have come to believe that there is transformative power inherent in diversity, particularly a form of diversity that elevates the voices of those who have historically been silenced. Sitting across from students who had such insightful analysis but who would time and time again say that they did not feel comfortable sharing those views in class, I found myself becoming

¹⁰ Interview with Black Female, Law School, PWI (Interview No. 385635).

¹¹ Ellen Berrey refers to Powell’s articulation of the diversity rationale as an “instrumentalist argument for race-conscious decision-making.” BERREY, *supra* note 110, at 31.

¹² The year after Bakke was announced, Law Professor Vincent Blasi asked: “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?” Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21, 21 (1979).

¹³ Describing our current valorization of diversity which incorporates only “culturally appealing” and “high status” people of color, Ellen Berrey eloquently writes: “It is a mechanism of containing and co-opting racial justice, as it largely leaves untouched persistent racial inequalities and the gulf between the rich and poor. This is the taming of the civil rights movement’s provocative demands for integration, equality and full citizenship.” BERREY, *supra* note 110, at 9.

¹⁴ Bell, *supra* note 1, at 1622.

¹⁵ *Id.*

enticed by the logic of the diversity rationale. Once students know better, they have the opportunity to do better, both as citizens and leaders. Simply putting a mix of students in the same space, however, is not going to automatically result in cross-racial understanding. Unless universities make a conscious attempt to interrupt pre-existing social hierarchies, those hierarchies will simply be reinscribed in the classroom. Students who have identities that wield authority will be more likely to engage in the classroom discussion, while others will feel the need to either disengage from the space or assimilate to its norms.

There is a wealth of valuable knowledge that goes unshared because underrepresented students are afraid of the consequences of saying what they truly feel. This dissertation has revealed an important dynamic that universities should attend to, not only to shore up constitutional vulnerabilities but also to advance the goals of equality inherent in racial integration. Creating the conditions where minority students feel comfortable bringing their whole selves into the classroom helps students of color, white students and the educational mission of universities. Perhaps most importantly, it can also help the most vulnerable members of our society, those who will never see the inside of the nation's most elite universities.