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DIVERSITY'S STRANGE CAREER: RECOVERING THE RACIAL PLURALISM OF LEWIS F. POWELL, JR.

Anders Walker*

I. INTRODUCTION

Diversity's days may be numbered. Though the Supreme Court's recent ruling in Ricci v. DeStefano did not target schools, it coincided ominously with the Court's holding in Parents Involved in Community Schools v. Seattle School District No. 1, which did.1 In both cases, the Court held that local authorities, whether school board members or fire department officials, violated the United States Constitution by taking race into account when drawing school district lines or selecting employment tests.2 Barring an about-face by Chief Justice John Roberts, the Court would likely hold the same to be true of admissions standards at institutions of higher learning, thus overruling its landmark opinion in Grutter v. Bollinger.3

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3. Grutter v. Bollinger, 539 U.S. 306 (2003); see also Gratz v. Bollinger, 539 U.S. 244 (2003). For Grutter's significance, see, for example, Marcia G. Synnott,
As the nation's highest Court trains its guns on anything even remotely evocative of racial classifications, school officials would do well to go back to original meanings, particularly the original meaning of diversity as articulated by Justice Lewis F. Powell, Jr. in the 1978 decision *Regents of the University of California v. Bakke.* Though heralded by legal liberals, Powell's notion of diversity derived not simply from an interest in helping blacks, but also a larger vision of racial pluralism that extended to helping whites as well. According to Powell in *Bakke,* whites were themselves minorities—divided by religion, lineage, and culture—and many had suffered "a history of prior discrimination at the hands of the State." Indeed, even America's traditional majority, white Anglo-Saxon Protestants, argued Powell, was no longer dominant and could itself be viewed as a "new minority."

Though bizarre at first glance, Powell's emphasis on white minorities might hold the key to new ways of thinking about diversity in university admissions. Rather than continue to emphasize the discrimination traditionally faced by non-whites, modern day diversifiers might be better off developing tools to preserve diversity among whites, then

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applying those tools to benefit everyone. Put simply, diversity's best defense might lie in extending its scope. If schools lower their standards to admit under-represented white candidates, whether they are Mormon or Mennonite, northern or southern, rural or urban, then they should also be allowed to admit under-represented racial minorities, provided that such students are identified along similar lines. This is because such a program would not be based on arbitrary racial classifications, but on a nuanced attention to the religious, regional, and cultural inflections of lived experience, which transcend simple distinctions of race.

To better explain Powell's position, and to show why that position is relevant to today's diversity debates, this article will proceed in three parts. Part II will reconstruct Powell's racial worldview, showing how his formative years in the American South made him particularly attuned to a pluralist vision of America, one in which racial diversity played a prominent role. Part III will show how Powell's concept of diversity became sharpened by the Cold War, particularly his reaction to Soviet propaganda efforts in the post-colonial developing world. Part IV will illustrate the manner in which Powell's vision of diversity articulated itself in Bakke, the pivotal diversity case in American constitutional law. The article will conclude by suggesting that Powell's attention to complexities within the white community might point the way to a new paradigm for understanding diversity, one that looks less at heredity and more at diversity of experience and perspective, taking infra-racial heterogeneity into account.

II. THE LOST PLURALISM OF THE AMERICAN SOUTH

Most scholars of American pluralism—a notion that ethnic and cultural diversity is worth preserving—locate its beginnings in the urban North with the publication of Horace M. Kallen's two-part essay, Democracy Versus the Melting Pot, in 1915.¹ Yet long before northerners began to wrestle

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¹ Horace M. Kallen, Democracy versus the Melting Pot, THE NATION, Feb. 25, 1918; Horace M. Kallen, Democracy versus the Melting Pot, THE NATION, Feb. 18, 1915. For a representative sampling of scholars who cite Kallen as the originator of pluralist thought in the United States, see EVERETT HELMUT AKAM, TRANSNATIONAL AMERICA: CULTURAL PLURALIST THOUGHT IN THE TWENTIETH CENTURY 56–60 (2002); BRUCE CLAYTON, FORGOTTEN PROPHET: THE LIFE OF RANDOLPH BOURNE 195 (1984); DALIA TSUK MITCHELL, ARCHITECT
with the problem of assimilating European immigrants, southerners moved to create an elaborate legal regime that separated the races, engendering a unique, regional form of racial pluralism. This pluralism arose out of laws that distanced the races in almost all social and cultural settings, preventing blacks and whites from sitting together on public transportation, at recreational and sports venues, and from being placed in the same morgues and cemeteries. Though racial segregation would come to be remembered for its discriminatory aspect, its architects saw it differently. To them, segregation was a mutually agreeable arrangement that allowed for “harmonious cooperation” between whites and blacks.

The ensuing section attempts to recover early views of Jim Crow in order to explain how it came to be that Lewis F. Powell, Jr., who was born on September 19, 1907 in Suffolk, Virginia, never came to see himself as a segregationist. To Powell, racial segregation was not something that had to be...
forced, but rather a legal codification of regional “mores and social customs” that were mutually acceptable to both races.  

Consequently, when the Supreme Court declared that legal segregation caused blacks unconstitutional harm in 1954, Powell confessed to being “shocked.”

At least part of Powell’s shock came from a sentiment common among southern whites that they, not blacks, were the real victims of legal repression. According to one prominent southern minister, “whites were held down by Federal bayonets” during Reconstruction; economic dislocations lasting through the end of the nineteenth century worsened this condition. Indeed, the spirit of the New South itself drew inspiration from memories of a time when southern whites “accepted,” as New South booster Henry Grady put it, “the arbitrament [sic] of the sword” from amid “the ruins of their homes.” As Duke University Professor Edwin Mims put it in 1903, four years before Powell was born, white southerners suffered “a humiliation never before or since undergone by the Anglo-Saxon race.”

For whites, part of the humiliation of Reconstruction was the fact that blacks, their former slaves, were placed in positions of political power over them. “You have thrown upon [white southerners] a great mass of ignorant voters, wholly unacquainted with the wants of the people and the management of affairs,” explained President Garfield, “and you have done [them] a great injustice in compelling that class to be [their] equals.” According to many white southerners, rumors of black corruption only worsened the indignity of having to answer to people who they believed to be inferior. “[T]hey plunged the white people into a maelstrom of ruin and debt,” lamented Louisiana Judge A.A. Gundy, “and levied on them a tribute more exacting and more

14. JEFFRIES, supra note 12, at 139.
17. Edwin Mims, A Liberal Southerner's View of the Negro Problem, 88 CONGREGATIONALIST & CHRISTIAN WORLD 35 (1903). These were the words of Edwin Mims, Chair of English Literature at Trinity College, later Duke University, in Durham, North Carolina. See id.
exhausting than ever paid by any other defeated people.”

Though historians have since shown that corruption crossed party lines in the Reconstruction South, general sentiments that whites had been discriminated against following the war lived on in the white community. Consequently, once the Union Army withdrew from the South in 1877, ex-Confederates and their sons mobilized to return “the best elements of society” to power, leading to almost two decades of corruption, bloodshed, and political violence. Reports of race wars emerged across the region, as over forty “major riots” exploded between 1898 and 1908 alone, along with several hundred lynchings a year and “countless acts of individual terrorism.” Georgia newspaper editor and aristocrat John Temple Graves warned that if racial violence did not stop, then complete “annihilation of the Negro race” might well ensue. Radical leaders like South Carolina Governor “Pitchfork” Ben Tillman called for precisely such an outcome.

While demagogues like Tillman endorsed genocide, others declared exclusion to be the key to the South’s racial strife. According to South Carolina Senator Matthew Calbraith Butler, the odds of African-Americans ever reaching “the full measure of American manhood and citizenship” were so slim that the United States government should provide a place of emigration for blacks where former slaves could “work out their own destiny.” Perhaps no white southerner articulated this position better than minister and author, Thomas Dixon. In Dixon’s mind, notions of racial uplift were naïve because African-Americans lacked the pure Teutonic bloodlines necessary for political leadership.

26. See Glenda Elizabeth Gilmore, Gender & Jim Crow: Women and
Consequently, Dixon called for total exclusion—the colonization of African-Americans back to their home continent.  

As talk of exclusion and extermination circulated, more moderate voices intervened, counseling racial segregation as a progressive reform designed to improve race relations and prevent race conflict. For some of these proponents, segregation was not only an obvious solution to racial violence, but constituted a mutually agreeable arrangement. "Neither race" wants integration, argued Henry W. Grady, editor of the Atlanta Constitution and celebrated booster of the New South. To illustrate, Grady cited efforts by Bishop Gilbert Haven of the Methodist Episcopal Church to join white and black congregations. Grady declared that after the first month, Haven's church was "decimated." Not only did blacks and whites not want to worship together, he argued, but also "blacks left it in squads." Instead, African-Americans opted for their own churches, congregations, pastors, conferences, and bishops. Grady maintained "There is not the slightest antagonism between them and the white churches of the same denomination."

In Powell's own state of Virginia, the Council of the Protestant Episcopal Church declared in as early as 1886 that "[t]he colored race have withdrawn in overwhelming majority from the churches in which they once worshipped with the
whites.”\textsuperscript{35} Even C. Vann Woodward conceded that churches were segregated long before Jim Crow laws required it.\textsuperscript{36} Perhaps the best example of this was the African Methodist Episcopal Church, formally organized in 1816.\textsuperscript{37}

Not only churches, but also militia companies, schools, state and private welfare institutions, and a wide range of activities were segregated in the post-Civil War South.\textsuperscript{38} When formal laws restricting interracial contact were finally passed in the 1880s and 1890s, many simply codified older patterns “deeply ingrained in southern life.”\textsuperscript{39} As Henry Grady observed in 1885, black southerners “have their own social and benevolent societies, their own military companies, their own orders of Masons and Odd-fellows.”\textsuperscript{40} The forces that sustained such organizations were not centrifugal but centripetal, argued Grady, meaning that they came from within, not without the black community.\textsuperscript{41} They also helped blacks more than integrated institutions would. One reason blacks demanded their own institutions, maintained Grady, was that within such institutions African-Americans had more freedom and more chance for leadership than if they had been forced into “association with the whites.”\textsuperscript{42}

Grady maintained that the same held true for schools. “[F]ar from feeling debased by the separate-school system,” argued Grady, African-Americans “insist that the separation shall be carried further, and the few white teachers yet presiding over negro schools supplanted by negro teachers.”\textsuperscript{43} Noting that almost one million African-American children had begun attending segregated public schools by 1885, Grady concluded that “[t]he negroes are satisfied with the situation.”\textsuperscript{44}

Though many blacks were in fact dissatisfied with Jim Crow, prominent African-American leaders like Booker T.
Washington came out in favor of the arrangement. 45 “In all things that are purely social, we can be as separate as the fingers,” declared Washington at the 1895 Atlanta Exposition, “yet one as the hand in all things essential to mutual progress.” 46 Celebrated by whites, Washington exemplified the kind of pluralism that whites like Grady believed in, and personally helped to build one of the biggest black institutions in the South, the Tuskegee Institute. 47

Washington provided a middle ground for white progressives like North Carolina Governor Charles Aycock, who fought to reserve white tax dollars for black schools, encouraging the development of black institutions and black teachers. 48 Some even argued that blacks would rather have their own schools. Gustavus J. Orr, Georgia educator and president of the National Education Association, declared that blacks “want their children in their own schools and under their own teachers.” 49 Yet another example was Robert Louis Brandt, the superintendent of public schools in St. Louis, Missouri, who noted that the more cultured classes of African-Americans were withdrawing into separate localities to the point that “the tendency in their social life is all toward segregation.” 50

Proponents of segregation, like Professor Robert T. Hill of the University of Texas, did not see legal separation harming African-Americans so much as “helping, protecting, educating, and elevating” them. 51 Others, like Kentucky

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46. Washington, supra note 45, at 183.


49. Grady, supra note 16, at 913.


51. WM M. Baskervil et al., Shall the Negro Be Educated or Suppressed?, INDEPENDENT, Feb. 21, 1889, at 2.
newspaper editor W.M. Beckner, rejected colonization, preferring instead to see segregation as an institution "acquiesced in by the Negroes themselves" as part of "the best interests of all." Rather than a capitulation to extreme racism, legal segregation struck most educated white southerners as an outgrowth of southern progressivism, an endorsement of pluralism that allowed the races to live "separately but harmoniously." "Where is the mother college" that produced "negro culture," asked the Atlanta Chamber of Commerce newsletter: "Is it Africa or Asia? No it has grown on Atlanta soil."

While southerners celebrated racial pluralism, northern reformers tended to reject pluralism and demand that African-Americans imitate whites. Many concentrated their efforts on black churches, arguing that black modes of worship were "too emotional, too primitive and wild, and too lacking in moral directive." Others declared that African-Americans were incapable of running their own institutions, on account of the fact that slavery had "dulled the minds of its victims," "destroyed their self-respect, and rendered them incapable of taking care of themselves." One of the great tragedies of the northern missionary, argues Robert Francis Engs, is that northerners "could not connect the right to be free with the right to be different." White southerners, by contrast, had no problem with the notion that blacks were different; indeed they presumed it. Even if southern whites were racists, they were not necessarily, to borrow a term from James M. McPherson, "culturalists"; they were not individuals who insisted on the imposition of one, monolithic

52. Id.
53. Grady, supra note 16, at 914. For a discussion of the manner in which legal segregation coincided with southern progressivism, see McGerr, supra note 28, at 182–202.
54. Pomerantz, supra note 28, at 92.
57. Litwack, supra note 55, at 477; Adams, supra note 57, at 100.
culture across the South. According to President Woodrow Wilson, a Virginian, segregation encouraged the “comfort and the best interests of both races,” avoided interracial friction, and facilitated the independent development of the races.

Southern intellectuals agreed. In 1930, a young writer from Kentucky named Robert Penn Warren reasoned that integration was less desirable than “a separate negro community” large enough to employ “more talented and better equipped” blacks. Without such a community, posited Warren, African-Americans might leave the region and seek their fortune elsewhere—a development that Warren hoped to avoid. “Let the negro sit beneath his own vine and fig tree,” he reasoned, for such an arrangement would provide the best opportunity for African Americans to remain in the South and “establish themselves.”

A decade later, Mississippi planter and poet William Alexander Percy concurred. He found it incredible “that two such dissimilar races should live side by side with so little friction, in such comparative peace and amity.” To Percy, whites were not engaged in a larger project of oppressing African-Americans so much as living peacefully in the same world as them. “To live in the pretense that whites and blacks share a single, identical culture and way of life,” he noted, “is not only hypocritical but illusory and obfuscating.” Though he considered African-Americans “deeply alien,” he also believed they possessed many beneficial traits. “The Southern Negro has the most beautiful manners,” extolled Percy, “and the Southern white, learning from him, I suspect, is a close second.” Other attributes that whites might learn from African-Americans were “poetry of feeling and expression,” “songs more filled with humility and heart-break

60. JAMES M. MCPHERSON, THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP 201 (1975).
61. President Resents Negro’s Criticism, N.Y. TIMES, Nov. 13, 1914, at 1.
63. See Warren, supra note 63, at 251.
64. Id. at 261, 264.
65. PERCY, supra note 59, at 286.
66. See id.
67. Id.
68. Id.
69. Id.
than Schubert’s or Brahm’s,” kindness, charm, and humor.\textsuperscript{70} Percy’s observations echoed Henry Grady, who, nearly half a century before, also noted that African-Americans possessed many unique and even “lovable” traits, which would be lost in integrated settings.\textsuperscript{71}

Though white articulations of racial difference tended to be mired in condescension, this was not always the case. Indeed, points of agreement could be found at times. For example, William Hooper Councill, the African-American president of the Agricultural and Mechanical College in Normal, Alabama, agreed that black uniqueness held the potential for remarkable contributions to American civilization.\textsuperscript{72} Councill argued in 1899 that precisely because blacks possessed a nature that coincided with Christianity “as the nature of no other race does,” blacks would someday “give an interpretation to the religion of Jesus of Nazareth which will make the ‘more favored races’ open their eyes to grander things.”\textsuperscript{73} This was because African-Americans were filled with a spiritual power that transcended “things of sense” and aspired “to the God of spirit and love.”\textsuperscript{74} “When the world moves up in the scale of humanity,” concluded Councill in a paean to perceived black spirituality, “it will place the wreath of honor upon the negro’s black brow for the lessons of peace and love which he has taught mankind.”\textsuperscript{75}

Councill believed African-Americans were not only more spiritually inclined than their white counterparts, but also that they were responsible for instilling many of the best qualities in white southerners.\textsuperscript{76} “The warm, genial companionability and fervor of the southern white man,” posited Councill, “was drawn from his black slaves.”\textsuperscript{77} This was because “the richest and best men” of the South were not only “reared, from the very hour of their birth, by the black

\textsuperscript{70} Id. at 306.
\textsuperscript{71} Grady, supra note 16, at 910.
\textsuperscript{72} See Prof. W.H. Councill Dead: Noted as a Negro Educator—Was Born a Slave in North Carolina, N.Y. TIMES, Apr. 18, 1909, at 11.
\textsuperscript{73} James Theodore Holly et al., The Race Problem: A Symposium, 21 ARENA 427 (1899).
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 430.
\textsuperscript{76} Id. at 431.
\textsuperscript{77} Id.
slave,” but “drank in the very souls of their negro nurses.”78 Councill also noted that though whites learned writing, reading, and arithmetic from white teachers in school, they learned manners, civility, and composure from blacks at home.79 “[T]he chivalrous, polite, hospitable southern white gentleman,” argued Councill in line with Percy, “is the product of negro slave-teaching.”80

Though the Jim Crow South has since become notorious for discrimination, lynching, and peonage, Councill, Percy, and Warren all suggest that southerners—white and black alike—also believed in a type of pluralism, an arrangement that preserved cultural and racial differences, meanwhile perpetuating “harmonious cooperation” between blacks and whites.81 Segregation, if repressive, was also conducive to the perpetuation of such traits; a system that allowed the races to live side by side in “peace and amity.”82 Though endorsed by extremists intent on subordinating blacks, Jim Crow legislation was also sponsored by black and white moderates who believed racial segregation would reduce interracial violence and allow the races to co-exist peacefully in their own, distinct, cultural spheres.83

Recovering Jim Crow’s role in bolstering southern pluralism helps to explain the odd fact that even though he himself was a product of the South, Lewis F. Powell, Jr. never

78. Id.
79. Holly et al., supra note 73, at 432.
80. Id. Of course, pluralist thinking also had a negative side, one that fostered racial prejudice. Following a race riot in Atlanta in 1906, for example, Georgia moderates lobbied for a series of restrictions on alcohol under the theory that lest “whiskey be taken from the Negro” blacks would “relapse into animalism,” whites would suffer from “Negro crime,” and the “ever-constant danger of race war” would be increased. Crowe, supra note 22, at 236. When whites protested, reformers like A.J. McKelway argued that sacrifices needed to be made by the “stronger” race in order to protect the “inferior” race from its own “weakness and folly.” A.J. McKelway, State Prohibition in Georgia and the South, OUTLOOK, Aug. 31, 1907, at 947–48. Though prejudiced to be sure, McKelway’s intent was to help blacks, even if that meant hurting himself. For moderate, or “Progressive” sponsorship of such laws, see J. Fanning O’Reilly, The Growth of Prohibition and Local Option, INDEPENDENT, Sept. 5, 1907, at 564–67.
81. See Warren, supra note 62, at 246–64. Again, I borrow the term “harmonious cooperation” from Dalia Tsuk Mitchell precisely because it dovetails with William Alexander Percy’s sense that segregation facilitated peace and amity between the races. MITCHELL, supra note 8, at 15.
82. PERCY, supra note 59, at 286.
83. CELL, supra note 9, at 179–80.
identified himself as a racist. It also helps explain why he embraced a rationale for integration that placed racial difference, or diversity, at its core. This, incidentally, was not a characteristic of Brown v. Board of Education of Topeka. According to the Supreme Court's opinion in Brown, African-American culture and institutions were not, on their own, worth preserving. Indeed, the ultimate goal of integration was not to celebrate black culture, but to awaken black children to the majority's "cultural values."

To illustrate, the Supreme Court cited a study of American race relations by a Swedish sociologist named Gunnar Myrdal who maintained unequivocally that black culture was both "distorted" and "pathological." To prove such assertions, Myrdal cited some of the very aspects of black culture that white southerners like William Alexander Percy and Henry Grady celebrated, including the black church's emotionalism, black cultivation of the arts, and black membership in sociable organizations. On this last point, Myrdal held black voluntary associations to be pathological because they "drain off a large part of the Negroes' spare time," and therefore constitute "wasted effort." Rather than encourage such organizations, Myrdal advocated their destruction. "[I]t is to the advantage of American Negroes as individuals and as a group," he maintained, that blacks become assimilated into American culture and be forced to "acquire the traits held in esteem by the dominant white Americans."

Brown's emphasis on assimilating blacks into white culture troubled white southerners like Powell for reasons that had little to do with racial discrimination. In his mind, desegregation posed staggering problems not simply to white supremacists but to "both races in the South." Indeed, "most southerners," he argued, had "understandable" reasons

85. See id. at 493-94.
86. Id. at 493.
87. GUNNAR MYRDAL, AN AMERICAN DILEMMA 928 (1944), cited in Brown, 347 U.S. at 494 n.11.
88. See MYRDAL, supra note 87, at 928-29.
89. Id. at 953-54.
90. Id. at 929.
91. Powell, supra note 13, at 1.
for supporting segregation and opposing Brown. 92 One such reason was the preservation of southern pluralism, or as Powell put it, combating the “threat” that integration posed to southern mores and social customs.93 While Gunnar Myrdal saw such mores and social customs to be pathological, Powell clearly did not. If anything, Myrdal’s call for the destruction of black culture, and the concomitant end of southern social customs, was arguably one of the aspects of Brown that “shocked” Powell the most.94

Powell confronted Myrdal’s brand of mono-culturalism directly during the summer of 1958 when he traveled to the Soviet Union as part of an American Bar Association (ABA) delegation.95 As the next section elucidates, this trip convinced Powell that the struggle over integration and the Cold War were linked, even as it alerted him to the manner in which the Soviets emphasized a frightening degree of centralized, cultural control. His time in the Soviet Union convinced him that whites were rapidly becoming a global minority.

III. POWELL GOES TO RUSSIA, 1958

Though Lewis Powell believed strongly in southern mores and social customs, the Soviet launching of Sputnik in 1957 convinced him that “massive and immediate aid” to public schools, not massive resistance, was necessary for Cold War victory.96 During an address in January 1958, he endorsed a plan proposed by President Eisenhower to funnel federal dollars into improving America’s schools, but complained that it did not go far enough.97 Convinced that Russia had “equaled” American atomic capabilities and “moved spectacularly ahead in missiles and rocketry,” Powell called for short-range as well as “long range programs to gain scientific superiority and ultimate control of Space.”98

Powell was not just interested in weapons; he believed

92. JEFFRIES, supra note 12, at 139; Powell, supra note 13, at 6.
94. JEFFRIES, supra note 12, at 139.
97. See id. at 1.
98. Id.
the most important long-range program was improving America’s educational system. This meant developing effective plans for training mathematicians, scientists, and supporting technicians, all of whom were required to return America to a position of technological primacy. Though Powell hoped that this could be done through state and local funding, he conceded that “there is little reason to believe” either states or localities would make the necessary effort. This meant that the federal government needed to step in, offering “massive and immediate aid” to facilitate state reforms. Powell believed states that were “devoted to the principle of ‘States’ Rights’” needed to soften their positions, acknowledge federal supremacy, and accept federal money lest the Soviets “out-distance us in the race for survival.”

For massive resisters in Virginia, Powell’s call to accept “massive” federal aid undermined the struggle against Brown. If, as Powell posited, local schools needed federal money, how could segregationists argue that the federal government possessed no right to dictate education policy? At first glance, this made Powell look like a strategic integrationist. By invoking the Cold War, he seemed to be developing a rationale for increased federal involvement in schools, arguably undermining Jim Crow.

Though he was opposed to massive resistance, Powell’s interest in national security proved more than simply a ruse aimed at destabilizing segregation. Evidence of this emerged in the summer of 1958, when he traveled to the Soviet Union. The two-week trip provided Powell and his fellow attorneys with an opportunity to study the Soviet legal system, meet lawyers and judges, and travel through Moscow, Leningrad, Minsk, and Kiev. Powell described the experience as amazing and discouraging. In a summary of

99. See id. at 2.
100. See id. at 1–2.
101. Id.
102. Powell, supra note 96, at 3.
103. Id. at 2–3.
105. Powell, supra note 96.
106. Id.
107. Id. at 1.
108. Id. at 2–3.
observations written shortly after his return, he lamented the “[b]lack [o]ut on [n]ews of the [o]utside [w]orld,” that the Soviets imposed on their people, which included the “jamming” of foreign radio broadcasts and maintenance of a “kept’ press” that only disseminated information the Government wished its citizens to know. Concomitantly, Powell expressed disbelief at the “[m]agnitude of [a]nti-American [p]ropaganda” which occupied “about [twenty percent] of the reading matter in every newspaper,” and focused on “belittling” American institutions and culture, including segregation in the American South, which proved one of the major points of the “propaganda attack.”

Just as Powell noted Soviet jabs at segregation, so too did he document many signs of a “Soviet effort to win the ‘uncommitted’ peoples and nations of the world.” Posters on walls and billboards often portrayed citizens of various races accompanied by slogans such as ‘peace and friendship.” Menus in hotels and restaurants were usually printed in several languages, and an “endless stream of ‘delegations’ from other countries” seemed to occupy the hotels in which the ABA group stayed. To Powell, the Soviet government appeared to be making every effort to “sell the basic Party line that the U.S.S.R. is the bulwark of peace and brotherhood against the ‘war-mongers’ of Capitalism in America.” Powell even described a Russian postage stamp picturing “a Soviet child arm and arm with children of other races.”

Intrigued by Soviet inter-racialism, Powell expressed even more admiration for the Soviet emphasis on education and culture. The “construction of secondary schools,” he noted, was “receiving high priority,” as was higher education. Not only was the new university the “most imposing building in Moscow,” but the state provided free college education to all who could pass the entrance

109. Id. at 2.
110. Id. at 2–3.
111. Powell, supra note 96, at 4.
112. Powell, supra note 95, at 4.
113. Id. at 4–5.
114. Id. at 5.
115. Id. at 4.
116. See id. at 5–6.
117. Id. at 5.
examinations. Such opportunity, coupled with the fact that university students could not be drafted into military service or forced labor, created a universal desire to go to college.

Powell learned about Soviet education from a variety of sources, including a conference with the top official in charge of Leningrad’s schools, talks with graduates of Russian universities, and a tour of a secondary school in Kiev. Perhaps the most remarkable source of information that Powell came across, however, was a seventeen-year-old Russian student named Irina Shapiro who had spent her first six years in a Russian public school before traveling to the United States for high school. Shapiro confirmed Powell’s theory that the United States had become a target of abuse. According to the seventeen-year-old, her instructors tended to “[d]istort American history,” by emphasizing segregation and “mak[ing] fun of American ‘culture.’” Shapiro explained that American culture was conveyed in negative, even prurient terms, and was obsessed with Hollywood, bars, gangsters, and crime. Conversely, Soviet officials strove to create “an atmosphere conducive to interest in literature, the theatre, art, and music.”

Russia’s official emphasis on culture struck Powell as a remarkable aspect of its educational system. On the one hand, Powell recognized that it created a national atmosphere conducive to interest in literature, the theatre, art, and music. He even recalled being “enormously impressed by the number of book stores, libraries, and by the countless thousands of people who walk the streets, stand in ‘queues’ and ride the subways reading a book or having one under their arm.” Yet Powell also feared that Russia’s obsession with high culture concealed costs. He noted that “[t]here is a National Minister of Culture,” who possessed absolute control

118. Powell, supra note 95, at 5.
119. See id.
120. See LEWIS F. POWELL, JR., SOVIET EDUCATION—A MEANS TOWARDS WORLD DOMINATION: REPORT ON TRIP TO SOVIET UNION (JULY-AUGUST 1958) 1 (1958).
122. Id. at 2.
123. See id.
124. POWELL, supra note 120, at 9.
125. See id.
126. Id.
over “book publishing, theatres, the museums, moving picture production, television and other cultural media.”127 This meant that freedom of the press—and, to a large extent, freedom of speech—did not exist. Television was “not used for advertising purposes, soap operas, or other ‘non-educational’ purposes,” and state sanctioned forms of art, literature, and music were infused with “massive propaganda.”128 The aim of such propaganda, Powell surmised, was both to elevate communism and to ridicule or belittle American culture—a depraved celebration of “juke boxes” and “jive dancing.”129

That the Soviets equated the worst of American culture with black cultural forms did not sway Powell from his view that southern customs were worth preserving; nor did it convince him that black culture needed to be destroyed. Indeed, rather than side with Gunnar Myrdal, Powell became convinced that Brown could be circumvented and southern pluralism preserved. All that needed to happen, he argued, was that public schools be “properly distributed geographically.”130 Once this was done, then “no more than a negligible percentage of integration” was likely to occur for many years.131 In cases where too few schools existed to serve racially segregated neighborhoods, Powell recommended building additional facilities.132 In Richmond alone, he maintained, “new schools would appreciably improve both the short and long range prospect for minimizing the impact of integration.”133

Rather than push white culture on black students, Powell demanded that all students be educated on the evils of communism, even arguing that children should be required to take a course on Marx.134 Alarmed at the “carefree and complacent” attitude that many Americans possessed towards the “relentless” efforts of the U.S.S.R. to destroy democracy

127. Id.
128. Id.
129. Id. (internal quotations omitted).
131. Id.
132. See id. at 8–9.
133. Id. at 8.
and freedom, Powell endorsed a full-year class highlighting the "threat of Communism." Powell argued that some discussion of totalitarian dictatorship, as well as the fact that Marxism was a "world-wide conspiracy" dedicated to world conquest, should be included in the course.

To further these goals, Powell introduced a bill into the Virginia legislature that would require every secondary school to offer a course dedicated to the study of Communism. In such a class, students would learn about "the techniques of propaganda, falsehood, intimidation and subversion" that communist countries "practiced relentlessly" to consolidate their influence around the world. Students would also learn about the "imperialistic expansion" of communism since World War II.

Powell's alarm at communist expansion following World War II became evident at a talk he delivered to Richmond teachers in January 1961. Contrasting America's global influence in 1946 to its international status in 1961, Powell noted that immediately following the War America was the world's "acknowledged leader," faced no foreseeable threat to its security, and enjoyed a tranquil world in which Europe, Asia, and South America were all on its side, and Africa was "still asleep." By contrast, in 1961 the United States had lost its "atomic monopoly" and control of the United Nations, declined in global influence, sacrificed its security, and entered economic decline.

Powell argued that among the reasons for America's slide, was a combination of Communist espionage, subversion, and propaganda that had led to the "awakening of underprivileged peoples" in Asia, South America, and Africa. Once "asleep" under European imperial rule, Third World peoples now threatened to tip the scales against the West, a development that not only alarmed Powell, but also

135. Id. at 2.
136. Id. at 7.
138. See id.
139. Id.
140. Lewis F. Powell, Jr., 15 Years Have Transformed Our World (Jan. 1, 1961).
141. Id.
142. Id.
pushed him to view race in global terms. With imperialism crumbling and communism boasting "one third of people on earth," Powell argued that whites had become an endangered minority.

Because Powell was already prone to thinking of white southerners as an embattled minority, his interest in the Cold War confirmed his fears that the white race was in decline. Indeed, Powell's 1958 trip to the Soviet Union helps explain why, over ten years later, he would refer to Anglo-Saxon Protestants as the world's "new" minority. Over the course of the 1950s and 1960s, challenges to white institutions, and to white rule, emerged across the South. In 1961, black activists organized freedom rides across the Deep South, not to celebrate southern pluralism but to dramatize the injustices suffered by African-Americans under Jim Crow. Barred from voting, they drew inspiration from black college students who were frustrated with the lack of compliance with Brown v. Board of Education and staged sit-ins across the South only a year earlier.

Rather than sympathize with such protests, Powell reacted harshly to them. In fact, he tended to associate the civil disobedience of the civil rights movement with America's Cold War struggle, but not in the same way that the Department of Justice tied the Cold War to civil rights in Brown. To Powell, the movement's violation of local law—even segregation ordinances—undermined the authority of law generally, compromising America's Cold War claims to being a nation that respected legal process. Powell made this

143. Id.
144. Id.
145. Id.
149. See id, at 118—19; See also WILLIAM H. CHafe, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 71—101 (1980).
150. See, e.g., Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61 passim (1988).
point clear on May 1, 1964 in Columbia, South Carolina.\textsuperscript{151} Noting the recent sit-ins and demonstrations, Powell announced to an audience of attorneys that, “it is not surprising that crime and delinquency by children within schools appear to be increasing sharply.”\textsuperscript{182} “[U]nless our cherished system of liberty under law is to become a mockery,” he continued, “the courts—rather than the streets—must be the arbiters of our differences.”\textsuperscript{153}

Powell’s aversion to the streets indicated a fear not only of rising crime rates, but an awareness of the manner in which direct action protest flaunted legal process. That he alluded to this on May 1st was significant; designated “Law Day” by President Eisenhower in 1958, May 1st represented one of Communism’s biggest holidays.\textsuperscript{154} During his Columbia address, Powell declared that Law Day was intended to “dramatize the contrast with Communism’s May Day.”\textsuperscript{155} For Powell, Eisenhower, and others, the occasion commemorated the stark contrast between America’s “freedom under law” and the “repressive system of Communism.”\textsuperscript{156}

That Powell chose to deride direct-action protest for undermining “freedom under law” indicates that he did not approve of the new generation of civil rights leaders, including Martin Luther King, Jr., who lobbied for moving away from the courts and into the streets. Yet, Powell also realized that massive resistance to civil rights was futile. Instead, he worked to forge a third way, a path that acknowledged the inevitability of integration without sacrificing the significance of racial difference. Indeed, as observed in the next section, Powell would make the preservation of racial difference, or diversity, the single most compelling rationale for integration in the post-Civil Rights Era United States.

IV. THE RACIAL PLURALISM OF \textit{REGENTS V. BAKKE}

As the tumultuous sixties ground on, Powell became

\textsuperscript{151.} Lewis F. Powell, Jr., Law Day—A Time for Rededication (May 1, 1964).
\textsuperscript{152.} \textit{Id.} at 5.
\textsuperscript{153.} \textit{Id.} at 7.
\textsuperscript{154.} \textit{Id.} at 1, 8.
\textsuperscript{155.} \textit{Id.} at 8.
\textsuperscript{156.} \textit{Id.} at 2.
more and more opposed to civil rights demonstrations and demonstrators. He made this clear in a 1966 Washington & Lee Law Review article, in which he referred to civil disobedience as heresy.\textsuperscript{157} Heralding America's tradition "of equal justice under law," Powell lamented that Martin Luther King, Jr. provided a justification of tactics that were "lawless and indefensible."\textsuperscript{158} Acknowledging that African-Americans had reason to be frustrated, he did not condone their move to direct-action protest in the streets. "Even the ebullient Dr. King," mocked Powell, "has recognized that his theory is not legal."\textsuperscript{159}

Yet, even as Powell bemoaned King's strategies, he seemed remarkably untroubled by groups who endorsed racial separatism. For example, in 1972 Powell ruled in favor of defendants belonging to a radical organization allied with the Black Panthers.\textsuperscript{160} Inspired by Stokely Carmichael's call for Black Power in 1966, the Panthers rejected the integrationist agenda of the NAACP and lobbied for black self-determination, black juries, and armed self-defense.\textsuperscript{161}

Powell confronted the legitimacy of the Panthers in 1972 when a member of an allied group was arrested for bombing a Central Intelligence Agency (CIA) office in Michigan.\textsuperscript{162} The suspect, Lawrence "Pun" Plamondon, had been ensnared in a series of wiretaps between himself and members of the Black Panther Party.\textsuperscript{163} However, the wiretaps had not been authorized by warrant and were therefore only admissible if the Supreme Court decided that national security had been at stake.\textsuperscript{164} Powell took pity on Plamondon's plight. In his mind, Pun's organization posed no threat of either attacking or subverting the existing structure of the United States Government, even though Plamondon had been caught with

\begin{itemize}
  \item \textsuperscript{157} See Lewis F. Powell, Jr., A Lawyer Looks at Civil Disobedience, 23 WASH. & LEE L. REV. 205, 205 (1966).
  \item \textsuperscript{158} Id. at 207.
  \item \textsuperscript{159} Id. at 215.
  \item \textsuperscript{161} See Thomas J. Sugrue, Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North 341-43 (2008).
  \item \textsuperscript{162} See U.S. Dist. Ct. for the E. Dist. of Mich., 407 U.S. at 299.
  \item \textsuperscript{163} See id. at 299-300; Jeffries, supra note 12, at 375; Detroit Radicals Face Bomb Trial: Defense Challenges Jury System and Wiretapping, N.Y. TIMES, Jan. 17, 1971, at 49.
  \item \textsuperscript{164} See U.S. Dist. Ct. for the E. Dist. of Mich., 407 U.S. at 306.
\end{itemize}
Powell's opinion was remarkable for at least three reasons. First, there was quite a bit of evidence to indicate that Plamondon's organization, the White Panthers, was indeed serious about attacking the United States government, as Plamondon's own bombing of a CIA office in Madison suggested. Second, Powell had only recently argued in favor of liberalizing warrant requirements on wiretaps, publicly criticizing an American Bar Association report recommending warrantless wiretaps only in cases involving "acts of a foreign power." Powell wrote that distinctions between external and internal threats were increasingly "meaningless" given that radical left organizations were plotting violence and revolution at home. Finally, Powell had made a point of sharply criticizing civil rights demonstrators in past statements. So why did he not look more harshly on groups like the Panthers?

One explanation offered by Powell biographer John C. Jeffries is that Powell changed his views after he "immersed himself in the language and reasoning of Fourth Amendment precedents," an argument that presumes a certain naivety on Powell's part, as if he did not understand the importance of warrant requirements before reading the relevant cases. A second explanation offered by Jeffries is that Powell changed his mind because he was no longer a private citizen free to indulge "his distaste for the targets of wiretapping," but rather was beholden to "protect the rights of all citizens." Yet, if Powell suddenly felt like he was beholden to all citizens, why did he not feel even more passionately about the perceived threats that a few fringe radicals posed to

165. JEFFRIES, supra note 12, at 375.
167. JEFFRIES, supra note 12, at 376.
168. Id. at 377.
170. JEFFRIES, supra note 12, at 380.
171. Id. at 380.
American institutions, institutions that he had sworn by law to protect?

Though it is certainly possible that Powell changed his views because he had read more cases and donned a black robe, he clearly did not appear to be phased by the Black Panthers or their friends. Indeed, Powell’s benign view of the Panthers contrasted starkly with his negative response to Martin Luther King, Jr., who endorsed non-violent protest as the best possible means of achieving integration. Perhaps the best explanation for this was that despite their violent bluster, the Panthers differed fundamentally from King in that they ultimately legitimated what Powell himself had always believed, namely that racial separatism was not inherently discriminatory and that, in some cases, African-Americans even preferred it.

Whether or not Powell’s decision in United States v. U.S. District Court for the Eastern District of Michigan was influenced by his pluralist view of race, Powell articulated those views more forthrightly in a widely publicized ruling six years later. In 1978, he wrote the controlling opinion in a case involving a white plaintiff named Allan Bakke, who had been denied admission to the University of California at Davis (U.C. Davis) Medical School. Convinced of his eligibility, Bakke blamed his rejection on a policy that reserved sixteen out of one hundred available entry positions to minorities, including African-Americans, Mexican-Americans, and American Indians. While the average scores of minorities who gained acceptance hovered around the thirty-fifth percentile on the Medical College Admissions Test, or MCAT, Bakke’s score neared the ninetieth percentile, fueling his outrage that lower scoring minorities had been admitted before him.

The Court’s conservatives, like William Rehnquist, immediately sided with Bakke, arguing that the racial set-asides endorsed by U.C. Davis were discriminatory. In a joint opinion, Justices Stevens, Burger, Stewart, and

174. Id.
175. See JEFFRIES, supra note 12, at 456.
176. Bakke, 438 U.S. at 408–21 (Stevens, J., dissenting); JEFFRIES, supra note 12, at 486.
Rehnquist agreed that U.C. Davis's quota system violated Title VI of the Civil Rights Act of 1964, which banned racial discrimination by any institution that received federal funds. Though the Act had been written to ameliorate conditions in the American South, conservatives on the Court believed that the Act applied to any institution that singled out individuals by race. They argued that regardless of whether the victims of such policies were minorities, quotas like the one at the U.C. Davis Medical School represented an arbitrary and therefore illegitimate racial classification.

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

Powell disagreed. In his mind, it was just as bad if groups were singled out for being better than if they were declared inferior. Yet, Powell proved unwilling to strike down all forms of affirmative action in admissions. So long as such programs were narrowly tailored to serve compelling state interests, posited Powell, then they should be upheld. Such interests included the attainment of "genuine" diversity, a goal that could not be achieved through quotas but rather required considering "racial or ethnic origin" as but one of several important elements.

To many, this was confusing. "For reasons that were not—and could not be—satisfactorily explained," complained Powell biographer John Jeffries, "Powell insisted that fixed

177. See Bakke, 438 U.S. at 408–21; JEFFRIES, supra note 12, at 486.
178. See Bakke, 438 U.S. at 325.
179. See id. at 324–79.
180. See id. (Brennan, J., concurring).
181. JEFFRIES, supra note 12, at 486.
182. Id.
183. See Bakke, 438 U.S. at 298; JEFFRIES, supra note 12, at 492.
184. See JEFFRIES, supra note 12, at 469.
186. Id. at 315.
quotas 'would hinder rather than further attainment of genuine diversity.'”187 Yet, Jeffries missed the manner in which Powell felt that diversity applied to whites as well as blacks. Unlike legal liberals, Powell did not think of diversity as part of a larger scheme for overcoming past discrimination against African-Americans, but rather an attempt to recreate the pluralist world in which he himself had been raised. In that world, whites did not repress blacks through Jim Crow laws, but rather whites and blacks voluntarily respected Jim Crow laws because they believed such laws helped bolster their own traditions, their own cultures, and their own identities.188

Most observers at the time missed this. To them, Powell’s decision represented a strategic compromise or, as Judge Henry Friendly put it, “moderation.”189 General Maxwell Taylor hailed Powell’s invocation of white minorities as an “amazing feat of making all parties reasonably happy.”190 Harvard Law Professor Alan M. Dershowitz proclaimed Powell’s opinion “an act of judicial statesmanship.”191 Others saw in Powell’s ruling more than simply an aim to compromise, but also a genuine shift in his segregationist views in favor of the African-American struggle. According to Jeffries, for example, Powell’s decision reflected a clear break from his past, evidence that he suddenly felt “personal responsibility for racial justice.”192

Yet, Powell forthrightly rejected the idea that blacks had suffered injustice, at least not any more than other “minorities” in the United States.193 Indeed, much like William Alexander Percy, Powell seemed to believe that whites had themselves become something of a discrete and insular minority, confounded by their black peers and menaced by Soviets abroad.194 “[T]he white majority,” argued Powell, is itself “composed of various minority groups, most of which can lay claim to a history of prior discrimination at the

187. JEFFRIES, supra note 12, at 477.
188. See supra Part II.
189. JEFFRIES, supra note 12, at 498.
190. Id.
192. JEFFRIES, supra note 12, at 499.
194. See id. at 295.
hands of the State and private individuals."\(^{196}\)

Everywhere Powell looked, he saw minorities. "[T]he United States had become a Nation of minorities," he mused, including Mexicans, Chinese, and Celtic Irishmen.\(^{196}\) Each had to struggle, "and to some extent struggles still."\(^{197}\) Though aware that the Fourteenth Amendment had been written expressly for "members of the Negro race," Powell insisted that its language was sufficiently neutral to embrace a broader principal including discrimination against white "minorities."\(^{198}\)

While liberals celebrated Powell’s decision as a victory for blacks, few recognized that his opinion ultimately focused on a more refined conception of whites.\(^{199}\) Indeed, most commentators ignored the possibility that even Allan Bakke himself might have been considered a member of a minority in Powell’s eyes. After all, he was a Norwegian from Minnesota who came from an under-represented geographic origin, had spent time on a farm, and belonged to the “new minority of white Anglo-Saxon Protestants.”\(^{200}\)

Powell’s invocation of the Anglo-Saxon Protestant as a “new” minority was truly remarkable. Not only did it invoke Percy, but it hearkened back to the earliest days of diversity theory, a point in time when American whites viewed themselves as racially dissimilar, and Anglo-Saxon Protestants proclaimed their superiority over other white Europeans, including immigrants from Central, Southern, and Eastern Europe.\(^{201}\) Perhaps no single theorist articulated this notion more forthrightly than Madison Grant, an intellectual, scientist, and conservationist who argued that Europeans of Nordic descent—Anglo Saxons—were being subsumed by hordes of immigrants from the Alpine and Mediterranean regions of Europe, many of them Catholic and

\(^{195}\) Id. Powell’s notion of whites as minorities echoed the views of Jewish intellectual Morris Cohen. Father of legal pluralist Felix Cohen, Morris believed that ultimately every “group of human being” was “a minority in one situation or another.” MITCHELL, supra note 8, at 15.

\(^{196}\) Bakke, 438 U.S. at 292.

\(^{197}\) Id.

\(^{198}\) Id. at 293.

\(^{199}\) See Greenhouse, supra note 5, at A23.

\(^{200}\) Bakke, 438 U.S. at 296, 316, 323.

Jewish. 202

Grant’s theories captured the imagination of white Americans in both the North and the South in the 1920s, even inspiring admissions officials at elite educational institutions like Harvard and Yale to limit Jewish applicants. 203 Jewish students proved so competent on entrance exams that they threatened to upset the “balance” at New England’s most selective colleges, pushing out “sturdy young men” of wealthy Protestant extraction. 204 To prevent a “Jewish problem,” admissions officials at schools like Harvard augmented test scores with letters from teachers and personal interviews to shed light on non-grade based qualities like applicants’ character. 205 Over time, this policy evolved into one that considered a variety of intangible qualities including alumni connections, athletic ability, regional background, familial wealth, and race. 206

To the dismay of his law clerks, Powell invoked Harvard’s diversity plan in his Bakke opinion. 207 As he explained it, the plan provided a flexible means of considering race without relying on inflexible quotas. 208 Though his clerks found the distinction to be disingenuous, they did not consider the possibility that Powell might have been drafting his ruling with whites in mind. 209 Only Thurgood Marshall insinuated that such might be the case. It is “more than a little ironic,” he complained, that Powell would rule in favor of Bakke given the “several hundred years of class-based discrimination” directed against blacks in the United States. 210

Others agreed. Some found Powell’s invocation of diversity little more than a bid to enhance the educational experiences of whites by allowing for the “token assimilation of people of color.” 211 According to this view, the Powell model of diversity meant little more than “assimilating token people

202. Id.
203. Id. at 103, 172.
204. Id. at 185.
205. Id. at 102.
206. See id. at 186, 498.
207. See JEFFRIES, supra note 12, at 484.
208. See id. at 476.
209. See id. at 476, 484.
of color into the dominant white-supremacist culture for the benefit of maintaining that culture.”

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

For Powell, genuine diversity meant admitting students of different religions, students from cities and rural areas, and students possessing a variety of interests, talents, and perspectives. Admittedly, this was not about correcting past injustice. Nor, for that matter, was it about ending segregation in all its forms. Instead, it indicated that legal discrimination had led to diverging perspectives, and that preserving those perspectives was important.

Of course, Powell did not endorse a return to Jim Crow. Evidence of this emerged in 1986 when he penned an opinion invalidating a school’s policy of retaining minority teachers during mass layoffs under the theory that such leaders provided role models for minority students. The idea that such students needed minority role models failed to convince Powell, who argued that such an argument “had no logical stopping point.” Indeed, in his mind it threatened a slide back in the direction of Jim Crow. “Carried to its logical extreme,” wrote Powell in Wygant v. Jackson Board of Education, “the idea that black students are better off with black teachers could lead to the very system the Court

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213. Sullivan, supra note 211, at 297.
215. Id.
216. Id.
217. See id. at 312–13 n.48.
219. Id. at 275.
rejected in *Brown v. Board of Education.*"  

*Wygant* would be Powell’s last decision on race and schools. Following his retirement in 1987, only two more cases emerged that dealt significantly with the standard of review that he had established in *Bakke.* The first case, *Hopwood v. Texas,* involved an applicant to the University of Texas Law School who charged that the school’s admissions policies discriminated against her because she was white. In a dramatic turn of events, the Fifth Circuit Court of Appeals declared the admissions policies at Texas to be unconstitutional because they employed race as a factor in student admissions. Though Texas officials had carefully tailored their plan to coincide with *Bakke,* the Fifth Circuit found Powell’s opinion both unpersuasive and non-authoritative given that the four Justices who joined his conclusion did not agree with his reasoning. In a move that shocked many, the Supreme Court refused to hear *Hopwood* on appeal, creating the impression that the Fifth Circuit might somehow be right, and that *Bakke* was invalid.

The Court resolved much of the uncertainty left by its refusal to hear *Hopwood* when it ruled on the University of Michigan Law School’s race-conscious admissions program in 2003. Writing for the majority in *Grutter v. Bollinger,* Justice Sandra Day O’Connor held that Michigan’s policy, which considered race to be one factor among many, was narrowly tailored to suit the University’s interest in promoting diversity, and was therefore constitutional. O’Connor modeled much of her opinion on Powell’s reasoning in *Bakke,* but went even further by holding that not only was genuine diversity important for the educational benefits that it provided students, but that it also had significant implications for national security and business. O’Connor argued that both corporate America and the military required

220. *Id.* at 276.
221. *Hopwood v. Texas,* 78 F.3d 932 (5th Cir. 1996).
222. *See id.* at 934.
223. *See id.* at 944–45.
226. *Id.* at 342.
diverse leadership in order to succeed.228

Hailed by proponents of affirmative action, Grutter appeared to affirm Bakke's place in America's constitutional canon.229 Yet, even as Powell's articulation of diversity continues to guide admissions committees around the country, administrators have reason to be concerned about emerging trends. Following O'Connor's retirement in 2006, two of the Court's opinions signaled a shift away from overt classifications. In one, the Court held that a local fire department erred by taking racial considerations into consideration when deciding on the validity of a promotion exam.230 In the other, the Court invalidated a local school district's attempt to use racial classifications in drawing more inclusive school districts.231 Instead, posited concurring Justice Anthony Kennedy, the way to achieve integrated school districts was to employ race neutral means.232

V. CONCLUSION

Since Lewis F. Powell penned the controlling opinion in Bakke in 1978, most scholars have tended to read the decision as a compromise, a ruling "critical to completing Brown's vision of a society without second-class races of citizens," yet at the same time a departure from "Brown's central premises," particularly its emphasis on the harm that segregation caused black children.233 Yet, Powell's apparent lack of concern for black children belied deeper misgivings about Brown's blatant disregard for black culture, particularly its conviction that minority students needed cultural "awakening."234 A southerner who believed that the races had much to learn from one another, Powell was "shocked" when Earl Warren, a Californian with little understanding of the segregated South, cited Swedish sociologist Gunnar Myrdal to support his Brown opinion.235 Completely ignorant

228. See Grutter, 539 U.S. at 331–33; see also Goldstein, supra note 227, at 918.
229. See Goldstein, supra note 227, at 918.
232. Id. at 790.
233. See Goldstein, supra note 227, at 913–914.
235. JEFFRIES, supra note 12, at 139.
of southern customs and mores, Myrdal blasted black culture as distorted and pathological, meanwhile arguing that the only solution for "American Negroes" was to "become assimilated into American culture" and "acquire the traits held in esteem by the dominant white Americans." 

To Powell, who had grown up in segregated but pluralist Virginia, the Warren Court's call for assimilation was alien, an affront to established "social customs" embraced by whites and blacks alike. Like many white southerners of his station, he believed that segregation fostered pluralism, and that African-Americans and whites possessed their own, unique cultural traits. This helps explain why he endorsed the concept of diversity—a notion that prized difference over assimilation—and proceeded to make the southern view of race the new premise upon which the Supreme Court's jurisprudence on schools would rest.

Now that race-conscious admissions programs risk falling under the same axe as race-conscious school districts and employment tests, defenders of diversity would do well to return to Powell's opinion and recover his notion of "genuine diversity." A southern pluralist, Powell believed that the United States was a "[n]ation of minorities," where blacks and Hispanics joined Celtic Irishmen and Anglo-Saxon Protestants as discrete and insular groups separated by culture, religion, and ethnicity. Rather than simply focus on obvious classifications like color, schools should broaden their scope to admit minorities based on their region of origin, religion, socio-economic background, familial makeup, cultural pursuits, and any other relevant characteristic that might be used not simply to differentiate between whites and blacks, but whites and whites.

As constitutional scholar Akhil Amar has noted, "[b]ackground and life experience are positive attributes—like growing up Amish—and it is neither unfair to whites nor stigmatizing to minorities to consider these factors so long as they do not become the only or the dominant things that

236. MYRDAL, supra note 87, at 929.
238. See supra pp. 649–662.
239. See supra pp. 649–662.
241. Id. at 290, 292.
admissions committees look at.” Of course, if *Ricci v. DeStefano* and *Parents Involved in Community Schools v. Seattle School District No. 1* are any indication, then even minor considerations of race might be invalidated. However, this does not mean that “genuine diversity” cannot still be achieved. As southern history reveals, there are many aspects of social life that are racially divided, even though legal segregation has long since been overruled. Even today, a large number of whites and blacks in America attend segregated churches and belong to segregated denominations; the African Methodist Episcopal Church (AME) being one example for blacks, and the Assembly of God for whites. It could hardly be argued that admitting members of the AME church would be a proxy for race, so long as schools lower their standards to admit Assembly of God candidates as well. The same could be said for students of different regions, different class backgrounds, and even different linguistic origins. If colleges suspend entrance requirements for students who are bilingual, for example, then why not do the same for students who speak American dialectics—like ebonics? After all, having students of different religions, different regions, and different cultural traditions in conversation with one another, regardless of race, would have been, for Lewis Powell, genuine diversity.

244. See supra Part II.