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## THE COURT BETWEEN HEGEMONIES

L.A. POWE, JR.\*

As a sitting Justice, Lewis Powell was a quintessential centrist. He found the center almost immediately with his three paragraph concurring opinion in *Branzburg v. Hayes*,<sup>1</sup> and he occupied it so thoroughly that when he retired the prevailing but erroneous assumption was that if his replacement differed, then abortion and affirmative action were constitutional history.<sup>2</sup> Yet not only was Powell a centrist, his time on the Court, too, was a centrist era, perched between the mid-century nationalism that began with the New Deal's 1937 revolution and the conservative orthodoxy established by the inability of liberal Justices to outlive both their own and the following eras. To be sure, I am using a somewhat imprecise instrument of measurement because history seldom offers the perfect break such as that marked by Franklin Roosevelt's Court-packing plan. Nevertheless, with this caveat, it remains that the bulk of Powell's service came between eras marked first by a nationalist and then by a statist hegemony.

From 1937 to 1973, the Court was overwhelmingly nationalist, first sustaining whatever the federal government did and then eradicating local differences in the ways governments treated their citizens. Within the passing of a decade and a half a new indelibly statist hegemony formed. The nationalist hegemony had genuflected only to national power; the new statist hegemony bows to any governmental power no matter how wielded. In between was the era of "rootless activism"<sup>3</sup> where the center of the Court attempted largely to maintain the status quo while differing blocs of Justices tugged it in opposite directions. While Powell's opinions contributed to each of these eras—the nationalization of feminism, the cautious balancing of affirmative action, the demand for respect of local institutions—he, like the centrist era in which he served the longest, seems best characterized for believing that a little bit of government involvement everywhere is not a constitutional wrong, but too much may be.<sup>4</sup> This is not a tidy summation of an era, but then rootless, centrist decision making is not tidy either.

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\* Anne Green Regents Chair, The University of Texas. I would like to thank my colleagues Douglas Laycock and Michael Sturley, and Tom Krattenmaker of Georgetown Law Center for their helpful comments on earlier drafts of this essay.

1. 408 U.S. 665, 709 (1972) (Powell, J., concurring) (stating that while First Amendment protections do not relieve reporters of their obligation to testify regarding criminal charges before grand jury, courts must balance First Amendment protections against society's interest in criminal adjudication to determine whether society's interest in each case is genuine and pressing enough to displace First Amendment).

2. L. A. Powe, Jr., *From Bork to Souter*, 27 WILLAMETTE L. REV. 781, 785 (1991).

3. Vincent Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT* 198 (Vincent Blasi ed., 1983).

4. The characterization was offered to me by my colleague Douglas Laycock. See *infra* note 149.

## I

Even more than the Civil War Amendments left prior constitutional history in its own era, the New Deal revolution created an abrupt constitutional demarcation.<sup>5</sup> What went before was legally irrelevant. Its function came to be that of a measuring rod to mark change. Before the revolution the commerce power did not reach the coal industry.<sup>6</sup> After the revolution it attached to wheat grown for home consumption.<sup>7</sup> That's a switch, so much so that Justice Jackson, who had been on both sides, first as the administration's lawyer, then as a justifying Justice, wondered in a memo whether the Court had any future function at all if federal authority were sustained.<sup>8</sup>

There turned out to be ample business for the Court even after it stopped interfering with legislative efforts to regulate the economy. Civil liberties and civil rights could and would be championed much as economic liberties had been prior to 1937. These in turn, fueled by the powerful promise of revolution inherent in *Brown*,<sup>9</sup> developed an increasingly powerful constituency in the North, which, with the 1960 and especially the 1964 elections, came into political dominance nationally. With that protective (and supportive) umbrella, the Court began imposing its vision of national values.<sup>10</sup> The purpose of constitutional law would hereafter increasingly be to eradicate what was different or backward, with the intent to replace it with what any right-thinking Ivy League graduate would believe.

The South, necessarily and properly, would be a huge loser. Its distinctiveness was etched by the poisoning of its institutions by segregation, and the Court's assault (tempered somewhat by Watts and Harlem in demonstration cases) never let up.<sup>11</sup> But rural Americans and those who did not belong to mainstream-liberal Protestant or Jewish denominations were also fit candidates for improvement. The same could be said for antiquated criminal justice systems where values and procedures were mired in the era of the Wickersham Commission.<sup>12</sup>

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5. BRUCE ACKERMAN, *WE THE PEOPLE* 47-50 (1991). I agree fully with Bruce Ackerman's view that constitutional theorists must have a more adequate explanation than an overdue restoration of Marshallian jurisprudence for the changes that occurred beginning with *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). *Id.* at 154-55.

6. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that Congressional power to regulate interstate commerce does not extend to regulation of production conditions).

7. *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that commerce power applies to regulation of wheat grown wholly for private consumption).

8. ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 594 (1956).

9. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

10. Robert C. Post, *Justice William J. Brennan and the Warren Court*, 8 CONST. COMMENTARY 11, 14-16 (1991).

11. A startling exception to the Court's assault on segregation was jury peremptory challenges. *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

12. The presidentially appointed National Commission on Law Observance and Enforcement presented Congress with a fourteen volume report in 1931. The gist of the Report was

Nothing so represented the nationalizing trend of the Court than its transformation of desegregation into integration. Arguably, the switch came in *Green v. County School Board*<sup>13</sup> when the Court struck down freedom of choice desegregation plans and demanded a plan that promised "realistically to work . . . now."<sup>14</sup> In the two-school, rural New Kent County district the way to adopt such a plan was clear, and the inference of subterfuge equally as clear, but in an urban district, with its residential segregation, it would not be so easy.

After some initial sticker shock,<sup>15</sup> the real switch came in *Swann v. Charlotte-Mecklenburg*<sup>16</sup> where the Court affirmed a massive, almost bus to balance, order issued by a district judge fed up with a footdragging school system. There was no other way to fully integrate an urban system, and seventeen years after *Brown* so many opinions had issued and so little integration had occurred, the Court was frustrated with continuing southern intransigence.<sup>17</sup> The busing order, first for Charlotte and then for other southern cities, changed the composition of southern schools almost overnight.

Chief Justice Warren blamed rural voters for the plight of urban America,<sup>18</sup> and with the reapportionment decisions, he stripped them of their undeserved political power both in the Congress and the states. After a misstep in upholding Blue Laws (on the quaint theory that retaining Sunday for a day of rest had nothing to do with Christianity),<sup>19</sup> the Court banned prayer<sup>20</sup> and Bible-reading<sup>21</sup> from the public schools to the howls of more culturally conservative religions.<sup>22</sup> But that was not their sole defeat. *Roth v. United States*<sup>23</sup> had begun the eradication of Victorian laws on

that "police violence and the 'third degree'" were flourishing. *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

13. 391 U.S. 430 (1968). The Court acknowledged that *Green* had marked a change in *Keyes v. School District No. 1, Denver, Colo.* 413 U.S. 189, 200-01 n.11 (1973).

14. *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968) (emphasis in original).

15. ROBERT WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 95-111 (1979).

16. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding that district courts have broad powers to fashion desegregation remedies for public schools).

17. L.A. Powe, Jr., *The Road to Swann: Mobile County Crawls to the Bus*, 51 TEX. L. REV. 505 (1973).

18. BERNARD SCHWARTZ, *SUPREMACY* 507-08 (1983).

19. *McGowan v. Maryland*, 366 U.S. 420 (1961). *McGowan* was a precursor of the conclusion in the 1980s that with enough reindeer and elves present, a creche is secular, too. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

20. *Engel v. Vitale*, 370 U.S. 421 (1962).

21. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (holding that First Amendment prohibits states from requiring Bible passages to be read or Lord's Prayer to be recited at start of school day).

22. *See* PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS* 392 (1972) (quoting Representative William Andrews of Alabama as saying: "They put the Negroes in the schools. Now they have driven God out.").

23. 354 U.S. 476 (1957) (stating that sex and obscenity are not synonymous and that obscenity is that which treats sex in manner appealing to prurient interests).

pornography; the 1966 Trilogy<sup>24</sup> appeared to be the clean sweep of sexual promiscuity. Finally, over the opposition of police forces everywhere, the Court federalized police procedures.<sup>25</sup> And believing, probably not without reason, that state courts would be unreceptive to the new national vision, the Court refashioned federal habeas to allow direct federal judicial supervision of state court processes.<sup>26</sup> Finally, during one of the Justices' periodic tests of their political acumen, the Court struck down the death penalty in *Furman v. Georgia*,<sup>27</sup> secure in the knowledge that public opinion would never authorize its reinstatement.

Surprising as it seems in retrospect, the Court's nationalizing trends during the 1960s were oblivious to the rebirth of the women's movement. Jurisprudence remained unchanged from Frankfurter's incredible opinion in *Goessert v. Cleary*<sup>28</sup> that any discrimination against women (or for them, for that matter, although it is difficult to so read the Michigan law) made sense and, therefore, was constitutional. The Court added its own update in *Hoyt v. Florida*<sup>29</sup> when it sustained a law allowing all women to avoid jury service. By 1970 the perception of the appropriate role of women in society had changed so drastically that both Lyndon Johnson and Richard Nixon supported the Equal Rights Amendment, which sailed through the House of Representatives 350 to 15, only to falter in the Senate over whether the ERA meant that women, too, had to be drafted.<sup>30</sup> After the new Congress assembled, the ERA was again introduced and swiftly secured House passage. On March 22, 1972, it passed the Senate, was sent to the states, and before the day was over had its first ratification of the thirty it would get in less than a year.<sup>31</sup>

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24. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (establishing three part test for determining obscenity); *Mishkin v. New York*, 383 U.S. 502 (1966) (finding books designed for and primarily disseminated to clearly defined deviant sexual group to be obscene); *Ginzburg v. United States*, 383 U.S. 463 (1966) (holding that publications which were represented to be erotically arousing and commercially exploited for the purpose of prurient appeal were obscene even if they were not obscene).

25. *See Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that all evidence obtained by unconstitutional searches and seizures is inadmissible in state criminal trial); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (holding that statement made by criminal suspect who has been refused opportunity to consult with counsel and who has not been apprised of his right to remain silent may not be used against accused at trial); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that Fifth Amendment requires accused to be informed of his right to remain silent, right to have counsel present, and right to have counsel appointed if unable to afford his own).

26. *Fay v. Noia*, 372 U.S. 391 (1963).

27. 408 U.S. 238 (1972) (holding that death penalty in cases at bar would be cruel and unusual punishment in violation of Eighth and Fourteenth Amendments).

28. 335 U.S. 464 (1948) (holding that Michigan statute prohibiting all women except wives and daughters of male owners of bars from bartending did not violate Equal Protection clause).

29. 368 U.S. 57 (1961).

30. JANE MANSBRIDGE, *WHY WE LOST THE ERA* 10-11 (1986).

31. *See id.* at 12 (recounting events surrounding 1972 passage of ERA by Senate and submission to states).

The Court, never uninfluenced by the strong intellectual currents of its time and subject to effective lobbying within the confines of the Justices' homes by strong-minded spouses and daughters, jumped on the bandwagon. In *Reed v. Reed*,<sup>32</sup> for the first time in the post-1937 era, the Court invalidated a law that classified on the basis of what had been prevailing gender stereotypes. *Reed* paled into insignificance as the Court voted later that Term, five to two, to constitutionalize the law of abortion.<sup>33</sup> This adopted the cornerstone of the women's movement and, given dicta in *Griswold v. Connecticut*<sup>34</sup> plus the recent decision upholding the District of Columbia's criminal abortion statute,<sup>35</sup> it would be a shock. Chief Justice Burger, who probably was a dissenter, first tried to have the case set aside until Powell and Rehnquist arrived and then assigned the case to Blackmun (who at the time was known as the junior member of the "Minnesota twins" and was the Justice least able to produce timely work). Late in the Term when Blackmun finally did circulate his opinion, pressure from Burger caused him to withdraw it, resulting in the case being set for reargument before the full Court. One can imagine Burger's surprise when the result held, this time by a seven to two margin (six to three if one counts the Chief's vote as an unrecorded dissent).<sup>36</sup>

## II

*Roe v. Wade*<sup>37</sup> finally came down on January 22, 1973. Before the following summer, the Court decided three significant cases that helped bracket a transition between eras: *Frontiero*<sup>38</sup> failed to equate gender discrimination with racial discrimination by a single vote; *Rodriguez*<sup>39</sup> let stand Texas' local property tax funding for public schools; *Keyes*<sup>40</sup> moved school integration into the North. Together with *Roe*, these cases offered different

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32. 404 U.S. 71, 76-77 (1971) (holding law granting preference to man when woman equally qualified for appointment as estate administrator invalid).

33. See WOODWARD & ARMSTRONG, *supra* note 15, at 169-70.

34. 381 U.S. 479 (1965).

35. See *United States v. Vuitch*, 402 U.S. 62, 67 (1971) (holding that abortion statute prohibiting abortion absent risk to mother's life or health was not unconstitutionally vague).

36. WOODWARD & ARMSTRONG, *supra* note 15, at 165-89.

37. 410 U.S. 113 (1973) (holding that Texas statute prohibiting abortion violated woman's constitutional right to privacy, including right to terminate her pregnancy, under Due Process Clause of Fourteenth Amendment).

38. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that federal statute placing burden only on women and not on men to obtain benefits for their spouses solely for administrative convenience violated Due Process Clause of Fifth Amendment).

39. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that Texas system of school district financing bears rational relationship to legitimate state purpose of assuring basic education for every child and is not violative of Equal Protection Clause of Fourteenth Amendment).

40. *Keyes v. School Dist. No. 1, Denver, Colo.* 413 U.S. 189 (1973) (concluding intentional segregation in one area justifies presumption that segregation elsewhere is also intentional).

views of two highly charged fields. *Roe* and *Keyes* significantly extended constitutional doctrine. By their advances, they looked backward to the era that was passing and would be gone by the end of the 1973 Term. *Rodriguez* and *Frontiero* refused to advance and thereby looked forward, ushering in a new era largely dedicated to the constitutional status quo.

The Court's embrace of women's rights in *Roe* had come as that era of feminism was reaching its peak. Shortly thereafter in *Frontiero*, with the Equal Rights Amendment being voted on in the states and still looking like a cinch, the Court faced the question of whether to hold gender discrimination to what was perceived, in the period before affirmative action, to be the standard for race: virtual per se unconstitutionality. Four Justices were ready to do just that and thereby moot the ratification process on the ERA. Indeed, they went so far as to cite the pending ERA as an example of Congress concluding that "classifications based upon sex are inherently invidious," and to argue that determination by "a coequal branch of Government is not without significance" to the constitutional question before the Court!<sup>41</sup> Powell's concurring opinion took a more modest view of the Congressional adoption of ERA:

By acting prematurely and unnecessarily . . . the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. . . . [R]eaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.<sup>42</sup>

The result—that the statutory classification was unconstitutional, but under a lower level of review than strict scrutiny—allowed the legislative process to continue to its surprising conclusion.

One can contrast the refusal of *Frontiero* to go forward with *Swann*, where, among its conclusions, the Court had stated that urban housing follows schools, and, thus, the location of segregated schools affects housing segregation.<sup>43</sup> This conclusion, which could be offered and believed only by old men cloaked in black robes,<sup>44</sup> necessarily pointed North where housing patterns were, if anything, more segregated than in the South. If the location of schools, an indisputable government function, created housing segregation, could the North be immune from the powerful nationalizing demand for integration? The answer on the one hand was no. Integration was a value that knew no legal boundaries; thus, in 1967, in its sole major northern case, the Court wiped out the retrograde attempt by California

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41. *Frontiero*, 411 U.S. at 687-88.

42. *Id.* at 692.

43. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971).

44. Eleanor P. Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63 (concluding that reasoning of courts on entire issue of relationship between school and residential segregation is illogical and confused).

voters to repeal their state open housing law.<sup>45</sup> On the other hand, Northern states had not mandated segregation by law, a distinction of no small constitutional import. Furthermore, moving busing into the ethnic neighborhoods of the North was a huge step even for a Court accustomed to lengthy constitutional strides.

Yet when *Keyes* posed the issue, it turned out that a solid majority (all but Burger and Rehnquist) was ready to give the North the benefits it had bestowed on the South. The Court held that when a trial judge found intentional segregation in one area of a school district, any segregation anywhere else in that district is presumed (rebuttably in theory, although probably not in fact) to have been caused also by intentional segregation. And intentional segregation was to be remedied in the North, just as in the South, with busing if necessary.

Powell's separate opinion was more forthright than Brennan's necessarily (to hold his Court) bland majority opinion. Furthermore, one cannot help feeling the passion Powell felt about the national double standard on school desegregation. "*Swann* imposed obligations on southern school districts to eliminate conditions which are not regionally unique but are similar both in origin and effect to conditions [everywhere else]. . . ."<sup>46</sup> Powell noted that "[u]nwillling and footdragging as the process was in most places, substantial progress toward achieving integration has been made in Southern States."<sup>47</sup> But not in the North. "[I]f our national concern is for those who attend such schools, . . . we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta."<sup>48</sup>

Having equated North with South generally (and accurately except for the South's obvious problem of original sin), Powell offered the first of his two—*Bakke*<sup>49</sup> would be the second—imaginative compromises of the decade. He would massively add to the requirement of desegregation and save the parties and the district judges the effort of attempting to prove some boundary line had been drawn or school sited with an illegal intent. But, in return, busing would be out as a remedy. Any other remedy would be available, but the outside influence of the federal judiciary could not tear a school system apart by the inevitably divisive busing order.

It was an imaginative compromise, one which, based on subsequent events, the Court would have been well advised to make because of its good sense and the recognition of political limitations on judicial implementation of social planning. However, the majority was having none of it. The South had opposed *Brown* and eventually had been forced to swallow major institutional changes. Now it was the North's turn. The Court had placed an unparalleled power in the hands of northern federal judges.

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45. *Reitman v. Mulkey*, 387 U.S. 369 (1967) (reading repeal of antidiscrimination laws by state constitutional amendment as creating constitutional right to discriminate).

46. *Keyes*, 413 U.S. at 223.

47. *Id.* at 218 (Powell, J., concurring in part, dissenting in part).

48. *Id.* at 218-19 (Powell, J., concurring in part, dissenting in part).

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



Because virtually every city had pockets of single-race schools, *Keyes* was a roadmap for willing district judges who could, seemingly at their own discretion, decide the future of each and every school system. Yet there is a quality of deflection to Brennan's solution. Rather than take the North wholesale, he took it retail; unlike Powell's compromise, Brennan required northern districts to be picked off one at a time. Politically, that might be a strength. It was possible that intense local hostility to busing might never materialize in the North as it had in the South because different communities would find themselves in court at different times. Nevertheless, the terms of the debate on busing said not a single word about educational quality. What a court order promised to white parents was a bus ride to a far-away school in what would be a deteriorating school system. Busing orders became inseparable from opposition to judicial intervention.

The confidence of *Keyes* contrasts with the modesty of *Rodriguez*,<sup>50</sup> and the latter, not the former, was to be the forerunner of decisions to come. The Court, by a five to four vote, refused to enter the fray over inequalities in the funding of public schools flowing from the accident of wealth: the amount of taxable property within the school district.<sup>51</sup> *Rodriguez* had a number of distinct holdings. First, wealth (and therefore poverty) was not a suspect classification. Second, education was not a fundamental right. Third, reliance on property taxes coupled with very mild state funding (basically an incentive matching with more funding going to the already healthy districts) was not irrational.

Powell's opinion stated that the Court should not be seen as "placing its judicial imprimatur on the [funding] status quo."<sup>52</sup> Maybe, but the opinion did embrace the *legal* status quo. Frank Michelman's imaginative Harvard foreword, *On Protecting the Poor Through the Fourteenth Amendment*,<sup>53</sup> just five years old and once perceived as being on the cutting edge of social and legal change, had been mortally wounded by *Dandridge v. Williams*<sup>54</sup> and *United States v. Kras*;<sup>55</sup> *Rodriguez* officially finished it off. The fundamental rights theories fared no better, although Powell's efforts to make fundamental rights a closed class had a hollow ring to it coming just two months after *Roe*. But as a promise never to do it again it was more comprehensible and reflected the Court's intent.<sup>56</sup> There were also statements of judicial modesty unseen (with the exception of *Dandridge*) in

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

51. *Id.*

52. *Id.* at 58.

53. 83 HARV. L. REV. 7 (1969).

54. 397 U.S. 471 (1970) (holding that Maryland regulation limiting amount of welfare grant did not violate Equal Protection Clause).

55. 409 U.S. 434 (1973) (holding that statutory requirement of payment of filing fees as condition of bankruptcy discharge did not deny indigents equal protection).

56. The Court, by a 5-4 vote, yielded slightly to find a grandmother could live with her two grandsons when they were merely cousins and not brothers, *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), but drew a firm line at sodomy, see *infra* note 91.

years. These were combined with Powell's view, which he would articulate again in *Keyes*, of the importance of localism in making educational decisions.

All in all, *Rodriguez* was the embrace of the constitutional status quo. It did not cut back, but it resolutely refused to cut new ground. While it is obviously impossible for a changing band of Justices to hold still for years on end, *Rodriguez* set a tone that would be echoed again and again over the subsequent decade, especially in gender discrimination, religion, and criminal procedure. Even when the Court was forced to eat a little crow once on the post-*Rodriguez* education-poverty issue—by concluding that Texas could not create a permanent underclass of illiterates by its refusal to enroll children of illegal aliens in the public schools unless their parents came up with the full costs of their schooling—Powell's concurring opinion underscored the limited fare: he wished "to emphasize the unique character of the case[. . .]"<sup>57</sup>

### III

*Rodriguez* set the tone, but *Roe*,<sup>58</sup> center of a firestorm of criticism, was the catalyst. The Justices, and especially Blackmun, were flooded with mail, labelling them child killers, sometimes with references to the Butchers at Dachau.<sup>59</sup> Creating a comparison that would also last, Texas filed a petition for rehearing comparing *Roe* to the infamous *Dred Scott*<sup>60</sup> decision.<sup>61</sup> Whatever the political justifications for legalizing abortion, there was more than ample reason for the critics' attack on the Court.

With excessive medical discussion, an obviously brokered legislative determination on trimesters, plus almost complete exclusion of the sources of constitutional law, Blackmun's opinion for the Court is probably the weakest of any major decision in American history. As Mark Tushnet so aptly commented, maybe *Roe v. Wade* is the entering wedge of Cubist legal "reasoning."<sup>62</sup> Surprisingly, with every Justice knowing this was a major

57. *Plyler v. Doe*, 457 U.S. 202, 236 (1982) (Powell, J., concurring). He wasn't kidding either. A year later he wrote for the Court in *Martinez v. Bynum*, 461 U.S. 321 (1983), sustaining facially a Texas law denying tuition-free education to minors who live apart from their parents or guardians if the minor's presence in the school district is "for the primary purpose of attending the public free schools." *Id.* at 321. The plaintiff was a U.S. citizen of Mexican parents who at the age of eight returned to Texas to live with his sister in order to attend public schools. *Id.* at 322-23.

58. *Roe v. Wade*, 410 U.S. 113 (1973).

59. WOODWARD & ARMSTRONG, *supra* note 15, at 239.

60. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

61. 410 U.S. 959 (1973).

62. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821 (1983). Tushnet stated:

[C]onsider the craft of "writing novels." Its practice includes Trollope writing *The Eustace Diamonds*, Joyce writing *Finnegan's Wake*, and Mailer writing *The Executioner's Song*. We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion. To say that

case, neither Rehnquist nor White in dissent took advantage of *Roe*'s void in legal reasoning to write the dissent that a major case deserves. That honor fell to John Hart Ely, a young liberal academic at Yale who rushed into print with a biting commentary<sup>63</sup> that has never been improved upon. Thereafter, other liberals, most notably Laurence Tribe<sup>64</sup> and Michael Perry,<sup>65</sup> attempted time after time to find a constitutional justification for abortion. Eventually, on sort of an adverse possession theory of constitutional law, the search for a rationale stopped and *Roe* became, for most liberals, a constitutional given, just as if the due process clause actually mentioned privacy and abortion. But the united liberal front that supported and justified the other nationalizing opinions did not immediately provide *Roe* with protective cover. Conservative opposition could not only attack the result, but also note that leading liberal academics found the result and opinion unjustifiable.

The Court, of course, had known that abortion was a hot political issue. But the Court had been there so many times before. Southerners disliked *Brown*. National security conservatives could never tolerate letting a pink, much less a red, go free. Police organizations felt similarly about criminals, and the Court's criminal procedure decisions, especially *Miranda*, had been targets of Richard Nixon's successful 1968 presidential campaign. Even the State Chief Justices had briefly weighed in against the Court in the late 1950s. But the decisions on busing and abortion brought an immediacy and a generalizeability to Court criticisms that had theretofore been lacking. Unintentionally, between them *Roe* and *Keyes* closed the nationalizing era that had begun over a third of a century earlier.

The certainty that there was but one true course for constitutional law dissipated. Opinions became more homogenized (law clerks taking the responsibilities and having the same backgrounds), offering up a multi-part doctrinal test<sup>66</sup> that wound up as balancing.<sup>67</sup> Lengthy, ponderous, unaesth-

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it does not look like Justice Powell's decision in some other case is like saying that a Cubist "portrait" does not look like its subject as a member of the Academy would paint it.

*Id.* (footnotes omitted).

63. John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (criticizing *Roe v. Wade* as unsupported by constitutional text, history, or doctrine).

64. Compare Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (stating that religious controversy surrounding abortion supports allocation selected by Court) with LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 928 (1st ed. 1978) (stating that *Roe* properly rests on fundamental personal right of reproductive autonomy).

65. Compare Michael J. Perry, *Substantive Due Process Revisited: A Comment on Roe v. Wade*, 71 NW. U. L. REV. 417 (1976) (stating that Court following conventional morality justifies *Roe*) with MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982) (stating that Court, using own views of morality, and properly behaving as Prophet justifies *Roe*).

66. See ROBERT NAGEL, CONSTITUTIONAL CULTURES ch. 7, "The Formulaic Constitution"

etic, with virtually all traces of individuality suppressed, these opinions made reading the Court's work tedious. In David Currie's apt words, "one can rapidly have one's fill of debating whether the government's interest in doing A outweighs the burden thereby imposed on B."<sup>68</sup> Balancing resulted in few extensions from the prior era, but few reversals as well. For more than ten years the Court trod along in the status quo. To be sure, some areas showed more change than others. Criminal defendants were almost cinch losers where previously they won. But the landmarks of the nationalizing period were not overruled, and only rarely were they extended<sup>69</sup> as the Court nibbled away at the margins. Other areas hardly changed. Thus, busing continued, but without enthusiasm and without extension.

As befits a centrist Court, the Justices themselves were split with Brennan and Marshall consistently<sup>70</sup> looking backward to the era of their appointments and Rehnquist and Burger looking ahead to the era that would begin shortly after the latter's retirement. In between were the centrists, Powell and Stewart, and to a lesser extent White. Centrist decisionmaking on a divided Court produces strained and strange results.<sup>71</sup> Nowhere is this better illustrated than with death and religion.

When *Furman*<sup>72</sup> invalidated all the capital punishment statutes in the country, the Court required legislators to do what the Court itself just a year earlier<sup>73</sup> had said was impossible: provide written guidance for juries to assist them in the choice of life or death. The Justices did not believe legislatures would take them up on it, not because of impossibility, but rather because, in the enlightened society in which they were living, capital punishment was a relic from a bygone era.<sup>74</sup> The only problem with the political prognostication was that it was completely wrong. If the Court

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(1989) (discussing Supreme Court's use of formulaic style in opinions to explicate constitutional jurisprudence).

67. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (examining "balancing" approach as form of constitutional reasoning).

68. DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY* 598 (1990).

69. The exception that jumps to mind is the extension of *Miranda* in *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that use of criminal defendant's confession at trial violated his Fifth and Fourteenth Amendment rights even though defendant responded to police-initiated interrogation after being advised of rights, because defendant had invoked right to have counsel present).

70. But see *Buckley v. Valeo*, 424 U.S. 1 (1976) (where they split). See *infra* note 109 (discussing dissent in *Bellotti* in which Brennan and Marshall joined).

71. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (observing that Court's natural operation will produce fractured and inconsistent decisions).

72. *Furman v. Georgia*, 408 U.S. 238 (1972).

73. *McGautha v. California*, 402 U.S. 183 (1971).

74. That was Stewart's position, WOODWARD & ARMSTRONG, *supra* note 15, at 218, and there is no reason to believe it was limited to him. Marshall concluded that capital punishment was "unacceptable to the people of the United States at this time in their history." *Furman*, 408 U.S. at 360.

demanding that juries be given guidance before a death penalty could be constitutionally administered, then guidance it would be. So states tried the easy way out, mandatory death penalties. A majority would not have that either.<sup>75</sup> It turned out that however bad discretion was, some discretion was mandatory. Neither excessive discretion nor excessive rigidity was valid. Appropriate discretion was valid.<sup>76</sup> Thereafter, the Court lessened its supervision of the amount of discretion needed,<sup>77</sup> but the thread of decisions throughout this period was to authorize capital punishment as a matter of constitutional law while simultaneously making it difficult for the states to carry out executions. If the results and opinions made little sense, fragmented voting was one culprit. From 1971 until his retirement a decade later, Justice Stewart was the law of capital punishment; he alone voted with the result in each case. The area achieved "rationality" only after Powell's retirement, when a majority formed which was willing for the first time to facilitate procedures accommodating states' desires to execute their death row inmates.

The religion cases, in which the Court maintained a tripartite test from *Lemon v. Kurtzman*,<sup>78</sup> produced widely conflicting results in the parochial cases that dominated the 1970s' docket. Nowhere has the job of ridiculing the Court been better practiced than by Rehnquist:

[A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington . . . . A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.<sup>79</sup>

No one, not even the few Justices controlling the results, could be happy with such a laughable situation, but because the topic was religion it brought out the worst in interest groups. One side, typically associated with the American Civil Liberties Union, liberal Protestants, and Jews, wanted no aid of any kind and saw any deviation as the beginning of a spiritual state. The other, a strange coalition of Catholics wanting financial aid and

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75. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that North Carolina's death sentence for first-degree murder violated Eighth and Fourteenth Amendments).

76. *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976) (holding that punishment of death for murder did not, under all circumstances, violate Eighth and Fourteenth Amendments).

77. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (discussing series of cases in 1982 Term in which Court prematurely announced it would no longer regulate way in which states administer death penalty phase of capital murder cases).

78. 403 U.S. 602 (1971). The *Lemon* test considers whether there is a secular purpose for the legislation, whether the primary purpose is to advance religion, and whether the legislation results in excessive government entanglement.

79. *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (footnotes omitted).

culturally conservative Protestants wanting school prayer, argued that the Establishment Clause did not bar government aid to religion.

The parochial cases satisfied neither group of activists, but when the Court broke out of that area and sustained a state's paying for a legislative chaplain<sup>80</sup> and displaying a Nativity scene,<sup>81</sup> those wanting more religion in public life were elated. Those decisions, however, were followed by *Wallace v. Jaffree*,<sup>82</sup> where the Court invalidated a statute authorizing teachers to announce a minute of silence "for meditation or voluntary prayer."<sup>83</sup> In summing it up, it seems impossible to improve on the observation of my colleague Douglas Laycock:

The Court occasionally alludes to . . . the theory that a little bit of aid to religious schools is permissible, but it must be structured in a way that keeps it from becoming too much. Indeed, this theory may be generalizable in ways that explain other establishment clause conundrums, such as the Court's approval of legislative chaplains and municipal Nativity scenes: perhaps, in general, the Court believes that a little bit of government support for religion is unobjectionable.<sup>84</sup>

The middle way also was prevalent in gender discrimination cases. Following the failed attempt to preempt the ERA in *Frontiero*, the Court compromised on what was called intermediate scrutiny in *Craig v. Boren*,<sup>85</sup> a case remarkably like *Cooley v. Board of Wardens*<sup>86</sup> in that everyone could join the compromise without giving up their intended outcomes. Thus, when women were exempted from draft registration,<sup>87</sup> the Court maintained its overly deferential approach to all things military. Also by a pair of five-to-four votes, the Court sustained statutory rape laws,<sup>88</sup> while forbidding a nursing school from excluding men.<sup>89</sup>

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80. *Marsh v. Chambers*, 463 U.S. 783 (1983).

81. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

82. 472 U.S. 38, 40, 61 (1985).

83. *Wallace v. Jaffree*, 472 U.S. 38, 40, 61 (1985).

84. Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 446 (1986).

85. 429 U.S. 190 (1976) (holding that teenagers get to drink at same age regardless of gender and traffic statistics).

86. 53 U.S. (12 How.) 299 (1851) (upholding state legislation for regulation of pilotage).

87. See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that Congress acted within constitutional authority when authorizing registration of men and not women under military Selective Service Act).

88. See *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding constitutionality of statutory rape law which limited liability to men alone).

89. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (determining that excluding men from state-supported nursing school violates Equal Protection Clause of Fourteenth Amendment).

When the issue turned from discrimination to abortion, despite intense political and public opposition as well as changing membership, *Roe* held. Even more than in other significant areas, "holding" meant no new movement either within the principle of privacy or the ability to obtain abortions. Thus, the Court dealt blows to less affluent women who wished to have governments fund their abortions instead of their deliveries.<sup>90</sup> Nevertheless, the confirmation hearings on the retirements of Powell, Brennan, and Marshall attested to *Roe's* ability, year after year, to hang by a tenuous thread despite the Court's swiftly changing composition. It seems unlikely, however, to survive much longer in the new era of conservative hegemony.

Holding the line also meant that gays, increasingly out of the closet and demanding the rights of first class citizenship, could not be accommodated within the constitution.<sup>91</sup> Here Powell attempted a compromise, not like *Keyes* and *Bakke*, but rather like that of *Branzburg*. The obvious fifth vote for the majority, he joined the opinion of the Court, but wrote a short concurring opinion with a slightly different rationale designed to soften the blow.<sup>92</sup> Even more than his *Branzburg* concurrence, Powell's effort in *Bowers* was irrelevant to the issue and the future, something poignantly underscored by his post-retirement recanting of his vote.<sup>93</sup>

With race there were two huge refusals to go forward, coupled with a seemingly cautious entry into the world of affirmative action. *Keyes* had marked the flood tide of busing. A year later, in *Milliken v. Bradley*,<sup>94</sup> the Court dealt busing a backhanded blow from which it could not recover. Demographics and the availability of constitutionally protected private schools<sup>95</sup> were leaving many urban school systems with fewer and fewer white students. While one of *Brown's* companion cases had involved the 70% black Clarendon County, South Carolina,<sup>96</sup> *Green's*<sup>97</sup> switch from desegregation to integration necessitated white children in the system. District judges, first in Richmond and then in Detroit, had found the needed white students in suburban school districts and entered busing

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90. See *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980) (holding that Equal Protection Clause did not require state, through its Medicaid program, to pay for nontherapeutic abortions for indigent women merely because it paid childbirth expenses).

91. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that Georgia's sodomy statute did not violate fundamental rights of homosexuals).

92. See *id.* at 197 (Powell, J., concurring) (agreeing that Due Process Clause embodies no substantive right to engage in consensual homosexual activity, but noting that sodomy statute might fail on Eighth Amendment grounds).

93. Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3.

94. 418 U.S. 717 (1974) (holding imposition of multidistrict remedy for single-district de jure segregation improper in absence of findings that other included districts had failed to operate unitary school systems or had committed acts that effected segregation).

95. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that Oregon Compulsory Education Act requiring children to attend public schools violated Fourteenth Amendment).

96. *Briggs v. Elliot*, 347 U.S. 483 (1954); RICHARD KLUGER, *SIMPLE JUSTICE* 6 (1976).

97. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

orders bringing them into the inner city schools (and sending black students out to the suburbs). The message, for those who were planning to engage in white flight, was that there was no escape.

The Detroit district judge, after finding intentional segregation in the Detroit schools and that any Detroit-only plan would still leave many schools with 75-90% black students, combined Detroit with 53 suburban districts involving an area the size of Delaware and almost tripling the number of students. Before the order Detroit had been approaching 70% black students; the new district was 75% white. By a five-to-four vote the Court reversed, finding the massive remedy incommensurate with the constitutional violation in Detroit alone. Whether or not the Court knew it, *Milliken* set busing on a lengthy course to minimization. Urban America had too few whites within its school systems and *Milliken* held that if they moved, they could not be recaptured by a busing order. Given the massive unpopularity of busing, there was little doubt what would happen. Still, district judges kept ordering busing into the 1980s and the Court affirmed orders in *Columbus*<sup>98</sup> and *Dayton*<sup>99</sup> and dismissed certiorari as improvidently granted in *Dallas*, where the Fifth Circuit had set aside a plan minimizing busing.<sup>100</sup>

*Keyes* and the Detroit suburbs had implicitly raised the question of what the Constitution said about governmental decisions having a disparate adverse impact on minorities (when there was no intent to harm them). In *Washington v. Davis*,<sup>101</sup> the Court held that governmental action is not unconstitutional solely because it has a racially disproportionate impact. Thus, the fact that a test used by the District of Columbia police department was failed more frequently by blacks than whites did not make use of the test unconstitutional even though Title VII bars tests under some (and often similar) circumstances. Had the decision come out otherwise, *Washington v. Davis* would have necessitated a major restructuring of American institutions. Even the Court during its nationalizing era might well have balked at such a decision.

With affirmative action, Powell offered his second major compromise of the decade, and this time it was "accepted" if only because the other eight were equally split. Powell's *Bakke* opinion rejected quotas but allowed universities to take race into account as one factor in the admission process. Universities embraced his solution even as it turned out to be

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98. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

99. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (affirming court of appeals ruling that plaintiffs, students in Dayton, Ohio, school system, had proved system-wide pattern of intentional segregation which warranted system-wide remedy).

100. *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437 (1979). At the Supreme Court I was counsel for the amicus Dallas Alliance, the tri-ethnic group that drafted the district court's plan.

101. 426 U.S. 229 (1976) (holding that standards applicable to equal employment opportunity cases should not have been applied in resolving issue whether test violated Due Process Clause, and that law is not unconstitutional solely because it has racially disproportionate impact).



impossible to implement. Taking race into account when grades and test scores were significantly lower for minorities offered no guidance at all toward the crucial question of how much race should count. This question could only be answered by predetermined "goals" which, with experience, became quotas. Those on the inside knew; those on the outside might, like the *New York Times*, choose to bury their heads and not "know."<sup>102</sup> The result, inevitably, was the Spring 1991 flap at Georgetown Law Center where a student exposed the lower test scores of minorities and, in an almost scripted response, the dean did Orwell proud by talking about "other factors" which could help a minority, but not a white, gain entrance.<sup>103</sup>

After *Bakke* cases seemed to meander, although this stemmed, as so much of the confusion from this era does, from the middle deciding which of the two polar blocks would prevail in each dispute. The prototypical affirmative action case was about jobs, and Powell and O'Connor voting in the middle determined the propriety of a racial (or gender) preference by their cost-benefit analysis, which ultimately looked to how severe the costs were to the whites in terms of disrupting settled expectations.<sup>104</sup> This was most clearly articulated by Powell in *Wygant*, where he noted that "hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, [but] layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive."<sup>105</sup>

The two areas where the Court distanced itself most from the nationalizing period were in freedom of expression and the relation of the states to the federal government. And yet even here the changes were incremental, with nothing of the order of a *Brown* or *Reynolds v. Sims* or *Swann* or *Roe*.

By the time the Court had decided *Brandenburg*,<sup>106</sup> *Watts*,<sup>107</sup> *Cohen*,<sup>108</sup> *Rosenbloom*,<sup>109</sup> and the Pentagon Papers cases,<sup>110</sup> it was hardly an exag-

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102. See N.Y. TIMES, Apr. 18, 1991, at 24 (editorial swallowing whole Georgetown dean's explanation); *infra* note 103.

103. Michael Marriott, *Storm at Georgetown Law on Admissions*, N.Y. TIMES, Apr. 16, 1991, at 14.

104. Samuel Issacharoff, *When Substance Mandates Procedure*, 77 CORNELL L. REV. 189, 208 (1992).

105. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986) (plurality opinion) (footnote omitted).

106. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding unconstitutional statute forbidding mere advocacy and assembly, for failing to distinguish mere advocacy from incitement to imminent lawless action).

107. *Watts v. United States*, 394 U.S. 705 (1969) (holding that defendant's statement, in context of opposition to Vietnam War, "if they ever make me carry a rifle the first man I want in my sights is L.B.J.," did not amount to threat against life of President).

108. *Cohen v. California*, 403 U.S. 15 (1971) (holding that state may not make mere public display of offensive language criminal offense).

109. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (applying New York Times

geration to state that Americans could say virtually anything they wished without fear of sanction. In the centrist era the Court nibbled a bit and took a fair bite when it came to sexuality.<sup>111</sup> Elite opinion on the problems of both obscenity and pornography changed as did some of the Court's doctrine, although the market for sexual materials and expression flourished well beyond that of even the late 1960s. In two areas, commercial speech and campaign finance, the Court went beyond prior protections. But in one area, in case after case, the Court's doctrine made it increasingly difficult for individuals to find appropriate forums. As a result, while Americans can still say pretty much what they please, there are few places where they may say it.

Until 1975<sup>112</sup> the prevailing wisdom was that commercial advertising was wholly without constitutional protection.<sup>113</sup> Then the Court dramatically constitutionalized the area,<sup>114</sup> eventually reaching the inevitable compromise on its anesthetizing multipart test.<sup>115</sup> While there has been more agreement among the Justices in this area than in highly politicized areas like abortion and affirmative action, the results have, as with so many areas, pleased few. Daniel Lowenstein summarizes the areas by stating that "the Court has struck down every restriction of purely or predominantly informational advertising to come before it, whereas all or nearly all (depending on how one classifies *Central Hudson*)<sup>116</sup> restrictions of noninformational commercial

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Co. v. Sullivan, 376 U.S. 254 (1964), knowing-or-reckless-falsity standard in state civil libel action brought by private individual for defamatory falsehood uttered by radio station about individual's involvement in event of public interest).

110. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (refusing to enjoin publication of contents of classified Viet Nam Study).

111. *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (articulating obscenity standards); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that in narrow circumstances government may restrict public broadcast of language that is indecent but not obscene); *New York v. Ferber*, 458 U.S. 747 (1982) (affirming statute prohibiting persons from knowingly promoting sexual performance by child under age of 16 by distributing material depicting such performance); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (upholding school's disruptive conduct rule prohibiting obscene or profane language or gestures).

112. *See Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that Virginia statute prohibiting encouragement of abortion by sale or circulation of any publication infringed upon constitutionally protected speech under First Amendment).

113. *See Cammarano v. United States*, 358 U.S. 498, 514 (1958) (Douglas, J., concurring) (stating that decision not to protect commercial speech was "casual, almost offhand"); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (denying First Amendment protection to purely commercial advertising).

114. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (granting limited First Amendment protection to commercial speech for first time).

115. *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). *Central Hudson* set out a four-part test for analyzing commercial speech. First, the Court must determine whether the commercial speech at issue concerns lawful activity and is not misleading. Second, the asserted government interest in regulating the speech must be substantial. Third, if the first two prongs have been satisfied, the state must show that the regulation directly advances the asserted governmental interest. Finally, the Court must determine that the regulation is no more extensive than is necessary to serve that interest. *Id.* at 566.

116. 447 U.S. 557 (1976).

speech have been upheld."<sup>117</sup> This does appear to be an area where, had the right case—say *Bigelow*<sup>118</sup>—appeared, the nationalizing Court would have gotten there first.

The controversial extension of free speech has been in the campaign finance area where many of the enthusiastic supporters of the nationalizing era believe the Court erred in placing First Amendment limits on the ability of government to restrict spending for elections.<sup>119</sup> *Buckley v. Valeo*<sup>120</sup> and *First National Bank v. Bellotti*,<sup>121</sup> the two key culprits, struck down provisions which varied from making it a criminal offense for any individual to take out a newspaper ad on her own stating "Gerald Ford Pardoned Richard Nixon. Say No to Him," to limiting the amount candidates could spend toward their election, to precluding corporations from spending corporate money to influence a referendum.

Campaign finance cases presented an issue untouched during the nationalizing era. Like affirmative action, the cases pitted liberty interests<sup>122</sup> against equality demands. Like affirmative action, the Court compromised, allowing regulation of contributions but not spending. To have held otherwise would have necessitated the Court in adopting some form of the conclusion that the speech of certain individuals could be limited so that the speech of others could be heard better. With the exception of *Red Lion*<sup>123</sup> and its embrace of broadcast scarcity, this had never been done, and the Court found the principle "wholly foreign to the First Amendment."<sup>124</sup> Thus, while the Court had entered a new area, it had created no new doctrine and had avoided the problem of whether there was a principled stopping place.<sup>125</sup>

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117. Daniel Hays Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1230 (1988).

118. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

119. The certainty that *Buckley v. Valeo*, 424 U.S. 1 (1976), would have come out differently in the prior era is not entirely justified; Brennan and Stewart voted with the majority on every issue with Marshall and White assuming (what would continue to be) the lead in opposition. In the case of *First National Bank v. Bellotti*, 435 U.S. 765 (1978), the dissenting lineup—Brennan, Marshall, White, and Rehnquist—underscores that it was not the normal case. Woodward and Armstrong also relate a story about the failing Douglas in one of his lucid periods stating that no matter what his mental problems, he will know what to do by doing the exact opposite of Burger. It is more than a little ironic that Burger (for slightly different reasons) was the only Justice who voted as Douglas intended to vote in *Buckley*—to strike down the whole act. WOODWARD & ARMSTRONG, *supra* note 15, at 391.

120. 424 U.S. 1 (1976) (holding that provisions limiting expenditures by candidates on their own behalf violated First Amendment).

121. 435 U.S. 765 (1978) (rejecting notion that expression loses First Amendment protection merely because speaker is corporation).

122. While *Bellotti* may represent the special problem of corporations, the theory restricting it is likely to apply to individuals as well. Compare Julian N. Eule, *Promoting Speaker Diversity*, 1990 SUP. CT. REV. 105 with L.A. Powe, Jr., *Mass Communications and the First Amendment: An Overview*, 55 LAW & CONTEMP. PROBS. (1992) (forthcoming 1992).

123. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), discussed in L.A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 37-44 (1987).

124. 424 U.S. at 48-49.

125. Compare Julian N. Eule, *Promoting Speaker Diversity*, 1990 SUP. CT. REV. 105 with

"Traditional public forum property occupies a special position in terms of First Amendment protection. . . ." <sup>126</sup> Unfortunately, traditional public forums—sidewalks and parks—are also verging on First Amendment obsolescence in our drive-to-the-mall nation. Yet the changes in society have not been matched with changes in public forums. The Court has rejected the possibility of new forums with such frequency that results are mired in an era long since passed. The effect is that the Court has seemingly ignored the problems of communication for the less affluent. Whether it is the absurdity of requiring a stamp before putting a flier in a mail box,<sup>127</sup> or denying teachers the use of school mail boxes,<sup>128</sup> or agreeing with Los Angeles' claim that its aesthetic interests preclude use of utility poles for campaign ads,<sup>129</sup> the Court has refused to accommodate the needs of those without access to radio, television, and newspapers. For a Court properly concerned that the affluent not be limited in their speech opportunities,<sup>130</sup> the lack of concern for the less affluent therefore is shocking<sup>131</sup> and is a distinct difference from the earlier era, which, while not perfect in its protection of speech opportunities, at least held to a better symmetry.<sup>132</sup>

When *National League of Cities v. Usery*<sup>133</sup> struck down the extension of the minimum wage to municipal workers, Brennan's dissent cried out that the majority obviously did not understand our constitutional order: the federal government never loses an economic case.<sup>134</sup> Brennan rightly saw *National League of Cities* as a change designed to favor state and local authority in ways unimaginable for decades. Of course, *National League of Cities* itself was interred nine years later.<sup>135</sup> Yet it was hardly a consti-

L.A. Powe, Jr., *Mass Communications and the First Amendment: An Overview*, 55 LAW & CONTEMP. PROBS. (forthcoming 1992).

126. *United States v. Grace*, 461 U.S. 171, 180 (1983).

127. *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981).

128. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983).

129. *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984).

130. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

131. L.A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 259 (1991).

132. See, e.g., *Adderly v. Florida*, 385 U.S. 39 (1966) (holding that convictions of student protestors who entered jail grounds with malicious intent, blocked vehicular travel on driveway to jail not open to public, and refused to disperse upon sheriff's warning were not in violation of First Amendment); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (holding that FCC order requiring radio station to furnish person attacked in broadcast with tape, transcript, or summary of broadcast enhanced rather than infringed upon First Amendment freedom of speech).

133. 426 U.S. 833 (1976).

134. *National League of Cities v. Usery*, 426 U.S. 833, 857 (1976) (Brennan, J., dissenting). The proper result, Brennan held, had been plain since *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *Id.*

135. *Garcia v. San Antonio Mun. Transit Auth.*, 469 U.S. 528 (1985) (holding that transit authority was not immune from minimum wage and overtime requirements). In what was neither the most touching nor the most distinguished moment of his tenure, Powell mourned

tutional virus ready to strike at the heart of democracy. It was a case that had bad luck. Had the errand-boy treatment of state government displayed in the Public Utility Regulatory Policies Act of 1978<sup>136</sup> followed on *National League of Cities*' heels instead of the absurd and traditional(ly losing) claim of the Virginia strip mines,<sup>137</sup> then *National League of Cities* might have lasted.

While the holding of *National League of Cities* did not last, its core—new-found respect for state and local institutions, in some respects already emerging in the jurisprudence following Black's "Our Federalism" of *Younger v. Harris*<sup>138</sup>—fared vastly better<sup>139</sup> than at any time since the New Deal revolution.<sup>140</sup> The Eleventh Amendment, which had been suffering a long erosion, was revitalized in *Edleman v. Jordan*<sup>141</sup> to become a major obstacle to suits against government. Most significant, however, was *Stone v. Powell*<sup>142</sup> and its signal that the regime of *Fay v. Noia*<sup>143</sup> was ending. *Fay* had been part and parcel of the nationalization of criminal procedure. A renewed deference to states—they seemed to win, instead of lose, every criminal case—meant less second guessing of state courts. The deference went all the way down to school boards (probably Powell's favorite beneficiary in his respect for localism).<sup>144</sup> Of all the areas of jurisprudence, the paying of respect to state and local institutions looked the least centrist and the most

for stare decisis and the decisions relying on *National League of Cities*. *Id.* at 557-58. If stare decisis really had worried him, he should have been grieving for *Maryland v. Wirtz*, 392 U.S. 183 (1968), which upheld minimum wage requirements as constitutional, did not come out of the blue, was 7-2, not 5-4, and had a mere eight year lifetime.

136. 92 Stat. 3117, *sustained in* FERC v. Mississippi, 456 U.S. 742 (1982).

137. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding Surface Mining Control and Reclamation Act as not violating Tenth Amendment).

138. 401 U.S. 37, 44 (1971) (refusing to enjoin state prosecution under unconstitutional California Criminal Syndicalism Act).

139. The exception is FERC v. Mississippi, 456 U.S. 742 (1982), which sustained a provision of PURPA that treated states as if they were bureaus of the Department of Energy.

140. One reason for the growing deference to states had to do with the changed selection process for Justices. After Fortas and Marshall, not a single Justice had any significant national political experience (viewing the NAACP Legal Defense Fund as part of the national governing coalition). Indeed, by 1991 the idea of even local political experience had ended. Only O'Connor had as much as run for dog catcher. Justices came from the states, with a tryout period in the federal courts of appeals. I suspect this lack of political experience and, thus, support for the branch of government that elevated them, are major factors in the Congress' dismal record in separation of powers cases.

141. 415 U.S. 651 (1974) (holding that Eleventh Amendment barred retroactive payment of wrongfully withheld benefits).

142. 428 U.S. 465 (1976) (holding that where state granted opportunity for full claim, state prisoner could not be granted habeas corpus relief on ground of unconstitutional search and seizure).

143. 372 U.S. 391 (1963).

144. *See Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that cruel and unusual punishment clause of Eighth Amendment did not apply to disciplinary corporal punishment in public schools).

like the era of statist hegemony that would dawn following Powell's retirement.

#### IV

For over a third of a century following the New Deal's successful revolution, the Court first genuflected toward whatever the federal government did and then began on its own to create a constitutional law based on the values of the northern elite. Somewhere around *Roe* and *Keyes* that era ran its course, and, possibly encouraged by strong popular dissent not limited to any given section of the country, a new era came into being. *Rodriguez* typified the new area by its deferential approach to local institutions and its unwillingness to create and extend new constitutional doctrine to solve emerging problems. When one compares the bulk of Powell's tenure with what went before and what is coming after, the reason for my title, *The Court Between Hegemonies*, becomes apparent: this was a centrist era.

Vincent Blasi characterized the Burger Court in its 1969-81 period as one of "rootless activism."<sup>145</sup> The catchy title of this famous essay is backed up well by his reasons, and the reader will likely remember the title and conclusion well after the specifics of his argument have been forgotten. His specifics, however, comport well with my own conclusion that the era following *Roe* was one largely dedicated to the constitutional status quo. Thus, he begins his essay by stating that the Court solidified activism by its failure to overrule either the front line or second tier landmark precedents from the Warren Court.<sup>146</sup> Furthermore, rootless activism is centrist: "In other words, in the hands of the Burger Court judicial activism has become a centrist philosophy—dominant, transcending most ideological divisions, but essentially pragmatic in nature, lacking a central theme or an agenda."<sup>147</sup>

I agree. But the Court does not need an agenda, and charges of activism are too much a relic of process jurisprudence with its presumed correctness of a single given way of thinking.<sup>148</sup> There is nothing inherently wrong with centrist activism, and my guess is that many of its critics will soon like it a lot better as they digest the results of the new hegemony which is likely (at least initially) to find constitutional violations only in affirmative action. Centrist activism, rootless or otherwise, cannot be neatly characterized;

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145. Blasi, *supra* note 3, at 198.

146. Blasi, *supra* note 3, at 199. Blasi's second introductory point is that the Burger Court in 13 years invalidated 24 federal statutes compared to the 19 the Warren Court took out in its 16 years. *Id.* at 200. My view of the earlier era as one of nationalizing values complete with following the lead of the federal government anticipates that during that era the Court would be more differential to federal legislation.

147. Blasi, *supra* note 3, at 211.

148. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* (1976); L.A. Powe, Jr., *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMMENTARY 267, 276 (1989).

nevertheless, there is much to be said for paraphrasing Douglas Laycock's summation of the Court and religion: "[P]erhaps, in general, the Court believes that a little bit of government [involvement in our lives] is unobjectionable."<sup>149</sup> Powell, one suspects, would not be uncomfortable with such a characterization of either his era or his decisions. Like Brennan in his younger days<sup>150</sup> and Rehnquist on the current Court, Powell, the centrist Virginia patrician, seems to have been cast for the era in which he served, a fleeting period between two very different hegemonies.

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149. The paraphrase of Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 446 (1986), is his own, offered to me in comments on an earlier draft of this essay.

150. Post, *Justice William J. Brennan and the Warren Court*, 9 CONST. COMMENTARY 11 (1991).