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JUSTICE POWELL'S CONSTITUTIONAL OPINIONS

GEORGE CLEMON FREEMAN, JR.*

A Justice's long term impact on the Supreme Court is difficult to predict. When there are wide philosophical differences among the sitting Justices, the votes of a "swing" Justice like Justice Powell have special significance in determining the controlling law of his day. We will continue to see analyses of the closely divided 5 to 4 opinions in which Powell participated and speculation on how those precarious precedents will fare as Powell and other Justices who participated in them depart and others take their places.

Although the votes of a Justice are one measure of his contemporary contribution to constitutional law, a Justice's influence on future generations is based primarily on his written opinions. Opinions live on in several ways. Some are great landmark or seminal opinions that over time become accepted as such. Sometimes they are majority opinions, sometimes dissents. Other opinions survive because they are instructive of the ordered process of analysis and decision.

A number of articles have been published about Justice Powell's life and his opinions.[1] It would serve little purpose to repeat what has been said elsewhere. But it may be of benefit to discuss briefly about thirty of Justice Powell's most significant constitutional opinions[2] to see what picture of his

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1. *See, e.g., A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395 (1987) (includes articles by Justice O'Connor, Richard H. Fallon, Jr., Gerald Gunther, George C. Freeman, Jr., Oliver W. Hill and Judge J. Harvie Wilkinson, III); *Dedication, Justice Lewis F. Powell, Jr.*, 39 BAYLOR L. REV. No. 3 (1988) (includes tributes by Justices White and Stevens, Judges Wright and Brown, Charles Allen Wright, George C. Freeman, Jr., and F. Wm. McCalpin); Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987). For earlier articles on Justice Powell, see *The Symposium in Honor of Justice Lewis F. Powell, Jr.*, 68 VA. L. REV. 161 (1982) (includes articles by BeVier, Estreicher, Freund, Martin, Merrill, Oaks, Stephan and Whitman); Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972); Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1972); Maltz, *Portrait of a Man in the Middle — Mr. Justice Powell, Equal Protection, and the Pure Classification Problem*, 40 OHIO ST. L.J. 941 (1979); Vrofsky, *Mr. Justice Powell and Education: The Balancing of Competing Values;* 13 J.L. & EDUC. 581 (1984); Yackle, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICH. L. REV. 181 (1975). *See also* Lewis F. Powell, Jr., *Reflections*, 96 VA. MAG. HIST. & BIOGRAPHY 315 (July 1988); ANNE HOBSON FREEMAN, THE STYLE OF A LAW FIRM, HUNTON & WILLIAMS 1901-1986 (Algonquin Press, Chapel Hill, N.C., forthcoming).

2. In his fifteen years on the Court, Justice Powell wrote more than 500 opinions; 254 were opinions of the Court.

judicial philosophy emerges. The selection is somewhat arbitrary, but these cases suffice to illustrate Justice Powell's central role on the Court.[3]

These opinions fall into several broad categories: the first (free speech and the establishment clause), fourth (search and seizure), eighth (capital punishment and proportionality), tenth, eleventh and fourteenth amendments and the abstention and implied rights of action cases (the last five categories involve intertwined issues of federalism, sovereign immunity, separation of powers, equal protection, and due process). In discussing them, I do not imply by the order mentioned any ranking of relative importance.

THE FIRST AMENDMENT

Justice Powell's most important "free speech/free press" first amendment opinions are his dissent in *Saxbe v. Washington Post Co.*,[4] his concurring opinion in *Gannett Co., v. DePasquale*[5] and his opinion for the Court in *Gertz v. Robert Welch, Inc.*[6] Perhaps his most important freedom of religion opinion is his opinion for the Court in *Committee for Public Education v. Nyquist.*[7] His views there are further developed in his more recent concurring opinions in *Wallace v. Jaffree*,[8] *Aguilar v. Felton*,[9] and *Edwards v. Aguillard.*[10]

FREE SPEECH/FREE PRESS

In *Saxbe* the Court upheld the provision in the policy statement of the Federal Bureau of Prisons that prohibits interviews between newsmen and inmates of federal medium and maximum security prisons. The Court reasoned that the "visitation policy does not place the press in any less advantageous position than the public generally"[11] and " '[n]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.' "[12]

Powell, joined by Brennan and Marshall, dissented on the ground that "the interview ban impermissibly burdens First Amendment freedoms."[13]

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3. The criteria used to select the cases reviewed in this article were my assessment of (1) the opinion's immediate and continuing importance, (2) its representative quality of other Powell opinions in the same field and (3) the social and legal significance of the subject area. Although the abstention and implied rights of action cases discussed technically are not constitutional, they are included to emphasize Justice Powell's strong views on federalism, separation of powers and judicial policymaking.

4. 417 U.S. 843, 850 (1974) (Powell J., dissenting).

5. 443 U.S. 368, 397 (1979) (Powell, J., concurring).

6. 418 U.S. 323 (1974).

7. 413 U.S. 756 (1973).

8. 472 U.S. 38, 62 (1985) (Powell, J., concurring).

9. 473 U.S. 402, 414 (1985) (Powell, J., concurring).

10. 107 S. Ct. 2573, 2584 (1987) (Powell, J., concurring).

11. Saxbe v. Washington Post Co., 417 U.S. 843, 849 (1974).

12. *Id.* at 850 (quoting Pell v. Procunier, 417 U.S. 817, 834 (1974)).

13. *Id.* at 850.

Powell's basic criticism of the majority's approach was that it was too simplistic and the result was contrary to the spirit of the Constitution when applied to the facts of modern life:

> The Court's resolution of this case has the virtue of simplicity. Because the Bureau's interview ban does not restrict speech or prohibit publication or impose on the press any special disability, it is not susceptible to constitutional attack. This analysis delineates the outer boundaries of First Amendment concerns with unambiguous clarity. It obviates any need to enter the thicket of a particular factual context in order to determine the effect on First Amendment values of a nondiscriminatory restraint on press access to information. As attractive as this approach may appear, I cannot join it. I believe that we must look behind bright-line generalities, however sound they may seem in the abstract, and seek the meaning of First Amendment guarantees in light of the underlying realities of a particular environment. Indeed, if we are to preserve First Amendment values amid the complexities of a changing society, we can do no less.[14]

Powell, practical and pragmatic, did not hesitate to plunge into the thicket of the facts of *Saxbe*. In so doing, he found

> that personal interviews are crucial to effective reporting in the prison context. A newsman depends on interviews in much the same way that a trial attorney relies on cross-examination. Only in face-to-face discussion can a reporter put a question to an inmate and respond to his answer with an immediate follow-up question. Only in an interview can the reporter pursue a particular line of inquiry to a satisfactory resolution or confront an inmate with discrepancies or apparent inconsistencies in his story. Without a personal interview a reporter is often at a loss to determine the honesty of his informant or the accuracy of the information received. . . . [C]orrespondence is decidedly inferior to face-to-face discussion as a means of obtaining reliable information about prison conditions and inmate grievances. In addition, the prevalence of functional illiteracy among the inmate population poses a serious difficulty; many prisoners are simply incapable of communicating effectively in writing.[15]

The Bureau of Prisons' across-the-board ban on prisoner interviews thus precluded "effective reporting on prison conditions and inmate grievances."[16] Because the "interview ban is categorical in nature" and "[i]ts consequence is to preclude accurate and effective reporting on prison con-

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14. *Id.* at 875.
15. *Id.* at 853-55.
16. *Id.* at 857.

ditions and inmate grievances," it "substantially impairs a core value of the First Amendment."[17] This is because

> [w]hat is at stake . . . is the societal function of the First Amendment in preserving free public discussion of governmental affairs. . . . And public debate must not only be unfettered; it must also be informed.[18]

Later Powell added that "[a]n informed public depends on accurate and effective reporting by the news media."[19]

Thus, Powell continued:

> This constitutionally established role of the news media is directly implicated here. For good reasons, unrestrained public access [to federal inmates] is not permitted. The people must therefore depend on the press for information concerning public institutions. The Bureau's absolute prohibition of prisoner-press interviews negates the ability of the press to discharge that function and thereby substantially impairs the right of the people to a free flow of information and ideas on the conduct of their Government. The underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right.[20]

But while an across-the-board ban on media interviews with prisoners cannot withstand first amendment scrutiny, it by no means follows that across-the-board media access to prisoners must be permitted:

> Governmental regulations should not be policed in the name of a "right to know" unless they significantly affect the societal function of the First Amendment. I therefore believe that a press interview policy that substantially accommodates the public's legitimate interest in a free flow of information and ideas about federal prisons should survive constitutional review. The balance should be struck between the absolute ban of the Bureau and an uninhibited license to interview at will.
>
> Thus, the Bureau could meet its obligation under the First Amendment and protect its legitimate concern for effective penal administration by rules drawn to serve both purposes without undertaking to make an individual evaluation of every interview request.[21]

In *Saxbe* we see Powell willing to give the press something, but less than it demanded. As far as access to sources of the news in the govern-

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17. *Id.* at 860-61.
18. *Id.* at 862-63.
19. *Id.* at 863.
20. *Id.* at 864.
21. *Id.* at 872-73.

ment's possession, the press has no constitutionally mandated access in its own right derived from "freedom of the press." The press' right to limited access is instead derived from the public's right to know the crucial facts on how government operates.

Five years later in *Gannett Co. v. DePasquale*,[22] the Court held that the sixth amendment right to a public trial is solely for the benefit of a defendant. Even if one assumes, *arguendo*, that members of the press and public have a right under the first amendment to attend criminal trials, such a right is not unlimited and was outweighed in this case by the defendant's right to a fair trial.

Powell concurred to make the following points:

> Although I join the opinion of the Court, I would address the question that it reserves. Because of the importance of the public's having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing. As I have argued in *Saxbe* . . . this constitutional protection derives, not from any special status of members of the press as such, but rather because "[i]n seeking out the news the press . . . acts as an agent of the public at large," each individual member of which cannot obtain for himself "the information needed for the intelligent discharge of his political responsibilities."
>
> The right of access to courtroom proceedings, of course, is not absolute. It is limited both by the constitutional right of defendants to a fair trial . . . and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants. . . . The task of determining the application of these limitations in each individual trial necessarily falls almost exclusively upon the trial court asked to exclude members of the press and public from the courtroom.[23]

Again focusing carefully on the particular facts of the case, Powell concluded that

> [t]he question . . . is whether the First Amendment right of access . . . was adequately respected in the present case. . . .
>
> . . . In the court's view, the nature of the evidence to be considered at the hearing, the young age of two of the defendants, and the extent of the publicity already given the case had indicated that an open hearing would substantially jeopardize the fairness of the defendants' subsequent trial.[24]

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22. 443 U.S. 368 (1979).

23. Gannett Co. v. DePasquale, 443 U.S. 368, 397-99 (1979) (Powell, J., concurring) (citations omitted).

24. *Id.* at 401-02.

In this *Gannett* concurrence we see two subsidiary themes that reappear in many Powell opinions. The first is Powell's insistence that when a balance must be struck between competing values in a context that is heavily fact dependent, "due deference" should be given "to the proximity of the trial judge to the surrounding circumstances."[25] We also should note Powell's solicitude for the "young age of the two defendants,"[26] a factor he emphasized again in the context of his capital punishment dissent in *Burger v. Kemp.*[27]

Powell's point that the first amendment mandates realistic access to the facts necessary for informed public discussion of governmental affairs subsequently became the approach of a majority of the Justices of the Court six years later in the seminal opinions in *Richmond Newspapers v. Virginia.*[28] There the Court addressed the issue reserved in *Gannett* and, although there was no majority opinion, the effect of the judgment was to afford reporters standing to contest a court order excluding the public from a murder trial. Although Powell had recused himself in that case, the plurality and concurring opinions echo Powell's reasoning. Chief Justice Burger, in his opinion for himself and Justices White and Stevens, stated that

> [t]he First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.[29]

Justice Stevens in a separate concurrence added:

> This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. . . .
>
> Twice before, the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large. In a dissent joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in *Saxbe* . . . MR. JUSTICE POWELL unequivocally rejected the conclusion that "*any* governmental re-

25. *Id.* at 403.
26. *Id.* at 402.
27. 107 S. Ct. 3114 (1987), *reh'g denied,* 108 S. Ct. 32 (1987).
28. 448 U.S. 555 (1980).
29. Richmond Newspapers v. Virginia, 448 U.S. 555, 575 (1980).

> striction on press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern." *Id.* at 857 (emphasis in original). . . . Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.[30]

Justice Brennan said:

> Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust and wide-open," *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964), but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.[31]

Finally, in his concurrence Justice Stewart observed that:

> In *Gannett Co. v. DePasquale,* 443 U.S. 368, the Court held that the Sixth Amendment, which guarantees "the accused" the right to a public trial, does not confer upon representatives of the press or members of the general public any right of access to a trial. But the Court explicitly left open the question whether such a right of access may be guaranteed by other provisions of the Constitution, *id.* at 391-393. MR. JUSTICE POWELL expressed the view that the First and Fourteenth Amendments do extend at least a limited right of access even to pretrial suppression hearings in criminal cases, *id.* at 397-403 (concurring opinion). . . . The remaining Members of the Court were silent on the question.
>
> Whatever the ultimate answer to that question may be with respect to pretrial suppression hearings in criminal cases, the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.[32]

Gertz v. Robert Welch, Inc.[33] is another example of Powell's helping the Court to find solid middle ground in an area where immediate past decisions had created major uncertainties. Prior to the *Gertz* decision in 1974, the scope of the first amendment's limitations on libel law was unclear. The Court's landmark decision in *New York Times Co. v. Sullivan*[34] had held that the first amendment bars liability for defamation of a public official absent proof of knowledge of falsehood or reckless disregard of the truth. Three years later a curiously divided Court extended this strict standard of proof to "public figures" in *Curtis Publishing Co. v. Butts*

30. *Id.* at 582-83 (Stevens, J., concurring) (citations omitted).
31. *Id.* at 587 (Brennan, J., concurring) (footnote omitted).
32. *Id.* at 598-99 (Stewart, J., concurring) (citations omitted).
33. 418 U.S. 323 (1974).
34. 376 U.S. 254 (1964).

and *Associated Press v. Walker.*[35] Justice Harlan announced the decision in an analysis that applied a different standard where a "public figure" was libeled: "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[36] Only three other Justices joined him. Chief Justice Warren, in an opinion concurring in the result, articulated the extension of the *New York Times* burden on "public officials" to "public figures" in an opinion joined by Justices Brennan and White.[37] Justice Black, joined by Douglas in a separate opinion, repeated their views on absolute immunity from liability for defamation, but joined in Warren's view on the extension of *New York Times* to public figures in order to give it majority status.[38]

A few years later in *Rosenbloom v. Metromedia, Inc.*[39] the Court split again. This time the dispute was whether the *New York Times* burden applied to all plaintiffs, private individuals as well as government officials and public figures, in defamation cases. In a plurality opinion announcing the decision of the Court, Justice Brennan said that the *Times* standard applied across the board if the statements concerned "a matter [that] is a subject of public or general interest."[40] Justice Black concurred in the result on other grounds.[41] White also concurred for a different reason.[42] Justice Douglas did not participate. Harlan[43] and Marshall[44] wrote separate dissents, with Stewart joining Marshall's opinion. All three dissenters agreed that the states should be free to permit recovery for defamation based on fault, but they differed as to whether punitive damages could be imposed. Harlan thought punitive damages could be imposed under certain circumstances; Marshall and Stewart did not.

In *Gertz* Powell resolved these questions for a majority consisting of himself and Justices Stewart, Marshall, Blackmun and Rehnquist. In *Gertz* a youth had been killed by a policeman who subsequently was convicted of murder in the second degree. The family of the victim had hired a lawyer to represent them in subsequent civil litigation against the policeman. This lawyer was attacked in an article published in a monthly magazine, which charged, among other things, that he was a "Leninist" or "Communist-fronter" and was participating in a Communist conspiracy to discredit local law enforcement agencies. The lawyer sued the publisher for libel in a

35. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 130 (1967).

36. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

37. *Id.* at 162 (Warren, C.J., concurring).

38. *Id.* at 170 (Black, J., concurring).

39. 403 U.S. 29 (1971).

40. Rosenbloom v. Metromedia, 403 U.S. 29, 43 (1971).

41. *Id.* at 57-62 (Black, J., concurring).

42. *Id.* at 57-78 (White, J., concurring).

43. *Id.* at 62-87 (Harlan, J., dissenting).

44. *Id.* at 78 (Marshall, J., dissenting).

diversity action in the United States District Court for the Northern District of Illinois. Because the statements in the article constituted libel per se under state law, the trial judge allowed the case to go to the jury on the issue of damages. The jury awarded $50,000. But thereafter the judge set aside the verdict, concluding that the *New York Times* standard should apply notwithstanding the fact the lawyer was neither a public official nor a public figure. The Seventh Circuit affirmed on the basis of Justice Brennan's plurality opinion in *Rosenbloom* that had just come down, finding that the article discussed an issue of significant public interest. The Supreme Court reversed, rejecting *Rosenbloom's* extension of the *New York Times* standard to defamation suits brought by private citizens.[45]

Powell's opinion began by acknowledging the high value of public debate. Powell further acknowledged that erroneous statements are inevitable in free debate and that prior Court decisions "recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."[46] Accordingly, "'the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.' The First Amendment requires that we protect some falsehood in order to protect speech that matters."[47] The question then is where to draw the line.

Powell rejected the "absolute protection" position of Justices Black and Douglas that would afford "unconditional and indefeasible immunity from liability for defamation."[48] He did so because "[t]he need to avoid self-censorship by the news media is . . . not the only societal value at issue."[49] In Powell's view the state has a competing interest in "the compensation of individuals for the harm inflicted on them by defamatory

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45. 418 U.S. 323, 352 (1974) (Blackmun, J., concurring). In *Gertz* Justice Blackmun, who had joined Brennan's plurality opinion in *Rosenbloom*, shifted to give Powell the needed fifth for a majority. *Id.* at 353-54. He explained that:

> Although the Court's opinion in the present case departs from the rationale of the *Rosenbloom* plurality, in that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard, I am willing to join, and do join, the Court's opinion and its judgment for two reasons:
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> 1. By removing the specters of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. . . .
>
> 2. The Court was sadly fractionated in *Rosenbloom.* A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity. If my vote were not needed to create a majority, I would adhere to my prior view. A definite ruling, however, is paramount.

Id. at 353-54 (Blackmun, J., concurring).

46. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

47. *Id.* at 340-41 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

48. *Id.* at 341.

49. *Id.*

falsehood."[50] Thus "[s]ome tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . ."[51] Powell then observed that in the Court's "continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise."[52] The *New York Times* standard is "an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons."[53]

Then Powell proceeded to draw the new line. "A different rule should obtain with respect" to "injury to the reputation of private individuals."[54] Powell advanced four reasons to justify this distinction.

First, "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater."[55]

Second, "[the] individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs."[56]

Third, the same consideration applies to "public figures" because

> for the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.[57]

Fourth, the test of the *Rosenbloom* plurality would force "state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."[58]

After drawing a line between public officials and public figures on the one hand and private individuals on the other, Powell then held that as to the latter "so long as they do not impose liability without fault, the States

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50. *Id.*
51. *Id.* at 342.
52. *Id.*
53. *Id.* at 343.
54. *Id.*
55. *Id.* at 344.
56. *Id.*
57. *Id.* at 345.
58. *Id.* at 346 (emphasis in original).

may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[59] But even here the state's discretion is not unlimited. "[T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[60]

Powell then turned to the classification of a person as a public figure:

> That designation may rest on either of two alternative bases. In some instances an individual may achieve such a pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.[61]

In applying these two tests to the facts before the Court, Powell afforded further insights into both. As to "pervasive fame or notoriety," general "participation in community or professional affairs"[62] is not enough. It was significant in *Gertz* that none of the jurors had ever heard of the plaintiff prior to the libel suit. As to the second test, involvement in the public issue, courts must look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[63] And in doing so here the Court concluded:

> In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution. . . . Moreover, he never discussed either the criminal or civil litigation with the press. . . . He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.[64]

The Court reversed and remanded, ordering a new trial "[b]ecause the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury."[65] In the new trial the *New York Times* standard was inapplicable.

Powell's position in *Gertz* has withstood the test of time. It was the cornerstone of the Court's most recent first amendment defamation opinion

59. *Id.* at 347.
60. *Id.* at 349.
61. *Id.* at 351.
62. *Id.* at 352.
63. *Id.*
64. *Id.*
65. *Id.*

in *Hustler Magazine v. Falwell.*[66] While Powell's position still leaves an unavoidable gray area as to when a relatively little known person becomes a "public figure" for purposes of the public controversy in which the libel arose, the *Gertz* test affords substantial guidance.

THE ESTABLISHMENT CLAUSE

In *Committee for Public Education & Religious Liberty v. Nyquist*,[67] Justice Powell, writing for the Court, found unconstitutional a set of New York statutes granting (1) financial aid to nonpublic elementary and secondary schools for maintenance, (2) tuition grants to the impoverished parents of students attending such schools, and (3) tax relief for "middle income" parents of students attending such schools. All three subsidies were held to violate the establishment clause of the first amendment.

Powell began by acknowledging that "it is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no 'bright line' guidance is afforded."[68] Nevertheless, he proceeded to observe that "the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined."[69] He then found that the controlling past precedents[70] lay down a "now well-defined three-part test"[71] applicable to statutes involving both education and religion:

> Taken together, these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose . . . second, must have a primary effect that neither advances nor inhibits religion . . . and, third, must avoid excessive government entanglement with religion.[72]

Applying these criteria to the New York statutes, Powell found that "each measure [was] adequately supported by legitimate, nonsectarian state interests."[73] But all three measures under scrutiny failed the second "primary effects" test. Thus it was unnecessary to apply the third "unnecessary entanglement" test.[74]

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66. 108 S.Ct. 876 (1988).

67. 413 U.S. 756 (1973).

68. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 n.5 (1973).

69. *Id.* at 761.

70. *Id.* at 770-72 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Engel v. Vitale, 370 U.S. 421 (1962); McGowan v. Maryland, 366 U.S. 420 (1961); McCollum v. Board of Education, 333 U.S. 203 (1948); Everson v. Board of Education, 330 U.S. 1 (1947)).

71. *Nyquist,* 413 U.S. at 772.

72. *Id.* at 772-73. In later opinions this three prong test is frequently referred to as the *Lemon* test. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

73. *Nyquist*, 413 U.S. at 772-73.

74. *Id.* at 780.

Looking first at the maintenance grants, Powell found that

> Absent appropriate restrictions on expenditures for [providing facilities in which religion is taught] and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.[75]

The parents' grant program failed for essentially the same reason:

> In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.[76]

The fact that the grants were given to the parents rather than the schools was immaterial. Citing *Pierce v. Society of Sisters,*[77] Powell acknowledged that parents have a right to choose non-public education because of the free exercise clause of the first amendment and that a "tension inevitably exists between the Free Exercise and the Establishment Clauses."[78] But, he continued "[a]s a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."[79] Thus, the fact that those who chose to "support other schools because of the constraints of 'conscience and discipline' " also might "pay public school taxes at the same time" could not remedy the departure from neutrality involved by the subsidy.[80] The tax benefit for more affluent parents was also constitutionally deficient because it was also a "form of encouragement and reward for sending [the taxpayers'] children to non-public schools."[81]

Powell rejected an analogy to the *Walz v. Tax Commission of New York City* line of cases upholding state laws exempting church property from taxation. He did so on two grounds. The first was precedent. Both before and after adoption of the first amendment, church property was exempt from property taxes. In contrast, "[w]e know of no historical precedent for New York's recently promulgated tax relief program."[82] Also the *Walz* line of cases was distinguished because the exemption of church property from taxation "was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State."[83] Powell found that "the

75. *Id.* at 774.
76. *Id.* at 780.
77. 268 U.S. 510 (1925).
78. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 778 (1973).
79. *Id.*
80. *Id.* at 788-89.
81. *Id.* at 791.
82. *Id.* at 792.
83. *Id.* at 793. The leading case upholding state laws exempting church property from taxation is Walz v. Tax Commission, 397 U.S. 664 (1970).

New York statute, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State."[84] A second ground for distinguishing *Walz* was the implication for "entanglement" posed by the relative breadth or narrowness of the benefited class:

> The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead, the exemption covered all property devoted to religious, educational, or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context. . ., it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor.[85]

In *Nyquist* the Court did not have to reach the entanglement issue because it found the New York statutes invalid under the "primary effects" test. Thus, Powell's discussion of entanglement parameters was dicta.

In subsequent cases the entanglement test has come under severe attack and this has threatened continued adherence to the three prong *Lemon* test that Powell made the linchpin of his *Nyquist* analysis.[86] Consequently, in three recent concurring opinions, Powell wrote to buttress the *Lemon* principles, with particular emphasis on strengthening the under-the-gun entanglement criterion.

In his concurrence in *Wallace v. Jaffree*,[87] Powell stated:

> I write separately to express additional views and to respond to criticism of the three-pronged *Lemon* test. *Lemon* . . . identifies standards that have proven useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted. . . . *Lemon* has not been overruled or its test modified. Yet, continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an ad hoc basis.[88]

Powell then noted that the Alabama moment of silent meditation statute set aside in *Wallace* did not have "a clear secular purpose" and thus

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84. *Nyquist*, 413 U.S. at 793.

85. *Id.* at 794. Powell subsequently cites *Lemon's* quotation of Freund that "'political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.'" *Id.* at 796 n.54 (quoting Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969).

86. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 67, 68-69, 79 (1985) (O'Connor, J., concurring); 472 U.S. 38, 84, 89 (Burger, C.J., dissenting); 472 U.S. 38, 90, 91 (White, J., dissenting); 472 U.S. 38, 91, 108-112 (Rehnquist, J., dissenting).

87. 472 U.S. 38, 62 (1985) (Powell, J., concurring).

88. Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring).

"fail[ed] the first prong of the *Lemon* test and therefore violate[ed] the Establishment Clause."[89]

A few weeks later, Powell delivered a concurring opinion in another establishment clause case, *Aguilar v. Felton.*[90] There, in an opinion by Justice Brennan, the Court found that New York City's use of federal funds to pay the salaries of public employees who taught special remedial courses in parochial schools violated the establishment clause. The City had taken special precautions to keep the program and its administration purely secular. As Justice Brennan observed:

> The professionals involved in the program are directed to avoid involvement with religious activities that are conducted within the private schools and to bar religious materials in their classrooms. All material and equipment used in the programs funded under Title I are supplied by the Government and are used only in those programs. The professional personnel are solely responsible for the selection of the students. Additionally, the professionals are informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols.[91]

Relying on *Lemon,* the majority found, however, that the very measures to avoid the "program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school" failed to save the program from unconstitutionality "because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state."[92]

Burger, Rehnquist, O'Connor, and White dissented. Rehnquist's dissent was brief, relying on his earlier lengthy dissent in *Wallace v. Jaffree,*[93] but he went for the jugular: "the Court takes advantage of the 'Catch 22' paradox of its own creation . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement."[94] Justice O'Connor wrote at greater length in rejecting application of the entanglement test of *Lemon* because she was unable to discern logical support for it.[95] She also believed that "the entanglement prong of the *Lemon* test is properly limited to institutional entanglement."[96]

89. *Id.* at 66.

90. 473 U.S. 402, 414 (1985) (Powell, J., concurring).

91. Aguilar v. Felton, 473 U.S. 402, 407 (1985).

92. *Id.* at 409.

93. 473 U.S. 402, 420 (Rehnquist, J., dissenting) (citing his dissent in Wallace v. Jaffree, 472 U.S. 38, 91 (1985)).

94. *Aguilar*, 473 U.S. at 420-21 (Rehnquist, J., dissenting).

95.*Id.* at 421, 427 (O'Connor, J., dissenting).

96. *Id.* at 429 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

Powell, while joining in the majority opinion, wrote a separate concurrence to defend the embattled entanglement test. The main thrust of his concurrence was that "[t]his risk of entanglement is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here."[97] Relying upon dicta in his opinion for the Court in *Nyquist,* Powell wrote:

> In States such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools. Public schools, as well as private schools, are under increasing financial pressure to meet real and perceived needs. Thus, any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from nonrecipient sectarian groups, who may fear that needed funds are being diverted from them. In short, aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."[98]

But Powell did not stop there. He acknowledged the difficulty inherent in the "paradox" or "dilemma" problem that Justice Rehnquist had emphasized:

> I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the *Lemon* test. Our decisions require governments extending aid to parochial schools to tread an extremely narrow line between being certain that the "principal or primary effect" of the aid is not to advance religion, and avoiding excessive entanglement. Nonetheless, the Court has never foreclosed the possibility that some types of aid to parochial schools could be valid under the Establishment Clause. Our cases have upheld evenhanded secular assistance to both parochial and public school children in some areas. *E.g., [Mueller v. Allen,* 463 U.S. 388, 393 (1938)] (tax deductions for educational expenses); *Board of Education v. Allen,* 392 U.S. 236 (1968) (provision of secular textbooks); *Everson v. Board of Education,* 330 U.S. 1 (1947) (reimbursements for bus fare to school). I do not read the Court's opinion as precluding these types of indirect aid to parochial schools.[99]

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97. *Aguilar,* 473 U.S. at 416 (Powell, J., concurring).

98. *Id.* at 416-17. As noted below in the discussion of Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Powell's deep concern about the danger to democracy from the civil strife likely to flow from religiously polarized politics parallels his views about the dangers of racially polarized politics.

99. *Aguilar,* 473 U.S. at 418-19.

While Powell's observation did not resolve the paradox, he attempted to place constraints on carrying the entanglement test to its ultimate extreme. But despite Powell's efforts, the entanglement test still poses a major problem for predicting the ultimate result in the gray areas in establishment clause cases.[100]

In his last term on the Court, Powell again concurred in an establishment clause case. In *Edwards v. Aguillard*[101] the Court held that Louisiana's "Balanced Treatment for Creation Science and Evolution-Science in Public School Instruction" Act was facially invalid under the establishment clause. Powell, while joining in Brennan's majority opinion, wrote separately "to emphasize that nothing in the Court's opinion diminishes the traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum."[102]

Powell's opinion started by reaffirming the continuing validity of the three prong test of *Lemon* reflected in his own opinion for the Court in *Nyquist*. He then focused on the first prong of that test: whether the challenged statute has a secular purpose. On its face the Act stated that its purpose was to protect academic freedom. Powell acknowledged that this posed a problem:

> This statement is puzzling. Of course, the "academic freedom" of teachers to present information in public schools, and students to receive it is broad. But it necessarily is circumscribed by the Establishment Clause. "Academic freedom" does not encompass the right of a legislature to structure the public school curriculum in order to advance a particular religious belief. . . . Nevertheless, I read this statement in the Act as rendering the purpose of the statute at least ambiguous. Accordingly, I proceed to review the legislative history of the Act.[103]

Powell concluded that "[my] examination of the language and the legislative history of the Balanced Treatment Act confirms that the intent of the Louisiana legislature was to promote a particular religious belief."[104] This was because it was "structuring the public school curriculum to make it compatible with a particular religious belief: the divine creation of man."[105] Then, citing his earlier dissent in *Board of Education v. Pico*,[106] Powell closed by emphasizing

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100. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) ("Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be structured on a case-by-case basis. . . . But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable.").

101. 107 S. Ct. 2573 (1987).

102. Edwards v. Aguillard, 107 S. Ct. 2573, 2584 (1987) (Powell, J., concurring).

103. *Id.* at 2586.

104. *Id.* at 2587.

105. *Id.* at 2588.

106. *Id.* (citing Board of Educ. v. Pico, 457 U.S. 853, 893 (1982) (Powell, J., dissenting)).

> "that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools."... A decision respecting the subject matter to be taught in public schools does not violate the Establishment Clause simply because the material to be taught "happens to coincide or harmonize with the tenets of some or all religions."... In the context of a challenge under the Establishment Clause, interference with the decisions of these authorities is warranted only when the purpose for their decision is clearly religious.[107]

Without citing Justice Rehnquist's lengthy reexamination of the history of the first amendment's establishment clause in *Wallace v. Jaffree,*[108] which sought to decouple Jefferson and the Virginia Statute of Religious Liberty of 1786 from the establishment clause, Powell indicated his belief in their continuing relevance to the original intent of the Founding Fathers:

> The early settlers came to this country from Europe to escape religious persecution that took the form of forced support of state-established churches. The new Americans thus reacted strongly when they perceived the same type of religious intolerance emerging in this country. The reaction in Virginia, the home of many of the Founding Fathers, is instructive. George Mason's draft of the Virginia Declaration of Rights was adopted by the House of Burgesses in 1776. Because of James Madison's influence, the Declaration of Rights embodied the guarantee of *free exercise* of religion, as opposed to *toleration.* Eight years later, a provision prohibiting the establishment of religion became a part of Virginia law when James Madison's Memorial and Remonstrance against Religious Assessments, written in response to a proposal that all Virginia citizens be taxed to support the teaching of the Christian religion, spurred the legislature to consider and adopt Thomas Jefferson's Bill for Establishing Religious Freedom. *See Committee for Public Education v. Nyquist,* 413 U.S. at 770, n.28, 93 S. Ct., at 2964, n.28. Both the guarantees of free exercise and against the establishment of religion were then incorporated into the Federal Bill of Rights by its drafter, James Madison.[109]

Finally, Powell concluded with the observation that the establishment clause by no means requires government to be hostile to religion, nor does it require school boards to exclude courses on religions or religious history or to ban religious books:

> As a matter of history, school children can and should properly be informed of all aspects of this Nation's religious heritage. I

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107. *Edwards,* 107 S. Ct. at 2588-89 (citations omitted).
108. 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).
109. *Edwards,* 107 S. Ct. at 2589.

would see no constitutional problem if school children were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government. Courses in comparative religion of course are customary and constitutionally appropriate. In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events. In addition, it is worth noting that the Establishment Clause does not prohibit *per se* the educational use of religious documents in public school education. Although this Court has recognized that the Bible is an "instrument of religion," . . . it also has made clear that the Bible "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.". . . The Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief.[110]

THE FOURTH AMENDMENT

Three of Justice Powell's more important fourth amendment opinions are his opinions for the Court in *United States v. United States District Court for the Eastern District of Michigan*[111] and *Oliver v. United States*[112] (the "open fields" case) and his dissent in *California v. Ciraolo*[113] (the "overflight" case).

Powell noted in the first opinion that "[a]s the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake."[114] The issue was whether the President had constitutional or statutory authority to authorize electronic surveillance in internal security matters without prior judicial approval as required by the Omnibus Crime and Safe Streets Act. Writing for the majority, Powell found neither the statute nor the Constitution gave the President such authority because the power would infringe upon defendants' rights under the fourth amendment. The factors to be balanced were the Government's right to protect itself and the individual's right to privacy. As Powell put it:

> [R]esolution [of the issue requires] sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.[115]

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110. *Id.* at 2589-90 (citations omitted).

111. 407 U.S. 297 (1972).

112. 466 U.S. 170 (1984).

113. 476 U.S. 207, 215 (1986) (Powell, J., dissenting).

114. United States v. United States Dist. Court for the E. Dist. of Mich., 407 U.S. 297, 314 (1972).

115. *Id.* at 299.

Powell recognized an implied right to privacy in the fourth amendment:

> We look to the Bill of Rights to safeguard this privacy. Though physical entry of the home is the chief evil which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.[116]

Indeed, this implied right to privacy extends to private discussions of political matters and thus involves first amendment as well as fourth amendment considerations:

> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.". . . History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security.". . . The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.[117]

Looking at the language of the Omnibus Criminal Safe Streets Act and its legislative history, Powell found that the Act "represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in *Berger v. New York,* 388 U.S. 41 (1967), and *Katz v. United States,* 389 U.S. 347 (1967)."[118] Thus, Powell found that the President could not evade the Act's requirement to obtain a court order before instituting electronic surveillance in *internal* security matters. However, Powell reserved the question of what constitutional requirements must be satisfied in *external* security matters. Thus, once again we see Powell's finely tuned balancing and his careful delineation of the

116. *Id.* at 312-13.
117. *Id.* at 313-14 (citations omitted).
118. *Id.* at 302.

scope of the precedent. We also see respect for the integrity of the courts, a theme that runs through many of Powell's opinions. Here he says that

> [w]e cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.[119]

Powell's opinion in *Oliver v. United States*[120] reaffirmed the "open fields" doctrine announced by Justice Holmes in *Hester v. United States.* The doctrine provides that the explicit language of the fourth amendment does not extend its special protections to open fields around a person's house.[121] But in reaffirming the open fields doctrine, Powell made clear that the fourth amendment includes an implicit right to privacy that is broader than the express words of the amendment.[122] He quoted the second Justice Harlan to support the argument that the amendment requires an inquiry into whether an individual legitimately may claim under the fourth amendment that a place "outside his house" should be free of government intrusion not authorized by warrant.[123] According to Powell that inquiry turns, however, not on the individual's subjective expectations, but rather only on those expectations that society is prepared to recognize as reasonable.[124]

In Powell's opinion "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[125] Thus, even though the defendant had fenced his fields and posted his land, the Government's trespass on his lands did not violate the owner's fourth amendment rights. Justice Marshall, joined by Brennan and Stevens, dissented on the ground that the fourth amendment protects people, not places, and that giving this protection geographical limitations such as the curtilage of a dwelling was improper.[126]

The geographical and societal expectation limitations on privacy rights discussed by Powell in *Oliver* troubled him later in *California v. Ciraolo,* where, joined by Brennan, Marshall, and Blackmun, he dissented.[127] In *Ciraolo* the governmental intrusion was not trespass on open fields, but aerial surveillance of the curtilage. Something more was needed in the

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119. *Id.* at 320.

120. 466 U.S. 170 (1984); *see* Hester v. United States, 265 U.S. 57, 59 (1924).

121. Hester v. United States, 265 U.S. 57, 59 (1924).

122. Oliver v. United States, 466 U.S. 170, 177 (1984). Justice White, on the other hand, disagreed in a separate concurrence: "However reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a 'house' or an 'effect.'" *Id.* at 184 (White, J., concurring).

123. *Id.* at 177.

124. *Id.* at 179.

125. *Id.* at 178.

126. *Id.* at 185 (Marshall, J., dissenting).

127. 476 U.S. 207, 215 (1986) (Powell, J., dissenting).

analysis. So Powell returned to the theme that constitutional safeguards must be adapted to changing times if the spirit of these safeguards is to be honored. Powell's dissent starts with the warning in Harlan's concurrence in *Katz v. U.S.* that any decision to construe the fourth amendment as proscribing only physical intrusions by police into private property "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion."[128] Powell then took the majority to task for failing to acknowledge the qualitative difference between police surveillance and other uses made of air space:

> Members of the public use the air space for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards. Here, police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant.[129]

Stated another way, Powell believed that the expectation of privacy within the constitutionally protected enclave should bar purposeful intrusion by government even if intrusions by others incidental to normal business or social activities can occur there.

THE EIGHTH AMENDMENT

One of the areas in which Justice Powell has had a major impact on current Supreme Court constitutional jurisprudence is the eighth amendment. That amendment provides that

> [e]xcessive bail shall not be required, nor excessive fines imposed and cruel and unusual punishment inflicted.

Justice Powell's more important eighth amendment opinions fall into two categories—the capital punishment cases and the length of sentence cases. The capital punishment opinions include his joint opinion with Justices Stewart and Stevens in *Gregg v. Georgia,*[130] his later opinions for the court in *Eddings v. Oklahoma,*[131] *Booth v. Maryland,*[132] and *McCleskey v. Kemp,*[133] and his dissent in *Burger v. Kemp.*[134] The noncapital cases are his dissent in *Rummel v. Estelle*[135] and his opinion for the Court distinguishing *Rummel*

128. California v. Ciraolo, 476 U.S. 207, 216 (1986); *see* Katz v. U.S., 389 U.S. 347 (1967).
129. *Ciraolo,* 476 U.S. at 224-25.
130. 428 U.S. 153 (1976).
131. 455 U.S. 104 (1982).
132. 107 S. Ct. 2529 (1987).
133. 107 S. Ct. 1756 (1987).
134. 107 S. Ct. 3114 (1987).
135. 445 U.S. 263, 285 (1980) (Powell, J., dissenting).

three years later in *Solem v. Helm.*[136] In both lines of cases one of Justice Powell's principal contributions has been to restore the concept of "proportionality" to determinations of what is cruel and unusual punishment.

THE DEATH PENALTY

Gregg v. Georgia[137] is unusual in that the plurality opinion, announcing the judgment, was written jointly by three Justices: Stewart, Powell and Stevens. The case is one of the most important decisions involving capital punishment and the eighth amendment in the past quarter-century. It involved the validity of the statutory scheme for imposition of capital sentences that the Georgia legislature enacted in the wake of the Court's ruling in *Furman v. Georgia,*[138] which had held that Georgia's old capital sentencing system was unconstitutional. In *Gregg* the Court upheld Georgia's new capital sentencing system but was divided on the rationale for the result.

The Court was split three ways. Justices Brennan and Marshall adhered to their view that what is "cruel and unusual punishment" evolves with the times and that under that criterion, the death penalty can no longer be justified in any circumstance.[139] Justice Stewart, Powell, and Stevens likewise viewed the concept as an evolving one, but they concluded that "the punishment of death does not invariably violate the constitution."[140] They focused instead on the procedures by which capital punishment was imposed. While in their view the old Georgia system permitted unguided jurors to impose "the death sentence in a way that could only be called freakish,"[141] the new Georgia system provided significant guidance to the jury and the appellate review process added an additional safeguard against abuse:

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.[142]

Justice White, Chief Justice Burger, and Justice Rehnquist concurred in the judgment in a separate opinion that avoided any discussion of evolving social standards and placed principal emphasis on the role of the Georgia Supreme Court in appellate review:

> Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed

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136. 463 U.S. 277 (1983).
137. 428 U.S. 153 (1976).
138. 408 U.S. 238 (1972).
139. Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).
140. *Id.* at 169.
141. *Id.* at 206.
142. *Id.*

> for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish . . . that the Georgia Supreme Court failed to properly perform its task in this case or that it is incapable of performing its task adequately in all cases; and this Court should not assume that it did not do so.[143]

The joint opinion of Justices Stewart, Powell and Stevens is of interest not only because of the seminal quality of *Gregg v. Georgia,* but also for the insight it affords into Powell's subsequent eighth amendment opinions. In particular, its heavy reliance upon *Weems, Trop* and *Robinson*[144] clearly foreshadowed Powell's subsequent insistence that the eighth amendment's requirements of proportionality apply to all sentences, those in noncapital as well as capital cases.[145]

In *Eddings v. Oklahoma* Powell, writing for the Court, set aside a death sentence imposed upon a defendant who was only sixteen years old, emotionally disturbed, and mentally retarded at the time he committed the murder. The Court did so because the sentencing judge "did not evaluate the evidence in mitigation and find it wanting as a matter of fact" but "rather he found that *as a matter of law* he was unable even to consider the evidence."[146] The Court reversed, noting that "this sentence was imposed without 'the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases.' "[147] As in many of Powell's opinions in this field, the Court was closely divided. Four Justices, Chief Justice Burger and Justices White, Blackmun and Rehnquist, dissented.

In *Eddings* Powell traced the recent history of the Court's evolving views on the constitutional limitations imposed on capital punishment:

> As THE CHIEF JUSTICE explained, the rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual. . . .
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> . . .
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> Beginning with *Furman,* the Court has attempted to provide standards for a constitutional death penalty that would serve both

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143. *Id.* at 224 (White, J., concurring).

144. *See id.* at 171-174 (discussing Weems v. United States, 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86 (1958); Robinson v. California, 370 U.S. 660 (1962)). All of these cases involved non capital sentences or offenses.

145. Justice Powell's subsequent non capital sentence opinions in Rummel v. Estelle, 445 U.S. 263, 285 (1980) (Powell, J., dissenting), and in Solem v. Helm, 463 U.S. 277 (1983), are discussed below.

146. 455 U.S. 104, 113 (1982) (emphasis in original).

147. Eddings v. Oklahoma, 455 U.S. 104, 105 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 606 (1978)).

> goals of measured, consistent application and fairness to the accused.[148]

Turning to the facts, Powell wrote:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett.* Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law,* any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.[149]

Powell again showed special solicitude for juvenile offenders in his dissent in *Burger v. Kemp.*[150] There he emphasized the special problems presented when the defendant sentenced to death was age seventeen and obviously mentally retarded:

> Imposing the death penalty on an individual who is not yet legally an adult is unusual and raises special concern. At least, where a State permits the execution of a minor, great care must be taken to ensure that the minor truly deserves to be treated as an adult. A specific inquiry including "age, actual maturity, family environment, education, emotional and mental stability, and . . . prior record" is particularly relevant when a minor's criminal culpability is at issue.[151]

In *McCleskey v. Kemp* Powell adhered to his belief that the appropriateness or inappropriateness of imposition of the death penalty should be objectively determined in light of facts directly related to the individual's character, conduct, and the circumstances regarding his crime. In this case the jury found two aggravating circumstances justifying imposition of the death penalty and the defendant offered no mitigating evidence. The lower court, on the recommendation of the jury, imposed the death sentence. Subsequently, the defendant sought to have the sentence set aside in a petition for a writ of habeas corpus. His counsel presented a statistical study that purported to show that "racial considerations . . . influence capital sentencing decisions in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant."[152] Speaking for

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148. *Id.* at 110-11.
149. *Id.* at 113-14 (1980).
150. 107 S. Ct. 3114, 3126 (1987) (Powell, J., dissenting).
151. Burger v. Kemp, 107 S. Ct. 3114, 3140-41 (1987).
152. 107 S. Ct. 1756, 1759 (1987).

himself, Chief Justice Rehnquist, and Justices White, O'Connor, and Scalia, Powell rejected arguments that imposition of the death penalty on McCleskey violated the eighth amendment and the equal protection clause of the fourteenth amendment.

Several comments on this opinion are in order. From the perspective of the court and its continuing deep division over the constitutionality of the death penalty under the cruel and unusual punishment clause, the opinion is yet one more precedent in the controlling line of decisions following in the wake of *Furman v. Georgia*[153] and *Gregg v. Georgia.*[154] Thus, Powell's opinion reaffirmed for himself and four other justices that as long as Georgia in fact provides for procedures in the capital sentencing process that ensure that the discretion unavoidably involved in sentencing is "controlled by clear and objective standards as to produce non-discriminatory application,"[155] the system itself is constitutional. Powell summarized this requirement as follows:

> In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.[156]

Powell concluded that "[i]n light of our precedents under the Eighth Amendment, McCleskey cannot argue successfully that his sentence is 'disproportionate to the crime in the traditional sense.' "[157]

One of the more interesting parts of Powell's opinion in *McCleskey* is his treatment of the statistical study and its relationship to both the eighth amendment and equal protection arguments advanced by the defendant. Since the statistical study was used by the defendant as the basis for two alternative constitutional arguments, Powell chose to discuss the study's implications for each constitutional provision separately.

Addressing the eighth amendment argument that the imposition of the death penalty on McCleskey "is disproportionate to the sentences in other

153. 408 U.S. 238 (1972).

154. 428 U.S. 153 (1976).

155. McCleskey v. Kemp, 107 S. Ct. 1756, 1772 (1987) (quoting Gregg v. Georgia, 428 U.S. at 198 (1975)).

156. *Id.* at 1774.

157. *Id.*

murder cases," Powell said that "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty."[158] The Court's earlier opinion in *Gregg* favored such an argument because it recognized that "opportunities for discretionary leniency" would produce disparate results in individual application. But Powell rejected that extension of *Gregg*. As long as the sentencing procedures "focus discretion 'on the particularized circumstances of the crime and the individual defendant,' . . . we lawfully may presume that McCleskey's death sentence was not 'wantonly and freakishly imposed,' . . . and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment."[159]

Having disposed of the facial attack on the Georgia statute, Powell then proceeded to deal with the defendant's argument that "the Georgia capital punishment system is arbitrary and capricious in *application*, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia."[160] Powell recognized that the statistical study was relevant but, in his view, it was not constitutionally determinative for two reasons. The first was the inherent probative weakness of statistical evidence generally:

> To evaluate McCleskey's challenge, we must examine exactly what the Baldus study may show. Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. . . . The question "is at what point that risk becomes constitutionally unacceptable". . . . McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.
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> . . . .
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> . . .Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not dem-

158. *Id.*.
159. *Id.* at 1775.
160. *Id.*

onstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process.[161]

Powell's second reason for rejecting the study was the lack of any limiting principle should such studies generally become criteria for finding constitutionally impermissible discrimination against minority groups:

> McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. . . . Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias.[162]

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161. *Id.* at 1775, 1778.

162. *Id.* at 1779-80. Powell's wariness of statistical studies is also evident in other contexts. *See, e.g.,* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 778, 787-88 (1973) ("Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement' [in Establishment Clause, First Amendment cases]."); *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 27 (1973); Mathews v. Eldridge, 424 U.S. 319, 346 (1976) ("Bare statistics rarely provide a satisfactory measure of the fairness of a decision-making process.").

At the American Bar Association's Annual Meeting in Toronto in August 1988, proponents of a resolution that would have endorsed federal and state legislation creating a statutory presumption of unconstitutional discrimination based on race when "there is a valid showing of a substantial disparity in the imposition of the death penalty which is statistically explicable only by reference to the races of either victims or defendants" cited *McCleskey* as supporting or condoning such legislation. ABA House of Delegates, Meeting August 1988, Toronto, Canada, Report of the General Practice, Criminal Justice and Individual Rights and Responsibilities Sections, Accompanying Proposed Resolution 109, pages 5-6. But a careful reading of Powell's *McCleskey* opinion, and his other opinions dealing with statistical studies cited in this article, dispels that notion. Powell's remarks in *McCleskey* about presentation to the legislatures of such statistical studies, 107 S. Ct. at 1781, went to the issue of whether or not legislatures should abolish the death penalty for all individuals in a multiracial society. Legislation creating a two-tiered capital sentencing system where the maximum sentence that could be imposed would in fact be dependent upon the race, religion or sex of the convicted criminal or his victim would be totally inconsistent with Justice Powell's philosophy of individualized justice and his fears of the effects of racially or religiously polarized politics.

In *Booth v. Maryland,* writing for the Court, Powell set aside a Maryland statute that permitted evidence of the impact of a murder on the family of the victim to be presented to a jury determining whether or not imposition of the death penalty was appropriate. He wrote:

> One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case [the sentence] on the relevant evidence concerning the crime and the defendant. As we have noted, any decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion.". . . The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.[163]

This last term in *Thompson v. Oklahoma*[164] a plurality of the Court, Stevens joined by Brennan, Marshall and Blackmun, held that the eighth amendment barred imposition of the death penalty on any person less than 16 years old at the time of commission of the crime. Justice O'Connor concurred only in the result.[165] She did not find the evidence available to the Court sufficient to support a finding that there was a national consensus forbidding the execution of any person for a crime committed before the age of 16, though she thought such a consensus might exist. But she said that the sentence must be set aside nevertheless since the state statute at issue did not specify a minimum age for imposition of the death penalty. Justice Scalia, joined by Chief Justice Rehnquist and Justice White, dissented.[166] Justice Kennedy abstained. Both the plurality and dissenting opinions cited different Powell opinions in support of their contradictory conclusions. For example, Stevens wrote:

> Justice Powell has repeatedly reminded us of the importance of "the experience of mankind, as well as the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold

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See supra text accompanying notes 97-98; *infra* note 284. Such legislation also would be unconstitutional under the logic of Powell's eighth and fourteenth amendment opinions for the Court discussed in this article.

163. 107 S. Ct. 2529, 2536 (1987).

164. 108 S. Ct. 2687 (1988).

165. Thompson v. Oklahoma, 108 S. Ct. 2687, 2706 (O'Connor, J., concurring).

166. *Id.* at 2711.

> office." *Goss v. Lopez*, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting).[167]

And Scalia cited Powell in rebuttal:

> Because I think the views of this Court on the policy questions discussed in Part V of the plurality opinion to be irrelevant, I make no attempt to refute them. It suffices to say that there is another point of view, suggested in the following passage written by our esteemed former colleague Justice Powell, whose views the plurality several times invokes for support, *ante*, at 5, 16:
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> "Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'street-wise,' hardened criminals, deserving no greater consideration than that properly accorded [*94] all persons suspected of crime." *Fare v. Michael C.*, 442 U.S. 707, 734, n.4 (1979) (Powell, J., dissenting).
>
> The view that it is possible for a 15-year-old to come within this category uncontestably prevailed when the Eighth and Fourteenth Amendments were adopted, and, judging from the actions of the society's democratically elected representatives, still persuades a substantial segment of the people whose "evolving standards of decency" we have been appointed to discern rather than decree.[168]

One can, of course, only speculate as to how Powell might have acted in this particular case had he still been on the Court. But in speculating, we may gain a clearer insight into Powell's judicial philosophy. Based on the facts of this case, I believe it is unlikely that Powell would have joined the dissenters. Whether he would have joined the plurality opinion or concurred in the result on other grounds is a much closer question.

A surmise that Powell would have joined in the plurality opinion can be supported by two points. First, Powell clearly believes that the contours of what is cruel and unusual punishment for eighth amendment purposes must reflect not only all the protections the Founding Fathers would have accorded a defendant under that concept, but also additional protections that changing social and moral values of our contemporary society, however measured, would also afford. Second, Powell in note 5 in his *Burger v. Kemp* dissent cites the positions of the American Law Institute, the American Bar Association and "[all] European countries" as opposing imposition of the death penalty on youthful defendants.[169] The plurality opinion in *Thompson* paraphrases Powell in citing these same authorities as additional support for the finding of a national consensus against its imposition on persons under 16.[170]

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167. *Id.* at 2692.
168. *Id.* at 2719.
169. 107 S. Ct. 3114, 3141 (1987).
170. *Thompson*, 108 S. Ct. at 2696.

On the other hand, an argument can also be made that when given a choice between overruling a State action under a procedural or substantive constitutional standard, Powell's notions of judicial restraint make him far more comfortable in the procedural realm. This was the approach he followed in *Gregg*. He also chose the procedural route in his majority opinion in *Eddings* and his dissent in *Burger*. Thus under his reasoning in these cases, perhaps a state may permit execution of some persons under 16 years of age under extraordinary circumstances. But if so, the legislature must specifically authorize it, as Justice O'Connor held, and in addition, as Powell's *Burger* dissent indicates, the statutory scheme also must require consideration of youth as one of several mitigating factors including "age, actual maturity, family environment, education, emotional and mental stability, and . . . prior record."[171] From this perspective, the Oklahoma statute in *Thompson*, like the broader Georgia statute in *Furman*, was procedurally deficient.[172] Whether Powell would have rested on that ground or gone ahead to join the eight justices in grappling with the harder substantive question can of course never be answered. But one suspects that had Powell been confronted with these alternatives, he would have taken a procedural route. Yet the dynamics of personal interactions in the conference and afterwards as draft opinions are circulated create imponderables that cannot be factored into speculative answers to such "what might have been" questions.

Length of Sentences

Powell's noncapital case opinions, his dissent in *Rummel v. Estelle*[173] and his opinion for the court three years later in *Solem v. Helm*,[174] provide yet another example of how Powell ultimately persuaded a majority of his colleagues to come around to his view on a major constitutional issue. In this instance Justice Stewart, who concurred in *Rummel*, had left the court and been replaced by Justice O'Connor who dissented in *Solem*. Thus the decisive vote in *Solem* came from Justice Blackmun who had been with the majority in *Rummel* but shifted to join Powell in *Solem*.

The issue in both *Rummel* and *Solem* was whether, based on the principle of proportionality, the eighth amendment imposes any limitations

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171. Burger v. Kemp, 107 S. Ct. 3114, 3141 (1987).

172. In *Thompson*, there was also a second *procedural* route to reversal of the sentence. It was a due process issue. Highly inflamatory photographs of the corpse of the victim were permitted to be considered in the sentencing process. This issue was raised by the defendant but it was not reached by the majority since the Court reversed on the eighth amendment argument. Scalia addressed it in his dissent. He found that "if there is a point at which inflammatoriness so plainly exceeds evidentiary worth as to violate the federal Constitution, it has not been reached here." 108 S. Ct. at 2722. Powell's opinion for the Court in *Booth* clearly indicates that such points do exist, and in *Booth* they were exceeded. One can only speculate that Powell and at least some of the Justices not joining in Scalia's dissent might have found such an exceedence here.

173. 445 U.S. 263, 285 (1980) (Powell, J., dissenting).

174. 463 U.S. 277 (1983).

on the length of sentences legislatures may establish for noncapital offenses. Powell's careful research into the English law roots of the amendment provided the key. He went back to the Magna Carta and its provisions on amercements to find the origins of the concept of proportionality and traced its descent through the English Bill of Rights of 1689 to the Virginia Declaration of Rights, which was the immediate source of the language in the eighth amendment.

In light of this history, Powell could have rested his result on the concept of "original intent." But he chose to take a more expansive approach. Evoking the "living Constitution,"[175] Powell tied the proportionality cases into the *Furman v. Georgia*[176] and *Gregg v. Georgia*[177] line of cases which had read limitations on death penalties into the eighth amendment to reflect changing social values. Powell stated in his *Rummel* dissent that "[t]he special relevance of *Furman* to this case lies in the general acceptance by Members of the Court of two basic principles. First, the Eighth Amendment prohibits grossly excessive punishment. Second, the scope of the Eighth Amendment is to be measured by 'evolving standards of decency.' "[178]

In his *Rummel* dissent, Powell also rebutted the argument that the Court's review of the scope of permissible punishment set by state legislatures is counter to the principles of separation of powers and federalism. He cited a line of Fourth Circuit cases imposing proportional constraints on sentences imposed under state law as "impressive empirical evidence that the federal courts are capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy."[179]

Thus, once more we see the pragmatic Powell refusing to let abstract principles triumph over according justice to the individual standing before the Court:

> The sentence imposed upon the petitioner would be viewed as grossly unjust by virtually every layman and lawyer. In my view, objective criteria clearly establish that a mandatory life sentence for defrauding persons of about $230 crosses any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment.[180]

In *Solem,* for his new found majority, Powell answered the arguments that applying federal scrutiny to sentences to see if they are consistent with the concept of proportionality will allow the courts virtually unfettered discretion and deluge the courts with a flood of new cases. He reached

175. Rummel v. Estelle, 445 U.S. 263, 307 (1980).
176. 408 U.S. 238 (1972).
177. 428 U.S. 153 (1976).
178. *Rummel,* 445 U.S. at 291-92.
179. *Id.* at 306.
180. *Id.* at 307.

back to *Weems v. United States*[181] and the few subsequent cases in that line, such as *Trop v. Dulles*[182] and *Robinson v. California*,[183] and to the death penalty cases to find objective factors by which proportionality may be determined:

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.[184]

Powell emphasized that application of such standards by courts is practical. "Application of the factors that we identify also assumes that courts are able to compare different sentences. . . . Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts."[185] Powell then proceeded to apply the criteria to the facts before him and concluded:

> Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.[186]

Justice Powell has made a major contribution by bringing new life to the almost moribund eighth amendment. Looking back into history to ascertain the evils that the founding fathers and their English forebears sought to avoid, Powell has made the eighth amendment's protections relevant to contemporary society.

Justice Powell's contribution to current eighth amendment jurisprudence may have broader influence in the future in areas outside criminal sentencing. Commentators have already noted the relevance of the concept of proportionality to awards of punitive damages.[187] Its applicability to such

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181. 217 U.S. 349 (1910).

182. 356 U.S. 86 (1958).

183. 370 U.S. 660 (1962).

184. Solem v. Helm, 463 U.S. 277, 292 (1983).

185. *Id.* at 294.

186. *Id.* at 303.

187. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987) (which unfortunately fails to acknowledge Jeffries' earlier work); Note, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CALIF. L. REV. 1432 (1987); Note, *The Constitutionality of*

damages was one of the issues before the Court in *Bankers Life and Casualty Company v. Crenshaw.*[188] But the Court did not reach the issue since it had not been raised below. Moreover, the Court subsequently denied certiorari in two California cases which rejected arguments that eighth amendment limitations and due process procedural requirements were violated by punitive damages awards. Justices O'Connor and Kennedy would have granted cert.[189] The Supreme Court of Georgia meanwhile reached and

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Punitive Damages under the Excessive Fines Clause of the Eighth Amendment, 85 MICH. L. REV. 1699 (1987). *See also* Freeman, *Tort Law Reform: Superfund/RCRA Liability as a Major Cause of the Insurance Crisis,* 21 TORT & INS. L.J. 517 (1986); Freeman, *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability,* 42 BUS. LAW. 215 (1986).

188. 108 S. Ct. 1645 (1988). In a concurring opinion Justice O'Connor, joined by Justice Scalia, observed that the "wholly standardless discretion [of the jury] to determine the severity of punishment appears inconsistent with due process." 108 S.Ct. 1645, 1656 (O'Connor, J., concurring). This due process "vagueness" argument is closely related to the proportionality concept in the eighth amendment and the equal protection clause. Absent appropriate guidance as to when and in what amounts punitive damages may be awarded, it is inevitable that some awards will be "wantonly and freakishly" imposed. Such awards will not only be "disproportional," they will also violate equal protection standards. Thus, the basic thrust of Powell's opinions for the Court in the death penalty cases discussed above, while technically dealing with the cruel and unusual punishments clause and equal protection, supports the same result reached through a "vagueness" analysis. *See, e.g.,* McCleskey v. Kemp, 107 S.Ct. 1756, 1772 (1987) (as long as Georgia in fact provides for procedures that ensure that discretion unavoidably involved in sentencing is "controlled by clear and objective standards so as to produce nondiscriminatory application," the system is constitutional.) Eddings v. Oklahoma, 455 U.S. 104, 111 (1982) ("Beginning with *Furman,* the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused.") There is nothing in Powell's logic or language in these cases that limits application of the principles and procedures discussed to the protection of life but not of liberty and property. Indeed, as noted earlier, Powell purposefully relied on the death penalty cases to extend the requirement of proportionality to the protection of liberty. Moreover, Powell has championed procedural constraints in other contexts to preclude abuses that rise to constitutional dimensions. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm cause. And they remain free to use their discretion selectively to punish expressions of unpopular views.")

189. Ohio Casualty Ins. Co. v. Downeys Sav. & Loan Ass'n, Calif. Ct. App., 2d Dist., 234 Cal. Rprt. 835, 189 Cal. App. 3d 1072 (Cal. App. 1987), *cert. denied* 108 S.Ct. 2023 (1988); Atlantic Richfield Co. v. Nielsen, *rev. denied,* 56 U.S.L.W. 3814, 3818 (May 31, 1988).

These California courts and other lower courts have cited Powell's opinion for the Court in Ingraham v. Wright, 430 U.S. 651 (1977), as support for the proposition that the eighth amendment does not apply to punitive damages because they are awarded in civil rather than criminal proceedings. But that reliance is misplaced. While *Ingraham* adhered to the traditional "criminal v. civil" focus of prior cruel and unusual punishment clause cases in deciding that clause did not apply to the paddling of school children, and contains dicta that lends support to that conclusion, it did not hold that the clause could never be applied to civil sanctions. Indeed, it expressly reserved the issue. *Ingraham,* 430 U.S. at 669 n.37. Thus Powell's subsequent approach to the excessive fines clause in *Rummel* and *Solem,* with his reliance on the Magna Carta's limitations on amercements and *Lord Devon's* Case, both of which support

decided the issue in *Colonial Pipeline Co. v. Brown.*[190] Relying on Powell's amercements analysis in *Solem* and the Jeffries' article,[191] the Georgia Court held that the excessive fines provision of the eighth amendment, and its Georgia Constitution equivalent, barred all excessive monetary penalties, including punitive damages.[192] The concept of proportionality already has been held applicable by lower courts to forfeitures under civil RICO.[193] Moreover, the concept of proportionality, whether applied under the eighth amendment or under the broader concept of due process, may also ultimately operate as an outer bound on the government's imposition of other civil penalties. They are irrefutably punishment for prohibited conduct. The legislative label put upon them cannot mask that reality and should not be able to lessen the constitutional safeguards afforded citizens when the government sets out to punish them. Finally, the concept may be relevant to the application of strict, joint and several liability under statutes like the Comprehensive Environmental Response, Compensation and Liability Act,[194] where on the facts of a particular case the liability imposed is so disproportionate to the conduct or contribution of the particular defendant as to be punitive in effect.[195]

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imposition of proportionality constraints on civil as well as criminal fines, should not be misunderstood as a fundamental shift of position on Powell's part. Powell used the same general approach in all three opinions. He looked back into history to see what rights the founding fathers sought to protect by the clause at issue and then at what contemporary evolving notions of decency dictate. It must be admitted, however, that in looking at the history of the excessive fines clause Powell gained new insights into the seminal quality of cases like *Weems* and *Trop* and that there is a decided difference in the general tone of *Ingraham* and *Solem.* Had Powell written *Ingraham* after *Solem,* one suspects that while the result would be the same, he would have written it differently. In any event, if Powell were to decide if the eighth amendment's proportionality requirement applies to punitive damages, I believe he would hold that it does. This is because the history of the excessive fines clause, which Powell marshalled in *Rummel* and *Solem,* is persuasive that at the time of adoption of the eighth amendment it was intended to apply to civil as well as criminal fines. Also, even if history were not determinative, as we have seen in the contexts of other opinions discussed in this article, Powell is loath to permit labels to defeat the basic purpose and spirit of a constitutional safeguard. Finally, any doubt is dispelled when Powell's subsequent dictum in *McCleskey v. Kemp,* 107 S.Ct. 1756, 1779 ("The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties") is read in light of his earlier observation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), that punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."

190. 258 Ga. 115, 365 S.E.2d 827 (1988), *appeal denied,* 56 U.S.L.W. 3228 (Oct. 3, 1988) (No. 87-2007).

191. *See supra* note 187.

192. Colonial Pipeline Co. v. Brown, 258 Ga. at 126-27, 365 S.E.2d at 831.

193. United States v. Feldman, 853 F.2d 648 (9th Cir. 1988); United States v. Littlefield, 821 F.2d 1365 (9th Cir. 1987); United States v. Busher, 817 F.2d 1409 (9th Cir. 1987); Hall v. City of Santa Barbara, 813 F.2d 198 (9th Cir. 1987); *cf.* United States v. Horak, 833 F.2d 1235 (7th Cir. 1987). *But see* United States v. Pryba, 674 F. Supp. 1504 (E.D. Va. 1987).

194. 42 U.S.C. § 9601 *et seq.* (1982) ("CERCLA" or the "Superfund Act").

195. When disproportionate liability is imposed retroactively, it violates yet another fundamental principle of Anglo-American law—the principle against retroactive legislation.

THE TENTH AMENDMENT

The tenth amendment provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Over the course of time this amendment has had extreme ups and downs as a constraint on Congress' exercise of the commerce power. During Powell's tenure on the Court, it fleetingly appeared to have life after *National League of Cities v. Usery,*[196] only to be relegated to useless platitude in *Garcia v. San Antonio Metropolitan Transit Authority.*[197] In the interval between the two decisions, Powell wrote two opinions that are among his more revealing decisions. They are his opinion in *Federal Energy Regulatory Commission v. Mississippi,*[198] concurring and dissenting, and his dissent in *Equal Employment Opportunity Commission v. Wyoming.*[199] In both opinions we see Powell's strong commitment to the principle of federalism, which appears again and again in his eleventh and fourteenth amendment opinions and those dealing with implied rights of action and abstention.

FERC v. Mississippi addressed Congress' use of the commerce clause power to enact a law imposing federal procedural requirements on state administrative bodies regulating electric and gas public utilities. In what is sometimes referred to as "selective preemption," Congress left the state regulatory systems in place but imposed its own policy notions in selected areas of substantive and procedural law. Powell objected to the process. The gist of his objection was that in prescribing "the procedures by which state regulatory bodies make their decisions . . . for the first time, [Congress broke] with this long standing deference to principles of federalism."[200] He rejected the majority's reasoning that "Congress can condition the utility regulatory activities . . . on any term it pleases since, under the Commerce Clause, Congress has the power to pre-empt completely all such activities. . . . Under this 'threat of pre-emption' reasoning, Congress . . . could reduce the States to federal provinces."[201] Powell concluded that " '[t]he

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The resulting effect can be doubly "harsh and oppressive." *See* Freeman, *supra* note 187; *cf.* Jeffries, *supra* note 187; Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988). *But see* United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988). The disproportionality issue was presented to the court in an appeal from the imposition of joint and several liability under CERCLA. The court assumed, however, that the effects of the judgment on appellants could be moderated by subsequent actions for contribution. It accordingly treated the constitutional arguments as a facial attack on the statute, which it rejected. It was silent on the "as applied" constitutional arguments and thus did not discuss "proportionality" under either the eighth amendment or due process.

196. 426 U.S. 833 (1976), *rev'd,* 469 U.S. 528 (1985).

197. 469 U.S. 528 (1985).

198. 456 U.S. 742, 771 (1982) (Powell, J., concurring in part and dissenting in part).

199. 460 U.S. 226 (1983).

200. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 772 (1982).

201. *Id.* at 773.

general rule, bottomed deeply in the belief in the importance of state control of state judicial procedure, is that the federal law takes the state courts as it finds them. I believe the same principle must apply to other organs of state government.' "[202]

A year later in *EEOC v. Wyoming* Powell again dissented. Powell's penchant for history again came to the fore: "I join the Chief Justice's dissenting opinion, but write separately to record a personal dissent from Justice Stevens' novel view of our Nation's history."[203] Powell took issue with Justice Stevens' statement that " 'this Court has construed the Commerce Clause to reflect the *intent of the Framers* . . . to confer a power on the National Government adequate to discharge its *central mission.*' "[204] Powell stated that he wrote "to place the Commerce Clause in proper historical perspective, and further to suggest that even today federalism is not . . . utterly subservient to [the Commerce] Clause."[205] Powell then reasoned that "[t]he Constitution's central purpose was . . . to constitute a government."[206] He pointed out that "the Virginia Plan, the initial proposal from which the entire Convention began its work, focuses on the framework of the National Government without even mentioning the power to regulate commerce."[207] Powell observed that nothing in the text of the Constitution gives the commerce clause supremacy over other enumerated powers. He referred to Madison's statement in *The Federalist* that " '[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and property of the State.' "[208]

Powell concluded that state sovereignty always has been a basic assumption of American political theory:

> Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this court has recognized time and time again. . . . In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on the power of Congress—including its power under the Commerce Clause.[209]

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202. *Id.* at 774 (quoting Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 508 (1954)).
203. Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 265 (1983).
204. *Id.* at 265 (quoting Justice Stevens, *id.* at 246-47).
205. *Id.* at 266.
206. *Id.*
207. *Id.* at 266-67.
208. *Id.* at 271 (quoting *The Federalist* No. 45, at 313 (J. Madison) (J. Cooke ed. 1961)).
209. *EEOC,* 460 U.S. at 273-75.

THE ELEVENTH AMENDMENT

The eleventh amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The eleventh amendment was enacted shortly after the Supreme Court held in *Chisholm v. Georgia*[210] that article III, section 2 of the Constitution permitted the Court to assume original jurisdiction in a suit brought by a citizen of South Carolina against the State of Georgia.

Three of Justice Powell's most significant opinions dealing with the eleventh amendment are those he wrote for the court in *Pennhurst State School & Hospital v. Halderman*[211] and *Atascadero State Hospital v. Scanlon*[212] and his plurality opinion, joined by Chief Justice Rehnquist and Justices White and O'Connor, in *Welch v. State Department of Highways and Public Transportation.*[213]

In *Pennhurst* Powell stated that "[t]he Amendment's language overruled the particular result in *Chisholm,* but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Article III."[214] Since the recent case law in this area had been closely divided, Powell carefully examined these precedents. He again found the touchstone was "federalism." Applying that principle to the facts of *Pennhurst,* he concluded:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.[215]

The following year in *Atascadero State Hospital v. Scanlon,* Powell further developed his *Pennhurst* views. For the Court, he refused to find that Congress in the Rehabilitation Act intended to waive the states' sovereign immunity from suit:

> The provisions of the Rehabilitation Act fall far short of expressing an unequivocal congressional intent to abrogate the States'

210. 2 U.S. 440 (1793).
211. 465 U.S. 89 (1984).
212. 473 U.S. 234 (1985).
213. 107 S. Ct. 2941 (1987).
214. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984).
215. *Id.* at 106.

> Eleventh Amendment immunity. Nor has the State of California specifically waived its immunity to suit in federal court.[216]

He rejected Justice Brennan's statement that: "[i]f the Court's Eleventh Amendment doctrine were grounded on principles essential to the structure of our federal system or necessary to protect the cherished constitutional liberties of our people, the doctrine might be unobjectionable. . . ."[217] Powell found instead that sovereign immunity is part of that essential structure:

> The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." . . By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance.[218]

Justice Powell's opinion for the Court in *Welch v. State Department of Highways and Public Transportation* reaffirmed that the principle of federalism requires that any Congressional intent to waive a state's sovereign immunity "must be expressed in unmistakably clear language."[219] Accordingly, for the majority he reversed *Parden v. Terminal Railway of the Alabama State Docks Department*[220] where "[t]he Court mistakenly relied on cases holding that general language in the Safety Appliance Act . . . and the Railway Labor Act . . . made those statutes applicable to the States."[221] Responding to Justice Brennan's dissent, Powell quoted Marshall, Hamilton, and Madison for the proposition that at the time of the adoption of the Constitution the founding fathers did not intend an individual to be able to sue a state in the federal courts.

FEDERAL ABSTENTION

Powell's opinion in *Pennzoil Co. v. Texaco,*[222] with its strong reliance on *Younger v. Harris,*[223] is consistent with his views on federalism reflected in his tenth and eleventh amendment opinions.

The issue in *Pennzoil* was "whether a federal district court lawfully may enjoin a plaintiff who has prevailed in a trial in state court from executing the judgment in its favor pending appeal of that judgment to a state appellate court."[224] The case arose in the wake of Texaco's acquisition

216. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985).
217. *Id.* (Brennan, J., dissenting).
218. *Id.* at 242 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985)).
219. Welch v. State Dept. of Highways & Pub. Transp., 107 S. Ct. 2941, 2948 (1987).
220. 377 U.S. 184 (1964).
221. *Welch,* 107 S. Ct. at 2947.
222. 107 S. Ct. 1519 (1987).
223. 401 U.S. 37 (1971).
224. Pennzoil Co. v. Texaco, 107 S. Ct. 1519, 1522 (1987).

of Getty Oil and Pennzoil's subsequent suit in the Texas court alleging that Texaco had tortiously induced Getty to breach an agreement to sell its shares to Pennzoil. A Texas jury awarded Pennzoil actual damages of $7.53 billion and punitive damages of $3 billion. Under Texas law Pennzoil could have obtained writs seizing Texaco's Texas assets unless Texaco posted a bond estimated at $13 billion. As a matter of trial strategy, Texaco did not challenge the Texas bond requirements as conflicting with federal law in the Texas court, but rather filed suit in the United States District Court for the Southern District of New York, where Texaco's headquarters were located. Pennzoil moved to dismiss the action on several grounds, including the abstention doctrine of *Younger v. Harris.* The district court rejected Pennzoil's arguments and the Second Circuit affirmed.

The Supreme Court reversed on the grounds that:

> The courts below should have abstained under the principles of federalism enunciated in *Younger v. Harris,* 401 U.S. 37 (1971). Both the District Court and the Court of Appeals failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system. Similarly, neither of those courts applied the appropriate standard in determining whether adequate relief was available in the Texas courts.[225]

Powell cited the admonition in *Younger* that " 'courts of equity should not act . . . when the moving party has an adequate remedy at law.' "[226] But he placed principal emphasis on Justice Black's classic definition of "our federalism" in *Younger,* quoting in the *Pennzoil* opinion Black's language:

> "This underlying reason . . . is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[227]

225. *Id.* at 1525.
226. *Id.* (quoting Younger v. Harris, 401 U.S. 37, 43 (1971)).
227. *Id.* at 1525-26 (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).

Powell then extended the *Younger* doctrine from state criminal proceedings to state civil proceedings. This extension was not across the board, however. It applies only "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."[228] Powell found such an interest in this case. He looked to *Juidice v. Vail*,[229] which held that a federal court should have abstained from deciding a challenge to a state's contempt process. Powell observed that *Juidice*

> rests on the importance to the States of enforcing the orders and judgments of the courts. There is little difference between the State's interest in forcing persons to transfer property in response to a court's judgment and in forcing persons to respond to the court's process on pain of contempt.[230]

Finally, Texaco argued that abstention was inappropriate because no Texas court could have heard Texaco's federal constitutional claims within the limited time available to Texaco to avoid bankruptcy. Powell made short shrift of this argument because Texaco never tried to get such relief in the Texas courts. Powell said "denigrations of the procedural protections afforded by Texas law hardly come from Texaco with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case."[231] Thus, the rule handed down was that when a "litigant has not attempted to present federal claims in related state court proceedings, [a] federal court should assume that state procedures will afford an adequate remedy, in absence of unambiguous authority to the contrary."[232] In Powell's view, the fact that after the Supreme Court's decision the possible Texas remedies were foreclosed did not matter. "[W]e have addressed the situation that existed on the morning of December 10, 1985, when this case was filed in the United States District Court for the Southern District of New York."[233] Texaco gambled and lost. Thus, it could not "escape *Younger* abstention by failing to assert its state remedies in a timely manner."[234]

IMPLIED RIGHTS OF ACTION AND "FEDERAL COMMON LAW"

Powell's important opinions on implied rights of action include his dissent in *Cannon v. University of Chicago*[235] and his opinion for the Court in *Middlesex County Sewerage Authority v. National Sea Clammers Association*.[236]

228. *Id.* at 1526.
229. 430 U.S. 327 (1977).
230. *Pennzoil*, 107 S. Ct. at 1527.
231. *Id.* at 1528.
232. *Id.* at 1528.
233. *Id.* at 1529.
234. *Id.* at 1521.
235. 441 U.S. 677, 730 (1979) (Powell, J., dissenting).
236. 453 U.S. 1 (1981).

Traditionally, the federal courts were reluctant to create a cause of action where none was provided expressly by statute.[237] These innovations were not rejected as bad policy, but as decisions that only Congress could make. But in the 1960's, the Court was induced to depart briefly from this principle by finding implied private rights of action under federal statutes that did not provide expressly for such enforcement. A key decision in this new line of cases was *J.I. Case Co. v. Borak*,[238] which seemed to indicate that the federal courts were empowered to create a private right of action whenever it seemed wise or necessary. *Borak* was followed some years later by *Cort v. Ash*,[239] where the Court identified legislative intent as only one of several factors to be considered in determining whether an implied right of action existed under a federal statute.[240]

The beginning of the end of this kind of federal judicial policymaking was signalled in Justice Powell's dissenting opinion in *Cannon v. University of Chicago*. There the issue before the Court was whether there was an implied right of action under Title IX of the education amendments authorizing a woman to sue two universities on the ground that she was denied admission to their medical schools because of her sex. Applying the reasoning in *Cort v. Ash*, the Court found such a right.[241] Powell in his dissent stated: "[M]ounting evidence from the courts below suggests . . . the mode of analysis we have applied in the recent past cannot be squared with the doctrine of separation of powers. The time has come to reappraise our standards for the judicial implication of private causes of action."[242]

Powell then analyzed the long line of implied private causes of action cases starting with *Texas & Pacific Railway Co. v. Rigsby*.[243] He zeroed in on *Cort v. Ash*: "It was against this background of almost invariable refusal to imply private actions, absent a complete failure of alternative enforcement mechanisms and a clear expression of legislative intent to create such a remedy, that *Cort v. Ash* . . . was decided."[244] Powell pointed out that the practical result violated the separation of powers principle because it

> allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch. It also invites Congress to avoid resolution of the often controversial question whether a

237. *See, e.g.*, United States v. Gilman, 347 U.S. 507 (1954) (refusing to create cause of action on behalf of United States against employee whose negligence resulted in government liability under Federal Tort Claims Act); United States v. Standard Oil Co., 332 U.S. 301 (1947) (refusing to recognize cause of action for recovery by United States for tortious injury to one of its soldiers).

238. 377 U.S. 426 (1964).

239. 422 U.S. 66 (1975).

240. *See* Cort v. Ash, 422 U.S. 66, 78 (1975) ("[I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?").

241. 441 U.S. 677, 677 (1979).

242. Cannon v. University of Chicago, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

243. 241 U.S. 33 (1916).

244. *Cannon*, 441 U.S. at 739.

new regulatory statute should be enforced through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public scrutiny and participation has been bypassed. . . .[245]

Once again an earlier dissent by Powell ultimately was adopted by a majority of the Court. Shortly after *Cannon,* in *Touche Ross & Co. v. Redington,*[246] the Court rejected a multifactor analysis and declared that "our task is limited solely to determining whether Congress intended to create the private right of action asserted."[247] The shift in focus was also recognized explicitly by Justice Stewart's opinion for the majority in *Transamerica Mortgage Advisors, Inc. v. Lewis:*[248]

> While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g., J.I. Case v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear.[249]

The Court's recent decisions denying liberal creation of implied private rights of action underscore the conclusion that major innovations in the rights and remedies available under federal law are policy decisions for Congress to pronounce. They are not to be resolved by the courts as a matter of federal common law.

Middlesex County Sewerage Authority v. National Sea Clammers Association involved coastal fishermen who sought damages and other relief in a federal court from various governmental entities of the federal government and the States of New York and New Jersey. The fishermen alleged that these entities destroyed fishing in the coastal areas adjacent to those states because of discharges of pollution into those waters. Though multiple legal questions were raised in the lower courts, the Court granted certiorari on only three: (1) whether the Federal Water Pollution Control Act (FWPCA), like the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), contained an implied right of action; (2) whether all federal common law nuisance actions had been preempted by those acts; and (3), if not, whether private citizens, as distinguished from the States, have standing to sue for damages under the federal common law of nuisance. The Court, in an

245. *Id.* at 743. Compare this with Powell's first amendment views discussed above where he emphasizes the importance of *informed* public debate of governmental affairs. *See supra* note 18 and accompanying text.

246. 442 U.S. 560 (1979).

247. Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

248. 444 U.S. 11 (1979).

249. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979).

opinion written by Powell, decided that there was no implied right of action, the two acts preempted federal common law, and thus, the Court need not reach the third question.

Consolidating the position gained in *Touche Ross & Co. v. Redington,*[250] and *Transamerica Mortgage Advisors, Inc. v. Lewis,*[251] and reaffirmed in the intervening decisions in *Texas Industries, Inc. v. Radcliff Materials, Inc.,*[252] *California v. Sierra Club,*[253] and *Universities Research Assoc., Inc. v. Coutu,*[254] Powell in *Sea Clammers* reiterated that "[i]n view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA."[255] As to the federal common law remedies question, Powell noted carefully that *Illinois v. Milwaukee, Wisconsin* (Milwaukee I)[256] had held only that the federal courts had jurisdiction "to consider the federal common-law issues raised by a suit . . . by the State of Illinois against various Wisconsin municipalities and public sewage commissions."[257] The question left open in *Milwaukee I,* whether a private plaintiff ever could seek relief under federal common law, again was not answered because *Illinois v. Milwaukee* (Milwaukee II),[258] handed down contemporaneously with *Sea Clammers,* found that the Clean Water Act entirely preempted the federal common law of nuisance.

At one level, these opinions are not "constitutional"; they concern policies of statutory construction and judicial decisionmaking. Yet those policies are grounded in the constitutional structure of separation of powers. They call for an approach to statutory construction that curtails open-ended legislative delegations and avoids unguided judicial resolution of important questions of public policy. Where the fact or extent of congressional innovation is significantly uncertain, the courts should resolve the uncertainty against change. Adherence to this approach encourages Congress to make the basic policy choices, as required by the Constitution, and to avoid the inappropriate delegation of legislative authority to the courts.

In Powell's view, if Congress successfully can transfer its policymaking responsibility to the courts in an obvious effort to avoid hard choices, then it can evade the political accountability to the people that is essential for the legitimacy of legislative power. And if the federal courts, constitutionally insulated from the winds of popular opinion, accept and exercise that legislative power, they will undermine their own role in the constitutional

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250. 442 U.S. 560 (1979).
251. 444 U.S. 11 (1979).
252. 451 U.S. 630 (1981).
253. 451 U.S. 287 (1981).
254. 450 U.S. 754 (1981).
255. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14 (1981).
256. 406 U.S. 91 (1972).
257. *Sea Clammers,* 453 U.S. at 21.
258. 451 U.S. 304 (1981).

scheme as neutral arbiter.[259] Finally, the principle of federalism also is offended if a federal court, with its constitutionally limited jurisdiction, extends its own "authority to embrace a dispute Congress has not assigned it to resolve."[260]

EQUAL PROTECTION

Justice Powell's more important opinions on equal protection include his opinions for the Court in *San Antonio Independent School District v. Rodriquez*[261] and *Batson v. Kentucky*,[262] his opinion announcing the holding of the Court in *Regents of the University of California v. Bakke*[263] and his brief concurrence in *Plyler v. Doe*.[264]

Although Justice Powell has been vigorous in finding the equal protection clause to be a shield against invidious discrimination against individuals, he has strongly resisted efforts to use that clause as the functional equivalent of substantive due process to create new constitutional rights for groups or classes of individuals. Thus in his opinion for the Court in *San Antonio Independent School District v. Rodriquez,* Powell stated that:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. . . .
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> . . . .
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> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.[265]

In *San Antonio* the plaintiffs were Mexican-American parents who had attacked the Texas system of financing its public schools. The attack focused on the disparities in funding levels among local school districts because of primary reliance on property taxes. State funds for education were divided among school districts on the basis of each district's assessed property. The

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259. *See* United States v. Richardson, 418. U.S. 166, 180, 188-97 (1974) (Powell, J., concurring). Powell also warned in his *Cannon* dissent that "[t]he dangers posed by judicial abrogation of the right to resolve general societal conflicts have been manifested to this Court throughout history." *Cannon*, 441 U.S. at 744.

260. Cannon v. University of Chicago, 441 U.S. 677, 746 (1979).

261. 411 U.S. 1 (1973).

262. 476 U.S. 79 (1986).

263. 438 U.S. 265 (1978).

264. 457 U.S. 202, 236 (1982) (Powell, J., concurring).

265. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-35 (1981).

assessed values in different districts varied widely between urban and rural areas and between rich and poor neighborhoods. The net results were wide discrepancies in per pupil expenditures among districts. The poorer districts, which often contained higher percentages of minority students, received relatively smaller funds. The federal district court had found that since (1) wealth is a suspect classification and (2) education a "fundamental" interest, the state system could be sustained only if the state could show some compelling state interest for its system, and that the state had failed to do so.

As in his opinion in *McClesky*, one of the Georgia capital sentence cases discussed above,[266] Powell was unimpressed by the plaintiffs' statistical evidence. Here the study presented had only surveyed about 10% of the Texas school districts. "It is evident that, even if the conceptual question were answered favorably to appellees, no factual basis exists upon which to found a claim of comparative wealth discrimination."[267]

One of the basic issues in *San Antonio* was under what circumstances a standard of strict scrutiny should be applied to the state actions challenged under the fourteenth amendment. Speaking for the Court, Powell held that since the action involved could not be shown to have "'deprived,' 'infringed,' or 'interfered' with the free exercise of some [constitutionally protected] personal right or liberty,"[268] strict scrutiny was inappropriate. The Texas action should instead "be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."[269] In his opinion, Powell returned to two of his familiar themes, federalism and judicial restraint. As to federalism, Powell wrote:

> It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action," it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.[270]

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266. McCleskey v. Kemp, 107 S. Ct. 1756 (1987). *See supra* notes 152-62 and accompanying text (discussing *McCleskey).*

267. *San Antonio,* 411 U.S. at 27.

268. *Id.* at 38.

269. *Id.* at 39.

270. *Id.* at 44 (citations omitted).

As to judicial restraint, Powell stated:

> In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.[271]
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> . . .
>
> We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested.[272]
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> . . .
>
> These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.[273]

In *Regents of the University of California v. Bakke*[274] the Court was fractured over the application of the equal protection clause to the admissions program of the Medical School of the University of California at Davis. That program had a "quota system" that effectively reserved 16 places in an entering class of 100 for members of "minority groups" including blacks, Chicanos, Asians and American Indians. The policy was challenged by Bakke, a white male applicant who had twice been denied admission. The Supreme Court of California held that the admissions program violated the equal protection clause of the United States Constitution, ordered Bakke admitted, and forbade the University from taking race into account as a factor in future admissions decisions. A closely divided Court (1) upheld the California court's judgment finding the admissions program unconstitutional and ordering Bakke admitted but (2) reversed the enjoining of the University from according any consideration to race in its ongoing admissions process. Justice Powell's vote was decisive to this result. He was joined by Chief Justice Burger and Justices Stewart, Rehnquist and Stevens in the former and by Justices Brennan, White, Marshall and Blackmun in the latter. Powell wrote a long opinion on each set of issues, parts of which were joined by various justices, and others that stood alone.

Rejecting the "color blind" approach, Powell started his equal protection analysis with the observation that not all racial or ethnic classifications are per se invalid. Thus, the critical process became "the level of judicial scrutiny to be applied to the special admissions program."[275] Powell con-

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271. *Id.* at 43.
272. *Id.* at 55.
273. *Id.* at 58-59.
274. 438 U.S. 265 (1978).
275. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 287 (1978).

cluded that since "[r]acial and ethnic distinctions of any sort are inherently suspect," they "call for the most exacting judicial examination."[276]

Powell then set forth the history of the equal protection clause since the adoption of the fourteenth amendment. He observed that

> [i]t was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. . . . It was only as the era of substantive due process came to a close . . . that the Equal Protection Clause began to attain a genuine measure of vitality.[277]

Powell rejected the argument based on the immediate post-Civil War origins of the fourteenth amendment that it should be applied differently to whites than to blacks. He characterized as a "two-class theory" the argument that "discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.' "[278] He stated that "[t]he clock of our liberties . . . cannot be turned back to 1868. . . . It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."[279] He also observed that "[t]here is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not."[280]

Thus whenever a state "denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background," it "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."[281]

Powell then examined each of the four asserted purposes of the University's special admissions program and found that none was substantial enough to support the use of the suspect classification. He distinguished other precedents involving affirmative action on the grounds that they had been predicated upon "judicial, legislative, or administrative findings of constitutional or statutory violations."[282] Powell asserted that without such

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276. *Id.* at 291.

277. *Id.* at 291-92.

278. *Id.* at 294-95.

279. *Id.* at 295. Kahn interprets Powell's rejection of this argument as "endorsing" the color-blind principle, though he later adds that Powell does not make it the determinative test but only "a factual interest to be represented within the balance." Kahn, *supra*, note 1, at 6-9. I do not agree with Kahn's characterization. I view Powell as rejecting both the "two classes" and "color blind" bright line approaches because he believes either could lead to extremes in certain factual contexts. In their place, he substitutes a "two step" equal protection test, described below, for determining the constitutionality of law or regulations affording racial, religious or sexual preferences.

280. *Bakke*, 438 U.S. at 296.

281. *Id.* at 305.

282. *Id.* at 307.

findings, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."[283] The Constitution, in Powell's view, does not permit the Davis Medical School faculty "to convert a remedy [affirmative action] heretofore reserved for violations of legal rights into a privilege [that could be granted] . . . to whatever groups are perceived as victims of societal discrimination."[284] Finally, while recognition of race is one factor that can appropriately be taken into consideration in pursuit of the goal of a diverse student body, Powell held that race must be balanced with other factors.[285] The constitutional fault of the Davis program was that it "focused *solely* on ethnic diversity."[286] "It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class."[287] "At the same time, the preferred applicants have the opportunity to compete for every seat in the class."[288] Powell then cited the Harvard Admissions Program as one that would pass equal protection muster because "[i]n such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."[289]

Powell's opinion in *Bakke* set the general framework for subsequent decisions dealing with the constitutionality of "affirmative" action programs

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283. *Id.* at 308-09.

284. *Id.* at 310.

285. Powell's earlier opinion for the Court in Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), discussed the constitutional relevance of a state's objective of encouraging diversity and pluralism in the field of education based on recognition of differences in religious beliefs. In that context, he observed that, in the balancing required where both the establishment clause and the free exercise clause are involved, "[o]ne factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program." *Id.* at 795. Powell quoted Black and Harlan to warn against evils of civil and political strife that can flow from competition among religious groups for preferential governmental support or favors, and contrasted that evil with the benefits of non sectarian political diversity. *Id.* at 796 n.54. He observed that "we know from long experience with both Federal and State Governments that aid programs of any kind tend. . . to generate their own aggressive constituencies. . . . In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." *Id.* at 797. Powell did not develop this point in *Bakke,* but it is reflected in his view that race alone constitutionally cannot be the determinative factor for admissions, while it may be considered if it is one of several other factors to be weighed in striking an overall balance. In that balancing context, political polarization along social lines would be less likely to develop. Thus one of the purposes of the fourteenth amendment could be viewed as analogous to one of the first amendment's purposes to protect against public strife and political division along racial lines. *Id. See also* Aguilar v. Felton, 473 U.S. 402, 414, 416-17 (1985) (Powell, J., concurring).

286. *Bakke,* 438 U.S. at 315.

287. *Id.* at 319.

288. *Id.* at 319-20.

289. *Id.* at 317.

and the Equal Protection Clause. These include *Wygant v. Jackson Board of Education,*[290] *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission,*[291] *United States v. Paradise,*[292] and *Johnson v. Transportation Agency, Santa Clara County, California.*[293]

In his brief concurring opinion in *Plyler v. Doe,*[294] Powell agreed that a Texas statute that barred the children of illegal aliens from its schools was impermissible under the equal protection clause. Powell pointed out that the children "are excluded only because of a status resulting from the violation by parents or guardians of our immigration laws and the fact that they remain in our country unlawfully. The . . . children are innocent in this respect."[295] Thus he concluded that a "legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment."[296]

Justice Powell's opinion for the majority in *Batson v. Kentucky* held that "purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[297] Powell pointed out that the jury "has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge," and thus the affirmative right to trial by jury reinforces the equal protection clause's constraints on prosecutors' use of peremptory challenges to exclude potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[298] The difficult issue addressed in this opinion was the standard for determining when such a constitutionally impermissible result has occurred. The Court found that "a defendant may establish a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[299] This might be done through showing a pattern of past strikes against black

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290. 476 U.S. 267 (1986) (holding that a school board plan providing preferential protection against layoffs to "Blacks, American Indians, Orientals and those of Spanish descent" violated the equal protection clause).

291. 478 U.S. 421, 483 (1986) (Powell, J., concurring).

292. 480 U.S. 149 (1987) (upholding a district court order requiring that the Alabama Department of Public Safety award promotions from privates to corporals in the state police to at least 50 percent blacks until approximately 25 percent of the corporals were black).

293. 480 U.S. 616 (1987) (upholding county promotion plan in favor of women employees that permitted women to be promoted over male employees with higher test scores).

294. 457 U.S. 202, 236 (1982).

295. Plyler v. Doe, 457 U.S. 202, 238 (1982).

296. *Id.* at 239.

297. 476 U.S. 79, 86 (1986).

298. Batson v. Kentucky, 476 U.S. 79 (1986).

299. *Id.* at 96.

jurors or by statements of the prosecutor during the *voir dire*. Once a defendant makes a *prima facie* showing, the burden shifts to the State to "articulate a neutral explanation" for challenging the black jurors that is "related to the particular case."[300]

From these later opinions and Powell's *Bakke* opinion, the proposition emerges that where evidence exists of systematic denial of equal opportunity because of race or sex, affirmative action designed to correct or catch up by achieving a more representative balance within a class by giving preference to members of the historically disadvantaged minority does not offend equal protection. But absent such sins of the parents, their children may not be discriminated against to prefer minorities as such. To be constitutional, preference on a racial, religious or sexual basis must occur as a result of a broader, more balanced process that furthers other legitimate goals, such as "diversity" in education or other social activities. Thus, once the bright line test of compensation for historic, deliberate discrimination is passed, purpose rather than effect controls whether the preference is or is not constitutional. And since stated purpose alone cannot be determinative, judges must enter the labyrinth of groping for "true intent" and weighing its social merit. In that complex process, as I suggested above in discussing possible parallels between Powell's views in *Bakke* and establishment clause cases,[301] avoidance of political polarization along racial or religious lines appears to be an important factor to Powell. Because such polarization is more likely to occur when affirmative action is direct, overt and single-purposed, such discrimination is unlikely to pass constitutional muster. Conversely, some discrimination or preference on a racial, religious or sexual basis is likely to be constitutionally permissible when necessary to implement social goals of "diversity" or "pluralism." In this unavoidably gray area, predictability is hard to come by and form will often command a premium. But that uncertainty is the price that Powell obviously feels must be paid as an alternative to the greater social evils likely to flow from adoption of either of the two "bright line" alternatives—the color blind imperative or unlimited deference to legislative preferences.

SUBSTANTIVE DUE PROCESS

Powell's forays into substantive due process are relatively rare. His most significant decisions in this area are his plurality opinion in *Moore v. City of East Cleveland, Ohio*[302] and his opinion for the Court in *City of Akron v. Akron Center for Reproductive Health Inc.*[303]

Moore involved a municipal housing ordinance that limited occupancy of a dwelling unit to members of a single family. Under the ordinance, "family" was defined in a way that did not include grandchildren. A

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300. *Id.* at 98.
301. *See supra* note 285.
302. 431 U.S. 494 (1977).
303. 462 U.S. 416 (1983).

grandmother whose grandchild came to live with her was convicted of violating the ordinance and sentenced to 5 days in jail and fined $25. Writing for himself and Justices Brennan, Marshall, and Blackmun, Powell found that the ordinance was invalid because it intruded upon "freedom of personal choice in matters of marriage and family life" which was protected by due process.[304]

At the same time, Powell warned:

> Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment. . . .
>
> Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society". . . . Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values. . . .[305]

Powell's opinion for the Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*, which commanded the support of six justices, is probably the most important of recent abortion cases besides *Roe v. Wade.*[306] The main insights *Akron* affords into Powell's judicial philosophy are his beliefs (1) in an implied constitutional right of privacy, (2) that the right of privacy "encompasses a woman's right to decide whether to terminate her pregnancy"[307] and (3) that "the doctrine of *stare decisis,* while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."[308]

Procedural Due Process

Justice Powell's opinion for the Court in *Mathews v. Eldridge*[309] sets forth the most recent controlling analysis for determining due process requirements in administrative proceedings to terminate "benefits" or "en-

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304. Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 499 (1977).
305. *Id.* at 502-04.
306. 410 U.S. 113 (1973).
307. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419 (1983).
308. *Id.* at 419-20.
309. 424 U.S. 319 (1976).

titlements." There, substantially restricting the scope of *Goldberg v. Kelly*,[310] the Court determined that procedural due process did not require that a current beneficiary of social security disability benefits payments be afforded opportunity for a trial type "evidentiary hearing" before termination of his benefits. The principal importance of the opinion is the three-step analysis it sets forth for determining what process is due in the context of administrative proceedings:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[311]

The procedures under scrutiny in *Mathews* provided for notice to a disability payments recipient of a proposed determination that his disability had ceased, together with an explanation for that conclusion and advice as to his appellate rights. The regulations provided that if the recipient sought agency reconsideration and reconsideration were denied, the recipient had a right to a nonadversarial hearing before an administrative law judge and, if the results before the judge were adverse to him, he might request discretionary review by an agency appeals council. Finally, the recipient could obtain judicial review. No provision authorized a stay of the cut-off of benefits beyond the originally determined cut-off date during this agency and judicial appeal process, but if an appellant ultimately prevailed, he was entitled to retroactive payments.

The thrust of the due process challenge was that an appellant was entitled to an evidentiary hearing *before* his disability payments were terminated. The challenger relied on a broad reading of *Goldberg v. Kelly* for the proposition that such a hearing was required prior to any temporary deprivation.

Applying the three part test to these facts, Powell found, first, that a disability benefit was not based on financial need. Therefore, while its suspension would produce hardships in some cases, the benefit is quantitatively different from the welfare payments involved in *Goldberg* which were given only "to persons on the very margin of subsistence."[312]

Second, turning to the reliability of the decisional system challenged, Powell found it adequate. He acknowledged that errors did occur and that "credibility and veracity [of witnesses] may be a factor in the ultimate

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310. 397 U.S. 254 (1970).

311. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

312. *Id.* at 340.

disability assessment in some cases."[313] "But," he concluded, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in *Goldberg*."[314] Again Powell found statistical evidence unpersuasive: "although we view such information as relevant, it is certainly not controlling in this case."[315]

Finally, looking at the Government's interests, the most visible burden of providing an evidentiary hearing upon demand would be the incremental costs, which "would not be insubstantial."[316] While these extra costs alone were not controlling, they "may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited."[317]

In striking "the ultimate balance,"[318] Powell found that the procedures assured fairness. He concluded:

> In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. . . . This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final.[319]

Some measure of *Mathews'* impact as precedent is reflected in the fact that *Shepard's* reports it has been cited more than 2700 times.

THE RESULTING OVERVIEW

When the opinions of Justice Powell discussed above are viewed as a whole, several themes emerge. One is Powell's balancing approach that numerous authors have noted and often compared to that of the second Justice Harlan. Also, as we saw in Harlan's opinions, there is careful, pragmatic attention to the facts of each case, with particular concern to see that the spirit of a constitutional protection prevails in changing times and justice is in fact meted to the individuals involved. An example is Powell's belief in an implied right of privacy, which as we have seen, underlies both

313. *Id.* at 344.
314. *Id.* at 344-45.
315. *Id.* at 347.
316. *Id.*
317. *Id.* at 348.
318. *Id.*
319. *Id.* at 349.

his fourth amendment and abortion opinions. It is also manifest in his "Living Constitution" approach to eighth amendment cases. Yet while changing social values may broaden constitutional protections, Powell is steadfast that they cannot be used to narrow the scope of these protections as they existed at the time of their adoption. Thus, in the proportionality, establishment clause, and equal protection cases, Powell looks not only at contemporary society but also back into history for guiding principles.

We also see that Powell's principal focus in constitutional cases is on individuals instead of groups. This is seen in his establishment clause opinions and in *Bakke* where he warns against the dangers of polarization along religious or racial lines likely to flow when the state creates conditions that lead to political competition based on either factor. It is reflected in his refusal to let statistical studies be determinative in his opinions in capital punishment, establishment clause, and procedural due process contexts. It is also apparent in his reluctance to expand the equal protection clause beyond protection against invidious discrimination against a particular individual to strike down state laws because of speculative effects on classes or groups. This restricted view of the equal protection clause ties into two other themes in his opinions. They are the Justice's awareness of the historic roots of the common law and our Constitution and his respect for "our federalism." In these respects, he is like his immediate predecessor and fellow Southerner, Justice Black.

Finally, his steadfast refusal to find implied rights of action in federal statutes and his view on the narrow scope of federal common law reveal his commitment to the separation of powers principle and his view of the restricted role of federal judges as policymakers in areas that are the traditional realms of the legislature. This is to be distinguished from his belief that it is the duty of the Court to give lower courts guidance on Constitutional issues and his closely related respect for stare decisis.

Apart from these individual themes, the overriding general conclusion is that while Justice Powell has written what he believes to be relevant today, he has always seen today in the broader context of the past centuries of our Anglo-American history. This combination of realism and historical perspective should keep Justice Powell's opinions alive and relevant for future generations.