

The South African Sources of the Diversity Justification for U.S. Affirmative Action

David B. Oppenheimer*

“[There are] four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

T.B. Davie, Address to new students at the University of Cape Town,
February 28, 1953.

“Racial diversity within the university is essential to the idea [or ideal] of a university in a multiracial society.”

Albert van der Sandt Centlivres and Richard Feetham, *The Open Universities in South Africa* (Witwatersrand University Press, 1957)

“I cannot imagine greater diversity than there is in Harvard College. It is not superficial; it is deep. It is shown in the variety of races, religions, households from richest to poorest, and in the mental gifts and ambitions [of our students and faculty].”

Charles Eliot, former president of Harvard College, NYT (Mar. 21, 1911).

DOI: <https://doi.org/10.15779/Z38D50FZ4G>

Copyright © 2022

* Clinical Professor of Law, University of California, Berkeley. I am deeply grateful to Jim Bierman, Debbie Collier, Bob Comfort, Nick Lemann, Albie Sachs, Marlene Silbert, and Amina Fahmy, to my student research assistants Nadia Akbari, Loulie Bunzel, Ernesto Casillas, Aaron Cheung, Megan Cistulli, Daniel Myerson, Yemaj Sheik, and Harriet Steele, and to the staff of the University of Cape Town library for their guidance and assistance on this paper.

ABSTRACT

This essay reveals that the “diversity justification” for affirmative action has its roots in part in the South African anti-apartheid movement of the 1950s, and that when Justice Powell wrote the controlling opinion in the Bakke case, placing diversity at the center of our discourse on race in America, he was relying on arguments developed in the anti-apartheid movement that the right to admit a racially diverse student body was a key element of academic freedom. When examined in this light, Justice Powell’s opinion was more concerned with academic freedom than racial justice.

Though Powell’s opinion – which provides the only basis for race-conscious affirmative action in higher education currently permitted under US law – has been the subject of exhaustive study and criticism, it was only recently revealed that the diversity argument Justice Powell articulated was largely cut and pasted from a brief crafted by the great American lawyer and Harvard Law Professor Archibald Cox. Cox drew on a hundred years of Harvard history, beginning with curricular reforms and an ever-expanding search for diversity begun by Harvard’s transformational President Charles Eliot, who in turn borrowed liberally from the work of John Stuart Mill and Harriet Taylor Mill, and from ideas generated in the nineteenth century reforms of the German university under the leadership of Wilhelm von Humboldt. Critical among these reforms was the decision to admit Catholics, Jews and other nonconformists to Oxford, Cambridge and the University of Berlin. Eliot’s quest for diversity, including racial, religious and ethnic diversity, carried through Harvard’s bitter fights over exclusion and inclusion through the twentieth century, with contributions from Oliver Wendell Holmes, Learned Hand, Felix Frankfurter, Erwin Griswold, Thurgood Marshall and Derrick Bok (among others) in what amounted to a multi-generational discussion about the relationship of diversity and academic freedom.

The South African anti-apartheid movement played a role in Cox's argument because his mentors Frankfurter and Griswold befriended their counterparts at the South African Supreme Court and the University of Cape Town just as the South Africans confronted and resisted the beginning of apartheid. In an attempt to prevent the apartheid government from imposing segregation on the two South African universities that then admitted Black students and allowed integrated classrooms, they developed the argument that a university had the freedom to select its students without interference and should select them with an eye on promoting racial diversity in a multi-racial society. Frankfurter and Griswold admired the argument and imported it to the United States, where it fit hand-in-glove into Cox and Bok's goals for Harvard. When Cox (at Bok's request) drew on Harvard's history in writing the brief that persuaded Justice Powell to embrace the diversity rationale, they gave us our anti-apartheid inspired diversity justification.

Although Justice Powell regarded his Bakke opinion as the most important he wrote in his years on the Court, it has been regarded by many as an unfortunate pragmatic compromise that came out of nowhere and has no intellectual heft. Today, as the Court considers whether diversity – or any other justification – is sufficient to allow affirmative action, it is important to recognize the rich legal, intellectual and political history that underlies the Bakke opinion.

INTRODUCTION

One of the most important decisions of the United States Supreme Court in the twentieth century was the case of *Regents of the University of California v. Bakke*,¹ where the Court rejected the University of California Davis medical school's affirmative action admissions program. Eight of the nine justices in *Bakke* saw the case as concerned with racial justice and civil rights. Four condemned the Davis plan as a violation of the principle of "color-blind" equality. Four others celebrated the Davis plan as a step toward equity for Black Americans and other members of racial and ethnic minorities. But the sole author of the controlling opinion – Justice Lewis Powell – in what he later called the most important opinion of his career, saw the case as primarily concerned not with racial equality but with academic freedom under the First Amendment. In this paper I will assert that one of the important influences on Justice Powell's view came from the anti-apartheid movement in South Africa.

On the resolution of the challenge to the UC Davis plan, Justice Powell agreed with the four justices who condemned it, because it created a racial quota by reserving seats that could not be allocated to white applicants.² This equality

1. 438 U.S. 265 (1978).

2. *Id.* at 289.

formalism is contrary to the South African view today, which embraces substantive equality and prohibits discrimination only when it is “unfair discrimination.”³ But even as he condemned the use of quotas, Justice Powell praised an approach he described as the “Harvard Plan”⁴ that would permit colleges and universities to use race and ethnicity as a factor in admissions decisions if they were considered as part of a plan to admit a broadly diverse student body. That plan is today the blueprint for admissions programs at virtually all selective colleges and universities in the United States,⁵ and has been re-approved by the Court in its subsequent higher education affirmative action cases challenging admissions programs at the University of Michigan and the University of Texas.⁶ It is now again before the Court in cases against Harvard and the University of North Carolina.⁷

I have previously explained how Justice Powell’s description of Harvard’s diversity admission policies were lifted word-for-word from a brief written in a different case by the great American lawyer Archibald Cox, and begin this paper by including a small portion of my prior discussion.⁸ Cox filed his brief four years before *Bakke* reached the Court, in a case brought by law school applicant Marco DeFunis against the University of Washington.⁹ The *DeFunis* case would subsequently be dismissed as moot,¹⁰ but not before Justice Powell read the Cox brief and filed it for further use.¹¹ Four years later – in *Bakke* – his law clerk Bob Comfort would remind him of the Cox brief in *DeFunis* and its diversity

3. Section 9(3) of the S. AFR. CONST., 1996.

4. *Bakke*, 438 U.S. at 316.

5. See BERNARD SCHWARTZ, BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT 153–55 (1988) (describing how the Powell opinion in *Bakke* has become a model for virtually all universities).

6. See *Fisher v. University of Texas (Fisher II)*, 136 S. Ct. 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

7. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 20-1199 Cert granted January 2022.

8. See David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 VA. J. OF SOCIAL POL’Y & LAW 158 (2018).

9. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

10. *Id.* at 319-21 (dismissing the case as moot because the petitioner “will complete his law school studies at the end of the term . . . regardless of any decision this Court might reach on the merits of this litigation”).

11. See Oppenheimer, *supra* note 8, at 172 (discussing a memo from Justice Powell’s law clerk drawing his attention to the Cox Brief, and newspaper clippings about the Cox Brief found in Justice Powell’s *DeFunis* file) (first citing Memorandum from John C. Jeffries, Jr. to Justice Powell (Feb. 12, 1974), in Justice Powell’s *DeFunis* archives at 32; and then citing Anthony Lewis, *The Legality of Racial Quotas: Who Will Pay for the Injustice of the Past?*, N.Y. TIMES (Mar. 3, 1974), http://www.nytimes.com/1974/03/03/archives/the-legality-of-racial-quotas-tough-intellectual-issues.html?_r=0 [https://perma.cc/GZQ4-LRE4], reprinted in Justice Powell’s *DeFunis* archives at 45).

justification¹² and he would respond that he liked the diversity argument and wanted to “use DeFunis.”¹³

In that prior paper I described the roots of the diversity justification for affirmative action in Harvard’s embrace of diversity in the late nineteenth century under the leadership of its transformative president Charles Eliot.¹⁴ Eliot, in turn, was influenced by John Stuart Mill and Harriet Taylor Mill’s *On Liberty*, which tied the importance of diversity to success in education, and by Wilhelm von Humboldt, whose reforms of German universities to promote academic freedom and embrace intellectual diversity inspired Eliot’s reforms at Harvard. Eliot’s belief in the importance of diversity was implemented in the 1950s and 60s by three visionary Harvard deans and became an important part of Harvard’s mission in the 1970s.

I have now learned of an additional source of the argument that universities should be permitted as a matter of academic freedom to seek out and admit Black students in order to promote diversity. That source is the South African anti-apartheid movement of the 1950s. I will demonstrate that the academic freedom/diversity argument made by Cox and endorsed by Justice Powell was first articulated by three South African scholars in defense of the University of Cape Town’s diversity admissions policies, and that these arguments first made their way into American First Amendment academic freedom doctrine twenty years before the Bakke case. Moreover, on at least three critical occasions, as Harvard’s leadership was struggling with how to expand their admissions process to admit more Black students, two of the South African proponents of the “academic freedom to obtain diversity” argument interacted with key decision influencers at Harvard, including at least one occasion in which they gained encouragement and support directly from Cox.

One of the South Africans – T.B. Davie – led the University of Cape Town from 1948-1955.¹⁵ In 1953, in defending UCT’s right to select and enroll Black students, Davie stated that there are “*four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.*”¹⁶ Davie’s formula became well known in South Africa, and played an important role in the resistance to apartheid at the University of Cape Town. And, as discussed *infra*, soon after formulating his four essential freedoms Davie met with at least two

12. See Memorandum from Bob Comfort to Justice Lewis Powell (Aug. 29, 1977) (on file with Justice Powell’s *DeFunis* archives, Bakke case folder 2), at 30-40, 55, 58-59, 61.

13. *Id.* at 58.

14. See Oppenheimer *supra* note 8, at 190-95, 196. (“[I]t was Charles Eliot who, in re-making Harvard into a great university, put John Stuart Mill’s ideas on diversity to work, helping to set Harvard on the path to the diversity policies adopted by every selective U.S. college today.”)

15. HOWARD PHILLIPS, UCT UNDER APARTHEID PART 1 FROM ONSET TO SIT-IN 1948-1968 at 4 (2019).

16. T.B. Davie, Address to new students at the University of Cape Town (Feb. 28, 1953).

Americans who would become important figures in American higher education and Harvard policy.

The second – Albert van der Sandt Centlivres – served as the Chief Justice of South Africa and the Chancellor of the University of Cape Town.¹⁷ In 1957 Centlivres and a third South African co-authored the book **The Open Universities in South Africa** in which he argued that “*racial diversity within the university is essential to the idea of a university in a multiracial society.*”¹⁸ Citing Davie, they argued that the right of the university to select its students with the goal of achieving racial diversity was one of the “four essential freedoms” of academic freedom.¹⁹

Cape Town is nearly 8,000 miles from Washington, and Centlivres’ book citing Davie’s “four essential freedoms” could easily have escaped the notice of American law. But Centlivres had befriended US Supreme Court Justice Felix Frankfurter and sent him a copy. That same year Frankfurter cited the Centlivres book and Davie’s four essential freedoms in *Sweezy v. New Hampshire*,²⁰ a Supreme Court decision on academic freedom under the First Amendment, incorporating the four freedoms into our constitutional doctrine. The Frankfurter opinion was featured in the South African and American press,²¹ and Centlivres sent Frankfurter a clipping of the coverage.²² Seventeen years later Cox – a Frankfurter protégé – would cite *Sweezy* in his brief making the Davie-Centlivres South African argument, that the importance of academic freedom justified the use of race under the “Harvard Plan” because (as Cox argued) the First Amendment “generally permits an institution to make an applicant’s probable contribution to the diversity of the student body the primary standard of selection once there is promise of satisfactory academic performance.”²³

17. PHILLIPS, *supra* note 15, at 3-4.

18. ALBERT VAN DER SANDT CENTLIVRES AND RICHARD FEETHAM, *THE OPEN UNIVERSITIES IN SOUTH AFRICA* 6 (1957). Note that the text states “ideal” not “idea,” but this is almost certainly a typographical error, as the key discussion is in a chapter titled “the idea of a university.” I first learned of the book from Professor Anna Hemingway of Widener University, who mentioned it in a presentation at the annual meeting of the Association of American Law Schools (AALS) in January of 2017, and subsequently described the connection briefly in Anna P. Hemingway, *Intentionally and Systematically Integrating Diversity Discussions and Lessons in the Law School Classroom During a Race-Conscious Era*, 33 RUTGERS U. L. REV. 37 (2020).

19. *Id.* at 11-12.

20. 354 U.S. 234 (1957).

21. See James Reston, *High Court Decision Put a Strong Stress on Academic Liberty*, N.Y. TIMES, June 19, 1957; Price Day, *Issues of Freedom Elsewhere: A Voice From Africa*, BALTIMORE SUN, June 24, 1957; Editorial, *Court on Freedom in S.A. Universities*, CAPE TIMES, June 27, 1957. See also, coverage of the book appeared as the case was under consideration in unsigned stories in the Philadelphia Tribune and Chicago Defender, *Academic Freedom*, Philadelphia Tribune, Feb. 16, 1957; *African Students Buck Plans for Segregation* (quoting Centlivres on academic freedom and open universities), CHICAGO DEFENDER, March 9, 1957.

22. See Letter from Albert van der Sandt Centlivres, C.J. of S. Afr. Sup. Ct., to Felix Frankfurter, J., U.S. (June 29, 1957) (on file with author).

23. Brief for the President and Fellows of Harvard College as Amicus Curiae, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235) at 25.

The South African anti-apartheid movement and the United States civil rights movement often worked in a loosely defined alliance, cheering each other's victories and mourning together at each other's losses. Others have written extensively about the hope generated in South Africa by the U.S. civil rights movement, and the communal mourning following the massacre at Sharpeville or the assassination of Dr. King. The connections between the legal profession of the U.S. and South Africa are legendary, with visits back and forth closely associated with support for an end to apartheid and Jim Crow, and with collective strategies regarding boycotts and divestment campaigns. But this story of how arguments crafted by South African jurists and scholars helped persuade Justice Powell to embrace the importance of racial diversity as a justification for affirmative action has not to my knowledge been previously extensively explored.²⁴

PART I: THE POWELL OPINION IN BAKKE

In *Regents of the University of California v. Bakke*, the U.S. Supreme Court divided on the question of whether the UC Davis medical school could set aside 16 of its 100 spaces for Black and other disadvantaged minority applicants.²⁵ The four more conservative members of the Court answered with an unequivocal no; to exclude applicants because of their race violated Title VI of the Civil Rights Act of 1964.²⁶ The four more liberal members answered with an equally unequivocal yes.²⁷ As Justice Blackmun put it, "in order to get beyond racism, we must take account of race."²⁸ But the controlling opinion, by Justice Powell, had little to say about race.

Justice Powell agreed with the conservatives that the Davis plan violated the Constitution by setting aside spaces that white students could not fill.²⁹ But relying on a description of how Harvard College uses race as a factor in admitting a diverse student body, and on the Constitutional doctrine of academic freedom as protected by the First Amendment, he articulated and embraced a different

24. A recent article in the New Yorker Magazine tells portions of this story. A draft of this essay and my conversations with the author providing further details and authorizing its use were the principal source for that portion of the article. See Nicholas Lemann, *Can Affirmative Action Survive*, THE NEW YORKER, Aug. 2, 2021, <https://www.newyorker.com/magazine/2021/08/02/can-affirmative-action-survive> [https://perma.cc/JYJ2-T98D] ("The Diversity Detective").

25. 438 U.S. 265, 266-67 (1978).

26. *Id.* at 421 (Stevens, J., concurring in part, dissenting in part) ("The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the Medical School because of his race.").

27. *Id.* at 325-36 (Brennan, J., concurring in part, dissenting in part) ("[W]e conclude that the affirmative admissions program at the Davis Medical School is constitutional.").

28. *Id.* at 407 (Blackmun, J., concurring in part, dissenting in part).

29. *Id.* at 319 (holding that "the Davis special admissions program involves the use of an explicit racial classification" and is thus "invalid under the Fourteenth Amendment.").

approach, now known as the diversity justification for affirmative action.³⁰ As Justice Powell explained, if a university sees value in racial/ethnic diversity in order to broaden the experiences brought by its students to the educational enterprise, the First Amendment provides that the courts should not interfere. But using racial quotas or making race decisive brings the schools' First Amendment interests into conflict with the applicants' Fourteenth Amendment rights. Thus, the method used by U.C. Davis – a separate admissions track for a certain number of spaces – was impermissible.³¹ In contrast, considering diversity in the way that Harvard College considered diversity was not only permissible, but laudatory.

Justice Powell's ground-breaking endorsement of diversity as a legal justification for race-conscious decision-making in college admissions remains the law today,³² and his description of Harvard College's admissions program has become a blueprint for the admissions process of nearly every selective college and university in the United States.³³ Other potential justifications, including the importance of reversing hundreds of years of racism and discrimination; the continuing social problem of racial discrimination, disadvantage and inequality; the bias and inadequacy of standardized tests; the value of restorative justice; the right to reparations; the importance of providing trained professionals in minority neighborhoods; or the need to address unconscious/implicit bias, have fallen away. Few, if any, schools continue to justify affirmative action on these grounds.

How important was Justice Powell's opinion in *Bakke*? When he stepped down in 1987, after serving for 15 years on the Court, he was asked which was his most important opinion. Without hesitation, he replied, the *Bakke* opinion.³⁴

Justice Powell's description of an acceptable affirmative action plan relied on Harvard College's admissions program and cited an amicus brief filed by four elite private universities (Columbia, Harvard, Stanford and Penn). Justice Powell was so impressed by the Harvard policy as described in the brief he attached the appendix from the brief as an appendix to his own opinion.³⁵ Thus, the amicus brief, and the appendix describing the "Harvard Plan," has taken on iconic status

30. *Id.* at 320 (finding that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.").

31. *Id.* at 314–16.

32. *See* *Fisher v. University of Texas (Fisher II)*, 136 S. Ct. 2198 (2016).

33. *See* *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) ("Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies."); SCHWARTZ, *supra* note 5, at 153-55 (describing how the Powell opinion in *Bakke* has become a model for virtually all universities).

34. SCHWARTZ, *supra* note 5, at 1 (citing Linda Greenhouse, *Powell: Moderation Amid Divisions*, N.Y. TIMES, June 27, 1987).

35. *See* *Bakke*, 438 U.S. at 321 ("Appendix to the Opinion of Powell, J.").

and the brief is recognized as among the most important examples of the power of amicus briefs to shape the law.³⁶

As I have previously written, Justice Powell first encountered and considered the diversity justification for affirmative action four years before the *Bakke* decision in *DeFunis v. Odegaard*,³⁷ a case now largely forgotten because it was dismissed as moot. He did so based on another amicus brief, written by the great American lawyer and Harvard Law professor Archibald Cox on behalf of Harvard University, describing the Harvard College diversity admissions program in identical terms to the appendix to the brief filed four years later in the *Bakke* case. The earlier brief was the unacknowledged source of the description of Harvard's policy that Justice Powell attached to his *Bakke* opinion as an appendix, having been cut and pasted into the four-university brief as its appendix describing Harvard's policies. It was the earlier brief – the Cox brief – which paved the way for the judicial embrace of diversity as a justification for race-conscious college admissions.³⁸

In his *Bakke* opinion, following word-for-word the text of Cox's *DeFunis* brief, Justice Powell described how Harvard's admission plan looked to racial/ethnic diversity to justify considering race in making admissions decisions:

In recent years, Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups . . . In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. . . .³⁹

PART II: T.B. DAVIE AND THE ANTI-APARTHEID MOVEMENT IN SOUTH AFRICA

In 1948 Thomas Benjamin ("TB") Davie (1895-1955) left his post as the Dean of the Faculty of Medicine at the University of Liverpool to return to his native South Africa, where he had been recruited to serve as the Principal and Vice-Chancellor of the country's leading university, the University of Cape Town ("UCT").⁴⁰ In the South African system, the Principal/Vice-Chancellor

36. See, e.g., SCHWARTZ, *supra* note 5, at 153-55.

37. 416 U.S. 312 (1974).

38. See Oppenheimer, *supra* note 8, at 161.

39. *Id.* at 316-18. The reference to the "Farm boy from Idaho" refers to Fred Glimp, who grew up on an Idaho farm and served as Dean of Admissions from 1947-67.

40. PHILLIPS, *supra* note 15, at 1-5.

was the academic leader of the university; the position of Chancellor, then held by the Chief Justice of South Africa, Albert van der Sandt Centlivres, was similar to a chair of the board of trustees or regents of an American University.

That same year, the pro-apartheid National Party came to power⁴¹ and began to systematically segregate the country, banning Black and other non-white persons from most occupations, from voting, from living in or even visiting white neighborhoods, from freedom of movement, speech or assembly, and eventually from attending universities with white students.⁴² From his selection as Principal in 1948 until his death in 1955, Davie actively opposed apartheid and worked to prevent the apartheid laws from taking effect at UCT. In his formal installation address in March 1948 at UCT, TB Davie announced that “a university flourishes only in an atmosphere of absolute intellectual freedom”⁴³ and he committed himself to “the maintenance of an atmosphere of absolute intellectual freedom at the University,”⁴⁴ an insistence which signaled that UCT and the apartheid government would soon be in collision.⁴⁵ As described by UCT professor and historian of apartheid Howard Phillips, when Davie arrived at UCT in 1948, his ideas on academic freedom “were still inchoate, much influenced by the fate of this freedom in the universities of Nazi Germany and the Iron Curtain countries.”⁴⁶

After two years of apartheid, Davie’s views on intellectual freedom had sharpened. In a 1950 graduation address at the University of Witwatersrand he announced his “four principles of academic freedom.” A university, he argued, must have “freedom from external interference in (a) who shall teach, (b) what we teach, (c) how we teach and (d) whom we teach.”⁴⁷ He further declared that “our lectures, theaters and laboratories shall be open to all who can show that they are intellectually capable of benefiting by admission to our teaching.”⁴⁸ Slightly reformulated, he described the four principles in February 1953 in welcoming new students to UCT as “[There are] four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁴⁹

41. *Id.* At 1-2.

42. *See, e.g.*, Extension of University Education Act 45 (S. Afr.).

43. PHILLIPS, *supra* note 15, at 2 (quoting T.B. Davie, Inaugural Address on the Occasion of the Installation of T.B. Davie as Principal (March 1, 1948), transcript available in the UCT Libraries, Special Collections Division, BUZV Collection – Staff).

44. PHILLIPS, *supra* note 15, at 2.

45. *See id.*

46. *Id.*

47. T.B. Davie, Address by Dr. T.B. Davie Vice-Chancellor of the University of Cape Town on the Occasion of the Graduation Ceremony of the University of Witwatersrand Johannesburg (Dec. 6, 1950) at 7, transcript available with UCT Libraries, Special Collections Division.

48. *Id.*

49. T.B. Davie, Address to new students at the University of Cape Town (Feb. 28, 1953); *see also* CENTLIVRES & FEETHAM, *supra* note 18, at 12 n.10.

Having developed his strongly held views connecting academic freedom and the participation of Black and other non-white students in universities, Davie took his views on tour in the United States. The Carnegie Corporation awarded him a travel grant, and he spent September through December of 1953 touring U.S. universities.⁵⁰ His connection with Carnegie was facilitated by a young Carnegie grant-maker⁵¹ – Alan Pifer – who began working with Carnegie in 1953 and would in time rise to serve as its president from 1967-1982. Under Pifer’s leadership, the Carnegie Corporation focused on social and racial justice and education. Pifer and his wife traveled to South Africa, where Davie and his wife hosted them. During the period that Harvard was formulating and defending its affirmative action efforts, Pifer served as a member of Harvard’s governing board,⁵² and was thus in a perfect position to help bring to Harvard Davie’s views on academic freedom and anti-racism.

Pifer was one of several connections between Davie’s four principles and Harvard. In his 1953 visit to the United States, Davie met with Harvard University President Nathen Pusey and with Law Dean Erwin Griswold,⁵³ with whom he discussed race relations and academic freedom.⁵⁴ In his diary of the trip Davie noted that Griswold had met Davie’s partner in his anti-apartheid work, Albert van der Sandt Centlivres, while on his own Carnegie travel grant, and had a very high opinion of him.⁵⁵

The meeting and the topic of their conversation gave Davie the opportunity to share with Pusey and Griswold his articulation of the four essential principles of academic freedom. The discussion with Griswold, in particular, was an opportunity for the two men to share their developing ideas of how racial exclusion offended principles of academic freedom, a subject that was by then foremost in Davie’s thoughts and independently developing in Griswold’s, as evidenced by Griswold’s collaboration with Thurgood Marshall on the cases leading to *Brown v. Board of Education*.

Griswold, a moderate Republican, was among the most influential American lawyers of his generation. He served as dean of Harvard Law School

50. See T.B. Davie, Report on the Tour of Canadian & American Universities by the Principal of UCT Under His Auspices of the Carnegie Corporation of New York, September to December 1953, at 1, (on file with UCT Libraries, Special Collections Division).

51. See *id.* at 1-3.

52. I have tried to determine the precise years of Pifer’s years of service on the Harvard Board, but Harvard insists that this information – which was publicized at the time and continues to be publicized for current board members – may not be disclosed for reasons of privacy.

53. Davie’s visit to Harvard also featured his having lunch with and attending a lecture by Gordon Allport, the pathbreaking professor of psychology who was about to publish his landmark text, *The Nature of Prejudice* (1954). The book was described in 2016 as “probably the most read volume in the history of social psychology.” (THOMAS F. PETTIGREW AND KERSTIN HAMMANN, GORDON WILLARD ALLPORT: THE NATURE OF PREJUDICE (2014) 174-78 in S. Salzborn (Ed.), *Klassiker der Sozialwissenschaften* (Classics of social science).

54. Davie, *supra* note 50, at 5.

55. *Id.*

for 21 years (1946-67), and then as U.S. Solicitor General, a position he held for six years (1967-73), under Democratic President Lyndon Johnson and Republican President Richard Nixon. Griswold was named SG following the elevation of the prior SG, Thurgood Marshall, to the Supreme Court. Marshall had been appointed SG when Archibald Cox stepped down from the position to return to teaching law at Harvard. Thus, from 1961-73 the three advocates who held the position of Solicitor General each played an important role in framing the justification for affirmative action. When Griswold stepped down as dean to become SG, he was succeeded by Derek Bok, a Cox protégé, who would go on to serve as president of Harvard (from 1971-91 and again on an interim basis from 2006-07) and one of the leading scholars and activists in support of the diversity justification for race-conscious affirmative action.⁵⁶

When he met with Davie, Griswold was working *pro bono* with Marshall, then general counsel to the NAACP, on the litigation that would lead to *Brown v. Board of Education*.⁵⁷ In Griswold and Davie's discussion of academic freedom and racial segregation Griswold could contribute his own ideas about diversity. Griswold had recently testified as an expert witness for Marshall in one of the cases against the University of Oklahoma's policy of excluding Black students, testifying that integration is important to a university's success because students learn from each other.⁵⁸ And Griswold would co-author an *amicus curiae* brief two years later with six other leading law professors (from Harvard, Yale, Columbia, Penn, Northwestern and Chicago) on behalf of the Committee of Law Teachers Against Segregation in Legal Education,⁵⁹ in the pathbreaking case *Sweatt v. Painter*,⁶⁰ which was argued in the Supreme Court by Marshall. There, the Court accepted the argument that the Texas plan to create a new law school for Black students, adopted in order to avoid allowing Black students to study law at the University of Texas, was a violation of the Fourteenth Amendment because a separate law school for Black students could never be equal. In a unanimous decision finding the Texas plan unconstitutional, Chief Justice Vinson explained that "[t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."⁶¹

56. Among the most important works on U.S. affirmative action is William G Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998 Princeton University Press and the Mellon Foundation).

57. 347 U.S. 483 (1954).

58. See Letter from Marshall to Griswold, June 14, 1948.

59. Brief for The Committee of Law Teachers Against Segregation in Legal Education, *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44).

60. 339 U.S. 629 (1950).

61. *Id.* at 634.

The Court's language and reasoning tracked that of the Griswold co-authored brief, which argued,

"In classifying the students at the two schools by the test of color, Texas effectively eliminates much of the cross-fertilization of ideas. When a law student is forced to study and talk the shop talk of justice and equity with a segregated handful, he is circumscribed in the effort to achieve any real understanding of justice or equity. At Texas (colored) Sweatt will lose the opportunity of exchanging ideas with a complete variety of fellow students. He will thus lose part of the opportunity to absorb those received traditions of justice and fairness on which Texas law, like the rest of the Anglo-American law, is based. The attorney uncultivated in the traditions of justice and fairness is handicapped in advising clients or in dealing with attorneys and judges who are a part of the broad stream of Texas jurisprudence deepened as a result of the years of group association at the Austin school."⁶²

Thus, at the time of their meeting in the fall of 1953, Davie was resisting apartheid in higher education in South Africa by arguing that it was essential for students of all races to study together, and that a university had a right under the principle of academic freedom to select its students without interference. Griswold was resisting segregation in higher education in the U.S., arguing that it was essential for students of all races to study together. Although in time the diversity justification would be criticized as a plan to bring Black students into white institutions to improve the education of their white students, at this critical point in its development it was being offered as a plan to provide Black students with an equal education by exposing them to the diversity found in largely white institutions. In their conversation on race relations and academic freedom, they had a lot to discuss. As we will see, the discussion continued with Davie's partner in advocacy Albert Centlivres even after Davie's death.

Davie passed away in 1955.⁶³ In a memorial address shortly after his death, the Vice Chancellor of the University of Liverpool described Davie's Cape Town years by saying:

"He had a task to perform: the defence of freedom within his University, the upholding of the ideal that Universities should be open to all, irrespective of race, colour, or creed, who can profit by the education they offer . . . Single-handed, if need be, he set himself to fight that fight; and he fought to the end. . . . [T]hose who have read them know that his pronouncements on the fundamental nature of a University are among the noblest utterances of academic statesmanship."⁶⁴

62. Brief for The Committee of Law Teachers Against Segregation in Legal Education, *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44) at 45-6.

63. *Dr. T. B. Davie*, 4967 J. OF THE ROYAL SOC'Y OF ARTS 104, 126 (Dec. 23, 1955).

64. "An In Memoriam Address Given in Liverpool Cathedral on 23 December 1955 by the Vice-Chancellor of the Liverpool University," S.A. MEDICAL J. 275-76 (Mar. 17, 2956).

PART III: ALBERT CENTLIVRES AND THE OPEN UNIVERSITIES IN SOUTH AFRICA

Albert Centlivres (1887-1966) served as Chief Justice of South Africa from 1950 to 1957, and as Chancellor of the University of Cape Town from 1950 until his death in 1966.⁶⁵ He was at the center of a number of important cases challenging apartheid, including an epic jurisdictional battle between the Appeals Court and Parliament over the right of Parliament to remove thousands of non-white voters from Cape Town's voting rolls.⁶⁶ But his most important contribution to the resistance to apartheid came in his role as Chancellor of the University of Cape Town.

When the National Party took power in 1948 they immediately began to put their apartheid policies into effect in many areas of life, but not in higher education. Although in May of 1948 Prime Minister D.F. Malan announced that "We want apartheid as far as our educational institutions are concerned, more particularly in our universities,"⁶⁷ the first important legislative push came in 1957. That year the National Party introduced the "University Education Bill,"⁶⁸ which would require UCT and the University of Witwatersrand ("Wits") to stop admitting non-white students. The bill initially failed for a combination of political and procedural reasons, but its objects were reached in 1959 with the passage of the "Extension of University Education Act," which made it "a criminal offence for a nonwhite student to register at a hitherto open university without the written consent of the Minister of Internal Affairs."⁶⁹

Among the principal actors in resisting the University Act and its imposition of apartheid were Davie (until his death in 1955), Centlivres (until his death in 1966) and Richard Feetham, the Chancellor at the other open university in South Africa, the University of Witwatersrand. The connections of Davie and Centlivres to US lawyers and legal scholars helped transfer the ideas they developed in resisting South African apartheid into the diversity justification for US affirmative action.

The relationships began in 1951, when Griswold and Centlivres first met in Sydney at the Seventh Legal Convention of the Law Council of Australia, and

65. *Albert Centlivres, 79, Is Dead; Ex-Chief Justice of South Africa*, N.Y. TIMES, Sept. 20, 1966, at 49.

66. *See id.* (detailing Justice Centlivres' role in overturning the act of Parliament "removing colored voters, that is, those of mixed blood, from the regular voting roles in Capetown (sic) Province.").

67. PHILLIPS, *supra* note 15, at 1.

68. This is also known as the "Separate University Education Bill," which was introduced as a public law, improperly because it affected private interests and thus required input from private parties affected, and was sent back to committee, then eventually passed in 1959 under the title "Extension of University Education Act No. 45," officially establishing separate university colleges for black students and prohibiting them from attending white universities, except under special ministerial permission. *See* Fred Hendricks, *The Mafeje Affair: The University of Cape Town and Apartheid*, 67 AFR. STUDIES 423, 424 (2008).

69. *See* BRIAN LAPPING, APARTHEID: A HISTORY 184 (1986).

begin to correspond.⁷⁰ By 1967, when Griswold gave the Day of Affirmation address at the University of Natal, he described Centlivres as his “good friend” and said of him,

I first met him sixteen years ago in when we were both invited to Australia. In the course of my life I have been privileged to know many great legal figures, but there has been none who stands higher in my regard than Chief Justice Centlivres. He was a true South African, a great lawyer, a fine gentleman, whose work here, in and out of the law, will provide long monument.⁷¹

In 1952 Chief Justice Centlivres wrote to US Supreme Court Justice Felix Frankfurter, thanking him for Frankfurter’s having asked Griswold to send Centlivres a copy of an important US Supreme Court decision (the Youngstown Steel case, overturning President Truman’s seizure of the steel industry), and expressing regret that Frankfurter was unable to attend the meeting in Sydney where Centlivres met Griswold.⁷² On October 6, 1952 Griswold wrote to Frankfurter that he had, at Frankfurter’s suggestion, sent Centlivres a copy of Holmes’ *The Path of the Law*.⁷³ The letter suggests that the three men were engaged in a discussion about an essay or judicial opinion by Centlivres in which Frankfurter was making editorial suggestions.⁷⁴ The correspondence continued in 1953, (the year Griswold met with Davie) with Frankfurter asking Centlivres to meet with an American journalist visiting South Africa, and noting that “the problems of South Africa are receiving a great deal of attention in this country.”⁷⁵

The relationship between the three men grew stronger in 1955, when Centlivres traveled to the US to participate in a Harvard Law School Chief Justice John Marshall bicentennial symposium on the rule of law, along with Frankfurter and Griswold.⁷⁶ Sixteen papers were presented, including papers by Frankfurter, Griswold and Centlivres.⁷⁷ Archibald Cox was on the faculty by this point, teaching Constitutional Law, though I have found no record of his participating in the conference.

70. See Letter from Albert van der Sandt Centlivres, C.J., S. Afr. Sup. Ct., to Felix Frankfurter, J., U.S. (undated) (on file with author) (“I was particularly pleased during my visit to Australia last year to make the acquaintance of Dean Griswold . . .”).

71. Erwin N. Griswold, Dean, Harvard Law School, Address at the Day of Affirmation at the University of Natal (June 23, 1967) (on file with author).

72. See Letter from Albert van der Sandt Centlivres to Felix Frankfurter, *supra* note 71.

73. See Letter from Erwin Griswold, Dean, Harvard Law Sch., to Felix Frankfurter, J., U.S. (Oct. 6, 1952) (on file with author).

74. See *id.*

75. See Letter from Felix Frankfurter, J., U.S., to Albert van der Sandt Centlivres, C.J., S. Afr. Sup. Ct. (Mar. 3, 1953) (on file with author).

76. See Program of a Conference Concerning Government Under Law on the Occasion of the Bicentennial of John Marshall, Harvard Law School 3, 5 (Sep. 22, 1955); see also ARTHUR E. SUTHERLAND, GOVERNMENT UNDER LAW 3–34, 398–400, 423–452, 552–555 (1955) (transcript of speeches by Centlivres, Frankfurter, and Griswold).

77. See SUTHERLAND, *supra* note 77.

On January 9-11, 1957, a conference was held at UCT with representatives from UCT and Wits, led by their chancellors, to discuss resistance to the University Act. The conference participants agreed to publish a booklet explaining their position, titled “The Open Universities in South Africa.” “Open” universities were described as universities that “admit non-white students as well as white students and aim, in all academic matters, at treating non-white students on a footing of equality with white students, and without segregation.” (Preface to *The Open Universities in South Africa* (1957 at iii).)⁷⁸

From January 28 through February 2, 1957, an editorial Committee prepared the book for publication.⁷⁹ Just a few days later, on February 4, 1957, Centlivres as Chancellor at UCT and Richard Feetham as Chancellor at Witwatersrand completed and dated the preface and the booklet was rushed to press.⁸⁰ Centlivres sent a copy to his friend Justice Frankfurter.

On March 5, 1957, the US Supreme Court held oral argument in *Sweezy v. New Hampshire*, addressing whether University of New Hampshire professor Paul Sweezy was properly held in contempt and imprisoned for refusing to testify about colleagues suspected of being communists.⁸¹ Sweezy denied that he himself was a communist, but like the “Hollywood Ten” and others caught up in the McCarthy era witch hunt, he refused to “name names.”

As Frankfurter was preparing a concurring opinion in *Sweezy*, we know he was thinking about the situation in South Africa, where academic freedom was being eroded. In Frankfurter’s *Sweezy* files at the US Library of Congress is a letter to Frankfurter from South African lawyer Arthur Suzman (QC), who had studied under Frankfurter at Harvard Law. The letter, dated May 15, 1957 enclosed a copy of a speech Suzman had given supporting Davie’s four principles of academic freedom, and reporting that Centlivres was “campaigning vigorously” against the proposal to close UCT and Witwatersrand to non-white students.⁸²

On June 15, 1957 the *Sweezy* decision was issued.⁸³ In a concurring opinion Frankfurter agreed with the majority in overturning *Sweezy*’s conviction and added an academic freedom basis. In defining academic freedom under the First Amendment, he cited *The Open Universities in South Africa* for the following, “[that there are] ‘four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁸⁴ Justice Frankfurter

78. UNIVERSITY OF CAPE TOWN, *THE OPEN UNIVERSITIES IN SOUTH AFRICA AND ACADEMIC FREEDOM, 1957-1974: A REVIEW* iii (1974).

79. See South Africa: Richard Feetham, C.M.G., 56 (222) *THE ROUND TABLE* 205, 207 (1966).

80. See *id.*

81. See *Sweezy v. New Hampshire*, 354 U.S. 234, 238–239 (1957).

82. Letter from Arthur Suzman, Queen’s Counsel, to Felix Frankfurter, J., U.S. (May 15, 1957) (on file with author).

83. See *Sweezy*, 354 U.S. at 234.

84. *Id.* at 263.

immediately sent a copy of the Sweezy opinion to Chief Justice Centlivres, who replied on June 29, 1957, thanking Frankfurter for sending him a copy of the opinion.⁸⁵ He included a clipping from the “Cape Times” newspaper reporting on the Sweezy case and Frankfurter’s cite to Centlivres’ book.⁸⁶ The letter is contained in Frankfurter’s files on Sweezy, at the US Library of Congress.⁸⁷

The following summer (1958), Griswold toured South Africa, meeting with Centlivres in Cape Town. On September 4, 1958, he sent Frankfurter a copy of the journal he kept of his visit.⁸⁸

In 1959 the National Party (the apartheid party) passed the Extension of University Education Act, which made it “a criminal offence for a nonwhite student to register at a hitherto open university without the written consent of the Minister of Internal Affairs.”⁸⁹ In response, on March 13, 1959 Centlivres gave an address on university apartheid in Jameson Memorial Hall (renamed in 2019 as Sarah Baartman Hall), during what he described as a “protest meeting.”⁹⁰ He stated that “[t]he threat, which was first officially made in 1948, to close the open universities was taken by the late Dr. T. B. Davie,” who offered a “valiant defence of the policy adopted by the two open universities.”⁹¹ He quoted Davie’s 1950 address at a graduation ceremony at Witwatersrand, “ ‘in a university this means our freedom from external interference in (a) who shall teach, (b) what we teach, (c) how we teach, and (d) whom we teach.’ What the last implies is that ‘our lecture theatres and laboratories shall be open to all who, seeking higher knowledge, can show that they are intellectually capable of benefiting by admission to our teaching and are morally worthy of entry into the close intimacy of great brotherhood which constitutes the wholeness of a university.’ ”⁹²

Centlivres’ speech was printed and distributed, with copies going to Justice Frankfurter, to Harvard President Nathan Pusey, and to members of the law faculty. Eleven days later, on March 24, 1959, Frankfurter wrote to Centlivres, “It does not require a poet’s imagination to realize with what a heavy heart, even an easy conscience, you find yourself in the contest in which you are engaged for a cause that has brought down upon you the full force of your government.

85. See Letter from Albert van der Sandt Centlivres, C.J., S. Afr. Sup. Ct., to Felix Frankfurter, J., U.S. (June 29, 1957) (on file with author).

86. See *id.*

87. Frankfurter’s files, physically stored at the US Library of Congress, can also be accessed behind a paywall via ProQuest History Vault.

88. Letter from Erwin N. Griswold, Dean, Harvard Law Sch., to Felix Frankfurter, J., U.S. (Sept. 15, 1958) (on file with author) (“Of course I am glad that you found some matters of interest in the journal.”).

89. Extension of University Education Act 45 (S. Afr.).

90. Albert van der Sandt Centlivres, Chancellor of the University of Cape Town, Address at Jameson Memorial Hall 1 (Mar. 13, 1959) (on file with author).

91. *Id.* at 2.

92. *Id.*

You must let me tell you the pride, bordering almost on reverence, with which I salute your championship of the cause of free men everywhere.”⁹³

A week later, on March 30, 1959, Pusey wrote to Centlivres, thanking him for sending him a copy of Centlivres’ “remarkable address on ‘university apartheid’ . . . a splendid and courageous statement on an issue which has to be fought out again and again if universities are to mean what their name implies.”⁹⁴ The following day, March 31, 1959, nineteen members of the Harvard Law faculty wrote to Centlivres to express their “admiration and respect for the steadfast effort you are making to preserve the tradition of a free and open university.”⁹⁵ They mentioned their bond of sympathy with Centlivres because of his contribution to their Chief Justice John Marshall bicentennial symposium on the rule of law (which was held in September 1955). Among the signatories is Archibald Cox.⁹⁶

A little over a week later, on April 9, 1959, Erwin Griswold, who was traveling at the time in Australia, wrote to Justice Frankfurter to let him know that he had received from Centlivres a copy of his most recent statement on “The Open Universities,” and had also received a copy of the March 31 letter written to Centlivres by 19 members of the Harvard Law faculty (including Archibald Cox) supporting the open universities campaign.⁹⁷ Griswold informed Justice Frankfurter that he had written to Centlivres to “tell him I join in the letter,” and that he admired his courage.⁹⁸ (Griswold also informs Frankfurter that he believes the letter was drafted by Harvard Law professor Paul Freund).⁹⁹ Two years later, Freund would be offered the position of Solicitor General by President Kennedy. He declined, and suggested that Kennedy appoint Cox, which he did. Cox famously chose to emphasize civil rights in selecting the cases he would argue personally, advancing the cause of equality rights in the US.

Six weeks after Centlivres’ speech on open universities, on May 6, 1959, he delivered the first annual T.B. Davie Memorial Lecture on Academic Freedom.¹⁰⁰ He discussed Davie’s resistance to apartheid and his four principles of academic freedom, and added that included in the function of the university

93. Letter from Felix Frankfurter, J., U.S., to Albert van der Sandt Centlivres, C.J., S. Afr. Sup. Ct. (Mar. 24, 1959) (on file with author).

94. Letter from Nathan M. Pusey, President, Harvard University, to Albert van der Sandt Centlivres, C.J., S. Afr. Sup. Ct. (Mar. 30, 1959) (on file with author).

95. Letter from Nineteen Faculty, Harvard University, to Albert van der Sandt Centlivres, C.J., S. Afr. Sup. Ct. (Mar. 31, 1959) (on file with author).

96. *See id.*

97. *See* Letter from Erwin N. Griswold, Dean, Harvard Law Sch., to Felix Frankfurter, J., Sup. Ct. (Apr. 9, 1959) (on file with author).

98. *Id.*

99. *See id.*

100. *See T.B. Davie Memorial Lectures: Full List*, UNIV. CAPE TOWN NEWS, Aug. 11, 2021, 8:52 PM, <https://www.news.uct.ac.za/news/lecturesandspeeches/tbdavie/lectures/all/> [<https://perma.cc/K6KK-538R>].

in a multi-racial society is “to reflect in the composition of its student body the multi-racial picture of the society it serves.”¹⁰¹

The fight to keep the open universities of South Africa integrated was lost in 1959, with the passage of the University Bill. But resistance in the form of arguments for diversity as an element of academic freedom did not disappear. In June 1961 Centlivres published, “We Fight for Our Rights,” reprinted in *UCT at 150: Reflections* (Cape Town: 1979).¹⁰² In this article, Centlivres drew a comparison between “[t]he wave of McCarthyism which swept over the United States of America a few years ago” and contemporary challenges to university autonomy in South Africa.¹⁰³ Centlivres traced the history of university autonomy back to Cambridge and Oxford allowing students of different religions to study there, beginning in the mid-1800s. He wrote: “The universities of the Western World, having been freed from the control of the Church, resisted every attempt by the State to substitute its control for that of the Church.”¹⁰⁴ In discussing the importance of academic freedom, Centlivres quoted Griswold, “the learned and greatly respected dean of the Harvard Law School,” who had recently said, in a speech in New York entitled “The Challenge to American Education”: “From South Africa . . . comes one of the most balanced and thoughtful statements on the need for an atmosphere of freedom in a university.”¹⁰⁵ Centlivres notes that Griswold quoted, in his address, a passage from page 10 *The Open Universities in South Africa*, which Centlivres reproduced in the article.¹⁰⁶

In 1966, the final year of Centlivres’ life, he and Cox would again be connected by a single degree of separation. Cox had served as US Solicitor General – the second highest position in the US Department of Justice -- from 1961-1963, while Robert Kennedy was serving in the top position -- US Attorney General. When they left the Department of Justice they continued to correspond. Three years later, in June 1966, Kennedy traveled to South Africa, where he gave his “Ripple of Hope” speech as the “Day of Affirmation” address at UCT, which is held on the University’s “Day of Reaffirmation of Academic and Human Freedom.”¹⁰⁷ Kennedy spoke about the need to work for freedom for all people, in the United States, South Africa, and across the globe. The speech is regarded

101. Albert van der Sandt Centlivres, Thomas Benjamin Davie: The First T.B. Davie Memorial Lecture (University of Cape Town Press, 1961) at 10.

102. See Albert van der Sandt Centlivres, *We Fight for Our Rights*, in *UCT at 150: Reflections at 17–21* (Alan Lennox-Short & David Welsh, eds., 1979).

103. *Id.* at 17.

104. *Id.* at 17-18.

105. *Id.* at 19.

106. *Id.*

107. Senator Robert F. Kennedy, Ripple of Hope, Day of Affirmation Address at the University of Cape Town, June 6, 1966, <https://www.jfklibrary.org/learn/about-jfk/the-kennedy-family/robert-f-kennedy/robert-f-kennedy-speeches/day-of-affirmation-address-university-of-capetown-capetown-south-africa-june-6-1966> [https://perma.cc/MR5B-YNBG].

by many as Kennedy's greatest.¹⁰⁸ In the most famous passage, he asserted "It is from numberless diverse acts of courage such as these that the belief that human history is thus shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring those ripples build a current which can sweep down the mightiest walls of oppression and resistance."¹⁰⁹ In the speech Kennedy speaks of the courage of Chancellor Centlivres, who was present.¹¹⁰ (He would pass away in September.)

Kennedy was hosted in Cape Town by NUSAS Vice-President Margaret Marshall, who would subsequently emigrate to the United States to escape political persecution for her anti-apartheid activism. Marshall served as General Counsel to Harvard from 1992-1996, and then as Chief Justice of Massachusetts (1999-2010).¹¹¹ In 1984 (a few years after the Bakke decision) she married Anthony Lewis, the journalist who had met regularly with Cox while he was writing the brief in *DeFunis*, and thus composing the Harvard Plan.¹¹² Lewis wrote a New York Times column on the diversity justification while *DeFunis* was pending, which Justice Powell had clipped and placed in his files.¹¹³

South Africa remained in Cox's mind. In 1973 he accepted an invitation to spend six weeks there, but he was forced to cancel his trip when he was named Watergate special prosecutor. In October 1973 he was fired as special prosecutor in the "Saturday Night Massacre." He returned to Harvard where he wrote the Harvard brief in *DeFunis*, arguing that under the principle of academic freedom as set forth in *Sweezy*, Harvard should be permitted to consider race as a factor in choosing its students in order to pursue its policy of diversity. It was the first argument in the US Supreme Court linking diversity and academic freedom, and would be the primary source of Justice Powell's controlling opinion four years later in the Bakke case.

Few in the legal academy have discussed the South African sources of the diversity justification. One exception is Widener professor Anna Hemingway,

108. See, e.g., Mark Memmott, *Looking Back: RFK's 'Ripple of Hope' Speech in South Africa*, NPR, June 30, 2013. ("Many historians consider Kennedy's 'Ripple of Hope' speech, which he delivered at the University of Cape Town on June 6, 1966, to be his greatest speech.")

109. Kennedy, *supra* note 116.

110. See *id.*

111. Margaret Marshall, WOMEN INSPIRING CHANGE, HARVARD LAW SCHOOL, Mar. 1, 2014, <https://orgs.law.harvard.edu/womeninspiringchange/2014/03/01/margaret-marshall/> [<https://perma.cc/2HTV-UZR5>].

112. Margaret H. Marshall, *a Law Partner, Is Wed to Anthony Lewis, a Columnist*, N.Y. TIMES, Sept. 24, 1984, <https://www.nytimes.com/1984/09/24/style/margaret-h-marshall-a-law-partner-is-wed-to-anthony-lewis-a-columnist.html> [<https://perma.cc/BX3M-XD3U>].

113. See Anthony Lewis, *The Legality of Racial Quotas: Who Will Pay for the Injustice of the Past?*, N.Y. TIMES, Mar. 3, 1974, <http://www.nytimes.com/1974/03/03/archives/the-legality-of-racial-quotas-tough-intellectual-issues.html? r=0> [<https://perma.cc/7XUH-EBVJ>] (on file with Justice Powell's *DeFunis* archives at 45).

from whom I first learned of the connection, who mentions it in passing in an article on diversity in the classroom.¹¹⁴ The most significant scholarly critique to consider it was by University of Florida professor Richard H. Hiers, who argues that Justice Frankfurter's opinions in *Sweezy* and *Keyishian* were misapplied by Justice Powell and subsequent court opinions and commentary.¹¹⁵ Hiers argues that while university professors are entitled to academic freedom under the First Amendment, universities as entities are not, and that the Supreme Court has never held that they are. To the extent that Justice Frankfurter's opinions and his citations to the *Open Universities* book suggest a right to academic freedom or autonomy for universities grounded in the First Amendment, Hiers asserts, they are either misunderstood, or dicta, or simply wrong.

Hiers claims that Justice Frankfurter's concurrence in *Sweezy* and its progeny was wrong to use the South African argument for a university's right to select its students free of government interference because the South African scholars were not "ground[ing] their concerns upon the First Amendment or other United States constitutional premises," and that they merely thought of university autonomy as "important social policy values."¹¹⁶ He points out that the First Amendment did not apply to South African law, and argues that while Frankfurter endorses "the four essential freedoms of a university" he never links it to the precise term "academic freedom."¹¹⁷

I think Hiers misses the point. Justice Frankfurter did not attempt to establish that the South African scholars were grounding their concerns upon the United States constitution. He is taking a universal argument about freedom and applying it to US law. When Frankfurter argues that "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority"¹¹⁸ he is placing this universal "basic liberty" within the US First Amendment for American purposes. The invocation of South African scholars helps to warn of the dangerous consequences of encroaching on institutional academic freedom and bolsters Frankfurter's point that mild "inroads [to tyrannical practices] must be resisted at their incipiency," or else small infringements will "get their first footing" and destroy an essential need of our society that the First Amendment protects.¹¹⁹ In Frankfurter's view, use of *Open Universities in South Africa* is not constitutional authority or support for a social policy preference — Frankfurter invokes it to assert the "overwhelming

114. Anna P. Hemingway, *Intentionally and Systematically Integrating Diversity Discussions and Lessons in the Law School Classroom During a Race-Conscious Era*, 33 RUTGERS U. L. REV. 37 (2020).

115. Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLIN L. REV. 1 (2007), available at <http://scholarship.law.ufl.edu/facultypub/742> [https://perma.cc/RR2M-TV2E].

116. *Id.* at 9.

117. *Id.*

118. *Sweezy*, 354 U.S. at 266.

119. *Id.*

importance” of academic freedom under the First Amendment, which “cannot be constitutionally encroached upon on the basis of so meager a countervailing interest . . .”¹²⁰

Hiers further complains that Justice Powell mis-applies Justice Frankfurter’s *Sweezy* opinion in *Bakke*. Hiers rejects the position of Justice Powell in *Bakke* that a university is entitled to academic freedom or university autonomy under the First Amendment. Once again, Hiers mistakenly assumes that the *Open Universities* book was used as constitutional authority: “[Powell did not] explain how language from a South African context could possibly serve as authoritative construction of the U.S. Constitution.”¹²¹ Hiers also criticizes Justice Powell’s assertion that the petitioner was “seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.”¹²² Instead of taking this as reinforcement of the importance of the decision, Hiers believes this shows that institutional academic freedom is “more of a social policy than a constitutional argument.”¹²³ Throughout his article, Hiers draws attention to constitutionally inconsequential parts of Justice Powell and Frankfurter’s opinions: references to the *Open Universities* book, the fact that Frankfurter’s opinion was a nonbinding concurrence, and agreement that institutional academic freedom is good social policy. But Hiers fails to engage with the core of the *constitutional* argument that would exist even without reference to South Africa: that the basic liberty of academic freedom, including university autonomy, is firmly rooted in the First Amendment.

Finally, Hiers does not address the most important role of the *Open Universities* book in the Justice Powell’s *Bakke* opinion, the assertion that racial diversity is legitimately a core value of a university, and that in a multi-racial state a university is acting within its mission when it takes affirmative steps to promote diversity.

PART IV: CRITIQUES OF THE DIVERSITY JUSTIFICATION FOR AFFIRMATIVE ACTION

When the *Bakke* decision was released, most legal commentators initially failed to appreciate the significance of the diversity justification.¹²⁴ The early reaction was that Justice Powell had found a middle ground by prohibiting quotas while endorsing the use of race as a plus factor. But the importance of using it for the purpose of pursuing a mission of student diversity was not widely

120. *Id.* at 265.

121. Hiers, *supra* note 114, at 16.

122. *Bakke*, 438 U.S. at 313.

123. Hiers, *supra* note 114, at 19.

124. This section is substantially drawn from my earlier paper, *Archibald Cox and the Diversity Justification for Affirmative Action*, 157 VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW 196-198 (2018).

appreciated,¹²⁵ nor was the argument that diversity was an essential element of academic freedom.¹²⁶

For example, in Joel Dreyfuss and Charles Lawrence's 1979 book, *The Bakke Case: The Politics of Inequality*,¹²⁷ the index contains no reference for diversity or academic freedom. In over 250 pages of text, the Harvard approach to diversity gets all of five paragraphs.¹²⁸ Justice Powell's opinion is described as a compromise,¹²⁹ but its embrace of diversity is barely mentioned, and the appendix to Justice Powell's opinion ("The Harvard Plan") is not mentioned at all.

Bernard Schwartz, in his in-depth examination of the decision ten years after it was issued,¹³⁰ discusses the diversity justification only briefly. In his view, the importance of the decision is the holding that colleges and universities may take account of race as long as there is no quota or numerical goal; he treats the goal of diversity as merely a means to an end -- providing preferences to minority students. Thus, he writes, "[t]hrough the Davis program was invalidated, the Powell opinion permits admissions officers to operate programs which grant racial preferences -- provided that they do not do so as blatantly as was done under the sixteen-seat 'quota' provided in Davis . . . The result has been that *Bakke* has, in practice, served to license, not to prohibit, race-conscious admissions programs."¹³¹

Similarly, in political scientist Howard Ball's 2000 book, *The Bakke Case: Race, Education and Affirmative Action*, there is no discussion at all of diversity as a justification for affirmative action, let alone academic freedom. He describes Justice Powell's opinion as a compromise that permits considerations of race, but does not describe the underlying diversity rationale.¹³²

125. Among the few exceptions were Laurence Tribe and Vincent Blasi. See Laurence Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice*, 92 HARV. L. REV. 864 (1979) ("For Justice Powell the relevant racial 'reality' was evidently that of racially diverse experience inasmuch as he was willing to uphold a race-conscious admissions process to achieve a 'diverse' student body."); Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 67-68 (1979) ("The Bakke precedent should pose little difficulty for those special admission programs that are founded on the premise that, because of their skills and special backgrounds, certain minority-race applicants represent a valuable resource which an educational institution primarily concerned with the quality of its dialog ought to draw upon.").

126. But see Guido Calabresi, *Bakke As Pseudo-Tragedy*, 28 CATH. U. L. REV. 427 (1979) at 430-31; Robert Bork, *The Unpersuasive Bakke Decision*, THE WALL STREET JOURNAL July 21, 1978 (It is hard to take seriously the idea that the First Amendment permits university freedom from the strictures of the 14th.)

127. JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 269-73 (1979).

128. *Id.* at 126-27, 211-12.

129. *Id.* at 211-12.

130. SCHWARTZ, *supra* note 6, at 151-56.

131. *Id.* at 153-54.

132. HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* 122-33 (2000).

For one last example, in John C. Jeffries, Jr.'s 1994 biography of Justice Powell,¹³³ the word "diversity" does not appear in the index.¹³⁴ It was Jeffries, as Powell's law clerk, who in 1974 recommended that Powell read the Cox brief in the *DeFunis* case.¹³⁵ But in the Powell biography his discussion of how Justice Powell came to embrace the diversity justification takes all of five pages out of 562, and describes it as a "middle ground" rather than a different conception of affirmative action,¹³⁶ as we now think of it. In Jeffries' view, writing sixteen years after the *Bakke* decision, the difference between the Harvard program to foster diversity, including racial diversity, and the Davis program to counteract racial disadvantage and train minority physicians was "more form than substance."¹³⁷ "Harvard," Jeffries' writes, "was simply Davis without fixed numbers."¹³⁸ His view in 1994, though it has since softened, was that for Justice Powell, "diversity was not the ultimate objective but merely a convenient way to broach a compromise."¹³⁹

As Professor Jeffries has more recently reported, at the time of the decision "[r]eviews of the intellectual craft of Powell's opinion were largely negative and sometimes scathing."¹⁴⁰ Jeffries quotes from articles by eight leading legal scholars from left to right, all of whom, writing in 1978 or '79, agreed that the opinion was seriously problematic.¹⁴¹ For example, Ronald Dworkin, writing in the *New York Review of Books*, claimed that "the argumentative base of his [Justice Powell's] opinion is weak. It does not supply a sound intellectual foundation" and that it "may not be sufficiently strong in principle to furnish the basis for a coherent and lasting constitutional law of affirmative action."¹⁴² John Hart Ely, writing the forward to the *Harvard Law Review* issue on the 1977 Supreme Court term, says nothing about diversity but complains that "Justice Powell forgets that he is not being asked to devise an affirmative action program but rather to rule on the constitutionality of the one the California officials had devised."¹⁴³ Antonin Scalia, then a professor at the University of Chicago, described the opinion as "thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution," and asserted that it would lead to universities adopting informal quotas and dishonestly

133. JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* (1994).

134. *Id.* at 680.

135. See Memorandum from John C. Jeffries, Jr. to Justice Powell, *supra* note 11.

136. JEFFRIES, *supra* note 133, at 475–78, 484–85.

137. *Id.* at 484.

138. *Id.*

139. *Id.* at 500.

140. John C. Jeffries Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1, 9 (2003).

141. *Id.* (citing articles by Guido Calabresi, Vincent Blasi, Harry T. Edwards, Ronald Dworkin, John Hart Ely, Laurence H. Tribe, Robert H. Bork, and Antonin Scalia).

142. Ronald Dworkin, *The Bakke Decision: Did it Decide Anything*, THE NEW YORK REVIEW OF BOOKS (Aug. 17, 1978).

143. John Hart Ely, *Forward, The Supreme Court 1977 Term*, 92 HARVARD L. REV. 5 (1978).

cloaking them in an excuse that they were pursuing diversity.¹⁴⁴ Guido Calabresi described the opinion as a “compromise that undermines candor and honesty.”¹⁴⁵ Of the eight leading scholars cited by Jeffries, a few recognized the diversity argument as central to the opinion, but none saw it as transformative, and some thought it was ridiculous. Only two even mentioned academic freedom.¹⁴⁶ And yet today the Powell opinion’s adoption of the diversity justification as within a university’s academic freedom is – while controversial – the controlling law, and the position embraced by nearly all selective colleges and universities in the United States. While higher education affirmative action may remain controversial among the general public, most university faculty and administrators today view diversity and inclusion as essential to the values of their institution. Meanwhile, the Bakke opinion is Justice Powell’s best known, and, as he predicted, his most important. And it is regarded, as in 2003, 2013 and 2016, to be hanging by a thread.

CONCLUSION

History has proven that Justice Powell was correct. His critics underestimated the strength and intellectual heft of his opinion. They may nonetheless have the last word. The opponents of diversity-justified affirmative action have again succeeded in placing the question before the Supreme Court. They argue that any consideration of race violates the Fourteenth Amendment and/or the 1964 Civil Rights Act. They sometimes claim that diversity policies are grounded in anti-Semitism or racism against Asian-Americans. They complain that Justice Powell’s articulation of a diversity justification for affirmative action was merely a pragmatic compromise that satisfied no one; that it was weak, incoherent, and without doctrinal roots or intellectual heft, that it should be laid to rest.¹⁴⁷ I believe my research, as described in this paper and my earlier paper on Archibald Cox and the diversity justification for affirmative action, shows otherwise.

The history of the diversity justification for affirmative action, as uncovered and described in this paper and my Cox paper, demonstrates that racial, ethnic and religious diversity are deeply linked to academic freedom, and that the embrace of diversity justifies special measures to ensure a diverse

144. Antonin Scalia, *The Disease as Cure: In Order to Get Beyond Racism, We Must First Take Account of Race*, 1 WASH. U. L. Q 147 (1979).

145. Guido Calabresi, *Bakke As Pseudo-Tragedy*, 28 CATH. U. L. REV 427, 432 (1979).

146. *Id.* at 430-31; Robert Bork, *The Unpersuasive Bakke Decision*, THE WALL STREET JOURNAL, July 21, 1978 (It is hard to take seriously the idea that the First Amendment permits university freedom from the strictures of the 14th.)

147. See, e.g., John C. Jeffries Jr., *Bakke Revisited*, *supra* note 140, 2003 SUP. CT. REV. 1, 9 (2003); HOWARD BALL, THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION, *supra* note 132, at 122–33 (2000); Adam Harris, *The Supreme Court Justice Who Forever Changed Affirmative Action*, ATLANTIC (Oct. 13, 2018), <https://www.theatlantic.com/education/archive/2018/10/how-lewis-powell-changed-affirmative-action/572938/> [<https://perma.cc/XN7L-S8PW>] (“Powell’s opinion sort of split it down the middle”).

student body. Cox' argument, accepted in its entirety by Justice Powell, has many deep roots in law and political theory. It can be traced to the great reforms of the German universities in the nineteenth century, as carried out by Wilhelm von Humboldt, including his advocacy of diversity and of allowing Catholics and Jews to teach and study at the University of Berlin (now named Humboldt University); the embrace of diversity and liberty in the work of John Stuart Mill and Harriet Taylor Mill; the nineteenth century decision to open Cambridge and Oxford to Catholics, Jews and other nonconformists; the transformation of Harvard into a great university in the nineteenth and early twentieth centuries by Charles Eliot, carried out through expanding the racial, ethnic and religious diversity of the students and faculty; the transformation of the First Amendment by Holmes, Brandeis and Frankfurter to include academic freedom; the merger of racial justice, democracy and education by John Dewey and Thurgood Marshall; and the brilliant advocacy of Cox. To these sources we should add the remarkable work of Davie, Centlivres and Feetham, encouraged by the collaboration between Centlivres, Griswold and Frankfurter, who crafted the argument that a university's student body should reflect the diversity of its society, and that the university must be free to pursue such diversity as an essential principle of its academic freedom.