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Balanced Justice: Mr. Justice Powell and the Constitution

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I. INTRODUCTION*

In his first five years on the United States Supreme Court, Justice Lewis F. Powell, Jr. has become and will most likely continue to be a leading force in shaping the direction of the Court. In many areas, Justice Powell's desire for judicial flexibility as well as judicial restraint has made him a leader in turning the Burger Court away from the bright-line tests enunciated by the Warren Court. However, where the Warren Court had been flexible, Justice Powell has usually preserved this flexibility and expanded it if possible. The tool consistently utilized to achieve this flexibility has been a balancing formula that has sought to accommodate all the competing interests.

It is the intent of this note to examine Justice Powell's judicial philosophy in limited areas of Constitutional adjudication. The areas to be examined include the first, fourth and fifth amendments and the due process and equal protection clauses of the fourteenth amendment.

II. DUE PROCESS

In order to appreciate fully Justice Powell's impact upon and contribution to the Supreme Court in the area of due process, one must keep in mind the direction and approach taken by the Warren Court. In general, the Warren Court preferred inflexible, rigid rules of due process and sought to assure the imposition of uniformity in procedure among the various states.[1] It is in this area, perhaps, that "the divergencies of the Burger from the Warren Court [are] most pronounced."[2] The Burger Court has been less amenable to rigid rules of due process and more likely to adopt flexible standards allowing some variety.[3] The trend on the Burger Court has been to limit the rigid Warren-era rulings rather than overrule them.[4]

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1. Prominent examples include Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), holding that due process requires notice and a prior hearing in any prejudgment procedure to garnish wages; Gideon v. Wainwright, 372 U.S. 335 (1963), which held that indigent defendants have a fundamental right to assistance of counsel in criminal trials.

2. Dionisopoulos, *The Uniqueness of the Warren and Burger Courts in American Constitutional History*, 22 BUFFALO L. REV. 737, 739 (1972). *See also* Ulmer & Stookey, *Nixon's Legacy to the Supreme Court: A Statistical Analysis of Judicial Behavior*, 3 FLA. ST. U.L. REV. 331 (1975).

3. *See, e.g.*, Mathews v. Eldridge, 96 S. Ct. 893 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Chambers v. Mississippi, 410 U.S. 284 (1973); Johnson v. Louisiana, 406 U.S. 356 (1972).

4. Paulsen, *Some Insights into the Burger Court*, 27 OKLA. L. REV. 677, 682-83 (1974). A

Justice Powell has been the Burger Court's leading advocate of the more flexible approach to questions of due process. However, his approach to this broad area of constitutional law can best be understood by analyzing the more specific issues involved in due process controversies. These issues may be grouped for convenience under two general topic areas—criminal and civil due process.

A. Criminal Due Process

1. *The Incorporation Controversy*

a. Introduction

Generally, the Warren Court followed what is known as a "selective incorporation" approach in the area of criminal due process. Once it determined that a particular procedural right in the Bill of Rights was "fundamental," the entire amendment in which the right was found was literally "incorporated" and made to apply in all its detail to criminal procedure in the state courts.[5] Mr. Justice Harlan was the most vocal opponent of this doctrine on the Warren Court.[6] Justice Powell, in turn, has led the Burger Court in rejecting the selective incorporation approach to criminal due process.[7] Justice Powell has pointed out that the selective incorporation approach derogates basic principles of federalism and deprives the states of the opportunity to experiment with their procedural methods, all in the name of imposing uniform high standards.[8] Justice Powell views this approach as symptomatic of judicial nearsightedness. Because of this distaste for incorporation, Justice Powell and other members of the Court have sought to avoid the requirements which stem from literal incorpora-

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good example of the Burger Court's tendency to limit rather than overrule the rigid procedural rules established by the Warren Court can be seen in the area of prejudgment garnishments. See the discussion in section II B(3) *infra*.

5. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the sixth amendment). See Cushman, *Incorporation: Due Process and the Bill of Rights*, 51 Cornell L.Q. 467 (1966).

6. *See* Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting), where Justice Harlan wrote that "the Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair . . . . It does not . . . impose or encourage nationwide uniformity for its own sake. . . ."

7. For comparison of Justices Powell and Harlan in this respect see Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 Stan. L. Rev. 1001, 1026-29 (1973) [hereinafter cited as Gunther]; Yackle, *Thoughts on Rodriquez: Mr. Justice Powell and the Demise of Equal Protection Analysis on the Supreme Court*, 9 U. Rich. L. Rev. 181, 197-205 (1975).

8. Johnson v. Louisiana, 406 U.S. 356, 375 (1972).

tion. However, in so doing, previously unquestioned federal rights have been "diluted."[9]

Justice Powell believes that the details of criminal procedure embodied in the Bill of Rights should apply in force to *federal* courts.[10] However, the source of procedural rights held by defendants in state trials is not the Bill of Rights, but the due process clause of the fourteenth amendment.[11] Justice Powell feels that while the Bill of Rights embodies certain "fundamental rights" which are guaranteed to defendants in state courts by due process, this does not necessarily mean that the procedural details protecting those rights in the federal courts are incorporated into the due process clause.[12] Thus Justice Powell's approach would hold that the due process clause requires not a literal incorporation of all the details in a particular amendment but a thoughtful determination as to whether a particular detail is so essential to fair process that it should be held binding on the states.[13] Literal incorporation should be avoided because, while it insures protection of the defendant's right in the procedure, it fails to take into account the legitimate interests of the state.[14] Justice Powell emphasizes the advantages to be gained from allowing diversity among the states on procedural matters and the disadvantages in forcing national uniformity.[15] So long as the state's alternative procedure is "fundamentally fair,"

9. *See* Williams v. Florida, 399 U.S. 78 (1970), in which petitioner claimed that he should have been tried by a twelve-member jury rather than the six-member panel provided by Florida law. The Court avoided the conclusion that incorporation of the sixth amendment now required twelve-member juries in all state criminal trials and upheld the Florida procedure. As Justice Harlan's dissent pointed out, this put in doubt the previously unquestioned guarantee of twelve-member juries in *federal* criminal trials. *Id.* at 118.

10. Justice Powell reached this conclusion not because those details were necessarily fundamental to due process but "because that result is mandated by history." Johnson v. Louisiana, 406 U.S. 356, 370 (1972).

11. *Id.* at 366, 371.

12. For example, Justice Powell felt that the right to trial by jury was "fundamental" because it was a "cherished element of English common law" and "[b]ecause it assures the interposition of an impartial assessment of one's peers between the defendant and his accusers. . . ." *Id.* at 367. Therefore, due process required the state to provide trial by jury. However, merely because that "fundamental" right was found in the sixth amendment did not mean that due process required that all details of trial by jury embodied in that amendment, such as unanimity of verdict, be imposed upon the states. *Id.* at 369.

13. *Id.* at 373.

14. *Id.* at 376. In *Johnson*, the state's primary interest was in providing the defendant a fair trial, but there were other legitimate state interests as well. These included such matters as efficiency and expense. Justice Powell believed that if local diversity on procedural details was not barred by "an unduly restrictive application of the Due Process Clause, [it] might well lead to valuable innovations . . ." without in any way prejudicing the defendant. *Id.*

15. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of

he believes it should not be invalidated on due process grounds.[16]

Thus, it is clear that Justice Powell is sensitive to the competing interests in the area of criminal procedure. But because he recognizes the existence of legitimate, competing interests, Justice Powell continually rejects the establishment of unbending, per se rules which fail to take those interests into account.[17] The only way to best accommodate the greatest number of interests and still guarantee "fundamental fairness" in every case, in Justice Powell's view, is through a case-by-case balancing.[18]

b. Right to Counsel

One of the earliest implementations of this case-by-case approach by Justice Powell in the criminal procedure area came in *Argersinger v. Hamlin*.[19] In *Argersinger*, it was argued that the Court should require the states to provide counsel for indigent defendants in criminal prosecutions only in those cases involving the possible imposition of more than six months imprisonment.[20] The plurality opinion went further, however, holding that "absent a knowing and intelligent waiver, no person may be imprisoned . . . unless he was represented by counsel at his trial."[21] Jus-

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special importance at a time when serious doubt exists as to the adequacy of our criminal justice system.

Id.

16. *See* Hampton v. United States, 96 S. Ct. 1646 (1976); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Johnson v. Louisiana, 406 U.S. 356 (1972). Justice Powell has not said specifically what is meant by the term "fundamental fairness," but he has made it clear that in order to be fundamentally fair, any procedure must accommodate the competing interests of the state and the accused (*i.e.*, a procedure protective of the interests of one while ignoring those of the other could not be fundamentally fair).

17. "[D]ue process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed." Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973).

18. *See* Doyle v. Ohio, 96 S. Ct. 2240 (1976); Middendorf v. Henry, 96 S. Ct. 1281 (1976); Procunier v. Martinez, 416 U.S. 396 (1974); Argersinger v. Hamlin, 407 U.S. 25 (1972).

19. 417 U.S. 25 (1972) (Powell, J., concurring). Petitioner, an indigent, argued that his conviction on a petty offense and sentence of ninety days in jail denied due process in that he was not represented by counsel, which the state had refused to provide.

20. The state argued that such a holding would be consistent with Duncan v. Louisiana, 391 U.S. 145 (1968), in which the Court held that due process required that a defendant have the right to a jury trial in any case involving a serious offense or a petty offense with possible prison sentence in excess of six months. 407 U.S. at 27.

21. 407 U.S.at 37. The plurality relied on and extended Gideon v. Wainwright, 372 U.S. 335 (1963), in which the Warren Court held that indigent defendants have a fundamental right to assistance of counsel in criminal trials and that the petitioner's conviction of a *felony* without assistance of counsel denied due process. The plurality interpreted this holding as a per se rule requiring counsel in any prosecution resulting in incarceration of the defendant. *Id.* at 32-33.

tice Powell preferred a "middle course"[22] between these two rigid positions. He would follow a principle of "fundamental fairness" and have the states provide counsel "whenever the assistance of counsel is necessary to assure a fair trial."[23] This approach would preserve the flexibility Justice Powell believed was demanded by due process[24] and avoid the numerous problems he foresaw resulting from the plurality's "immutable line drawing."[25] Justice Powell recognized the danger inherent in balancing and pointed to several general factors, the weighing of which, he felt, would greatly limit arbitrary decisions.[26] This balancing, however, may have been weakened by a failure to deal with one legitimate argument: should this approach be followed, "there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer."[27] Nonetheless, Justice Powell continues his adherence to the balancing technique in counsel cases. The most recent example was *Middendorf v. Henry*,[28] where Justice Powell, in a concurring opinion, underscored the Court's holding that the right to counsel recognized in *Argersinger* did not apply in military tribunals.[29] He considered the serviceman's right to counsel but said that the right must be viewed

22. *Id.* at 47.

23. *Id.*

24. *Id.* at 65-66.

25. *Id.* at 49. Justice Powell raised several questions regarding the per se rule which the plurality chose not to address. Specifically, Justice Powell felt that the rule would have the effect of favoring the indigent defendant over the barely self-sufficient one; the Court's reasoning, extended to its logical conclusion, would require provision of court-appointed counsel in *all* petty offense cases; the rule forced on state judges a Hobson's choice—they must appoint counsel in *every* petty offense case carrying a possible jail sentence as an alternative to fines or proceed without counsel and abandon their discretion in sentencing and it would add to the expense and increase the backlog of cases in the state courts. *Id.* at 50-55.

26. Specifically, these were: (a) the complexity of the offense charged; (b) the probable sentences and likely consequences of such a sentence if a conviction was obtained; and (c) the individual factors peculiar to each case. *Id.* at 64. In Professor Gunther's words, "A Supreme Court opinion should strive for more than a fair balancing in the individual case . . . . It should also provide the *maximum possible guidance* for lower courts and litigants . . . ." Gunther, *supra* note 7, at 1026 (emphasis added). But Justice Powell saw it as "impossible, as well as unwise . . ." to set any more precise guidelines than those in *Argersinger*. 407 U.S. at 64.

27. Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973). In *Gagnon*, Justice Powell made a brief reply to this argument, admitting that it had "some force" but said that it was not important, for in this case the Court was dealing "with the more limited due process right of one who is a probationer or parolee." *Id.* This seemed to be at least an implicit admission that the argument had more than "some force" when applied to the criminal trial situation involved in *Argersinger*. *See generally* Gunther, *supra* note 7, at 1028-29.

28. 96 S. Ct. 1281 (1976).

29. *Id.* at 1294.

"in light of the 'unique military exigencies' that necessarily govern many aspects of military service."[30] Thus, these "unique military exigencies" will be weighed against the defendant's right to counsel in order to determine what is necessary for a fair trial under the circumstances.[31]

c. Right to Confront and Cross-Examine

Justice Powell acknowledges the right of the defendant in a criminal trial to confront and cross-examine adverse witnesses as "more than a desirable rule of trial procedure . . . . It is, indeed, 'an essential and fundamental requirement.' "[32] Although fundamental, it "is not absolute"[33] and may "in appropriate cases, bow to accommodate other legitimate interests. . . ."[34] Still, because this right is fundamental, any infringement thereof "requires that the competing interest be closely examined."[35] This illustrates how Justice Powell's balancing technique may be very protective of the individual's right without declaring a per se rule which must be adhered to in all cases, regardless of the circumstances.

For example, in *Chambers v. Mississippi*,[36] Justice Powell balanced the defendant's interest in cross-examining an adverse witness against the state's interest in preserving the "voucher" rule,[37] which he labeled a "rem-

30. *Id.* at 1294-95. Justice Powell pointed out that Congress has always recognized this principle by enacting special legislation applicable only to the armed services. For example, see the current provisions in the Uniform Code of Military Justice for summary courts-martial. 10 U.S.C. § 816(3) (1970).

31. Justice Powell made it clear that a defendant never has had the same procedural rights in military tribunals as in civilian criminal courts. *Id.* at 1294-95. Still he did not say precisely what "unique military exigency" mandates the particular result reached by the Court.

32. Chambers v. Mississippi, 410 U.S. 284, 295 (1973). Justice Powell said in *Chambers* that the right to cross-examine adverse witnesses "is implicit in the constitutional right of confrontation." *Id.* To support his statement that these rights were "fundamental," Justice Powell cited Pointer v. Texas, 380 U.S. 400 (1965), which in turn relied upon history and a long line of precedent. *See* 380 U.S. at 403-06.

33. 410 U.S. at 295.

34. *Id.* As an example of a case where this right has been made to "bow" to other legitimate interests, Justice Powell cited Mancusi v. Stubbs, 408 U.S. 204 (1972). In *Mancusi*, the Court held that where an adverse witness was truly unavailable, the requirements of the confrontation clause were satisfied when prior-recorded testimony of the witness was admitted if that prior testimony bore "indicia of reliability" that would afford "the trier of fact a satisfactory basis for evaluating" its truth. *Id.* at 213-16.

35. 410 U.S. at 295.

36. 410 U.S. 284 (1973).

37. Mississippi denied Chambers' request to cross-examine a particular witness on the basis of its common law rule that a party may not impeach his own witness, based on a presumption that a party who calls a witness "vouches" for his credibility. *See* 3A WIGMORE, EVIDENCE § 896, 658-60 (J. Chadbourn ed. 1970).

Chambers was charged with murdering a policeman and the witness he sought to cross-

nant of primitive English trial practice"[38] which "bears little . . . relationship to the realities of the criminal trial practice . . . ."[39] Justice Powell thus concluded that the fundamental right here weighed more heavily than did the state's interest.[40]

In *Gagnon v. Scarpelli*,[41] Justice Powell adhered to his holding in *Chambers*. Faced with the question of what procedure the due process clause demanded in probation revocation,[42] he determined that minimal procedural safeguards included the probationer's right to confront and cross-examine adverse informants.[43] Still, he made it clear that this right was not absolute and could be denied by the state upon a showing of "specific good cause."[44] Last term, in *Doyle v. Ohio*,[45] this issue arose once more but under more complex circumstances. Justice Powell's majority opinion held that there was a denial of due process under the test of "fundamental fairness" when the silence of a defendant, after having received his *Miranda* warnings, was used to impeach his testimony at trial.[46] Here, unlike the earlier cases, Justice Powell was forced to consider the importance of the *state's* right to cross-examine.[47] Justice Powell recog-

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examine had made and later repudiated a written confession, and had orally confessed to three separate persons that he, and not Chambers, had committed the murder. The voucher rule prevented Chambers from calling this witness and then cross-examining him, obviously weakening Chambers' defense.

38. 410 U.S. at 296.

39. *Id.*

40. *Id.* at 295-98.

41. 411 U.S. 778 (1973).

42. The initial question was whether a probationer was entitled to a hearing when his probation was revoked. Justice Powell answered that due process required both a preliminary and a revocation hearing. *Id.* at 781-82. *See* Morrissey v. Brewer, 408 U.S. 471 (1972), dealing with the rights of parolees when parole is revoked.

43. 408 U.S. at 487-90. Justice Powell extended the procedural requirements spelled out in *Morrissey* to apply to probationers as well as parolees, since he saw no "difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation . . . ." Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

44. Morrissey, v. Brewer, 408 U.S. at 489. The Court has followed this reasoning in refusing to extend these requirements in all their force to a proceeding in which prisoners could lose only good-time credits, Wolff v. McDonnell, 418 U.S. 539 (1974), and in refusing to require a prior hearing before a state prisoner could be transferred to a less favorable institution unless such transfers were conditioned on proof of serious misconduct by the prisoner or on some other occurrence, Meachum v. Fano, 96 S. Ct. 2532 (1976). Justice Powell joined the majority in both opinions.

45. 96 S. Ct. 2240 (1976).

46. "After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution . . . is allowed to undertake impeachment on the basis of what may be the exercise of that right." *Id.* at 2245 n.10.

47. In both Chambers v. Mississippi, 410 U.S. 284 (1973), and Gagnon v. Scarpelli, 411

nized the legitimacy of the state's right[48] but held due process was violated when that right was exercised to use a defendant's silence for impeachment purposes after informing him of his right to remain silent.[49]

d. Right to a Speedy Trial

Justice Powell recognized, in *Barker v. Wingo*,[50] the right to a speedy trial as "fundamental" and guaranteed to defendants in state prosecutions by the due process clause. His comprehensive opinion rejected both "inflexible approaches" urged on the Court,[51] and adopted instead "a balancing test, in which the conduct of both the prosecution and the defendant are weighed."[52] Balancing with regard to this right was made more difficult by the nature of the right, which Justice Powell said was "generically different"[53] from other specific procedural rights guaranteed the accused by due process.[54] Justice Powell stated that a rigid rule requiring trial within a specified time period had its virtues, but he rejected the tempta-

U.S. 778 (1973), Justice Powell was faced with the issue of the importance to be given to the *defendant's* right to cross-examine.

48. 96 S. Ct. at 2244 n.7.

49. *Id.* at 2245.

50. 407 U.S. 514 (1972). Petitioner was not brought to trial on murder charges until more than five years after his arrest. He made no objection to the delays obtained by the prosecution until 3½ years after his arrest. Finally, he was tried and convicted. He appealed his conviction on the ground that his right to a speedy trial had been denied. In classifying the right to a speedy trial as "fundamental," Justice Powell relied on Klopfer v. North Carolina, 386 U.S. 213 (1967). On the right to a speedy trial generally, see Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476 (1968); 10 U. RICH. L. REV. 449 (1976).

51. The Court was urged to adopt a per se rule regarding the right to speedy trial. First, it was urged that the Court interpret the Constitution to require trial within a specified time from the date of arrest. Justice Powell rejected this because of his belief in judicial restraint, saying that to adopt such a rule would be "to engage in legislative . . . activity, rather than in the adjudicative process to which we should confine our efforts." 407 U.S. at 523. *Cf.* Speedy Trial Act, 18 U.S.C.A. § 3161 *et seq.* (1975). Second, the Court was asked to adopt a "demand-waiver rule" under which a prior demand must have been made before any consideration could be given to the speedy trial right. Justice Powell rejected this because he found it "inconsistent with this Court's pronouncements on waiver . . ." 407 U.S. at 525, and "insensitive to a right which we have deemed fundamental." *Id.* at 529-30. *See generally* Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 853 (1957).

52. 407 U.S. at 530.

53. *Id.* at 519.

54. Justice Powell saw three essential differences: (a) a societal interest in speedy resolution of the charges which was distinct from and sometimes opposed to the individual's interest; (b)the fact that deprivation of this right may actually work to the advantage of the accused in some cases; and (c) the right to a speedy trial was a more vague concept than were other rights of criminal procedure, in that it was impossible to set a deadline beyond which it could be stated flatly that the right had been denied. *Id.* at 519-22.

tion to formulate such a rule[55] and adhered to the balancing formula. He balanced skillfully and convincingly in *Barker*, specifically identifying certain criteria to be weighed by lower courts in determining in future cases whether a particular defendant's right to a speedy trial had been violated.[56]

e. Reasonable Doubt Requirement

In a criminal trial, due process requires that every element of the crime charged be proven beyond a reasonable doubt.[57] However, the reasonable doubt standard is subject to rules allocating the burden of going forward with the evidence. One such rule involves the prosecutor's freedom to use inferences establishing elements of the crime.[58] The use of any inference, however, brings into question the sufficiency of the evidence for conviction or, in other words, the question of whether the reasonable doubt standard of due process had been satisfied.[59]

In *Mullaney v. Wilbur*,[60] Justice Powell dealt at length with the general constitutionality of inferences in criminal prosecutions. A determination of whether a particular inference satisfied due process required, in Justice Powell's view, "an analysis that looks . . . to the interests of both the state and the defendant as affected by the allocation of the burden of proof."[61]

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55. *See* note 51 *supra*.

56. These criteria included the length of, and reason for, any delays in the trial and the likelihood that those delays prejudiced the defendant. While Justice Powell felt the fact of the defendant's assertion or failure to assert his right to a speedy trial should not be determinative (see note 51 *supra*), it too was among the factors to be weighed. 407 U.S. at 530-33.

57. *In re* Winship, 397 U.S. 358 (1970), in which the Court expressly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . ." *Id.* at 364.

58. *See generally* Comment, *Due Process Requirements for Use of Non-Statutory Inferences in Criminal Cases*, 1973 WASH. U.L.Q. 897.

59. The Court has most often used standards other than "beyond reasonable doubt" by which to judge the constitutionality of inferences. Some cases have required a "rational connection" between the proven fact and the ultimate fact inferred. *See, e.g.*, Tot v. United States, 319 U.S. 463 (1943). Others have asked only whether the fact inferred was "more-likely-than-not" to result from the proven fact. *See, e.g.*, Leary v. United States, 395 U.S. 6 (1969). Justice Powell has recognized that if the inference satisfies the reasonable doubt standard "it clearly accords with due process." Barnes v. United States, 412 U.S. 837, 843 (1973). *Cf.* note 66 *infra*.

60. 421 U.S. 684 (1975). This case involved a challenge to a Maine law which in effect established three categories of felonious homicide-murder, voluntary-manslaughter and involuntary manslaughter. Absent justification or excuse, all intentional or criminally-reckless killings were felonious homicides. Felonious homicide was punished as murder (life imprisonment), unless the defendant proved by a preponderance of the evidence that it was committed in the heat of passion on sudden provocation in which case it was punished as voluntary manslaughter (maximum $1000 fine or maximum imprisonment of 20 years). *Id.* at 691-92.

61. *Id.* at 699.

In short, Justice Powell would once again balance the competing interests in deciding whether a particular procedure accorded the defendant due process.[62] However, while Justice Powell recognized that the burden of proof beyond a reasonable doubt "is often a heavy burden for the prosecution to satisfy,"[63] it was nonetheless a "traditional"[64] and "essential"[65] burden of our criminal system which could be lightened only where it imposed "unique hardship" on the prosecution.[66]

f. Double Jeopardy

Justice Powell's majority opinion in *Chaffin v. Stynchcombe*[67] clearly showed his disdain for per se rules of due process. In this case, the imposition of a higher sentence on retrial raised the possibility of vindictiveness.[68] The petitioner had urged the Court to protect the defendants from the possibility of vindictiveness on retrial either by limiting the jury to imposing a sentence no harsher than the original one or empowering the judge

62. In *Mullaney*, Justice Powell dealt with the nature of the competing interests in detail—his balancing was comprehensive. He saw the defendant's interest in having the inference invalidated as very weighty, based on the possible differential in sentencing (a minimum fine versus life imprisonment) which could result; "the stigma to the defendant"; the fact that society's confidence that innocent men were not being condemned could possibly be jeopardized; and the further possibility that "the likelihood of an erroneous murder conviction" could be increased by the lowering of the burden of proof. *Id.* at 700-01. As to the state's interest, Justice Powell felt that proving the absence of heat of passion was similar to proving "any other element of intent," and that the requirement of proving a negative was not unique. *Id.* at 702. Since leaving the burden of proof entirely on the state imposed "no unique hardship" on the state, the use of the inference was unjustified and violated due process. *Id.* at 702.

63. *Id.* at 701.

64. *Id.*

65. *Id.*

66. *Id.* at 702. Again, Justice Powell rejected establishing rigid or absolute rules of due process. It seems clear that Justice Powell has not foreclosed the possibility that circumstances could arise in which an inference which failed to satisfy the reasonable doubt standard could nevertheless be used in accordance with due process, because not to allow its use would impose a "unique hardship" on the prosecution.

67. 412 U.S. 17 (1973). Petitioner's conviction was overturned and remanded on appeal. He was then reconvicted and given a higher sentence by the jury. The Supreme Court had earlier established limitations on the imposition of higher sentences by judges in similar circumstances. North Carolina v. Pearce, 395 U.S. 711 (1969). *See* 19 AM. U.L. REV. 290 (1970).

68. This was the primary concern in North Carolina v. Pearce, 395 U.S. 711 (1969). In Michigan v. Payne, 412 U.S. 47 (1973), the Court was faced with the issue of whether the limitations established in *Pearce* should be made retroactive. Justice Powell's majority opinion implied his distaste for what he called the "prophylactic" restrictions in *Pearce*. *Id.* at 51. Justice Powell balanced several factors and concluded that retroactive application was not required. *Id.* at 51-57.

to reduce a higher sentence. Justice Powell rejected the rigid rule,[69] satisfied that a more flexible formula would adequately protect the defendants on retrial. He saw no violation of due process in the imposition of a harsher sentence by the jury on retrial *so long as* the jury was not informed of the prior sentence and there was no other evidence of vindictiveness on the jury's part.[70] This implied that due process would be offended where the jury had knowledge of the prior sentence, but Justice Powell expressly avoided establishing even this much of a per se rule.[71]

Justice Powell, as this case exemplifies, seems determined to examine the likely effects any rigid rule will have on the interests of *all* concerned parties. Invariably, a strict, inflexible rule of procedural due process formulated to protect the defendants'rights in *every* case will, at least in *some* cases, infringe upon the legitimate rights of the state. Thus Justice Powell consistently opts for the more flexible balancing technique which he feels can be utilized to assure the maximum protection of the interests of both parties.

One further example of this logic can be seen in *Chaffin* where the petitioner argued that allowing imposition of higher sentences upon retrial would have a "chilling effect" on defendants' exercise of their right of appeal, in effect denying due process.[72] Predictably, Justice Powell admitted there may be such a problem but said that "the inquiry, by its very nature, must be made on a case-by-case basis. . . ."[73]

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69. "Although these alternatives would provide an absolute protection from . . . vindictiveness, they would also interfere with ordinary sentencing discretion. . . ." 412 U.S. at 29 n.15.

70. "The potential for such abuse of the sentencing process by the jury is . . . *de minimis* . . ." where the jury had no knowledge of the prior sentence. *Id.* at 26.

71. "We do not decide, however, whether improperly informing the jury would *always* require limitation of the sentence or whether such error might be cured. . . ." *Id.* at 28 n.14 (emphasis added).

72. *See* United States v. Jackson, 390 U.S. 570 (1968). Here the capital punishment provision of the federal antikidnapping statute was invalidated because it limited to the jury the power to impose the death sentence thereby discouraging defendants from exercising their right to trial by jury.

73. 412 U.S. at 32. Justice Powell has said that the defendant in a criminal trial is often faced with "difficult choices" concerning the effects that the exercise of a particular right may have on the outcome of his case. The fact that the right is one of "constitutional dimensions" does not of itself preclude the making of such choices. The question is "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Id.* Therefore, the nature of the question required, in Justice Powell's view, a case-by-case solution. *Id.* at 29-35. *Cf.* Blackledge v. Perry, 417 U.S. 21, 32 (1974) (Rehnquist, J., dissenting). Respondent was convicted of a misdemeanor and appealed. The prosecutor then brought felony charges based on the same act and respondent pleaded guilty. The majority held that the second prosecution violated the due process clause. Justice Powell joined part II of Justice

g. Capital Punishment

The capital punishment cases perhaps offer a clearer illustration of the basic precepts of Justice Powell's judicial approach than any other group of cases. They also provide clear evidence of his growing influence on the Court. In *Furman v. Georgia*,[74] the Court was badly splintered[75] but held the death penalty, as imposed, to be a cruel and unusual punishment[76] violative of the due process clause. Justice Powell, dissenting, strongly and at some length criticized the Court for what he saw as its lack of judicial restraint.[77] He strongly rejected the per se abolition of capital punishment urged by the petitioners and approved by Justices Marshall and Brennan.[78] He chastised the majority for its extensive use of sociological data and its concurrent failure, in his view, to deal with the applicable precedents.[79]

Justice Powell asserted that balancing was both the "traditional and [the] more refined approach . . ."[80] to the issue of capital punishment. He agreed with the majority's contention that the concept of due process was evolving rather than static.[81] But Justice Powell viewed the evolution as permissible only with respect to the questions of the manner of execution employed and the appropriateness of the punishment for the crime—*not* on the validity of execution itself.[82] The notion of capital punishment, in Justice Powell's view, was so clearly founded in the Constitu-

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Rehnquist's dissent which argued that in pleading guilty to the more serious charge, respondent effectively waived his claim on the "antecedent constitutional violation." *Id.* at 35-37.

74. 408 U.S. 238 (1972).

75. Five Justices filed separate concurring opinions, while four, including Justice Powell, filed separate dissenting opinions. Justices Douglas, White and Stewart felt all existing capital punishment statutes (except for that of Rhode Island which was mandatory and therefore beyond the scope of the decision) were unconstitutional. Justices Brennan and Marshall flatly stated their feelings that capital punishment was per se unconstitutional.

76. U.S. CONST. amend. VIII.

77. Justice Powell eloquently stated his feelings, always evident but rarely expressed, on judicial restraint:

> [W]here as here, the language of the applicable provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency.

408 U.S. at 431 (Powell, J., dissenting).

78. Justice Powell felt that such a "judicial fiat" would be "plainly at variance" with the language of the Constitution. *Id.* at 420-21.

79. Justice Powell cited a string of prior Supreme Court decisions dealing with capital punishment. *See* 408 U.S. at 423-25. Justice Powell said that in these cases "the power of the States to impose capital punishment was repeatedly and expressly recognized." *Id.* at 424.

80. *Id.* at 430.

81. *Id.* at 429.

82. *Id.* at 430.

tion as to be beyond question.[83] In short, Justice Powell saw ad hoc balancing[84] as the only judicial approach compatible with judicial restraint and the intent of the Framers which could satisfy due process while also protecting the legitimate interests of both the individual defendant and society.[85]

Justice Powell's forceful arguments in *Furman* and a change in Court personnel[86] had their effect. Last term, the Supreme Court reconsidered the capital punishment issue in five companion cases, which included *Proffitt v. Florida*[87] and *Gregg v. Georgia*.[88] Justice Powell wrote for the plurality in *Proffitt*[89] which upheld the new Florida death penalty statute[90] and capital sentencing procedure.[91] It appeared from these opinions that there had been a substantial swing in sentiment by the Court toward Justice Powell's position in *Furman*. The Court in *Proffitt* and *Gregg* expressly rejected any notion that *Furman* established a per se rule abolishing capital punishment in *all* cases.[92] Rather, the Court limited *Furman* to those instances where the death penalty was being imposed "capriciously and arbitrarily."[93] Thus the Court rejected not only the per se abolition of capital punishment but also the per se acceptability of capital punishment. The death penalty in any given case was held to be acceptable only after the nature of the crime and the character of the defendant have been considered.[94] What was a separate dissent by Justice Powell in

83. *Id.* at 417-20.

84. "Although this case-by-case approach may seem painfully slow and inadequate . . . it is the approach dictated both by our prior opinions and by a due recognition of the limitations of judicial power." *Id.* at 461.

85. *Id.* at 430.

86. Justice John Paul Stevens replaced the retired Justice Douglas who had voted with the majority in *Furman*.

87. 96 S. Ct. 2960 (1976).

88. 96 S. Ct. 2909 (1976).

89. Justice Powell was joined by Justices Stewart and Stevens; Justice White, the Chief Justice and Justice Rehnquist concurred; Justice Blackmun filed a separate concurrence. Justices Brennan and Marshall dissented, still insisting on a per se abolition of capital punishment. Justice Powell's opinion in *Proffitt* was brief and cited the reasoning in *Gregg*.

90. FLA. STAT. ANN. § 782.04(1) (Supp. 1976).

91. FLA. STAT. ANN. § 921.141 (Supp. 1976).

92. 96 S. Ct. at 2922-32.

93. *Id.* at 2940.

94. It should be noted that Justice Powell stressed the importance of considering these factors in his *Furman* dissent. 408 U.S. at 420-21. Justice Powell's basic premise was that capital punishment itself was not unconstitutional. *See* notes 78-79 *supra*. Still, the requirements of due process must be satisfied in the imposition of the death penalty. Due process, in Justice Powell's view, can only be satisfied by means of ad hoc balancing because rigid rules (such as per se abolition and, implicitly, mandatory death sentences) fail to take into

Furman had now become, in all its essentials, the plurality opinion in both *Proffitt* and *Gregg*.

2. *Vagueness Test*

While it may sometimes seem that Justice Powell's balancing technique is more likely to favor the interests of the government than those of the individual,[95] the technique as utilized by Justice Powell is in fact very sensitive to an individual's rights. A good example of this sensitivity can be seen in Justice Powell's opinion in *Smith v. Goguen*.[96] Goguen, who wore a small U.S. flag sewn to the seat of his jeans, was convicted of violating a flag-misuse statute that subjected to criminal liability anyone who "publicly . . . treats contemptuously the flag of the United States . . . ."[97] Justice Powell's opinion held that the "treats contemptuously" language in the statute was void for vagueness under the due process clause.

Balancing the competing interest with some sensitivity, Justice Powell implicitly recognized the state's interest in preventing flag misuse,[98] but felt that the individual's interest in knowing precisely what conduct was proscribed was very important, particularly where the conduct could lead to imprisonment.[99] Justice Powell did not adopt a rigid rule. He did not say that individuals could never be punished for flag misuse, nor did he even say *when* individuals could be so punished. He merely held that due process demanded that an individual be informed in advance that his conduct is criminal.[100] Thus Justice Powell not only condemned the statute

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account all the legitimate interests and pertinent circumstances. *See* 408 U.S. at 420-21.

95. *See generally* Ulmer & Stookey, *Nixon's Legacy to the Supreme Court: A Statistical Analysis of Judicial Behavior*, 3 FLA. ST. U.L. REV. 331 (1975).

96. 415 U.S. 566 (1974). Justice Powell delivered the majority opinion in which four justices joined; Justice White concurred; and Justices Blackmun, Rehnquist and the Chief Justice dissented.

97. MASS. GEN. LAWS ANN., c. 264, § 5 (1968). The statute carried a possible penalty of $100 fine plus one year in prison and Goguen was in fact sentenced to six months imprisonment.

98. 415 U.S. at 567-76.

99. *Id.* at 572-76. Justice Powell said this statute set up a "standard so indefinite that police, court and jury were free to react to nothing more than their own preferences for treatment of the flag." *Id.* at 578.

100. In the vagueness area, Justice Powell seems to say that he will weigh the individual's interest in being forewarned precisely against the difficulty confronting the state in formulating precisely what conduct is to be proscribed. Due process places a burden on the state to draft its laws with specificity. Justice Powell's view has been that this burden *can* be lessened, but only where it would be very difficult for the state to meet this burden and where the individual's interest in specificity was slight. For example, Justice Powell cited "control of the broad range of disorderly conduct" as one such area where vagueness *may* be constitutional. *Id.* at 581. But he saw "no comparable reason" for failure to enunciate clear guidelines in the area of flag-misuse. *Id.*

for allowing officials to impose "their own preference" in this matter, but he also rejected the temptation to impose *his* own preference.

B. Civil Due Process

Justice Powell's approach to due process questions in civil cases has differed little, if at all, from his approach in criminal cases. He has consistently balanced the conflicting interests. He has continued to reject the establishment of unbending, rigid rules and has continued to apply his basic policy of judicial restraint.

1. *Termination of Benefits and Employment*

Once an individual has been imbued with a property interest protected by the fifth or fourteenth amendment, the question arises as to exactly what procedures are required to satisfy due process in the termination of that interest.[101] Consistent with his views on judicial restraint, Justice Powell has shown a reluctance to meet the constitutional issue when the case can be settled on other grounds.[102] When, however, the constitutional issue has to be resolved, Justice Powell has consistently balanced by pointing to three factors which must be considered: (a) the private interest in continued, uninterrupted benefits or employment; (b) "the risk of an erroneous deprivation"[103] of that private interest; and (c) the governmental interest.[104]

The balancing of these factors has typically resulted in a finding that no pretermination evidentiary hearing was required, at least when an early opportunity for posttermination hearings was provided.[105] In this balancing

101. "Governmental deprivation of such an interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing." Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Powell, J., concurring).

102. *See, e.g.*, Dillard v. Industrial Comm'n, 416 U.S. 783 (1974). This case involved suspension of workmen's compensation benefits without notice or opportunity for a prior hearing. Justice Powell felt that if, as indicated in argument by counsel, state law permitted a claimant whose benefits had been suspended to have them reinstated by a state trial court as a matter of course pending a full administrative hearing on the merits, it would be unnecessary to reach the constitutional question.

103. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (involving termination of Social Security benefits).

104. *Id.*; Fusari v. Steinberg, 419 U.S. 379, 389 (1975).

105. This was Justice Powell's conclusion in Mathews v. Eldridge, 424 U.S. 319 (1976); Fusari v. Steinberg, 419 U.S. 379 (1975); and Dillard v. Industrial Comm'n, 416 U.S. 783 (1974). In each of these cases, benefits were terminated without prior hearings. In *Fusari*, the case was remanded for reconsideration in light of subsequent changes in state law, but Justice Powell clearly spelled out the factors to be weighed in judging the new procedure. 419 U.S. at 387-89. In *Mathews*, Justice Powell's opinion held that no pretermination hearing was

process, the determining factor has usually been the likelihood of "an erroneous deprivation," since the private and governmental interests have generally offset one another.[106]

Justice Powell's approach to cases involving termination of government employment has been similar.[107] In *Arnett v. Kennedy*,[108] Justice Powell concurred in the result but objected to the majority's reasoning.[109] Justice Powell's view was that, while Congress may confer by statute a property interest,[110] it may not, once the interest has been conferred, provide procedures for termination of that interest unless those procedures meet the requirements of due process. In other words, the question of what satisfied due process was a matter for the courts and not the legislatures.[111] Again, he would balance the competing interests in making this judicial determination.[112]

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necessary because the claimant would be awarded retroactive relief if he prevailed in the posttermination procedure and because the temporary denial was unlikely to be a serious deprivation. 424 U.S. at 339-43.

106. More precisely, it is the degree of deprivation which will result from the error that has been critical. If an erroneous deprivation is likely to occur, still a pretermination hearing is not required by due process unless the degree of potential deprivation is severe. Justice Powell has recognized that the denial of welfare benefits based upon financial need, even though only temporary, could very well amount to a serious deprivation. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). A temporary deprivation of disability benefits unrelated to financial need, on the other hand, is not likely to cause as serious a deprivation in Justice Powell's view.

107. *Contra,* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (Powell, J., concurring), where Justice Powell argued for an equal protection analysis rather than the due process approach taken by the Court. See section V C(1) *infra* for further discussion.

108. 416 U.S. 134 (1974).

109. Petitioner challenged the procedural provisions for removal of government employees under the Lloyd-La Follette Act, 5 U.S.C. § 7501 (1970), which left it within the discretion of agency officials to hold a pretermination hearing. The majority rationale was essentially that Congress conferred upon the petitioner a protected property interest in his employment by the provision in the challenged Act that he could be removed only for "cause", and since Congress had granted the property interest, it had the power to determine by what procedure it could be terminated. 416 U.S. at 150-54.

110. Justice Powell agreed that the Act conferred an "entitlement" on the employee by providing that he could only be removed for "cause." 416 U.S. at 166. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972), where the Court said that to have a protected property interest in a benefit, an individual must "have a legitimate claim of entitlement to it," and that claims of entitlement must be supported by "rules or understandings" independent from the Constitution. *Accord,* Perry v. Sindermann, 408 U.S. 593, 604 (1972).

111. 416 U.S. at 166-67. This can be seen as evidence that while he has advocated judicial restraint, Justice Powell will in no sense allow judicial abdication.

112. *Id.* at 168-71. Justice Powell saw the same basic factors being weighed here as in the denial-of-benefits area. See notes 103-04 *supra* and accompanying text.

2. *School Expulsion*

Justice Powell has strongly criticized the Court for its rigid approach to the due process requirements in school expulsion cases, which he has seen as an abandonment of the more "reasonable" balancing approach.[113] By its holding in *Goss v. Lopez*,[114] the Court established a rigid rule of due process requiring notice and a hearing either before or promptly following suspension of a public school student for as much as a single day. Justice Powell felt the Court's approach failed to take into account either the significance of the right or the substantiality of its deprivation—factors that would be considered in a more flexible balancing approach.[115] By its failure to consider these factors, Justice Powell felt that the Court had enunciated a standard under which "it is difficult to perceive any principled limit . . . ."[116]

However, the Court has not been receptive to Justice Powell's arguments in this area. Since *Goss*, the Court has held that school board members may be personally liable to students whom they expel.[117] In contrast, Justice Powell would impose on school board members a less rigid standard[118] which would consider all the relevant circumstances and grant to the school official personal immunity from suit where it appeared that he had acted "reasonably and in good faith."[119]

3. *Prejudgment Attachment and Garnishment*

The requirements of procedural due process in the area of prejudgment

113. Goss v. Lopez, 419 U.S. 565, 599 (1975) (Powell, J., dissenting).

114. 419 U.S. 565 (1975). *See generally* Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25.

115. 419 U.S. at 599-600.

116. *Id.* at 600.

117. Wood v. Strickland, 420 U.S. 308 (1975). Two public high school students were expelled for violating school regulations prohibiting the use or possession of intoxicating beverages at school. They brought suit against members of the school board under 42 U.S.C. § 1983 (1970) alleging that their constitutional right to due process had been violated under color of state law by their expulsion without a prior hearing. The majority rejected arguments for immunity of school board members to such suits and held that they should be liable if they knew or should have known that their action would violate a student's "unquestioned constitutional rights." 420 U.S. at 322.

118. Justice Powell said in his opinion that the meaning of the phrase "unquestioned constitutional rights" is not likely to be self-evident to constitutional law scholars—much less to the average school board member. 420 U.S. at 329.

119. *Id.* at 330. Justice Powell said he could see no reason why the Court should impose a higher standard upon school officials in expelling students than it imposed on the Governor of Ohio for his role in summoning the National Guardsmen who subsequently killed Kent State students. *Id.* at 331. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974).

attachments and garnishments do not yet appear to be firmly settled.[120] Justice Powell disapproved of *Fuentes v. Shevin*,[121] which he viewed as having laid down a sweeping, inflexible rule. Therefore, he concurred in *Mitchell v. W.T. Grant Co.*,[122] and expressed his opinion that the Court had withdrawn from its per se rule and to that extent had overruled *Fuentes*.[123] Justice Powell felt that the procedure in *Mitchell* should be upheld not because it satisfied any rigid rule of due process but because it struck a reasonable balance between competing interests.[124] Apparently, Justice Powell's optimism toward the Court's approach in *Mitchell* was little more than wishful thinking because a more recent holding[125] "appears to resuscitate *Fuentes*."[126] In this area, while Justice Powell has not yet completely convinced the Court to abandon its rigid approach to due process questions in favor of balancing, the Court does appear to be wavering.

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120. In Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), the Court established a firm rule forbidding garnishment of wages without notice and an opportunity for a prior hearing. *See generally* Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U.L. REV. 158 (1970). In Fuentes v. Shevin, 407 U.S. 67 (1972) (a decision in which Justice Powell did not participate), the Court seemed to require a prior hearing in attachment or garnishment proceedings. Then in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the Court validated a prejudgment attachment proceeding which made no provision for a prior hearing.

121. 407 U.S. 67 (1972).

122. 416 U.S. 600 (1974). The decision validated a Louisiana procedure which made available to creditors a writ of sequestration to forestall waste or alienation of encumbered property. The procedure required only a creditor's affidavit and bond; no notice or prior hearing was provided. The Court distinguished *Fuentes* on the ground that the procedure in *Mitchell* required a more extensive showing of proof by the creditor and because the procedure was controlled throughout by the judiciary, unlike *Fuentes* where a creditor had only to make his claim and a writ of replevin was issued automatically without involvement of the courts.

123. *Id.* at 623.

124. *Id.* at 625-27. Justice Powell emphasized his view that this procedure was more protective of the debtor's interest while not totally disregarding the legitimate interests of creditors, which he clearly felt was the result of the more rigid *Fuentes* approach.

125. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

126. *Id.* at 609. The Court relied on *Fuentes* in invalidating a Georgia prejudgment garnishment procedure. Justice Powell objected to the Court's reliance on *Fuentes* and argued that the same result would have been reached on these facts under the more flexible approach the Court had appeared to adopt in *Mitchell*. Again, he expressed his view that creditors as well as debtors have legitimate interests in the property and that the interests of both can only be accounted for by balancing. *Id.* at 609-10. To avoid leaving the question to the unguided discretion of lower court judges in future similar cases, Justice Powell outlined a minimal standard for prejudgment attachment or garnishment proceedings, which he felt differed from the majority's standard in that it accommodated the interests of both creditors and debtors. His standard would require that: (a) the garnishor provide security and proof before a "neutral officer" of the need for the writ prior to issuance; (b) the state provide opportunity for a prompt hearing in which the burden of showing probable cause would be on the garnishor; and (c) the state provide the debtor an opportunity to free garnished assets by posting adequate security. *Id.* at 611-12.

C. Conclusion

Upon analyzing Justice Powell's opinions in the area of due process, at least this much becomes obvious: He has consistently opposed rigid, per se rules and has opted instead for a more flexible balancing approach. There seem to be several reasons for Justice Powell's position. His view has been that "due process in essence means fundamental fairness . . ."[127] and that "[a] fair system of justice normally should eschew unbending rules that foreclose . . . judicial discretion."[128] Justice Powell has not expressly said what is meant by "fundamental fairness." However, the term as he has used it in the due process area seems to be a label for what he has viewed as fair to all the parties concerned, under all the circumstances and in light of all the legitimate interests to be affected by the result. When viewed in this sense, it becomes apparent that "fundamental fairness" can only be accomplished in all cases by ad hoc balancing.

Obviously, a system of due process totally void of absolutes involves risks of confusion and unbounded discretion in its application. Justice Powell has sought to minimize this risk by his searching, extensive evaluations of the competing interests[129] and by singling out factors to be considered in future applications of the balancing technique.[130] This has not made Justice Powell's approach infallible, but it has, arguably, made it *more* protective of all the competing interests than a rigid, uncompromising approach. Under Justice Powell's approach, the legitimate interests of both the state and the individual can be protected; on the other hand, per se rules will in some cases necessarily infringe upon one interest with no perceptible benefit to the other.

III. FIFTH AMENDMENT

A. Introduction

By the end of the sixties, the Warren Court had significantly enlarged the individual's sphere of protected rights in fifth amendment controversies.[1] Most famous, of course, were the *Miranda* requirements for a full

127. Hampton v. United States, 96 S. Ct. 1646, 1652 n.6 (1976).

128. *Id.* at 1652 n.5.

129. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Goss v. Lopez, 419 U.S. 565, 584 (1974) (Powell, J., dissenting); Furman v. Georgia, 408 U.S. 238, 414 (1972) (Powell, J., dissenting); Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Powell, J., concurring).

130. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Wood v. Strickland, 420 U.S. 308, 328 (1975) (Powell, J., concurring in part and dissenting in part); Procunier v. Martinez, 416 U.S. 396 (1974); Johnson v. Louisiana, 406 U.S. 356 (1972) (Powell, J., concurring).

1. Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 Mich. L. Rev. 445,

and knowing waiver during custodial interrogations.[2] But apart from any specific holdings, there had been an attitude that fifth amendment rights were to be liberally construed; the rights were to be secured "for ages to come and . . . designed to approach immortality as nearly as human institutions can approach it."[3] With or without changes in the Court, Justice Powell felt that this attitude could not be maintained, that a retrenchment would and should take place.[4] And so it has. While the Burger Court, including Justice Powell, has been reluctant to overrule directly any Warren Court or earlier precedent, the recent cases have shown a definite reevaluation of the Constitution's typically cryptic command that "no person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[5]

B. The Nature of the Right

The fifth amendment privilege against self-incrimination was part of the common law of England that was brought to the early colonies.[6] In codified form, it has represented a complex of ideas[7] and has been taken to be one of the marks of an advancing civilization.[8] Of the many policies inherent in the fifth amendment, the ones which Justice Powell has taken as his own can be summarized as follows:

> Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhuman treatment and abuses;

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452 (1972). *See* Powell, *An Urgent Need: More Effective Criminal Justice,* 51 A.B.A.J. 437, 439 (1965) [hereinafter cited as Powell].

2. Miranda v. Arizona, 384 U.S. 436 (1966).

3. *Id.* at 442, *citing* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821). Justice Marshall made this statement in *Cohens* concerning the entire Constitution and not just the fifth amendment.

4. Report on the Court, Address to the Labor Law Section of the American Bar Association, August 11, 1976, at 11.

Justice Powell voiced his concern over the expanding rights of the accused in two articles written for the American Bar Association Journal: Powell, *supra* note 1; Powell, *The President's Annual Address: The State of the Legal Profession,* 51 A.B.A.J. 821 (1965). His comments indicated his basic philosophy on fifth amendment, as well as all personal, rights:

> But the immediate problem is one of balance. While the safeguards of fair trial must surely be preserved, the right of society in general and of each individual in particular to be protected from crime must never be subordinated to other rights. . . .

Powell, *supra* note 1, at 439.

5. U.S. Const. amend. V.

6. 8 J. Wigmore, Evidence § 2250 (McNaughton rev. ed. 1961).

7. Kastigar v. United States, 406 U.S. 441, 444 (1972).

8. Ullman v. United States, 350 U.S. 422, 428 (1956).

> our sense of fair play. . . our respect for the inviolability of the human personality.[9]

Despite this sweeping statement of policy, Justice Powell has seen the privilege as an exception to a broader rule—that the public has a right to each man's testimony.[10] This broader rule, Justice Powell has felt, has been essential to the functioning of the courts and to the maintenance of an ordered society, although it has often been at loggerheads with the privilege to be silent absent immunity. By casting the privilege into the shadow of the public's right to know, Justice Powell laid the groundwork to reverse the trend of the Warren Court, which, to him, was threatening to permit the exception to engulf the general rule.[11]

To prevent this, Justice Powell has distilled the values and policies of the privilege to uncover its essential elements. Although he has not labeled them as such, these essential elements have been that the privilege is *personal*, that it prevents the *compulsion of testimonial* evidence and that the evidence must be such that it may be *used or potentially used* in a *criminal* prosecution. Since they must co-exist, each element has been important in each case.

C. The Elements of the Right

1. *Personal*

To Justice Powell, the central element of the fifth amendment privilege has been its personal nature. Corporations,[12] and now partnerships,[13] are not privileged from revealing incriminating evidence. But to define the constitutional limits, Justice Powell has looked for more than just the presence of a natural person; he has attached great significance to the individual on whom the compulsion was worked. Justice Holmes' statement that "a party is privileged from producing evidence but not from its

9. Couch v. United States, 409 U.S. 322, 328 (1973), *citing* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

10. Kastigar v. United States, 406 U.S. 441, 443-44 (1972). *See also* Garner v. United States, 96 S. Ct. 1178, 1182 (1976); United States v. Nobles, 422 U.S. 225, 230 (1975). The importance of the government's ability to compel testimony has been noted by others. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 93 (1964) (White, J., concurring).

11. Couch v. United States, 409 U.S. 322, 336 (1973).

12. Wilson v. United States, 221 U.S. 361 (1911).

13. Bellis v. United States, 417 U.S. 85 (1974). *See also* United States v. White, 322 U.S. 694 (1944), where it was held that a labor union official was not privileged from producing books and records of the union. The Court restricted the privilege to natural individuals. *Id.* at 698.

production . . ."[14] has been the foundation of many of Justice Powell's decisions. Or, in his words:

> By its very nature the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.[15]

Justice Powell has stated that it has been not so much the private nature of the information but its use to incriminate in an accusatorial system that has put it beyond the public reach and made it personal.[16] The "extortion of information from the accused himself" has been the breach of the constitutional command that has marked the value to be protected.[17] This personal element played a significant role in three of his majority opinions: *Couch v. United States*,[18] *United States v. Nobles*,[19] and *Doyle v. Ohio*.[20]

Documents, and especially tax records[21], have been an area of particular difficulty for the Court. Documents were held to be within the scope of the privilege in the landmark case of *Boyd v. United States*,[22] where the Court

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14. Johnson v. United States, 228 U.S. 457, 458 (1913), *cited in* Couch v. United States, 409 U.S. at 328.

15. Couch v. United States, 409 U.S. at 327.

16. The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination, not to protect private information. Testimony demanded of a witness may be very private indeed, but unless it is incriminating and protected by the Amendment or unless protected by one of the evidentiary privileges, it must be disclosed.

United States v. Nobles, 422 U.S. 225, 233 n.7 (1975), *citing* Maness v. Meyers, 419 U.S. 449, 473-74 (1975). *See also* Andresen v. Maryland, 96 S. Ct. 2737, 2747 (1976).

17. Couch v. United States, 409 U.S. at 328.

18. *Id.* at 322.

19. 422 U.S. 225 (1975).

20. 96 S. Ct. 2240 (1976).

21. *See* Garner v. United States, 96 S. Ct. 1178 (1976); Fisher v. United States, 96 S. Ct. 1569 (1976); Lyon, *Tax Investigations Revisited*, 29 TAX LAW. 477 (1975). Some of the more important lower court decisions include United States v. Beattie, 522 F.2d 267 (2d Cir. 1975); United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961); United States v. Guterma, 272 F.2d 344 (2d Cir. 1959).

22. 116 U.S. 616 (1886). In this case, the Government had charged that thirty-five cases of plate glass had been imported into the country without paying the necessary customs charges. A district court judge ordered the invoice for the glass to be produced. The defendants complied with the order, but protested its use at their trial. The Supreme Court upheld their fifth amendment objections, stating:

> We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

Id. at 633.

The *Boyd* decision may well be outdated. It has not been construed liberally, and Justice White, writing in Fisher v. United States, 96 S. Ct. 1569 (1976), observed that the precise

rejected a narrow, literal interpretation of "being a witness" and included papers and private effects within the meaning of those words. Though often private, documents may be diverse in ownership and possession, raising doubts about who may be privileged from producing them.

Justice Powell in *Couch* was presented with just this issue.[23] He viewed the essential element in the case to be the compulsion, or lack of it, against the person. Possession of the documents was important only to the extent of being an indicator of compulsion.[24] And since the tax records had been held for years by an independent accountant, they were not in Mrs. Couch's possession, constructive or otherwise.

No doubt, Justice Powell's idea of what is personal for the purposes of the fifth amendment has been more restricted than the theories on personal rights that had been developing in the Warren Court. Justice Douglas in his dissent to *Couch* argued that penumbral rights as described in *Griswold v. Connecticut*[25] should be protected.[26] He would have held all personal effects and possessions sacrosanct. Justice Brennan in his concurrence would have expanded the protection to include at least those instances when an individual had taken steps to protect his privacy.[27] However, Justice Powell has not equated privacy or intimacy of the information with the personal element of the fifth amendment.[28] Although there was language in *Couch* about privacy,[29] once Justice Powell accepted as the basis of the right the desire to prevent compulsion by prohibiting the use of inquisitorial techniques on the person, he rejected any broad reading of privacy as a judicial construction not dictated by the Constitution.

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claim that was upheld in *Boyd* would now be rejected. *Id.* at 1579. The invoice had belonged to a partnership, and under Bellis v. United States, 417 U.S. 85 (1974), partnership records are not privileged.

23. The defendant had turned over possession of her tax records to an independent accountant, though she retained title in herself. The Court held that she could not interpose her fifth amendment privilege to defeat an Internal Revenue Service summons issued to her accountant, since there was no compulsion against her personally.

24. Justice Powell's view was criticized in Justice Marshall's dissenting opinion for creating a "bright line" rule that equated possession with personal compulsion. 409 U.S. 322, 344 (1973); *cf. id.* at 337 (Brennan, J., concurring). Justice Powell rejected this thesis as misguided. 409 U.S. at 336. He noted that divestment of possession could be so insignificant or temporary that the documents would still be in the constructive possession of the accused and thus part of her personal sphere. *See generally*, 15 B.C. IND. & COM. L. REV. 185 (1973); 40 BROOKLYN L. REV. 211 (1973).

25. 381 U.S. 479 (1965).

26. 409 U.S. at 341.

27. *Id.* at 337-38.

28. The open question is whether this is adequate to protect the complex of values and the "inviolability of the human personality." See note 9 *supra* and accompanying text.

29. 409 U.S. at 335-36.

This formulation served as the basis for Justice Powell's decisions in *United States v. Nobles*[30] and *Doyle v. Ohio.*[31] In *Nobles,* he held that the accused could not claim any fifth amendment privilege to prevent the production of notes belonging to another, since there was no personal compulsion against the accused in ordering the papers produced. On the other hand in *Doyle,* the evidence—personal silence—had been obtained directly from the defendants. It, therefore, followed from *Couch* and more directly from another case,[32] that Doyle was presumably exercising his fifth amendment privilege and to have allowed the use of an adverse inference from the exercise of a constitutional right was unfair.[33]

2. *Compulsion*

The second element of the privilege is that there must be some compulsion against the accused. This element is closely linked to the personal nature of the right, but it has some characteristics of its own. For example, volunteered information has been held not to be within the fifth amendment restriction, even if the information was personal, and may properly be entered into evidence.[34] Justice Powell has twice found this element essential in determining the fifth amendment rights of the accused.

The simpler case was *Barnes v. United States.*[35] Barnes had been charged with knowingly possessing government checks stolen from the

30. 422 U.S. 225 (1975). Nobles was accused of robbing a federally-insured bank. The most damaging evidence against him was the testimony of a teller and one other witness, a salesman. During the investigator's interviews, the teller suposedly was less than certain about identifying the defendant, and the salesman was quoted as saying that all blacks look alike. Counsel for the defense sought to put the investigator on the stand to impeach this testimony. The trial judge held that, should he testify, the investigator's notes, edited by the court, would have to be opened to the prosecution. Defense counsel excepted, and the court of appeals reversed the conviction on appeal. 501 F.2d 146 (9th Cir. 1974).

31. 96 S. Ct. 2240 (1976). Doyle and codefendant Woods were accused of selling ten pounds of marijuana to a police informer. Neither Woods nor Doyle offered any account of any of the events at the time of his arrest. The prosecutor used this silence to impeach their testimony at trial as to what was to have supposedly occurred. Unlike *Nobles* or *Couch,* the information, in this instance, inferred from silence, was elicited from the persons of the defendants, not from their agent-investigator or tax accountant. Informed of their *Miranda* rights, the defendants had the right to remain silent, and this could not be used as evidence against them. In any event their silence was ambiguous. It could as easily have been a cautious response to the warnings as a silence from not yet having constructed their story.

32. United States v. Hale, 422 U.S. 171 (1975).

33. The actual basis for the decision was that the state's action was fundamentally unfair and violated due process.

34. United States v. Monia, 317 U.S. 424, 427 (1943); Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 113 (1927).

35. 412 U.S. 837 (1973).

mail. He challenged a permissive inference of knowledge that the checks had been stolen, claiming that the inference compelled him to testify and thereby violated his privilege to be silent. Justice Powell said that, although the inference put pressure on the defendant to testify, it was no more than a part of the adjudicatory procedure, not an inquisitorial tool, and, therefore, was not a denial of any right. Previous cases had clearly so held.[36]

A more complex case was *Garner v. United States*[37] in which Justice Powell turned away from the implications of Warren Court precedent to narrow the element of compulsion. In *Garner,* the Court was faced for the first time with the question of whether information on an individual's tax return could be entered against him in a criminal prosecution not involving the tax matter.[38]

A line of cases from late in the Warren era had dealt with self-disclosure statutes which had been directed at an identifiable group in a field of inquiry permeated with criminal sanctions.[39] Registration was held tantamount to an admission of guilt. Garner claimed that similar reasoning should be employed in his case, at least to preclude the use of evidence disclosed in tax returns, since the completion and filing of returns was mandatory[40] and the reporting of illegal income was also required.[41] Garner felt that because such information was supplied by him as *required,* it should not be used against him.[42]

Instead of following these precedents, Justice Powell turned to older precedent[43] and held that Garner could have claimed his privilege on the

36. Yee Hem v. United States, 268 U.S. 178 (1925). Yee Hem was convicted under a three-part opium statute. The third part stated that opium found after July 1, 1913 would be presumed to have entered the country after April 1, 1909. Yee Hem contended that this presumption violated his fifth amendment rights. The Court dismissed the assertion summarily:

> The statute compels nothing. It does no more than make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses.

Id. at 185.

37. 96 S. Ct. 1178 (1976).

38. *See generally* Note, *Garner v. United States: Self-Incrimination and the Use of Tax Returns in Nontax Criminal Prosecutions—The Ninth Circuit Attempts a Balancing Act,* 24 HASTINGS L. J. 959, 961 (1973) [hereinafter cited as *Self-Incrimination*].

39. Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

40. United States v. Sullivan, 274 U.S. 259 (1927).

41. James v. United States, 366 U.S. 213 (1961).

42. Some commentators have felt that this was a valid argument. *See Self-Incrimination, supra* note 38, at 978-84.

43. United States v. Sullivan, 274 U.S. 259 (1927). Sullivan had failed to file his tax

return itself but by having not done so his disclosure was voluntary. The threat of prosecution arising from claiming the privilege was held insufficient to amount to compulsion.[44] The *Garner* decision has been criticized as coming perilously close to forcing taxpayers to pay the penalty of a criminal prosecution for exercising their constitutional privilege.[45] At a minimum, it was a shunning of the broader aspects of compulsion which had become recognized by the Warren Court.

3. *Testimonial*

As a third element involved in the fifth amendment privilege, the evidence compelled from the person must be testimonial. Other than tangentially, as in *Couch,* Justice Powell has not written a decision addressing this issue. However, he did join the Court's opinion in *Fisher v. United States,*[46] which added another significant limitation to the fifth amendment privilege.

It had long been recognized that not all evidence is free from compelled production; only a testimonial communication that is incriminating.[47] Thus involuntary voice exemplars[48] or blood samples[49] have been consid-

returns. When prosecuted on this account, he claimed that filing a return would have violated his fifth amendment rights, since it would have announced his illegal operations. The Court disagreed. They held that he could have claimed the privilege on the return, but that the privilege was no defense for failing to file a return.

44. 96 S. Ct. at 1187-88. Prosecution could come under INT. REV. CODE OF 1954 § 7203 (26 U.S.C. § 7203 (1970)) (failure to file). Justice Powell affirmed that a valid claim of a fifth amendment privilege could serve as a defense to a section 7203 prosecution. By the reasoning of *Sullivan,* Garner had his opportunity to validly claim the privilege if he could. The threat of having to test the validity or invalidity of the claim in a criminal trial was thought to be insufficient compulsion to make Garner forego his privilege on the original returns.

45. Saltzman, *Supreme Court's Garner Decision Puts Illegal Income Earners in a Bind,* 1976 J. TAX. 334. Saltzman believed that the expense and disgrace of a criminal prosecution to test the privilege ought to be constitutionally meaningful. Even if acquitted, the taxpayer would carry the ill-fame of the trial, thus exacting a price for the exercise of a privilege guaranteed by the Bill of Rights. In that regard, this decision seems somewhat contradictory to the holding in *Doyle.* See note 31 *supra* and accompanying text.

46. 96 S. Ct. 1569 (1976). *Fisher* was the consolidation of two cases: United States v. Fisher, 500 F.2d 683 (3d Cir. 1974), and United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974). In both cases, the IRS began investigations of the defendants by approaching their accountants for information. Before the summonses were issued, the taxpayers transferred the working papers and records first to themselves and then to their lawyers. The lawyers then refused to comply with the summonses, asserting their client's fifth amendment privilege and the attorney-client privilege. The fifth circuit reversed the enforcement order; the third circuit granted it. The majority opinion in the Supreme Court was written by Justice White.

47. 96 S. Ct. at 1579.

48. United States v. Wade, 388 U.S. 218 (1967).

49. Schmerber v. California, 384 U.S. 757 (1966).

ered to be only physical evidence and not testimonial communications. *Fisher* added another restriction: to be testimonial, the communication must now be the product of the accused himself, and if not, production may possibly be compelled.[50] Thus, in *Fisher*, the Court held that a taxpayer's lawyer could be forced to turn over the working papers of the taxpayer's accountant. There was no derogation of the lawyer-client privilege;[51] rather, the Court decided that the working papers were not the "testimony" of the taxpayer, since they had not been prepared *by him.*[52] If Justice Powell's assent to the case is an accurate reflection of his thoughts, information will not be "testimonial" unless it is the accused's oral testimony or the compelled product of his own hand.[53]

4. *Criminal*

As in the testimonial cases, Justice Powell has written only indirectly on the criminal element of the privilege. For the most part, it is well settled. In *Kastigar v. United States,*[54] he noted in passing that the privilege could be put forward in all governmental hearings—court cases, inquiries, grand jury hearings, etc. What has mattered is that the testimony could be used in a later criminal prosecution.

This point was well illustrated in *Maness v. Meyers,*[55] a decision in which Justice Powell joined. An attorney was cited for contempt as a result of counselling his client to disobey a subpoena duces tecum in a civil case. The judge in the trial court had mistakenly thought that the privilege could be raised only in criminal proceedings. The lawyer's citation for contempt was thrown out.[56] So long as there was a reasonable apprehension of criminal prosecution, the nature of the forum was irrelevant.

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50. 96 S. Ct. at 1580.

51. The information had been originally transmitted to the accountant by the client and the worksheets had been prepared by the accountant. These worksheets were in the hands of the accountant when the IRS investigation began. They were then transferred to the client and then to the lawyer. However, documents which could have been obtained when in the possession of an attorney's client may be obtained even after transfer to the attorney. *See also* Grant v. United States, 227 U.S. 74 (1913).

52. The Court acknowledged that by the production of the documents the taxpayer was tacitly conceding the existence of them and his possession and control over them. 96 S. Ct. at 1581-82 n.12. The Court felt, however, that, at least on the facts of this case, no testimonial evidence was compelled, since the accountant had prepared the papers and the simple act of production did not involve self-incrimination.

53. The Court left open the question of whether records prepared by a taxpayer could be compelled from him, since the making of the records would not have been compelled. *Id.* at 1582. *But see* Couch v. United States, 409 U.S. 322 (1973). *See also* Andresen v. Maryland, 96 S. Ct. 2737 (1976).

54. 406 U.S. 441 (1972).

55. 419 U.S. 449 (1975).

56. *Id.* at 468.

D. Immunity Cases

Immunity cases have offered a different perspective on the fifth amendment. Although the Constitution prohibits the compulsion of incriminating testimony from a person, the Court has held that the privilege can be supplanted by an immunity which is coextensive with it.[57] The contours of the privilege, then, may also be examined by looking at the scope of the constitutionally recognized immunity.

Two forms of immunity had been propounded. The first type of immunity was transactional immunity. Under this standard the government was barred from prosecuting the individual for any event about which he testified. The second type was "use-or-derivative-use" immunity under which the government was merely barred from using the individual's testimony or any fruits derived from it.[58] In *Kastigar v. United States,* Justice Powell, writing for the Court, held that immunity from use and derivative use was coextensive with the constitutional privilege.[59]

The holding in *Kastigar* was not dictated by prior cases, but, unlike the other areas of the privilege, Justice Powell continued a trend that had been developing throughout the Warren Court era,[60] that use immunity com-

57. Brown v. Walker, 161 U.S. 591 (1896).

58. Transactional immunity has at least two policies behind it: it prevents the enormous difficulties of enforcing a "use-or-derivative-use" standard, and it also prevents the person from being "whipsawed" between two jurisdictions. The arguments for use immunity are that it shifts the burden of proof and, therefore, adequately protects the party, and that it prevents an overbroad "immunity bath" for those who could otherwise be prosecuted. Note, *Immunity: The Dilemma of "Transactional" Versus "Use,"* 25 Okla. L. Rev. 109, 114-16 (1972).

59. 406 U.S. 441, 459 (1972). The literature on *Kastigar* is huge. It includes Zimmet, *The Federal Use Immunity Statute Since Kastigar,* 1973/1974 Ann. Surv. Am. L. 343; Note, *Kastigar v. United States: The Required Scope of Immunity,* 58 Va. L. Rev. 1099 (1972); Note, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli,* 82 Yale L.J. 171 (1972) [hereinafter cited as *Standards*].

Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972), was handed down on the same day as *Kastigar.* That case also held the use-or-derivative-use standard to be adequate.

60. The earliest case on the subject, Counselman v. Hitchcock, 142 U.S. 547 (1892), was ambiguous, but the Congress and some later court decisions thought of it as requiring transactional immunity. *See* Hale v. Henkel, 201 U.S. 43 (1906); Brown v. Walker, 161 U.S. 591 (1896). The issue was never squarely before the Court. A conflict arose later when the fifth amendment was made applicable to the states in Malloy v. Hogan, 378 U.S. 1 (1964). If states were required to grant full transactional immunity, prosecution for federal crimes as well as state crimes would be barred for those transactions. Arguably at least, such a holding would violate the supremacy clause. In response, the Warren Court in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), held that immunity from use and derivative use was sufficient for interjurisdictional prosecutions. Justice White in his concurrence to *Murphy* urged that "use" standards be adopted for all immunities, and the Court later hinted its acceptance of

ported with the fifth amendment. It appears likely that Justice Powell adopted this standard because of its more limited scope. Transactional immunity offers something of a "blunderbuss" approach; it prevents the evil contemplated but is usually overbroad in its application. Immunity from use and derivative use better fits Justice Powell's more narrow fifth amendment views. It protects the individual from being forced to give testimony which would lead to criminal prosecution while at the same time it gives greater weight than transactional immunity to society's needs to judge the accused. Like the right to remain silent, it "grants neither pardon nor amnesty."[61]

E. Conclusion

Justice Powell has been in full agreement with the Burger Court's reevaluation of fifth amendment protections. Under the Warren Court, the rights were liberally applied. Now, "despite its cherished position, the Fifth Amendment addresses only a relatively narrow scope of inquiries."[62] The privilege has come much closer to Justice Powell's view of its historical origins and grammatical terms. Justice Powell also believes that this is more in line with the government's interest in obtaining the information it needs, and the interests of the fifth amendment itself, which, in his view, had become somewhat turgid.

IV. FOURTH AMENDMENT

A. Introduction

The traditional purpose of the fourth amendment to the United States Constitution[1] has been "to safeguard the privacy and security of individuals against arbitrary [and unreasonable] invasions [searches and seizures] by government officials."[2] The exclusionary rule, prohibiting introduction by the prosecution of evidence obtained in violation of the fourth amendment, is the judicially-formulated means of effectuating the protec-

this position. 378 U.S. at 92. *See* Piccirillo v. New York, 400 U.S. 548 (1971) (certiorari dismissed as improvidently granted); *Standards, supra* note 59, at 174 n.19.

61. Kastigar v. United States, 406 U.S. 441, 461 (1972).

62. Garner v. United States, 96 S. Ct. 1178, 1183 (1976).

1. U.S. Const. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

tion afforded by the fourth amendment.[3] The exclusionary rule was extended to state court prosecutions in 1961.[4]

The Supreme Court under Chief Justice Warren was particularly innovative in expanding the constitutional protection afforded criminal defendants by the fourth amendment.[5] This expansion was accomplished chiefly by the use of precisely delineated constitutional guidelines,[6] and a change in emphasis in fourth amendment protections from places to persons.[7] In contrast, the Supreme Court under Chief Justice Burger, instead of further expanding individual protection under the fourth amendment, has returned to more traditional concepts in certain areas.

B. The Substantive Protection

1. *Introduction*

Justice Powell has viewed the fourth amendment as an expansive but not absolute protection of the privacy of an individual.[8] The protection has not been absolute because, as with most rights of the individual, countervailing forces of society must also be considered.[9] These countervailing forces have been the foundation of probable cause, which must exist in order to intrude constitutionally upon the individual's right. To ensure that the protection is not swallowed by the exception, the Court, at least in the area of searches, has required that probable cause, absent exigent

3. Weeks v. United States, 232 U.S. 383 (1914).

4. Mapp v. Ohio, 367 U.S. 643 (1961).

5. Not only was the exclusionary rule extended to the states, but the substantive protection from warrantless searches and seizures was expanded. Terry v. Ohio, 392 U.S. 1 (1968). Warrant provisions were tightened. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). Warrantless administrative inspections by municipal housing and fire officials were barred. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). And the right to attack a state conviction on the basis of a fourth amendment violation by federal habeas corpus petition was granted to state prisoners. Kaufman v. United States, 394 U.S. 217 (1969).

6. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523 (1967); Mapp v. Ohio, 367 U.S. 643 (1961).

7. This protection of persons was first enunciated in Katz v. United States, 389 U.S. 347 (1967). This protection has been commonly couched in terms of a reasonable expectation of privacy. *Id.* at 361 (Harlan, J., concurring).

8. In his decisions, Justice Powell has described the protected right in terms of privacy, United States v. United States District Court, 407 U.S. 297 (1972), or "an expectation of privacy," United States v. Robinson, 414 U.S. 218 (1973) (Powell, J., concurring).

9. For example, see the quartet of border search cases discussed *infra* p. 369, where one of the main concerns of Justice Powell was the almost impossible burden on the border patrol of controlling the entrance of illegal aliens into the United States.

circumstances, be determined by a neutral and detached third party.[10] However, at times even nonexigent circumstances have been held sufficient to allow a search or seizure to occur without a neutral determination of probable cause[11] or even the existence of probable cause.[12]

Thus, fourth amendment protections by their nature are extremely conducive to being evaluated by balancing. Justice Powell, as well as most of the Burger Court, has used this opportunity to develop a flexible standard of protection.[13] This standard has been essentially one which asks whether it would be reasonable to say that the individual's fourth amendment right to be free from unreasonable searches and seizures is more important than the interests of society in conducting the search or seizure under the circumstances.

2. *Neutral, Independent Magistrate*

Justice Powell has emphasized that the very heart of the protection afforded by the fourth amendment has been judicial approval by a neutral and detached magistrate prior to any invasion of privacy so that executive discretion will not go unchecked.[14] However, this, as with other protections provided by the fourth amendment, has been subject to the possibility of modification in particular circumstances. An early example of this possibility was *United States v. United States District Court*,[15] where Justice Powell scrutinized the conflicting values by balancing the expansive but not absolute right of the individual against the exigency of the situation, the burden strict adherence to the fourth amendment would place upon the investigation and the extent to which an individual's privacy would be invaded.

Justice Powell has employed this balancing test in several other situations involving who should determine probable cause. A significant ele-

10. *See, e.g.*, United States v. United States District Court, 407 U.S. 297 (1972). *Contra*, United States v. Robinson, 414 U.S. 218 (1974).

11. *See* South Dakota v. Opperman, 96 S. Ct. 3092 (1976).

12. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

13. The Warren Court also used a balancing test to some extent. *See* Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523 (1967). However, the Warren Court was less inclined to give substantial weight to facts that could have affected the reasonableness of the expectation of privacy than has been the Burger Court. *Compare* Chimel v. California, 395 U.S. 752 (1969), *with* United States v. Robinson, 414 U.S. 297 (1972).

14. United States v. United States District Court, 407 U.S. 297, 316-18 (1972).

15. 407 U.S. 297 (1972). In this case, Justice Powell concluded that the potential danger to individual privacy posed by unrestricted surveillance was greater than the burden placed upon the government in requiring the issuance of a warrant prior to electronic surveillance to protect domestic security. *Id.* at 321. *But see* United States v. Donovan, 45 U.S.L.W. 4115 (U.S. Jan. 18, 1977).

ment in this balance has been statutory requirements which he has viewed as explicit directions by society through the legislature on how probable cause should be determined in particular situations. It follows, therefore, that a violation of the statute would render the determination invalid regardless of the circumstances.[16]

The danger of overburdening a municipal court was found sufficient in *Shadwick v. City of Tampa*[17] to allow the determination of probable cause by a magistrate with neither a law degree nor special legal training. Justice Powell concluded that the essence of the probable cause requirement lay in the determination being made by an independent and neutral[18] individual who was capable of determining probable cause.[19] He felt legal training was unnecessary to such a determination. Thus, the optimum level of individual protection was sacrificed when the circumstances necessitated such action.

This manner of balancing, in *Gerstein v. Pugh*,[20] resulted in the holding that, although probable cause for arrest must exist at the time of arrest, it need not be determined by an independent and detached magistrate *prior* to arrest. It was sufficient if the determination occurred *subsequent* to arrest.[21] Justice Powell believed that the right of the individual to be free from restraint without a showing of probable cause would be maintained by such a showing subsequent to arrest, while at the same time the government's ability to maintain law and order would not be unduly hampered.[22]

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16. United States v. Giordano, 416 U.S. 505 (1974). Justice Powell concurred with the majority in this case which held that evidence obtained by wiretap should be excluded, because the warrant application had not conformed to the procedure established by 18 U.S.C.A. § 2516(1) (Cum. Supp. 1976). Justice Powell dissented on a separate issue.

17. 407 U.S. 345 (1972). Pursuant to a local ordinance, court clerks (without special legal training) issued arrest warrants for violation of minor local ordinances. Justice Powell balanced heavy court dockets and a shortage of legal personnel against the desirability of review of warrant requests by a judge or lawyer.

18. A situation as found in *Shadwick* could not be alleviated by allowing the prosecutor or any individual connected with the police to determine probable cause, since such a person is neither neutral nor independent. Gerstein v. Pugh, 420 U.S. 103 (1975).

19. 407 U.S. at 353, 354.

20. 420 U.S. 103 (1975). Pursuant to a local ordinance, no prearrest or postarrest probable cause determination was required to hold a suspect for trial when charged by an information filed by the prosecutor.

21. The crucial element that Justice Powell found in *Pugh* that permitted this conclusion was the burden that would be placed upon legitimate law enforcement by requiring a warrant. He noted that while Beck v. Ohio, 379 U.S. 89 (1964), had expressed a preference for the use of arrest warrants, an arrest had never been invalidated when supported by probable cause because of the lack of an arrest warrant. *Accord*, United States v. Watson, 96 S. Ct. 820 (1976), which upheld a warrantless arrest in public.

22. *Pugh* and *Watson* have created a peculiar anomaly in the search and seizure area. Both a search and a seizure require probable cause. However, for a search to be valid, absent

3. *Administrative Searches*

a. Border Searches

The cases dealing with border searches[23] also illustrate Justice Powell's concern for probable cause determination and the fourth amendment's warrant requirement. As with the question of who should determine probable cause, Justice Powell has been willing to sacrifice some individual fourth amendment protections when the circumstances have required it. An examination has been made in each case of the severity of the circumstances, the legitimate needs of law enforcement and the extent of the invasion of individual privacy. This scrutiny has led Justice Powell to expand not only the situations where no warrant will be required but has led to a dilution of the requirement of probable cause as well.[24]

Almeida-Sanchez v. United States[25] is the first case in which Justice

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exigent circumstances such as an emergency, probable cause must be determined by an independent and neutral magistrate prior to the search. Coolidge v. New Hampshire, 403 U.S. 443 (1971). On the other hand, *Watson* permits an arrest, even absent any exigent circumstances, in a public place without a prior determination of probable cause by a judicial officer. Although *Pugh* still requires such a determination after arrest, it nonetheless sanctioned warrantless arrests. Justice Powell wrote the opinion in *Pugh* and concurred in the result in *Watson*.

Viewing these cases as the result of the balancing test used by Justice Powell, the results are not so anomalous, since Justice Powell has accorded great weight to the interests of law enforcement. He felt that requiring a warrant for an arrest in public was neither historically mandated nor wise policy, since it would unduly inhibit the freedom of action of law enforcement officers. 96 S. Ct. at 832. Moreover, to Justice Powell, society has a greater interest in immediately apprehending a violator of the law than in conducting an immediate search, making an interference with the conduct of a search less burdensome. Therefore, on balance, the difference, although somewhat peculiar, is in Justice Powell's view legitimate.

23. United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Ortiz, 422 U.S. 891 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

24. One factor has seemed to be very important in the area of border searches: the searches are not usually conducted to obtain incriminating evidence in order to prosecute. Criminal penalties can be and have been assessed for the importation of illegal aliens, but this has not been determinative to Justice Powell. He has consistently relied on Camara v. Municipal Court, 387 U.S. 523 (1967), which allowed area-wide municipal searches, but only after a showing by the authorities as to why they believed a particular area contained dangers to society. The facts were not required to relate to an individual dwelling but to a specific area. The fact that an individual could have been prosecuted for refusing entry to the official did not persuade the Court that the full protections of the fourth amendment should apply.

The general situation in border searches is the same. To allow searches without probable cause or a warrant would leave the individual at the mercy of the discretion of the official in the field. To require a warrant and probable cause may unduly hinder the border patrol. This conflict has been the backdrop against which these cases were decided.

25. 413 U.S. 266, 275 (1973). In addition to border inspections, permanent checkpoints for

Powell dealt with this problem. The case is very instructive since, although it addressed both the interests of law enforcement and the right of citizens to fourth amendment protections, it did not exclusively support either. The Court refused to sanction random searches of automobiles by roving patrols, not at the border or its functional equivalent, when there was neither a warrant nor probable cause. However, weighing this against the impossible task facing the government,[27] Justice Powell fashioned a compromise which called for a substituted form, or "functional equivalent," of probable cause.[28]

Besides probable cause, Justice Powell also examined the need for a warrant. He would have held, after weighing the effect on the government created by requiring a search warrant against the intrusion occasioned by a roving search, that the particular border patrol case did not meet the criteria for warrantless searches.[29] This result, to Justice Powell, was dictated by the conclusion that the inconvenience to the government of obtaining a warrant was not sufficient to overcome the extensive intrusion on personal freedom.[30] The warrant Justice Powell advocated was an area

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the discovery of illegal aliens were maintained at various locations on major highways extending north from the Mexican border into the United States. Border patrol officers also conducted searches of automobiles when they were encountered in areas where the smuggling of aliens was known to occur.

26. The search took place twenty-five miles from the Mexican border.

27. "The Immigration and Naturalization Service suggests there may be as many as 10 or 12 million aliens illegally in the country." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). Many had entered along the largely uninhabited 2,000-mile border between the United States and Mexico. The border patrol had utilized vehicle inspections as one method of attempting to minimize this illegal immigration.

28. 413 U.S. at 279. The justifications for this substituted form of probable cause were: a) consistent prior judicial approval of this form of search; b) absence of reasonable alternatives; and c) a modest intrusion. The justifications were modeled after *Camara*, where the Court noted that the long history of permitting administrative searches of houses attested to the reasonableness of the search. 387 U.S. at 537.

One significant difference between *Camara* and this type of situation in a border search was that the former involved a dwelling and the latter an automobile. The fact that an automobile has been traditionally afforded less protection than a dwelling, Chambers v. Maroney, 399 U.S. 42, 48 (1970), was a significant factor on the side of the government.

The government had argued this point, saying that since an automobile was involved, an exception should apply to the requirement of probable cause and a warrant. But Justice Powell rejected this, saying that the cases providing an exception for automobiles, such as *Chambers*, created an exception to the warrant requirement, not the probable cause requirement. 413 U.S. at 281.

29. 413 U.S. at 277.

30. Without requiring a warrant, an individual would be subjected to the discretion of the official in the field and not a neutral and independent judicial officer. 413 U.S. at 280.

warrant of the type required in *Camara v. Municipal Court*,[31] because he felt that such a warrant would prevent unreasonable intrusions into the privacy of individuals without significantly interfering with the interests of the government.[32]

The seriousness with which Justice Powell viewed the intrusion in *Almeida-Sanchez* was evidenced by the fact that it overcame strong policy arguments of the government and a somewhat lessened expectation of privacy caused by the presence of an automobile. *United States v. Ortiz*[33] underscored this belief of Justice Powell. Writing for the majority, Justice Powell applied *Almeida-Sanchez* and required a showing of probable cause.[34] The fact that a permanent checkpoint was involved did not mitigate the intrusion nor change the result.[35]

In a case decided the same day, *United States v. Brignoni-Ponce*,[36] Justice Powell, again writing for the majority, concluded that probable cause was not required for a roving border patrol to stop a vehicle for a brief questioning of its occupants and a visual inspection.[37] Returning to his *Almeida-Sanchez* rationale, Justice Powell balanced the difficult task faced by the border patrol of controlling illegal immigration, against the limited nature of the intrusion into individual privacy occasioned by the questioning and limited visual inspection. The compromise he reached was

31. 387 U.S. 523 (1967). The facts which Justice Powell considered relevant in this case in determining whether a warrant should be issued on probable cause for an area included: a) the frequency of known illegal entry in the area; b) the area's proximity to the border; c) the size and geographic characteristics, including the number and condition of the roads and the type and frequency of their use; and d) the probable interference with ordinary use of the roads by the general public. 413 U.S. at 283-84.

32. 413 U.S. at 283-85.

33. 422 U.S. 891 (1975). The defendant's automobile was searched at a permanent checkpoint, not at the border or its functional equivalent, without either probable cause or a warrant.

34. Justice Powell applied the majority view of *Almeida-Sanchez* and left open the question of the applicability of area warrants, as he had advocated in *Almeida-Sanchez*, to this situation. 422 U.S. at 897 n.3.

35. The government argued that the permanency of the checkpoint and its routine procedures mitigated the intrusion. Justice Powell rejected this, noting that only a small percentage of cars was searched, which meant that the individual was subject to the discretion of the official and, moreover, established procedures did not lessen the embarrassment of the search. 422 U.S. at 895.

36. 422 U.S. 873 (1975). The defendant's automobile was stopped at a permanent border patrol checkpoint by a patrol car because the checkpoint was closed due to inclement weather. There was no warrant or probable cause, the stop being primarily based upon the Mexican ancestry of the defendant. There was no search either, but merely a brief questioning. Since the checkpoint was closed, and the questioning was conducted by an officer in a patrol car, the Court characterized the stop as a roving patrol stop.

37. *Id.* at 881.

a requirement of reasonable suspicion based upon articulable factors[38] to support a stop for questioning. Justice Powell emphasized that this did not authorize a wholesale search, but only the less drastic alternative of a mere questioning and visual inspection.

In *United States v. Martinez-Fuerte*,[39] which involved a stop for questioning and a limited inspection at a permanent border patrol checkpoint, Justice Powell and the majority concluded that neither probable cause nor reasonable suspicion was necessary to justify the intrusion. Again this conclusion was a compromise wrought by Justice Powell's balancing of all the facts in a given situation. A brief stop for questioning at a clearly marked permanent check point was felt to be a minimal intrusion which was outweighed by the momentous problem border patrol officers were faced with in attempting to halt illegal immigration.[40] Therefore, Justice Powell felt it was unnecessary to impose a standard which would protect the individual from such a minimal intrusion. The individual would be sufficiently protected by limiting the scope of the stop to a questioning rather than a full scale search.[41]

The area of border searches has provided a forum for Justice Powell to balance extensively. The results have shown that as the intrusion on privacy has been reduced the justification that need be shown in order to

38. *Id.* at 884-87. These factors include: a) the area in which a vehicle is encountered; b) its appearance-loaded etc.; c) the appearance of the occupants, including their ancestry; d) the behavior of the driver, attempts at evasion; and e) the officer's general knowledge of alien smuggling. This decision paralleled Terry v. Ohio, 392 U. S. 1 (1968), which allowed a "stop and frisk" based upon a reasonable belief that the suspect was armed and dangerous.

39. 96 S. Ct. 3074 (1976). The defendant's vehicle was stopped at a permanent border patrol checkpoint and diverted to a secondary area for questioning and a visual inspection. There was no warrant and no probable cause, not even reasonable suspicion.

40. Justice Powell differentiated *Brignoni-Ponce* on the basis that the intrusion occasioned by a stop and question by a roving patrol was greater than at a permanent checkpoint because the individual knows that at a permanent checkpoint the intrusion will occur and therefore the regularity will be greater. 96 S. Ct. at 3083. Although this differentiation was insufficient to create a difference in result when a search was involved, it was felt to be a significant enough lessening of the intrusion to make a stop for questioning, which is by itself a minimum intrusion, virtually *no* intrusion upon an individual's privacy.

41. *Id.* at 1086-87. The defendant had asked the Court to require at least an area warrant for such searches as was required in *Camara* and as Justice Powell had advocated in *Almeida-Sanchez*. Justice Powell, however, felt that both were distinguishable because they involved searches. Moreover, in this situation, the reasons for requiring a warrant were already fulfilled. The permanency of the checkpoint provided assurance of legality and would prevent hindsight from coloring the facts that existed at the time of the intrusion. Also, individuals other than the official in the field designated the location of the checkpoint. This fact limited the discretion of the officer and negated the need to protect the individual from this discretion by the use of a judicial officer.

justify the intrusion also has been reduced. Moreover, a lesser intrusion has resulted in a similarly diminished need for a warrant, since subjecting the individual to the discretion of an official in a situation where the intrusion would be minimal would be of little harm.

b. Inventory Searches

Almost the identical rationale found in border searches can be seen in the 1976 case which validated inventory searches of cars: *South Dakota v. Opperman*.[42] The majority found such a search reasonable, primarily because the purpose of the search was not to obtain incriminating evidence and the search was conducted according to strict police procedures.[43]

Justice Powell concurred, but wrote apparently to specify considerations that were crucial to the result. Again he noted that the resolution would depend on the result of balancing the interests of society against the interests of the individual.[44] The interests of society lay mainly in protecting the police and the owner of the automobile from loss;[45] and, to Justice Powell, these interests were felt to be significant. The individual's interest in protection was felt to be lessened by two factors. The first was that an automobile as opposed to a home or office was involved.[46] The second was that the search was limited by established police procedures and, therefore, the intrusion was minimized.[47] Moreover, Justice Powell believed that the search was not rendered unreasonable because of the lack of a warrant.[48] A warrant in this situation, as in *Martinez-Fuerte*, would have

42. 96 S. Ct. 3092 (1976). The defendant's automobile was impounded after multiple parking tickets had been issued and it had not been moved. Pursuant to department procedure, the vehicle was searched and its contents inventoried and stored.

43. Since the search was held not to be criminally oriented, a probable cause determination and a warrant were unnecessary. 96 S. Ct. at 3095-96. Also, the majority found the fact that an automobile was involved lowered the expectation of fourth amendment protection. *Id.*

44. As precedent, Justice Powell cited, among others, three of the four border search cases, Terry v. Ohio, 392 U.S. 1 (1968), and Camara v. Municipal Court, 387 U.S. 523 (1967).

45. [T]hree interests generally have been advanced in support of inventory searches: (i) protection of the police from danger; (ii) protection of the police against claims and disputes over lost or stolen property; and (iii) protection of the owner's property while it remains in police custody.
96 S. Ct. at 3101.

46. As in the border search cases, this fact was held to lower the individual's expectation of privacy, which meant that only a lesser amount of justification was needed to overcome the expectation. Justice Powell cited United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976) and United States v. Ortiz, 422 U.S. 897 (1975), as precedent for the fact that one's expectation of privacy was reduced when in an automobile.

47. 96 S. Ct. at 3102.

48. *Id.* Justice Powell emphasized, as he had in Almeida-Sanchez v. United States, 413 U.S. 266, 281 (1973) (Powell, J., concurring), that the exception to the warrant requirement

served no purpose and, therefore, was not required.[49]

c. Conclusion

These cases point out significant features of Justice Powell's analysis when dealing with what are basically administrative searches. His balancing is detailed and two-tiered. Interference with police functions, discretion exercised by the official in the field and the policy behind the actions (search for criminal evidence or other reasons) all affect the government's interest. The presence of an automobile and the extent of the intrusion (full search or stop and question and the presence or nonpresence of the owner) affect the individual's interest. The weighing of these factors determines the permissibility of the search. Whether a warrant will be required is determined by balancing the purposes of a warrant (hindsight review and the limiting of discretion) against the worth of requiring it. The worth is determined by analyzing both the protection a warrant will afford the individual and the hinderance it will create for the police. The result determines the applicability of the warrant requirement.[50]

4. *Search Incident to Arrest*

The concept that evolved in the area of administrative searches, that the

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created by Chambers v. Maroney, 399 U.S. 42 (1970), due to the presence of an automobile, was applicable only because of the presence of special circumstances and was not a general exception.

49. As noted in *Martinez-Fuerte*, a warrant serves basically two functions. First, it insulates the individual from the exercise of arbitrary discretion as to the existence of probable cause by the officer in the field. *See* Camara v. Municipal Court, 387 U.S. 523 (1967). In an inventory situation, Justice Powell, as well as the majority, has felt that this discretion does not exist because the police follow set procedures, and the decision to search is, therefore, not dependent on varying fact, as would be the case in a search to discover criminal evidence. 96 S. Ct. at 3103. Secondly, a warrant is to prevent hindsight review from coloring the reasonableness of the search. Here, Justice Powell believed that proper hindsight review was assured because of the set procedures. *Id.*

Camara, which had required a warrant for certain administrative searches, was distinguished. The primary concern in *Camara* had been that the occupant of the dwelling to be inspected had no way of discerning the legitimacy of the search or its allowable limits without the presentment of a warrant. However, an inventory search places no discretion in the hands of the police. Moreover, the owner is not usually around nor reasonably accessible and, therefore, a warrant would serve no notice of the legitimacy of the search.

50. In both *Martinez-Fuerte* and *Opperman*, Justice Powell reiterated the traditional preference for a warrant unless the situation is one of the recognized exceptions. It appears to be an open question whether the balancing of the need for a warrant against the purposes of a warrant will in the future expand the instances when no warrant will be required in nonborder search situations. This area certainly is not identical to searches for incriminating evidence. However, the balancing, as done by Justice Powell, at the minimum foreshadows a more flexible approach in the future in the application of fourth amendment protections against searches.

lesser the intrusion the lesser need be the probable cause to search, found its earlier fruition in Justice Powell's concurrence in *United States v. Robinson*.[51] The majority, extending the search incident to arrest doctrine to arrests for automobile violations, held that upon a *full custody* arrest a full search of the person was reasonable, since the arrest was based upon probable cause and this probable cause was sufficient to uphold the subsequent search.[52] The driver of the automobile, once in custody, was allowed to be fully searched even without any apparent reason to believe that he had weapons or evidence on his person.[53]

Justice Powell in his concurrence went philosophically one step further. He would have held that once an individual has been arrested, his expectation of privacy has been fully abated or, when compared to the significant state interest in controlling an individual upon a valid arrest, any expectation that did remain has been vastly outweighed.[54]

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51. 414 U.S. 218 (1974).

52. A search incident to arrest has always been an exception to the fourth amendment's warrant requirement. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969). Since such a search is conducted without a warrant or probable cause to search, the Court has had, to maintain the reasonableness of the search, to limit the search to the person's body and the area under his control. Also, since such a search was allowed for the policy reasons of protecting the officer and preventing the destruction of evidence, the search could only be for articles of evidence or weapons. *See, e.g., id.*

53. The suspect was stopped for a minor traffic violation and put under full arrest upon discovery of his driving with a revoked license. The nature of the offense and the situation clearly did not give rise to any belief of danger on the part of the officer as this was a nonviolent crime, nor did it create a belief that the suspect had any "evidence" on his person, since the crime had no "evidence." The lower court found that no grounds existed for a full search incident to arrest since no probable cause existed, 414 U.S. at 227, nor was a pat-down justified without the existence of a reasonable belief. *Id.* The later holding was based on an analogy to Terry v. Ohio, 392 U.S. 1 (1968).

However, Justice Rehnquist and the majority reversed. Based on the history and the nature of a search incident to arrest, they upheld the search on the basis that an arrest based on probable cause, even without a warrant, was reasonable under the fourth amendment and, therefore, so was a search of the person, as the arrest and the search were all components of the same action. *Id.* at 235. The fact of a lawful arrest gave full authority for a full search of the person.

Terry was distinguished on the grounds that in a "stop and frisk," it was necessary to limit the extent of the intrusion as the intrusion was based only upon a limited form of probable cause—a reasonable belief. *Id.* at 228. But to try to minimize a further intrusion after the massive intrusion of a valid arrest was held to be without any justification, since the intrusion of the arrest was of a continuing and not of a limited nature. 414 U.S. at 228.

54. 414 U.S. at 237, 238. The interesting question is whether the expectation of privacy could be, in Justice Powell's view, revived in the future; if not, then a prisoner would appear to have no fourth amendment protections available while incarcerated. For this reason, the rationale of the majority—that the probable cause for arrest makes the search reasonable —seems the better decision. Once the transaction that began with the probable cause to

5. *Searches of Third Parties*

The expectation of privacy can be abated by many factors. The most complete of which is the release of control over things or information. The crucial question is, however, how much expectation is retained when one turns items or information over to a third party either because the law or the exigencies of modern life compel him to do so.

The passage of the Bank Secrecy Act in 1970 brought this question to the forefront.[55] Originally challenged in *California Bankers v. Shultz*,[56] the Act, in *United States v. Miller*,[57] was held not to violate the fourth amendment. Justice Powell, writing for the majority, found no expectation of privacy in papers neither owned nor possessed by the complaining party,[58] nor any expectation of privacy in information revealed by such a person to a third party.[59]

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arrest and ended with the search has been completed, the expectation of privacy would again increase, subject, of course, to the substantial interests of the government.

In view of the manner in which Justice Powell has balanced most fourth amendment claims, it appears likely that all he may have been saying was that at the time of arrest the government's interest was so overwhelming, and in view of the already significant intrusion caused by the arrest, the prisoner's rights were clearly outweighed. If this was truly his view, then his rationale was not very different from that of the majority.

55. 12 U.S.C.A. §§ 1730d, 1829b, 1951-59 (Cum. Supp. 1976) and 31 U.S.C.A. §§ 1051-62, 1082-83, 1101-05, 1121-22 (Cum. Supp. 1976). The Bank Secrecy Act required banks to keep microfilm records of all day-to-day transactions, and to report foreign transactions and substantial domestic transactions to the Secretary of the Treasury.

56. 416 U.S. 21 (1974). The fourth amendment challenge by certain depositors was dismissed since no evidence was produced to show that they had engaged in any of the actions which were required to be reported. The simple act of maintaining records pursuant to the requirements of the Act was held not to be a search. *Id.* at 54.

Justice Powell concurred but voiced misgivings concerning the domestic reporting provision, since no neutral judicial determination was required to check executive discretion. "At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy." *Id.* at 79.

57. 96 S. Ct. 1619 (1976).

58. 96 S. Ct. at 1623. See the discussions of fifth amendment cases which have also undercut this rationale in section III C(1) *infra*.

59. This holding simply reaffirmed the old doctrine that the fourth amendment does not prohibit the government from

> obtaining . . . information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

96 S. Ct. at 1624, *quoting* United States v. White, 401 U.S. 745, 751-52 (1971). *See also* Hoffa v. United States, 385 U.S. 293 (1966); Lopez v. United States, 373 U.S. 427 (1963).

6. *Conclusion*

The substantive fourth amendment protections provided by Justice Powell are narrower in scope than those provided by the Warren Court. This has occurred because Justice Powell has been more receptive to the interests of the state and more willing to find circumstances that mitigate the expectation of privacy. This tendency has also prevented the expansion of fourth amendment protections into areas where the Warren Court may have done so (*i.e.*, the cases involving the Bank Security Act). In the future, there will no doubt be a continuance and further refinement of this approach.

C. The Exclusionary Rule

Determination of a fourth amendment violation by itself provides no protection to an offended party. It is the judicially formulated exclusionary rule which implements the protection accorded by the Constitution. Thus, where the exclusionary rule is not applied, a fourth amendment right is a hollow protection. Justice Powell in applying the exclusionary rule has balanced in the same manner as he has in determining the extent to which the substantive protections of the fourth amendment would apply. His view has been that the rule should be applied only "where its remedial objectives will be most efficaciously served,"[60] and this has usually been found to be where the most harm could occur.

Justice Powell, writing for the majority in *United States v. Calandra*,[61] concluded that the exclusionary rule should not be extended to grand jury proceedings. He balanced the burden its application would place on the function of the grand jury against the deterrent effect it would have on violations of the fourth amendment. He determined that the extension would unduly fetter grand jury proceedings and would act only as a minimal deterrent to police misconduct.[62] The exclusionary rule and a balancing of these same underlying factors formed the basis of Justice Powell's concurring opinion in *Brown v. Illinois*.[63] The majority of the Court felt that a variety of factors should determine whether incriminating state-

60. United States v. Calandra, 414 U.S. 338 (1974).

61. *Id.*

62. *Id.* at 350-52. Justice Powell felt that the deterrence would be minimal since the benefits of the exclusionary rule were already being enjoyed. The evidence could not be used in a subsequent trial and it was therefore unlikely that a prosecutor would seek such evidence to obtain an indictment if there was no hope for a conviction.

63. 95 S. Ct. 2254 (1975). The defendant made certain incriminating statements when questioned pursuant to an arrest without a warrant or probable cause after the police had broken into his home without a warrant or probable cause.

ments obtained following an illegal arrest should be excluded.[64] Justice Powell agreed, but saw the greatest deterrent effect where the misconduct was greatest and, thus, would exclude a confession only when obtained pursuant to flagrant and purposeful violation of the fourth amendment. On the other hand, he saw only a slight deterrent effect on police where the misconduct was technical (*e.g.*, a defective warrant), and would not exclude a confession obtained in such a situation.[65]

Justice Powell's consistent advocation of disallowing federal habeas corpus appeals from state courts based on fourth amendment violations[66] was predicated on this same balancing of all interests and the same insistence that deterrence was the only justification for the rule.[67] The crucial element in his view was that the rule was a means to uphold the efficacy of the fourth amendment, and did not, in reality, bear on the question of the guilt or innocence of the person. On the other hand, a reversal by a federal court after all state appeals had been exhausted, years after the violation, would have no deterrent value whatsoever.[68] Therefore, when weighed against the injury to society by releasing a guilty individual and other considerations,[69] no reason existed to apply the rule. This belief became law in *Stone v. Powell*.[70]

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64. *Id.* at 2261-63. The majority and Justice Powell agreed that *Miranda* warnings per se could not render admissible a confession pursuant to an unlawful arrest. The majority concluded that the totality of the circumstances must be determinative and these would include: (1) *Miranda* warnings; (2) temporal proximity of the arrest and the confession; (3) presence of intervening circumstances and (4) the purpose and flagrancy of the official misconduct.

65. *Id.* at 2265-66. A problem with this approach is the potential for inconsistent determinations as to whether a particular police indiscretion was flagrant.

66. *See* Lefkowitz v. Newsome, 420 U.S. 283 (1975) (Powell, J., concurring); Cupp v. Murphy, 412 U.S. 291 (1973) (Powell, J., concurring); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (Powell, J., concurring).

67. In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights, generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

United States v. Calandra, 414 U.S. 338, 348 (1974).

68. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by federal courts harms no one but society on whom the convicted criminal is newly released.

412 U.S. at 269.

69. The concept of federalism has been important to this philosophy. Justice Powell has felt that reversals by a single lower federal court of decisions by the highest court of a state has bred friction between the two systems. Schneckloth v. Bustamonte, 412 U.S. 218, 263-64 (1973). Another consideration has been that to Justice Powell the purpose of habeas corpus is "redressing an unjust incarceration." *Id.* at 258. Justice Powell has felt that since a viola-

V. EQUAL PROTECTION REVIEW OF STATUTORY CLASSIFICATIONS

A. INTRODUCTION

In 1972, Justice Powell's first year on the Supreme Court, there began to develop a new model for the review of statutory classifications.[1] This new model represented a shift from the Warren Court two-tiered standard of analysis and a return to the traditional or old equal protection standard.[2] However, unlike the old equal protection standard, the Burger Court, and especially Justice Powell, will not hypothesize a governmental interest to

tion of the fourth amendment does not affect one's guilt or innocence, allowing habeas corpus appeals on the basis of a fourth amendment violation has been unjustified.

70. 96 S. Ct. 3037 (1976). This reversed Kaufman v. United States, 394 U.S. 217 (1969), which had originally given the right of appeal by habeas corpus petition to state prisoners. For an analysis of the *Stone v. Powell* holding see Boyte, *Federal Habeas Corpus After Stone v. Powell: A Remedy Only for the Arguably Innocent?*, 11 U. RICH. L. REV. 291 (1976).

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1. *See generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther]; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974) [hereinafter cited as Nowak]; 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) [hereinafter cited as Yackle]; Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975). *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

2. Traditional equal protection review required a substantial relationship between the legislative classification and the legislative purpose. However, this requirement received little more than "lip service." "[E]xtreme deference to imaginable supporting facts and conceivable legislative purposes was characteristic of the 'hands off' attitude of the old equal protection." Gunther, *supra* note 1, at 21. Characteristic of the old equal protection was F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

In contrast, the Warren Court developed a two-tiered standard of review with the results determined by the selection of an appropriate standard. If the interest affected was fundamental (those interests associated with the political process, interstate travel or the judicial process) or the classification was suspect (based on race or national origin) the government was required to show: (1) Its interest was compelling, not merely legitimate; (2) the class was necessary and not merely rational; (3) there was a less restrictive alternative; (4) the statute was narrowly tailored and (5) the public interest involved outweighed the detriment to the individual. This test was always fatal to the governmental interest.

The second tier was the traditional "hands off" minimum rationality. This standard of review was applied when there were neither fundamental interests nor suspect classifications involved. This "hands off" standard was especially deferential when the classification involved an economic regulation. *See generally* Gunther, *supra* note 1; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

support a classification[3] but will demand that the governmental interest be obvious or articulated. Also, the Court will demand a factual showing that the classification be rationally related to the legislative purpose. In his opinions, Justice Powell has determined rationality by the use of a case-by-case balancing approach. This flexible standard of review has become more and more an abandonment of the rigid two-tiered equal protection standard of review, where minimum rationality was "minimal scrutiny in theory and virtually none in fact," and strict scrutiny " 'strict' in theory and fatal in fact."[4]

An example of this form of review is *McGinnis v. Royster*,[5] in which Justice Powell stated the test which was to be the basis of his equal protection decisions, including, to some extent, those involving a suspect class.[6] In *McGinnis*, Justice Powell conceded that the statute drew a distinction,[7] yet held that the groupings only required some rational basis to sustain them.[8] He stated:

> We do not wish to inhibit state experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, *articulated* state purpose.[9]

The formulation stated was the traditional equal protection analysis, but with an added element—the word *articulated*. As Justice Powell stated in his opinion, "the Court supplied no imaginary basis or purpose for this . . . scheme."[10] It relied on the articulated state purpose to find that the differentiation was rational. The fact that the purpose relied upon, rehabilitation,[11] was only a secondary purpose was not important in Justice Powell's view. He emphasized that it is not for the Court to pick

3. *Compare* McGinnis v. Royster, 410 U.S. 263 (1973), *with* Railway Express Agency v. New York, 336 U.S. 106 (1949).

4. Gunther, *supra* note 1, at 8. *Accord*, Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting). *See also* Craig v. Boren, 45 U.S.L.W. 4057, 4063 n.* (U.S. Dec. 7, 1976).

5. 410 U.S. 263 (1973). State prisoners incarcerated in county jails prior to sentencing were denied good-time credit, whereas those incarcerated in state prisons prior to sentencing were given full credit.

6. *See generally* Yackle, *supra* note 1, at 213 n.164.

7. 410 U.S. at 268.

8. *Id.* at 270. *See also* Marshall v. United States, 414 U.S. 417 (1974). In *Marshall*, treatment for narcotics addiction was being denied to addicts with two or more felony convictions. Nonetheless, the Court found the denial of such treatment to be rationally related to Congress' determination that such addicts were less susceptible to rehabilitation.

9. 410 U.S. at 270 (emphasis added).

10. *Id.* at 277.

11. *Id.*

and choose legislative objectives, but to sustain the regulation as long as some legitimate state interest was advanced.[12]

Throughout the remainder of this section in the discussions concerning suspect classifications and neutral classifications, it will be shown that Justice Powell has demanded that there be an obvious or articulated state interest to support *any* statutory classification; that once such an interest has been shown, it has been weighed against the individual's interests; that the result of this balancing has determined whether the means—the statutory classification—was rationally related to the articulated legitimate state purpose. This scrutiny has been purely means oriented[13] and has not entailed the ends scrutiny reminiscent of the era of *Lochner v. New York.*[14] Also shown will be that, although the questions in all of Justice Powell's decisions in this section have concerned equal protection, the analyses have been, to a large extent, grounded in substantive due process and the results have been a combination of both, mixed with a bit of fundamental fairness.

The test articulated in *McGinnis* has been utilized consistently throughout Justice Powell's opinion. It has been relied upon more and more in recent years by other members of the Supreme Court when there has been a fourteenth amendment equal protection claim or a fifth amendment due process claim alleging discrimination by the federal government.

B. Suspect Classifications

1. *Alienage*

The pre-Burger Court had held that classifications based on race[15] and national origin[16] were inherently suspect and subject to close judicial scrutiny. In *Graham v. Richardson,*[17] the Burger Court added alienage to the

12. *Id.* at 276. *See generally* Hughes v. Alexandria Scrap Corp., 96 S. Ct. 2488 (1976). Here the Court, in an opinion by Justice Powell, sustained a requirement that out-of-state junk processors produce a Maryland motor vehicle certificate of title before they could collect a bounty for junk hulks, because the statute was rationally related to an obvious state interest in removing auto hulks from Maryland's landscape.

13. *See generally* Gunther, *supra* note 1; Yackle *supra* note 1.

14. 198 U.S. 45 (1905). With an ends scrutiny analysis, the Court decided which legislative ends were legitimate. On the basis of what appeared to be the prevailing economic theory of the day, many economic regulations were invalidated under the due process clause. *Accord, id.* at 75 (Holmes, J., dissenting).

15. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). *Cf.* Korematsu v. United States, 323 U.S. 214 (1944).

16. Oyama v. California, 332 U.S. 633 (1948).

17. 403 U.S. 365 (1971). The Court held invalid a state law denying welfare benefits to anyone not a United States citizen, and, if an alien, benefits were denied unless one had

list of suspect classifications. *Graham* held aliens to be a prime example of a "discrete and insular" minority[18] for whom a heightened judicial scrutiny was appropriate. This heightened scrutiny required the state to show a compelling justification for the classification.

In *In re Griffiths,*[19] the Court, through Justice Powell, held unconstitutional a state law denying aliens admission to the state bar. Relying on *Graham's* holding that alienage was inherently suspect, Justice Powell stated that a statute which contains a suspect classification "bears a heavy burden of justification."[20] To meet this burden, a state was required by Justice Powell to show that its interests were "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."[21] In a footnote,[22] he explained that "substantial" could be substituted for "overriding,"[23] "compelling"[24] or "important."[25] Although, these were all words of the Warren Court's strict scrutiny level of review, Justice Powell, unlike members of the Warren Court, actually examined the state's asserted interest and weighed it against the individual interest at stake.[26] Indeed, Justice Powell did not limit the Court's future review of

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resided in this country for several years. The statute was invalid under the equal protection clause and because of Congress' plenary powers over immigration and naturalization under U.S. CONST. art. 1, § 8. *See, e.g,* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

18. 403 U.S. at 372. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

19. 413 U.S. 717 (1973). The same day the Court decided Sugarman v. Dougall, 413 U.S. 634 (1973), which held unconstitutional a state statute which had denied employment in the New York Civil Service to anyone who was not a United States citizen. The flat ban could not be sustained. Yet, the Court did not hold that a person may never be discharged because he is an alien. A statute embodying "legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee" could be upheld. *Id.* at 646-47. *See also* Note, *Wandering Between Two Worlds: Employment Discrimination Against Aliens,* 16 VA. J. INT'L L. 355 (1976); Comment, *The Constitutionality of Employment Restrictions on Resident Aliens in the United States,* 24 BUFFALO L. REV. 211 (1975); 39 MO. L. REV. 241 (1974).

20. 413 U.S. at 721, *quoting* McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

21. 413 U.S. at 721-22 (footnotes omitted). In a footnote, Justice Powell explained that an intent to discriminate was not a constitutionally permissible purpose. *Id.* at 722 n.8.

22. *Id.* at 722 n.9.

23. McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

24. Graham v. Richardson, 403 U.S. 365, 375 (1971).

25. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

26. Justice Powell closely examined the state's articulated purpose of determining the character and general fitness of a member of the bar. However, there was no question of Griffiths' character and fitness. The sole reason for her exclusion was that she was an alien. Weighed against her interest in the right to work, the state was unable to carry the burden of justification.

statutory classifications of aliens to an inflexible standard where the government's interest, not only would never be sufficiently substantial, but would not even be considered. However, this past term the Supreme Court in two cases refused to extend the doctrine of *Griffiths* or *Sugarman v. Dougall*[27] to the federal government because of Congress' paramount power over immigration and naturalization.[28]

In dealing with the suspect classification of alienage, the Burger Court will apply a strict scrutiny. However, it appears that this scrutiny is more a balancing test as used by Justice Powell in *Griffiths,* than the strict scrutiny of the Warren Court and its predictable death blow to the classification. This is so because the Court will actually consider the governmental interests involved and, as seen in the two most recent cases, the classification may survive due to the weight of these interests.

2. *Race-School Desegregation*

The cases following *Brown v. Board of Education*[29] did not question the constitutional mandate to eliminate segregation, but considered instead what remedies were appropriate for dismantling dual systems.[30] For southern urban schools, massive busing became the solution.[31] However, the cases mandating this remedy have all dealt with school systems that historically have maintained dual systems through which state and local officials had purposefully engaged in discrimination.[32] Consequently, the southern school cases were limited by their facts. They did not answer the question as to whether a remedy existed for segregated districts where there had been no showing of an intent to discriminate.[33] It appeared as

27. *See* note 19 *supra.*

28. U.S. CONST. art. 1, § 8. In Hampton v. Mow Sun Wong, 96 S. Ct. 1895 (1976), the Court rejected the notion that all resident aliens may be arbitrarily subjected to substantive rules different than those applied to citizens by any agency of the national government. *Id.* at 1904. However, the Court did recognize the national interest in flexibility of foreign affairs.

In Mathews v. Diaz, 96 S. Ct. 1883 (1976), the Court upheld a congressional requirement that in order to be eligible for welfare benefits an alien must have been legally admitted, have been a resident continuously for five years and have been admitted for permanent residence.

29. 347 U.S. 483 (1954).

30. 52 N.C.L. REV. 431 (1973). *See* Green v. County School Bd., 391 U.S. 430 (1968), where freedom of choice was found to be an ineffective tool in the abolition of a segregated system. The school board was charged with an affirmative duty to formulate an immediate solution.

31. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), authorized the use of busing within reasonable limits of time and distance, along with the grouping of noncontiguous school zones as permissible tools of desegregation.

32. *See* Amak, *Milliken v. Bradley: The Meaning of the Constitution in School Desegregation Cases,* 2 HASTINGS CONST. L.Q. 349, 357 (1975).

33. *See generally* Comment, *Keyes v. School District No. 1: Unlocking the Northern*

though the answer would come in *Keyes v. School District No. 1*,[34] but the majority searched for and found an intent to discriminate on the part of the school board.

Justice Powell, concurring in part and dissenting in part, addressed himself to two issues of the majority's opinion. He first attacked the continued use of the de facto-de jure distinction and the failure of the majority to pronounce a uniform desegregation rule of national, not just regional, application. The de facto-de jure distinction, in his view, had resulted in a lack of progress towards integration of nonsouthern schools which did not have a history of purposeful segregation.[35] While the majority had looked to the cause of segregation, Justice Powell wanted the Court to look at the effect. In all major cities, the housing and migratory patterns were such that the segregation of schools was seldom the result of official action.[36] Justice Powell stated that where a segregated school existed, a prima facie case of intent should be found and the burden should be placed on the school board, because of its affirmative duty to promote integration, to demonstrate that they had operated a genuinely integrated school.[37]

The second major issue addressed was the Court's remedy. The lower federal courts had been reading *Swann* as requiring massive busing to achieve maximum desegregation.[38] Justice Powell called for a flexible remedy that would balance the quest for desegregation with the competing community interest in neighborhood education. He would not completely prohibit court-ordered busing but would require that greater respect be given the legitimate community interest in neighborhood schools.[39] This

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Schoolhouse Doors, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 124 (1974) [hereinafter cited as *Unlocking*].

34. 413 U.S. 189 (1973). Without questioning the de jure-de facto distinction, Justice Brennan set forth criteria that would facilitate a finding of de jure discrimination in northern areas without a background of state-mandated segregation. First, if the plaintiff could show that the school authorities had carried out a systematic program of segregation affecting a substantial proportion of the students, school, teachers and facilities, absent a showing that the system was divided into unrelated districts, the court was authorized to find the system a dual system and invoke the remedies of *Swann*. Second, if an intent to segregate was found in one area of the school district, it was proof of intent to segregate in the other areas of that district which would result in a district-wide remedy.

35. *Id.* at 218-19. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 3-5 (1971).

36. 413 U.S. at 222-23. For the Court to determine the cause of segregation, it would have to look for a subjective intent to segregate. The elimination of the de jure-de facto distinction would establish an objective national test. Justice Powell saw no basis for the Court to look to the effect in Virginia, as it did in Wright v. Council of City of Emporia, 407 U.S. 451 (1972), and then look to the cause in Colorado. 413 U.S. at 231.

37. 413 U.S. at 224. *See Unlocking*, *supra* note 33, at 145-46.

38. 413 U.S. 237-38. See note 31 *supra* for a discussion of *Swann*.

39. *Id.* at 251.

opinion represented an endeavor by Justice Powell to find a result that was fundamentally fair.

Since *Keyes*, the de facto-de jure distinction has persisted. In *Milliken v. Bradley*,[40] a multidistrict remedy ordered by a lower federal court was overruled because there had been no showing of purposeful or intentional segregation in any of the effected districts other than the one district where the segregation was found. Even if the Court had applied Justice Powell's opinion in *Keyes* and had looked to the effect, the results may not have been different because of Justice Powell's strong emphasis on the people's interest in neighborhood schools.[41] Last term in *Pasadena City Board of Education v. Spangler*,[42] a year-by-year review by a lower federal court of Pasadena's school system was found to be beyond the authority of the district court. Once the city had remedied the past de jure discrimination, the school system could not be subjected to future scrutiny, absent a new showing of an intent to discriminate. To have followed Justice Powell's decision in *Keyes* may have, in this case, put an affirmative duty on the school board to run an integrated school system. However, the standard Justice Powell stated in *Keyes* was a balancing test. Furthermore

> [a]n integrated school system does not mean—and indeed could not mean in view of the residential patterns of most of our major metropolitan areas—that *every school* must in fact be an integrated unit.[43]

Another recent case where the Court examined an intent or purpose to discriminate was *Washington v. Davis*.[44] The Court in *Washington* stated that simply because a law had a racially disproportionate impact did not make it unconstitutional without a showing of a racially discriminatory purpose.[45] The Court, referring to *Keyes*, emphasized the need for an intent

40. 418 U.S. 17 (1974). The lower federal court had ordered a multidistrict remedy after a finding of de jure segregation in one school district. The Supreme Court held that the remedy exceeded the wrong. *Id.* at 744-45.

41. 413 U.S. at 240. "Where desegregation steps are possible within the framework of a system of 'neighborhood education,' school authorities must pursue them." *Id.*

42. 96 S. Ct. 2697 (1976). The school board sought relief from a 1970 district court order that there were to be no schools with a majority of minority students. The school board had complied, but failure to restructure the school district each year to compensate for shifts in population had resulted in nonliteral compliance with the lower court's order.

43. 413 U.S. at 226-27.

44. 96 S. Ct. 2040 (1976). The District of Columbia Police Department required all applicants to pass a written personnel test. Based on results of this test, a disproportionately high number of black applicants were denied employment. For an analysis of the case see 11 U. RICH. L. REV. 209 (1976).

45. *Id.* at 2047.

or purpose to segregate.[46] Justice Powell voted with the majority in *Washington* as he had in *Milliken* and *Pasadena.* While his vote in *Washington* is difficult to reconcile with his *Keyes* opinion, possibly his vote with the majority can be explained because of the difference in subject matter. Perhaps it was because the law was neutral on its face and had only a disproportionate impact and for the Court to have held such a law unconstitutional would have had a grave impact on tax, welfare, public employment and licensing statutes.[47] It is possible, also, that he voted with the majority because the verbal personnel tests were rationally related to the state's interest in having police officers with certain minimum verbal skills.

3. *Conclusion*

The area of suspect classification scrutiny is an example of the Burger Court's shift from the rigid levels of scrutiny of the Warren Court.[48] The scrutiny is still intensive, but not necessarily fatal to the classification. This has been true because the Court has been willing, as in *Griffiths*, to consider the interests of all parties, even though the state has continued to carry a heavy burden. Further evidence of this desire to maintain flexibility has been the Court's refusal to add to the list of suspect classifications since *Graham*.[49] However, in the area of race, flexibility, although advocated by Justice Powell in *Keyes,* has not been the standard, since no remedy has been provided regardless of the hardship involved, without a showing of intent to discriminate.

C. Neutral Classifications

1. *Sex-Based Classifications*[50]

Not until 1971 in *Reed v. Reed*[51] was a gender-based classification de-

46. *Id.* at 2049.50. *Accord,* Village of Arlington Heights v. Metropolitan Housing Devel. Corp., 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977).

47. *Id.* at 2051-52. *See also* Goodman, *De Facto School Segregation: Constitutional and Empirical Analysis,* 60 Calif. L. Rev. 275, 300 (1972), *as cited in* 96 S. Ct. at 2052 n.14.

48. Gunther suggested that there was a growing discontent with the Warren Court two-tiered standard of review even in 1972. Gunther, *supra* note 1, at 12.

49. Not only has the Court not created many new suspect classifications, it has refused to recognize new fundamental interests which also had triggered strict scrutiny by the Warren Court. *See, e.g.,* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973). For further discussion on the nature of a suspect class and what may constitute a fundamental right, see notes 97-103 *infra* and accompanying text.

50. *See generally* Nowak, *supra* note 1. These "neutral" classifications have included sex, illegitimacy and wealth.

51. 404 U.S. 71 (1971). *Reed* held a state statute which gave preference to males over females as administrators unconstitutional.

clared to be unconstitutional. Prior to *Reed*, the Court had generally applied a "hands off" rational basis test to all sex-based classifications.[52] But even today, "the Court [has] never developed a principled basis for determinging what sorts of governmentally-ordered discriminations are sex-based," nor has the Court ever "reached [a] consensus on the mode of equal protection or due process analysis that should be applied to gender-based discrimination."[53]

This lack of consensus is readily ascertainable by examining three cases. In *Reed*, the Court applied the traditional rational basis test of *F.S. Royster Guano Co. v. Virginia*[54] and inquired if the statutory classification had a fair and substantial relation to the governmental interest. In *Stanley v. Illinois*,[55] the Court used the due process, irrebuttable presumption standard of review to overturn a state statute. In 1973, in *Frontiero v. Richardson*,[56] four Justices,[57] without relying on either precedent, attempted to add sex to the list of suspect classifications.[58]

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52. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948), where the Court upheld a statute forbidding a woman to be a bartender unless she was the wife or daughter of the barkeeper; Muller v. Oregon, 208 U.S. 412 (1908), where the Court upheld a statute prescribing a maximum workday for women. *Cf.* Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), in which the Court invalidated laws setting minimum wages for women because the legislation interfered with the liberty of contract.

53. Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A. L. REV. 235 (1975) [hereinafter cited as Johnston]. *See generally* Lombard, *Sex: A Classification in Search of Strict Scrutiny*, 21 WAYNE L. REV. 1355 (1975); Comment, *The Supreme Court 1974 Term and Sex-Based Classifications: Avoiding a Standard of Review*, 19 ST. LOUIS U.L.J. 375 (1975).

54. 253 U.S. 412 (1920). *See also* note 2 *supra*.

55. 405 U.S. 645 (1972). The state statute in question presumed that an unmarried father was unfit to take custody of his children and denied him a hearing to prove his fitness.

56. 411 U.S. 677 (1973). A federal statute required a female member of the armed services to demonstrate that her husband was dependent upon her for more than half of his expenses; however, it was presumed that the wife of a serviceman was dependent upon her husband for more than half of her living expenses. The Court relied on the equal protection element of the due process clause of the fifth amendment. *See also* Bolling v. Sharpe, 347 U.S. 497 (1954).

57. These four were Justices Brennan, Douglas, Marshall and White. Justice Brennan in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), did not invoke the suspect class standard review; in Geduldig v. Aiello, 417 U.S. 484 (1974), Justice White also departed from the suspect classification analysis; Justice Douglas had been the first to retreat from this position in Kahn v. Shevin, 416 U.S. 351 (1974). *Contra*, Mathews v. Lucas, 96 S. Ct. 2755 (1976), where Justice Blackmun, who had joined Justice Powell's concurring opinion in *Frontiero*, placed sex next to race as a classification which carries an obvious badge of discrimination. *Id.* at 2762. *See* Johnston, *supra* note 53, at 238.

58. It is questionable if the plurality really did apply the strict scrutiny level of review. They stated that the statutory classification could not be supported "solely for the purpose

Justice Powell concurred in the Court's results but not in its opinion in *Frontiero*, because of the "far reaching implications of such a holding."[59] *Reed* had not added sex to the list of suspect claims and to Justice Powell *Reed* was controlling. In *Frontiero*, as in *Reed*, Justice Powell would have demanded a showing that the classification was substantially related to the government's purpose of providing benefits for dependents of uniformed service personnel.[60] He would have weighed the government's interest in administrative convenience against the statutory classification.

It appeared that Justice Powell's reluctance to designate sex as suspect may have resulted from a justifiable fear that such action would commit the Court to an inflexible compelling interest test in all future litigation involving gender classifications.[61] To Justice Powell, the rational basis test of *Reed* was sufficient to overturn the regulation, therefore, declaring sex suspect was unnecessary.

In *Cleveland Board of Education v. LaFleur*,[62] the Court again returned to its "irrebuttable presumption" analysis and held that school board regulations concerning pregnancy leave created an irrebuttable presumption that interfered with matters of marriage and family life, one of the liberties protected by the due process clause.[63]

Justice Powell again concurred in the Court's result but not with its opinion.[64] The Court's use of the irrebuttable presumption analysis of

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of achieving administrative convenience . . . ." 411 U.S. at 690. This appears merely to be a more rigorous application of the old minimum rationality test. *See generally* Nowak, *supra* note 1, at 1081-82. This standard of review has been called by Nowak "the demonstrable basis standard." It required the state to demonstrate a factual relationship between a state's interest, capable of sustaining the analysis, and the means chosen to advance that interest. In *Frontiero*, the state's interest of administrative convenience did not withstand analysis.

59. 411 U.S. at 691-92. Justice Powell also preferred to delay any addition of sex to the group of suspect classes because of the pending adoption of the equal rights amendment to the United States Constitution which would resolve the dispute without preempting a major political decision. *Id.* at 692.

60. *Id.*

61. Nowak, *supra* note 1, at 1079.

62. 414 U.S. 632 (1974).

63. 414 U.S. at 639, 648. The school board compelled a teacher to quit her job several months before the expected birth of her child and prohibited a return to work until three months after childbirth. In a footnote, Justice Powell stated that he did not reach the question of whether these regulations involved sex classifications or disability classifications. *Id.* at 653 n.2 (Powell, J., concurring). *Accord,* Geduldig v. Aiello, 417 U.S. 484 (1974). *See generally* Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975). *Accord*, General Electric Co. v. Gilbert, 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976).

64. One basis for Justice Powell's disfavor with the majority opinion was that, although the regulation added burdens to childbearing, Congress had a similar right in its ability to

Stanley appeared to trouble Justice Powell because of the implications of the doctrine to the traditional legislative power to classify.[65] Justice Powell felt that the Court should have applied an equal protection analysis, since the constitutional difficulty was with the irrational classification, not with the board's decision to classify.[66]

In determining this irrationality, Justice Powell examined the governmental interest to be served and how this interest was promoted by the classification. His analysis was a rigorous rational basis standard of review. He pointed out that the legislative objectives (the "ends") were legitimate, but that they were not furthered by the statutory classification (the "means").[67] Hence, the statute was violative of the equal protection clause.

Since *LaFleur*, the Court has decided several cases challenging sex-based classifications. In each case, the results have depended upon whether the classification had perpetuated past discrimination[68] or whether it was benign and viewed by the Court as a remedy for past discrimination.[69] One case in which past discrimination was perpetuated was *Weinberger v. Wiesenfeld*.[70] The majority, however, did not specify a

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limit tax deductions in order to discourage excessive population growth. He cited Dandridge v. Williams, 397 U.S. 471 (1970), to illustrate his point. 411 U.S. at 651. In that case, the Congress had placed a $250 per month limit on welfare benefits regardless of family size.

65. 414 U.S. at 652.

66. *Id.* As pointed out in note 63 *supra*, Justice Powell did not treat this as a sex classification, yet he applied the same test as though it had been. The implication seems to be that, in the view of Justice Powell, this rigorous rational basis test is applicable to almost any equal protection claim.

67. In fact, Justice Powell determined that the asserted interest in continuity of teaching was actually hindered by the cut-off date. *Id.* at 654.

68. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975), where a state statute which distinguished between the ages of majority for males and females could not survive an equal protection attack under *any* test. *See also* Taylor v. Louisiana, 419 U.S. 522 (1975), where a law which excluded women from jury duty unless they submitted a written declaration of their desire to serve was held in violation of the sixth amendment because a jury without women could not be a representative cross section of the community. For more discussion of *Stanton*, see 7 TEX. TECH. U.L. REV. 161 (1975). *See also* Frontiero v. Richardson, 411 U.S. 677, 689 n.22 (1973), where the Court identified various statutes as placing additional disadvantages on women.

69. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975), which upheld a congressional mandate for discharge of male Navy officers who twice were passed over for promotion; whereas, female officers were guaranteed at least thirteen years service before mandatory discharge. *See also* Kahn v. Shevin, 416 U.S. 351 (1974), which upheld a Florida statute that gave a property tax exemption to widows but not widowers.

70. 420 U.S. 636 (1975). A husband-father challenged the Social Security Act which paid benefits to a widow and the couple's minor child based on the earnings of the deceased father and husband but denied benefits to a widower after the death of the wife and mother wage-earner. The majority found that the gender-based differentiation resulted in less protection

test,[71] but it did apply a relatively high level of scrutiny,[72] making the opinion an excellent example of the Court's use of Justice Powell's technique of examining the government's objectives and then determining if these objectives had been substantially furthered by the statutory classification.

It is obvious that neither Justice Powell nor a majority of the Court will apply the strict scrutiny-compelling interest test to classifications based on sex. "It is equally clear, however, that the Court is serious about examining the governmental interest asserted in support of statutes and regulations that discriminate on the basis of sex."[73] Exactly what standard of review the Court will decide on is still not settled. This past term in *Turner v. Department of Employment,*[74] the Court returned to the irrebuttable presumption analysis of *LaFleur* and *Stanley* in a per curiam decision. However, it appears from a majority of the cases that, whichever form of analysis is utilized, Justice Powell and the Court will apply a more intense rational basis test than did the Warren Court.

2. *Illegitimacy*

Unlike sex-based classifications, the standard of equal protection review seems to have been determined for statutes affecting illegitimates. In the 1968 cases of *Levy v. Louisiana*[75] and *Glona v. American Guarantee & Liability Insurance Co.,*[76] it appeared as though the Warren Court had

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for the families of women wage-earners than was afforded families of men wage-earners. *Id.* at 645.

> The *Wiesenfeld* opinion suggests the Court's readiness to look beneath the surface of 'benign' or 'compensatory' rationalizations, and to strike classifications based on the notion that social roles are prescribed by sex, that woman's first job is wife and mother, man's, doctor, lawyer or Indian chief.

Ginsburg, *Gender and the Constitution,* 44 U. CINN. L. REV. 1, 14 (1975) [hereinafter cited as Ginsburg].

71. Johnston, *supra* note 53, at 256. Justice Powell concurred in the result, but disagreed as to where the discrimination took place.

72. *See generally* 5 N. MEX. L. REV. 335 (1975).

73. Johnson, *supra* note 53, at 261.

74. 96 S. Ct. 249 (1975). A Utah statute made pregnant women ineligible for unemployment benefits during a period from twelve weeks before expected birth to six weeks after childbirth.

75. 391 U.S. 68 (1968). A Louisiana wrongful death statute that barred unacknowledged illegitimate children from recovering for the death of their mother was held to be unconstitutional.

76. 391 U.S. 73 (1968). A Louisiana wrongful death statute that barred a mother from recovering for the death of her unacknowledged illegitimate child was found to be unconstitutional.

added illegitimacy to the list of suspect classes.[77] Then, in *Labine v. Vincent*,[78] decided in 1971, an illegitimacy classification was sustained. In *Glona*, the Court had stated a rational basis test; in *Labine* the Court applied it. However, in *Weber v. Aetna Casualty & Surety Co.*,[79] because a total deprivation had been suffered, Justice Powell held that *Levy*, where a total deprivation had also been suffered, and not *Labine*,[80] controlled.[81]

After *Weber*, the Court decided all challenges to classifications dealing with illegitimates on the basis of that case.[82] However, this term in

77. When these two cases were decided, there were only two levels of review, strict and minimum. Since the statutes had not withstood the attack, it was assumed, in 1968, that strict scrutiny had been applied. Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479, 482 (1974).

78. 401 U.S. 532 (1971). A Louisiana intestate succession statute subordinated the claims of an acknowledged illegitimate child to the claims of legitimate children in the sharing of their father's estate. The Court in *Labine* distinguished *Levy* and *Glona* as being based on tort, *id.* at 535, whereas *Labine* dealt with the state's interest in disposition of property left within the state. *Id.* at 536 n.6.

The Court in *Glona* had found that there was no rational basis for prohibiting a mother from recovering for the wrongful death of her son. 391 U.S. at 74-75. The statute in *Labine* was found to have a rational basis. 401 U.S. at 536. Unlike *Levy*, the state in *Labine* had not created an insurmountable obstacle to the illegitimate child. The father could leave a will, marry the mother or legitimize the child.

79. 406 U.S. 164 (1972). Louisiana's Workmen's Compensation laws relegated unacknowledged illegitimates to the position of other dependents, allowing recovery only if the legitimate and acknowledged illegitimate children did not exhaust the maximum compensation benefits awarded.

80. The children in *Weber* could not have been acknowledged by the father because Louisiana prohibited the acknowledgment of children whose parents were unable to marry. In *Levy*, whether the child was acknowledged or unacknowledged he could not recover. In *Labine*, the father could easily have changed the status of his illegitimate daughter.

81. In *Weber*, Justice Powell articulated a test which would seem to have applicability to all equal protection cases.

> [T]his Court requires, at a minimum, that a statutory classification bear some rational relation to a legitimate state purpose . . . . Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny.

406 U.S. at 172 (citations omitted). (The omitted citations are both minimum rationality and strict scrutiny cases.) This test, although very similar to traditional equal protection scrutiny, is in essence a balancing test-the interests of the state versus the interests of the individual.

Weber has also given a clear indication that, when a complete deprivation has occurred, the Court will apply a stricter scrutiny, for three articulated state interests were held to be outweighed in importance by the damage to the individual. The state claimed an interest in 1) legitimate family relationships; 2) preventing false claims and 3) administrative convenience. 406 U.S. at 173-74. *See generally* Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479 (1974).

Not to be ignored in this balancing is the sense of fundamental fairness that has permeated this and many other of Justice Powell's opinions:

Mathews v. Lucas[83] the Court, distinguishing earlier cases, relied on *Labine,* the only case dealing with illegitimates which had upheld the statutory classification to uphold a classification based on illegitimacy.[84] The Court flatly disagreed with the lower court's holding that illegitimacy was suspect,[85] but also stated that the scrutiny to be employed was "not a toothless one."[86]

The standard of scrutiny which the Court will employ when analyzing illegitimacy-based classifications seems to be settled by *Mathews.* Based on Justice Powell's dual-inquiry balancing test, such a classification will be upheld only when the individual's interest does not outweigh the government's interest. This analysis will be means-focused, as in all of Justice Powell's equal protection opinions, with the Court closely examining the government's purpose to see if it is substantially furthered by the statutory classification.

3. *Wealth*

A wealth classification by itself cannot support an equal protection claim, but coupled with a fundamental interest the Court will scrutinize

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> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.

406 U.S. at 175.

82. Jimenez v. Weinberger, 417 U.S. 629 (1974), where the Court held unconstitutional a provision which denied disability insurance benefits to afterborn illegitimates, since the primary purpose was to provide support for dependents (not simply legitimate dependents) of disabled wage earners. The government's interest in preventing spurious claims was held insufficient. *See* New Jersey Welfare Rights Org'n v. Cahill, 411 U.S. 619 (1973) (per curiam), where a program which denied health benefits to illegitimates because the parents were not married was overturned. *See also* Gomez v. Perez, 409 U.S. 535 (1973) (per curiam), which held that once a state has granted a judicially enforceable right on behalf of children to support from their natural father, there could be no constitutionally-sufficient justification for denying such an essential right to illegitimate children.

83. 96 S. Ct. 2755 (1976). The Social Security Act presumed the dependency of legitimate children and denied benefits to any illegitimate child who could not prove dependency on the father at the time of his death.

84. *Id.* at 2762.

85. *Id.* at 2761-62.

86. *Id.* at 2764. The Court scrutinized the government's claim that the classification would prevent spurious claims and found the interest substantial. In *Weber,* this governmental interest, although substantial, was not sufficient. However, it was found to be sufficient in this case. The difference probably can be found in the differing weight accorded the interest of the individual in the balancing process. In *Weber,* there was a complete deprivation, while in *Mathews* the deprivation was not complete since the child needed only to have rebutted the presumption to get the same benefits as a legitimate child.

the claim more closely.[87] In his first term, Justice Powell, in *James v. Strange*,[88] was faced with the claim that a state recoupment statute interfered with the constitutional right to counsel in felony cases.[89] Instead of deciding the claim on sixth amendment grounds, Justice Powell declared the statute to be unconstitutional under the equal protection clause.[90]

The standard of review applied was more stringent than the old minimum rationality and almost identical to the standard of review for classifications based on illegitimacy. Justice Powell closely examined the state's interest in recouping expended funds and found this interest to be important.[91] However, there was no articulated state purpose for the difference in treatment accorded indigents, as opposed to other judgment creditors,[92] and Justice Powell did not infer a purpose which could have supported the classification. Therefore, the means used to ensure recoupment (affording less protection to indigent defendants) were not rationally related to the state's purpose of recouping money spent. Moreover, an element of *fairness* was noticeable throughout the opinion. There was constant reference to "harsh conditions," "hardship," "discourages the search for self-sufficiency," "denying him the means to keep himself and his family afloat," and Justice Powell characterized the statute as punitive and discriminatory.[93]

In *San Antonio Independent School District v. Rodriguez*,[94] wealth dis-

87. *See, e.g.*, Memorial Hosp. v. Maricopa Cty., 415 U.S. 250 (1974) (right to travel interstate); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on first appeal as of right). *See also* Clune, *Wealth Discrimination in School Finance*, 68 NEV. U.L. REV. 651, 655 (1973).

88. 407 U.S. 128 (1972). A state statute provided for the recovery of counsel and other legal fees from the indigent defendant in a subsequent civil proceeding.

89. *See* Douglas v. California, 372 U.S. 353 (1963) (right to counsel on first appeal as of right); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel in all felony cases). *See also* Ross v. Moffit, 417 U.S. 600 (1974) (*Douglas* not extended to discretionary appeals); Fuller v. Oregon, 417 U.S. 40 (1974) (state's recoupment statute held constitutional).

90. 407 U.S. at 140-41.

91. *Id.* at 141.

92. *Id.* at 135. The indigent's wages could be garnished without limit. His clothes, books and tools were not exempt. Even his food, fuel, clothing and family burial plot could be attached. None of these items could be taken from other judgment creditors.

93. Yackle, *supra* note 1, at 212. Yackle has compared Justice Powell's search for fairness in equal protection with Justice Harlan's "eloquent defense of the notions of fundamental fairness he found embodied in due process." *Id.* at 210.

94. 411 U.S. 1 (1973). *See generally* Morgan & Yudof, *Rodriguez v. San Antonio Independent School District: Gathering the Ayes of Texas—The Politics of School Finance Reform*, 38 L. & CONTEMP. PROB. 383, 402 (1974); Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973) [hereinafter cited as Richards].

crimination was again the issue. However, it was not coupled with a previously declared fundamental right but with education,[95] which at that time was a close candidate for inclusion in the list of fundamental rights. The challengers hoped that the combination of the two would be sufficient to overturn the Texas system of school financing.[96]

Writing for the majority, Justice Powell first determined that wealth, at least on the facts in the case, was not a suspect classification. This determination was predicated on the fact that, although some forms of wealth discrimination may have occurred,[97] none of the forms of discrimination was against an identifiable class.[98] The group was not identifiable since there was "reason to believe that the poorest families are not necessarily clustered in the poorest property districts."[99] Nor was there an absolute deprivation of the desired benefit,[100] since "at least where wealth is in-

95. The system of school financing in Texas was very complex. The discrimination complained of had arisen from the fact that a school district was required to reimburse the state for twenty percent of its expenditures for schooling in the district. Any amount raised by property taxes which exceeded the twenty percent could be used by the district to supplement the state funding of its schools. This gave rise to greater per pupil expenditures in "affluent" districts than in other districts.

96. The district court found wealth a suspect classification and education was a fundamental interest. It had also held that on the basis of wealth, the system discriminated in the manner in which education was provided for its people and required the state to show that the system was premised upon some compelling state interest. 411 U.S. at 16.

The state admitted the system had "defects" and "imperfections" and that if the compelling interest test was applied, the Texas finance system, as well as virtually every other state school finance system, would not pass. *Id.* at 16-17. *See generally* Richards, *supra* note 94, at 35.

97. (1) against 'poor' persons . . . who might be characterized as functionally 'indigent,' (2) against those who are relatively poorer than others, (3) against all those who, irrespective of their personal income, happen to reside in relatively poorer school districts.

Id. at 19-20.

98. These groups were not a "discrete and insular minority" as found in Graham v. Richardson, 403 U.S. 365, 372 (1971). *See* notes 17-18 *supra* and accompanying text. Therefore, there was no way in which the traditional indicia of suspectness, a history of purposeful unequal treatment and a position of political powerlessness, could exist. 411 U.S. at 28.

99. 411 U.S. at 23.

100. *Id.* at 19-20. In the text of the opinion, Justice Powell cited several cases to illustrate this point. In all of the cases cited, there was an *absolute* denial of a benefit. It is significant that in all the cases he discussed, the benefit could be linked to a fundamental interest. *See, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972) (access to the ballot); Tate v. Short, 401 U.S. 395 (1971) (access to the judicial process). Later in the opinion, Justice Powell said, "this court has never heretofore held that wealth discrimination *alone* provides an adequate basis for invoking strict scrutiny. . . ." 411 U.S. at 29 (emphasis added). *See also* Roos, *The Potential Impact of Rodriguez on Other School Reform Litigation*, 38 L. & CONTEMP. PROB. 566, 578 (1973) [hereinafter cited as Roos].

volved, the equal protection clause does not require absolute equality or precisely equal advantages."[101] Justice Powell also rejected the contention that education was a fundamental right on the basis that the Constitution had neither expressly nor implicitly guaranteed the right to an education.[102] Moreover, the facts of the case had not indicated any infringement on first amendment rights or the right to vote caused by the differentials in educational opportunities,[103] therefore these fundamental interests were not involved.

Since strict scrutiny was not appropriate, Justice Powell turned to the traditional standard of review "which requires only that the State's system [of financing education] be shown to bear some rational relationship to legitimate state purposes."[104] Like all of Justice Powell's decisions in this field, this was more than traditional "hands off" minimum rationality. He demanded a showing of some articulated state purpose sufficient to relate to the system of finance used. The articulated state purpose in *Rodriguez* was local control.[105]

The significance of *Rodriguez* lies in Justice Powell's "thorough and revealing inquiry into the equal protection doctrine."[106] The opinion revealed that to be a suspect classification there must exist an identifiable class that has suffered a total deprivation of a right.[107] However, the opin-

101. 411 U.S. at 24. *See also* Yackle, *supra* note 1, at 217.

102. 411 U.S. at 33. Justice Powell also emphasized that it was not for the Court to create substantive constitutional rights. What is fundamental is not determined by how important one interest is as compared with another interest. *See* Roos, *supra* note 100, at 567; Yackle, *supra* note 1, at 228.

103. *Id.* at 35-37.

104. 411 U.S. at 40. Justice Powell pointed out that this was really a case questioning a state's taxing power, an area from which the Court has traditionally stayed clear. Since most states operate their school finance systems in much the same manner as Texas, for the Court to overturn the system could have caused chaos and interfered with the system of federalism. *Id.* at 40, 56-59.

Furthermore, the case dealt with educational policy, a very complex area where the Court lacks competence and where legislative judgment should be given respect. *Id.* at 42.

105. *Id.* at 53-54. *Contra*, Nowak, *supra* note 1, at 1116-17. The Court in *Rodriguez* never inquired whether the system in fact bore a rational relation to the state interest which could withstand analysis.

106. Yackle, *supra* note 1, at 215.

107. The benefit derived from being a suspect classification has been the fact that the statutory classification seldom withstood scrutiny. However, as noted in the discussion of classifications based on alienage (*see* section III B(1) *supra*), the Burger Court, even when dealing with such a classification, will not inevitably strike down the classification. *See* note 28 *supra*. This result has occurred because of the balancing form of scrutiny espoused by Justice Powell. Therefore, since all factors will be evaluated, whether a classification is suspect or not seems no longer determinative, but simply a factor to be considered along with all other factors in the particular case.

ion also revealed that once the determination has been made that a classification was not suspect, further inquiry would not foreclosed. The interest of the state would still be weighed against the interest of the individual in light of what would seem fundamentally fair.

D. Conclusion

As in most other areas of the law, the Burger Court has brought to equal protection scrutiny a flexible standard of review. This tendency has been accelerated by Justice Powell and his desire to accommodate all interests.[108] Minimum scrutiny of the Warren Court was a complete abdication to the interests of the state. Strict scrutiny was a complete abdication to the interests of the individual. The desire of both the Burger Court and Justice Powell to avoid being locked into these rigid forms of analysis has caused a definite shift in equal protection analysis from the Warren Court years.

This shift was best exemplified in *Rodriguez*. Justice Powell shied away from creating another suspect class or fundamental interest so as to avoid being locked into a strict scrutiny form of analysis. Yet, the analysis performed was not minimum rationality review. It was a flexible analysis that concerned itself with the interests of both the state and the individual with deference to neither. The fact that the classification was not suspect did not automatically affect the result, since the form of analysis in the case, and seemingly in all current equal protection analysis, did not depend on the description of the classification but rather on the interests of the parties involved.

VI. FIRST AMENDMENT

A. Introduction

The language of the first amendment to the United States Constitution[1]

108. Compare Justice Powell's equal protection analysis with the due process analysis of Nebbia v. New York, 291 U.S. 502 (1934): "The guaranty of due process . . . demands only that the law shall not be unreasonable . . . and the means selected shall have a real and substantial relation to the object sought to be attained." *Id.* at 525.

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

U.S. Const. amend. I. The first amendment was made applicable to the states through the fourteenth amendment. *See, e.g.*, Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

is plain. However, what this apparently simple set of phrases means has produced a constant stream of litigation over the last fifty years. It is not the object of this section to attempt an examination of all facets of first amendment litigation.[2] Rather, narrow concerns in broad first amendment areas have been selected to demonstrate how Justice Powell typically deals with several important aspects of constitutional concern. For purposes of analysis, several areas of the first amendment will be examined independently with the realization that they are actually greatly intertwined.[3]

B. Freedom of Speech

Included in the area of freedom of speech are many problems, such as content of speech restrictions, the clash of important governmental interests with freedom of speech and the problem of the captive audience. To say that Justice Powell has a comprehensive theory for resolving first amendment problems would be misleading.[4] There are, however, doctrinal threads that run through his opinions. He has noted many times the importance of freedom of speech in our society.[5] However, he also has been keenly aware that legitimate governmental interests at times can be so important that some speech must be curtailed.[6] To prevent the dominance by one group of interests, Justice Powell, as he has done in most other areas, has balanced all the interests so as to find a just solution.[7]

1. *Access to the Public Forum*

The streets and sidewalks of every municipality historically have been appropriate forums for the dissemination of information and the communi-

2. "The lines drawn by the Supreme Court in first amendment cases have always been wavering and uncertain ones, and it is no easier to say where [the Court] is headed in this respect than to sum up where the Court stood at any earlier juncture." Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 Mich. L. Rev. 445, 459 (1972).

3. *See, e.g.*, Pell v. Procunier, 417 U.S. 817 (1974); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add To Freedom of Speech?*, 26 Hastings L.J. 639 (1975).

4. *Compare* Justice Powell's use of overbreadth in Lewis v. City of New Orleans, 415 U.S. 130 (1974) (Powell, J., concurring), *with* his suggestion in Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (Powell, J., dissenting), that "fighting words" was a broader concept than the majority recognized.

5. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting).

6. *See* Procunier v. Martinez, 416 U.S. 396 (1974).

7. Justice Powell has often been compared to the late Justice Harlan because of his use of a balancing methodology in first amendment cases. *See generally* Gunther, *In Search of Judicial Quality on a Changing Court: the Case of Justice Powell*, 24 Stan. L.R. 1001 (1973)[hereinafter cited as Gunther]. Professor Gunther stated that the Harlanesque balancing approach is one which avoids categorical answers and simplistic rules but which is rich in sensitive, candid and articulate perceptions of the competing interests. *Id.* at 1013-14.

cation of ideas. Individuals cannot be totally banned from exercising their right of free speech on the ground that title to the property is in the municipality.[8] However, restrictions on access to private property have been treated in a different fashion.[9]

The Warren Court in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*[10] searched for a means to treat private property the same as public property so as to prevent the restriction of the union's first amendment rights. The means derived was to label the property "the functional equivalent" of a "business block." Although the case indicated that the Warren Court felt that actions on truly private property would not give rise to any first amendment rights, the Court did show its preference for first amendment rights by developing a test that, once fulfilled, overcame the rights of the property owner.

The Burger Court, beginning with Justice Powell's decision in *Lloyd Corp. v. Tanner*,[12] has shown much more solicitude for the rights of the property owner. This solicitude has been manifested by a steady drift away from the rationale of *Logan Valley* by according substantial weight to the rights of an owner of private property. In *Lloyd, Logan Valley* was sharply narrowed by the holding that private property was not a public forum, since the state was not involved in any form with the property.[13] The

8. Hague v. CIO, 307 U.S. 496 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

9. Hudgens v. NLRB, 96 S. Ct. 1029 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

10. 391 U.S. 308 (1968). The case concerned picketing of a store in Logan Valley Plaza which was a large suburban shopping center with sidewalks and extensive parking facilities surrounding it. Union members picketed the Weis market in the center. In response to a request by the owner of the shopping center, a Pennsylvania court enjoined the picketing on the property of the center. The union sought to attack this injunction as a deprivation of its first amendment rights. *Id.*

11. *Id.* at 325. The Court relied for much of its rationale on Marsh v. Alabama, 326 U.S. 501 (1946), a case which held that a company-owned town could not deprive a Jehovah's Witness of her first amendment right to use the sidewalks to distribute handbills just because the sidewalks were owned by the company. The basis of the holding was that the town, except for being privately owned, had "all the characteristics of any other American town." 326 U.S. at 502.

12. 407 U.S. 551 (1972). Vietnam protesters had attempted to pass out handbills criticizing the war in Southeast Asia in a privately owned shopping mall. Officials of the mall threatened to have the protesters arrested for trespassing. The protesters departed but later filed suit for injunctive relief claiming their first amendment rights had been violated. The lower courts, relying on *Logan Valley*, held that the mall was depriving these protesters of their first amendment rights.

13. 407 U.S. at 569. "The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." Justice Powell further stated that property does not lose its private character merely because the public is invited to use it for a specific purpose. *Id.*

finding of a lack of infringement of first amendment rights appeared to be dictated by the weight of the property interest and the modest intrusion on first amendment rights.[14] To Justice Powell, any other holding in these circumstances would have shown an insufficient regard for personal property rights.[15]

However, the concept that private property with no nexus to the state could be the equivalent of a public forum in certain circumstances[16] was fully rejected in *Hudgens v. NLRB*.[17] Justice Stewart held that *Logan Valley* had been overruled by *Lloyd* and that *Lloyd* had held that first amendment rights were inapplicable to private property. Justice Powell seemed to agree with Justice Stewart,[18] although he felt that "the present case can be distinguishable narrowly from *Logan Valley*."[19]

It now seems that what began in Justice Powell's opinion in *Lloyd* has been completed: unless property privately owned has assumed "to some *significant* degree the functional attributes of public property devoted to public use,"[20] no first amendment rights are applicable due to the deference now accorded the rights of property owners.[21] Although that much

14. *Id.* at 568. The intrusion was felt to be modest because the aggrieved parties had alternative forums available to them and the shopping mall uniformly banned all handbilling. These factors gave the appearance of a balancing test. *Cf.* Greer v. Spock, 96 S. Ct. 1211 (1976) (government property) (see discussion *infra*). *Contra*, Hudgens v. NLRB, 96 S. Ct. 1029 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972).

15. *See* Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37, 67-71 (1976) [hereinafter cited as Yarbrough].

16. Justice Powell seemed to imply that *Logan Valley* had validity for protection of first amendment rights on private property if: 1) the picketing was directly related to the purpose for which the property was used and 2) no other reasonable opportunity existed for pickets to communicate their message to their intended audience. 407 U.S. at 563.

17. 96 S. Ct. 1029 (1976).

18. "Upon more mature thought, I have concluded that we would have been wiser in *Lloyd Corp.* to have confronted this disharmony rather than draw distinctions based upon rather attenuated factual differences." *Id.* at 1039 (Powell, J., concurring) (footnotes omitted). Justice Powell came to believe that the great lengths to which he went to distinguish *Lloyd* and *Logan Valley* had not been wise, since the threshold question in both cases was whether private property would be deemed sufficiently "public" in order that first amendment limitations could be imposed. The narrow ground for decision he attributed to *Logan Valley* (see note 16 *supra*) made little sense in light of his assertion that if state action was not involved, then the first amendment does not apply.

19. *Id.* at 1039.

20. Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972) (emphasis added).

21. The only deviation has come in labor cases where the right to organize has been involved. However, these cases were decided on the statutory basis of 29 U.S.C. § 157 (1970) and not on constitutional grounds, since no state action was involved. *See* Hudgens v. NLRB, 96 S. Ct. 1029 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). Both cases dealt with when the employers' private property rights must "yield" to the statutory right given unions to organize.

is now settled, the factors that may create attributes of public use may still be open to question.[22]

Parallel to this evolution in the protection of the rights of owners of private property have been the questions that have arisen when government property maintained for other than public use has been chosen as a public forum.[23] The difficulty has arisen from the fact that the parallel to privately-owned property has been readily discerned. However, the important factor as to first amendment rights missing in the private property decisions has been present in these situations—state action. To solve this tension, Justice Powell has treated such property more like public property than private property, in that first amendment rights have been considered and weighed against the state's interest. In *Greer v. Spock,*[24] the majority held that " 'the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' "[25] Consequently, no first amendment rights were applicable. Justice Powell concurred, but only because on balance he felt that the government's interest outweighed the individual's first amendment interest.[26]

Justice Powell has been in the mainstream of the Court's retreat from expansion of the public forum concept. His disposition of the problem in *Lloyd* drew the Court back from expansion of the public forum concept that had attempted to cover private property held open to the public. As *Greer* shows, the Court and Justice Powell will also allow first amendment activity to be totally banned on government property. However, as opposed to situations where property privately owned by an individual is involved,

22. *See* Heneley, *Property Rights and First Amendment Rights: Balance and Conflict,* 62 A.B.A.J. 77, 80 (1976).

23. *See, e.g.,* Hague v. CIO, 307 U.S. 496 (1939); *cf.* Edwards v. South Carolina, 372 U.S. 229 (1963). *Contra,* Adderly v. Florida, 385 U.S. 39 (1966).

24. 96 S. Ct. 1211, 1220 (1976) (Powell, J., concurring). The commander of Fort Dix, N.J., refused permission for minority party presidential candidates to campaign on the base. This was part of a general policy forbidding all political activity on the base.

25. *Id.* at 1217, *quoting* Adderly v. Florida, 385 U.S. 39, 47 (1966).

26. The factors which caused Justice Powell to find for the government were that the intrusion into the activity of the military base was significant, since it threatened the long standing policy of ensuring that the military remains politically neutral. *Id.* at 1220. Secondly, alternative forums were available which limited the intrusion. *Id.*

The use of the alternative forum concept in balancing was reminiscent of Justice Powell's narrowing of *Logan Valley* in *Lloyd,* which seemed to be precluded in *Hudgens. See* note 16 *supra* and accompanying text. The question which arises from this is whether Justice Powell would consider this factor when dealing with private property or is it simply restricted to property owned by the government. If the former, then private property may not be, in Justice Powell's view, a complete bar to the application of first amendment rights.

Justice Powell will show more regard for first amendment freedoms than the majority by balancing the competing interests.

2. *Scurrilous Language*

The Supreme Court has had numerous occasions to deal with the problem of the proscription of speech that contained scurrilous language. Justice Murphy, in his famous dictum in *Chaplinsky v. New Hampshire,*[27] laid down the rule that is still generally adhered to with respect to fighting words and other narrow classes of speech.[28] This rule gives no constitutional protection at all to these forms of speech. The difficulties have arisen in defining when speech falls into these categories. Some Justices determine the result by the words themselves, while others examine the circumstances in which the speech was uttered.[29]

The early Burger Court, before Justice Powell's appointment, had the opportunity to twice review state statutes that dealt with obscene or scurrilous words.[30] The convictions of both defendants were reversed by the Supreme Court because the state was found to be intruding on protected speech. *Cohen* v. *California*[31] was decided on the basis that no fighting words were involved and first amendment protections were therefore available.[32] *Gooding* v. *Wilson*[33] was decided under a Warren Court first

27. 315 U.S. 568 (1942).

28. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72 (footnotes omitted).

29. The position of some members of the Court has been that in these scurrilous language cases, fighting words are "conduct" and not speech. *See* Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech,* 35 MD. L. REV. 555, 583 (1976) [hereinafter cited as Bogen]. The position of the other members of the Court, including Justice Powell, is not this simplistic. They perceive in these cases often times a communicative function of the words used and thus subject the statutes involved to first amendment scrutiny.

30. Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971).

31. 403 U.S. 15 (1971).

32. "[F]ighting words are unprotected, but that category is no longer to be understood as a euphemism for either controversial or dirty talk but requires instead an unambiguous invitation to brawl." Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1493 (1975). Cohen's jacket message ("Fuck the Draft") did not constitute fighting words because it was not employed

amendment protective technique—the overbreadth doctrine.[34]

Instead of dealing with the problem of scurrilous language by utilizing the techniques developed by the Warren Court, Justice Powell has looked to the words themselves and their potential effect on the listener in each case. An example is *Lewis* v. *City of New Orleans.*[35] The majority found the statute overbroad and not simply limited to fighting words and remanded the case. Although Justice Powell agreed with the remand, he felt that the crux of the matter was to whom the words had been addressed. Since the statute dealt with language directed to a trained police officer, the words to him were not fighting words, although they could have been in some other situation.[36] The potential chilling effect of an ordinance of this nature was also a factor, as well as a concern by Justice Powell with the real likelihood of police abuse of such a statute.[37] Justice Powell's balancing in this case was not so much to see if the speech itself was protected, but rather if the speech in this particular factual setting constituted fighting words, which would then be afforded no protection. The fact that the speech was directed to a policeman, as opposed to an ordinary citizen, was the determining factor in this balancing.

This "who is the receiver" test has played a significant role in cases dealing with speech which was directed at captive audiences. Who the receiver is will not only determine the probability that offense may be taken at the words (and therefore possibly threaten community peace), but it will give rise to an examination of the rights of the receiver in not being spoken to. This examination has led Justice Powell to balance the rights of all involved. When scurrilous language has been directed at a captive audience, it has been the right of the listener that has usually been determinative of the outcome, not whether the scurrilous language actually constituted fighting words under the *Chaplinsky* doctrine.[38] For this reason

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in a personally provocative manner. "[A]bsent a more particularized and compelling reason [than that the words might upset some people] for its actions" states cannot make it a crime to publicly display a four-letter word. 403 U.S. at 26.

33. 405 U.S. 518 (1972).

34. *See* 405 U.S. at 520-21 for a description of this technique.

35. 415 U.S. 130 (1974). The decision dealt with a Louisiana statute which made it a crime to curse a policeman.

36. *See* Bogen *supra* note 29, at 586.

A police officer, because of the nature of his job and his training, plus his role in society, should be able to take more verbal abuse than ordinary citizens. 415 U.S. 130, 135 (Powell, J., concurring).

37. *Id.* at 135.

38. Although not technically within the *Chaplinsky* definition, Justice Powell felt that language which could grossly offend and emotionally disturb its listeners fell within the

the use of the overbreadth technique is inappropriate in Justice Powell's view.[39] Rather, he seeks a determination on the difficult first amendment issue by a careful analysis of all available, and sometimes competing, facts.

This position led Justice Powell to dissent in *Rosenfeld v. New Jersey*.[40] The majority had remanded the case for an overbreadth determination and for an examination as to whether the language constituted fighting words.[41] Justice Powell conceded that these words probably were not fighting words, because it was unlikely anyone in the audience would react with physical violence.[42] But he would not allow these words to be uttered with impunity by a speaker in front of a captive audience simply because they technically were not fighting words. The captivity of the audience and the offensiveness of the words went into the constitutional balance, with the result that the language was, in Justice Powell's view, unprotected.[43] To Justice Powell, such words as used in *Rosenfeld* could by their very utterance inflict injury.[44]

Justice Powell has shown independence of thought in the scurrilous language cases. He has tried to perceive new rationalizations for the protection of first amendment rights by balancing, in each case, the right of the speaker to speak and the listener not to be spoken to.[45] In *Lewis*, he again did not accept the overbreadth argument but rather felt that abusive language when directed to a policeman did not constitute fighting words. However, such speech when directed to a captive audience may be prohibited.[46] Justice Powell has not abandoned facial overbreadth but has advo-

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spirit of *Chaplinsky*, since it offended the listener in the same manner as would fighting words. Rosenfeld v. New Jersey, 408 U.S. 901, 905 (1972).

39. *Id.* at 907.

40. 408 U.S. 901 (1972). The case involved a speaker's conviction under a New Jersey statute prohibiting offensive language in a public place. The speaker used a particularly offensive word repeatedly during a school board meeting at which were present women and children. The majority ordered the case remanded in light of *Cohen* and *Gooding*. *See also* Brown v. Oklahoma, 408 U.S. 901 (1972) (Powell, J., concurring).

41. Chief Justice Burger and Justices Rehnquist and Blackmun dissented, essentially on the ground that the words were clearly fighting words, at least in the sense that they could have caused outrage on the part of a parent whose children had never been subjected to this type of language.

42. *Id.* at 905.

43. *See* Shea, *"Don't Bother to Smile When You Call Me That" — Fighting Words and the First Amendment*, 63 KY. L.J. 1117 (1975).

44. *See* note 28 *supra*. The other dissenters, Chief Justice Burger and Justices Rehnquist and Blackmun, agreed with Justice Powell's result, but they sought to do this by arguing that such language was "fighting words" even though the possibility of immediate violence was remote.

45. *See* Gunther, *supra* note 7.

46. *See* Bogen, *supra* note 29, at 588.

cated restraint in applying it. For Justice Powell, the focus is on the circumstances in which the speech is uttered. His willingness to extend the *Chaplinsky* dictum beyond fighting words to language calculated to inflict injury, mental or physical, suggests that Justice Powell has a stronger concern for the rights of the captive audience than many of the other Court members.[47] And this concern has been manifested by his placing of these rights into the constitutional balance, rather than permitting the definition of fighting words found in *Chaplinsky* to be controlling.

However, when the unwilling listeners have not been a captive audience, their rights have not been accorded as much weight, and, consequently, the result of the balancing has changed. In *Erznoznik v. City of Jacksonville,*[48] Justice Powell reached such a result. Although not scurrilous language of the type in *Rosenfeld,* the motion pictures presented essentially the same issue of offending the listener/viewer. Several factors went into Justice Powell's disposition of the case.[49] First, he found that this was an ordinance to prohibit speech on the basis of content which meant that the government justifications had to be more substantial than in other contexts.[50] Second, he saw the problem of the privacy of the citizens. Justice Powell did not consider the privacy interests of sufficient value to uphold the ordinance because the audience was not in fact captive. Absent narrow circumstances, in Justice Powell's view, "the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities sim-

47. *See* Yarbrough, *supra* note 15, at 50.

48. 422 U.S. 205 (1975). The ordinance in question prohibited drive-in movies from showing films which contained human nudity when the theater screen could be seen from a public place or public road. The principle argument upon which the city tried to justify the regulation was that the ordinance was designed to protect the privacy of its citizens. The city also made the argument that the ordinance was designed to protect children from obscenity and that the ordinance was a traffic regulation in that it attempted to prevent nude movies from distracting drivers. Justice Powell dismissed both of these latter asserted grounds. The statute as applied to protect children was overbroad in that it prevented even the showing of educational films at drive-ins and thus deprived children of their right to receive this communication. The traffic argument was dispensed with by a rationale similar to equal protection in that other movies, equally distractive as nude movies, were not banned at drive-ins. *Id.* at 206-17.

49. Justice Powell felt that nudity in the films did not lessen their need for first amendment protection. In contrast, Chief Justice Burger characterized "the First Amendment interests involved . . . [as] trivial at best" and dispensed with the case as an appropriate use of the police power. 422 U.S. at 223 (Burger, C.J., dissenting).

50. "[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the grounds that they are more offensive than others, the First Amendment strictly limits its power to do so." 422 U.S. at 209. *See also* Young v. American Mini Theaters, Inc., 96 S. Ct. 2440 (Powell, J., concurring).

ply by averting [his] eyes."[51] Also, Justice Powell invoked notions of overbreadth in that the statute affected both constitutionally protected speech and unprotected speech.[52] The key to the decision for Justice Powell seems to have been that this was a content prohibitive statute designed to protect more than a captive audience. Given the captivity of the audience, Justice Powell may well have concluded that this ordinance was constitutional as in *Rosenfeld.*[53]

Lewis, Rosenfeld and *Erznoznik* give some indication of the importance of the receiver to first amendment speech in Justice Powell's set of values. The probability of the listener taking action or being offended because of the communication and his ability to avoid being a listener have weighed heavily as to whether or not Justice Powell will deem the utterance protected speech.[54]

3. *Time, Place and Manner Restrictions*

Another important factor in the balance of first amendment rights has been the legitimate interests of the government. These interests have been given weight in the balancing process in accordance with their value to society. The principal countervailing factor in the balancing determinations has been the extent to which this governmental interest has conflicted with the individual's first amendment rights.

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51. 422 U.S. at 210-11 (citation omitted). The narrow circumstances which would make this a compelling state interest have been when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling auditor or viewer to avoid exposure. *Id.* at 209. See the discussion of Rosenfeld v. New Jersey, 408 U.S. 901 (1972), at notes 40-44 *supra* and accompanying text, where Justice Powell felt as if scurrilous language used in front of a captive audience could be punished. *Cf.* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

52. This idea of overbreadth is not the same type of overbreadth used by the Court in cases like *Gooding.* Here, as in his concurrence in Lewis v. City of New Orleans, 415 U.S. 130 (1974), Justice Powell used overbreadth only as another factor to weigh, not as an outcome determinative technique.

53. Justice Powell concluded that the limited privacy interest of persons on the *street* could not "justify this censorship of otherwise protected speech on the basis of its contents." 422 U.S. at 212 (footnote omitted).

54. Justice Powell seemed to agree with the set of recommendations made by Professor Haiman in Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?,* 67 Nw. U.L. REV. 153 (1972). In that article, Haiman made the following observation which accords well with Justice Powell's view.

> [I]n the clash of free speech and privacy interests surrounding claims of a right not to be spoken to, we must be careful not to allow our natural sympathy for tender psyches to beguile us into accepting serious erosions of the first amendment. . . . Privacy will be adequately safeguarded if our right to escape from one another after the first exposure to unwelcome communication is made secure.

Id. at 199.

The problem of the clash between a zoning ordinance and the first amendment came to the Court in *Young v. American Mini Theaters, Inc.*[55] Justice Powell in his concurrence dealt with the problem of valid governmental objectives that implicate first amendment concerns only secondarily and to a limited extent.[56] For Justice Powell, the resolution lay in whether or not this was an attempt by the city to regulate the content of speech under the guise of zoning. If so, a more demanding balancing test would be in order to determine if the ordinance was justified.[57] But Justice Powell found that the impact of this ordinance on speech was both secondary and minimal and, therefore, held the city to a lesser standard of justification. Justice Powell believed that the test used in *United States v. O'Brien*[58] could be used as a guide.[59] The essential finding of this test in *Young* was that first amendment freedoms were being encroached upon no more than was necessary. Therefore, since the theater owners were not completely deprived of an avenue for exercise of their first amendment rights, the interest furthered by the ordinance outweighed the effect of the minimal intrusion that had resulted from a statute that was not intended to directly restrict speech.[60]

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55. 96 S. Ct. 2440 (1976). This case involved a section of a Detroit zoning ordinance that prohibited theaters that showed obscene movies (as defined by the ordinance) from locating near one another. The ordinance was attacked as unconstitutional by theater owners as violative of their first amendment rights in that it allegedly was an impermissible ban on the content of speech. The Court through Justice Stevens held that this ordinance did not violate the commands of the first amendment since the restriction was on where the owners could locate and not whether they could locate and operate their theaters.

56. *Id.* at 2453.

57. Justice Powell made two inquiries to determine if this ordinance was an attempt to regulate speech because of its content: 1) did the ordinance impose any content limitations on the makers of adult movies or their ability to make them available to the public and 2) did it restrict in any significant way the viewing of these movies by people desiring to see them. Justice Powell answered both inquiries in the negative, finding only that the ordinance was concerned with where expression took place and not with its content. 96 S. Ct. at 2456. *See also* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

58. 391 U.S. 367 (1968).

59. *O'Brien* was a speech-plus case involving the burning of a draft card. The destruction of the draft card violated a statute which the government contended furthered an important goal. The Court announced a four-part test for deciding if a statute which did not attempt to suppress the content of speech violated the first amendment. The statute had to: 1) be within the government's power; 2) further an important governmental interest; 3) be unrelated to the suppression of speech; and 4) restrict first amendment freedoms no more than was essential to further the government's interest. *Id.* at 377, *as cited in* 96 S. Ct. at 2456 (Powell, J., concurring).

An *intent* to restrict the content of speech would make the *O'Brien* test inapplicable. 96 S. Ct. at 2457 n.4.

60. Justice Powell has frequently cited three speech-plus cases to make his point that states can reasonably regulate the time, place and manner of the exercise of first amendment

The significance of various governmental interests relating to the maintenance of prisons has been the focus of several recent cases.[61] These interests had been used to restrict first amendment rights, including associational rights of inmates, other individuals and the press. The basic justification had been that the state's interest in prison security had required these time, place and manner restrictions. In *Procunier v. Martinez,* Justice Powell refused to view the case as presenting only a problem of prisoners' first amendment rights, because he believed that the first amendment rights of those with whom prisoners had communicated were also implicated.[62]

However, Justice Powell viewed the situation as one in which first amendment rights were only incidentally infringed by a governmental regulation; therefore, the *O'Brien* test was again the applicable model for balancing the interests.[63] In contrast to *Young,* first amendment freedoms were being encroached upon more than necessary, and when balanced against the interest of the government, the statute was unconstitutional. If the statute had dealt directly with such purposes as discipline, order or rehabilitation, it may have withstood the scrutiny.[64]

In *Pell v. Procunier,* the Court directly confronted the first amendment rights of prisoners and rejected the claim that the prisoners had a constitu-

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speech. United States v. O'Brien, 391 U.S. 367 (1968); Adderly v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965). It is unclear whether Justice Powell has put any weight on the speech/speech-plus distinction as developed by the Warren Court. Justice Powell has seemed to draw from these cases the general principle that government may reasonably regulate the time, place and manner of public speech without addressing the problem of whether the speech involved was more speech or more conduct.

61. Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974).

Martinez presented the problem of prison officials censoring prisoners' mail. *Pell* presented two problems. First, whether or not prisoners had a right to demand face-to-face interviews with willing newsmen. Second, whether or not newsmen had a right to face-to-face interviews with prisoners of their choice in order to gather news. *Washington Post* dealt with the latter problem in the federal prison system. Justice Powell wrote the decision in *Martinez,* concurred with the majority opinion in the disposition of the first problem in *Pell* and dissented on the issue of newsmen's right to interview in both *Pell* and *Washington Post.*

62. 416 U.S. at 409. The interests of free citizens had to be balanced along with the rights of prisoners against the governmental justifications.

63. Professor Ely has criticized the *O'Brien* test as being not very protective of first amendment values. He saw its use as appropriate only in symbolic speech-plus cases. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1493-96 (1975).

Justice Powell has used this approach only in cases where the effect on speech had been incidental and where the Court was not particularly competent to suggest alternative ways to accomplish the governmental interests which would have no effect on the first amendment.

64. Yarbrough, *supra* note 15, at 78.

tional right to demand interviews with willing newsmen.[65] Justice Powell concurred, but without his usual systematic weighing of all relevant factors. One is left to guessing whether Justice Powell agreed with the rather restrictive and unprotective balancing of Justice Stewart. Perhaps central to Justice Powell's agreement was the fact that there were reasonable alternative means for exercising this claimed first amendment right.

The newsmen's challenges in *Pell* and *Saxbe v. Washington Post* were rejected by Justice Stewart.[66] Justice Powell, in dissent, strongly voiced his disapproval. He found that personal interviews were essential to effective reporting in the prison environment.[67] Because the press has such an important function to play in society, Justice Powell felt that "without some protection for seeking out the news, freedom of the press could be eviscerated."[68] To prevent this, Justice Powell stated that he would apply the balancing test of *Martinez* and strike down any statute that too broadly infringed upon first amendment rights. He noted that he would require more than administrative convenience to uphold a complete ban on the newsmen's right to gather information[69] and the public's right to receive information. "The balance should be struck between the absolute ban . . . and an uninhibited license to interview at will."[70]

The cases concerning time, place and manner restrictions reveal that Justice Powell will not ignore first amendment problems that have been created by the secondary effects of a statute. Instead, he will measure the extent of the intrusion against valid governmental interests by using a balancing technique based on the test laid down in *O'Brien*. The method is no different, essentially, than that used in examining content restric-

65. Justice Stewart, writing for the Court, noted that under some circumstances, the right of free speech has included the right to communicate with any willing listener, and also that prisoners do retain those first amendment rights not inconsistent with imprisonment. 417 U.S. at 822. Justice Stewart, however, found there were alternative means for the prisoners to communicate with whom they wanted and so dismissed their claim. *Id.* at 827-28.

66. Justice Stewart delivered a rather conclusory opinion. He did not carefully weigh the asserted first amendment rights of newsmen to gather news. Instead, he used what seemed to be a rational basis equal protection test. "It has generally been held that the First Amendment does not guarantee the press a constitutional right to special access to information not available to the public generally. . . . [N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." 417 U.S. at 833-34. *See* the factual discussion of *Washington Post* in note 61 *supra*.

67. *Id.* at 856.

68. *Id.* at 860, *quoting* Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

69. *See* the discussion of Branzburg v. Hayes, 408 U.S. 665 (1972), at notes 89-96 *infra* and accompanying test.

70. *Id.* at 872. For a general discussion of these cases see Comment, *Problems in Defining the Institutional Status of the Press*, 11 U. RICH. L. REV. 177 (1976).

tions. The difference is found in that the intrusions caused by time, place and manner restrictions are usually less than that caused by content restrictions and, therefore, the government's interests need not be as compelling in order to save the statute.[71]

C. Press

The Court has encountered a special set of problems when dealing with the first amendment right of freedom of the press. Those problems concern what first amendment protection is due commercial speech, prior restraints on publication and the interface between a free press and the law of defamation. Justice Powell has had a large impact on the Court in these areas as he has striven consistently to achieve a fair balance between competing interests.

1. *Prior Restraints, Commercial Speech and Testimonial Privilege*

a. Prior Restraints

A view of the great solicitude which Justice Powell has for a free press can be found in his concurrence in *Nebraska Press Association v. Stuart.*[72] The case presented a clash between first amendment values and the commands of the sixth amendment. Chief Justice Burger wrote for the Court but was joined by only two Justices.[73] The Chief Justice found that to protect the defendant's sixth amendment rights, the trial court should have used an alternative method than gagging the press.[74] However, he did not lay down workable guidelines for the resolution of future problems of the same nature.

Justice Powell concurred in a separate opinion in order to emphasize

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71. *See* Peebles, *Mr. Justice Frankfurter and The Nixon Court: Some Reflections on Contemporary Judicial Conservatism*, 24 Amer. U.L. Rev. 1, 56-57 (1974).

72. 96 S. Ct. 2791 (1976). In the case, a county judge presiding over a spectacular murder case in a small town had issued an order prohibiting the publishing of a wide array of items concerning the trial and the defendant. The press objected to the order, contending it was unnecessarily broad and violated its first amendment rights.

73. The basic backdrop for a prior restraint problem was set out in New York Times Co. v. United States, 403 U.S. 713 (1971).

> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. . . . The government thus carries a heavy burden of showing justification for the imposition of such a restraint.

Id. at 714 (citation omitted).

74. Chief Justice Burger, relying on Sheppard v. Maxwell, 384 U.S. 333 (1966), mentioned four possible protective devices short of prior restraint: 1) continue the case until the publicity has died down; 2) transfer it to another county not permeated with publicity; 3) sequestration of a jury; and 4) prevent prosecutors, counsel for the defense and witnesses from collaborating with the press in the dissemination of information concerning the trial. 96 S. Ct. at 2800.

what he felt was the unique burden on the government to justify prior restraints. Justice Powell would have required a difficult four-prong test to be met by the government before allowing a prior restraint on publication by the press.[75] These requirements indicate the importance which Justice Powell has placed on the right of freedom of the press. The fact that a sixth amendment right was also included did not change the result. This approach, however, retains the possibility that in cases where a strong evidentiary showing could be made, the governmental interests may outweigh the first amendment interests of the press.

b. Commercial Speech

Commercial speech, since the decision in *Valentine v. Chrestensen,*[76] had been afforded little or no constitutional protection. However, Justice Powell, as he has done when first amendment rights have been incidentally affected by a statute,[77] has not ignored potential restrictions on first amendment rights, even when the rights were supposedly nonexistent. An example of this desire to accommodate all interests was *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[78] in which Justice Powell paid lip service to the doctrine that commercial speech was due no constitutional protection. But rather than summarily dismissing the paper's claim, Justice Powell examined the Commission's basis for instituting the restriction. Such an examination was indicative of his refusal automatically to deny constitutional protection merely because the speech was categorized as commercial.

Following *Pittsburgh Press,* the Court has extended first amendment

75. Justice Powell would require a showing that: 1) there must be a clear threat to the fairness of the trial; 2) such a threat is posed by the actual publicity to be restrained; 3) no less restrictive means are available; and 4) a restraint may not issue unless it is shown that previous publicity would not render the order inefficacious. *Id.* at 2808 (Powell, J., concurring).

76. 316 U.S. 52 (1942). *Chrestensen* involved the distribution of handbills advertising tours of a submarine. In the course of his opinion, Justice Roberts first reiterated the commercial speech exception. Although the streets are proper places for communication and states may not unduly proscribe their use as a public forum, nonetheless said Justice Roberts, "[w]e are equally clear that the Constitution imposes no such restraint on Government as respects purely commercial advertising." *Id.* at 54. Read broadly, this implied that commercial advertising was due no constitutional protection.

77. *See* discussion in section VI B(3) *supra.*

78. 413 U.S. 376 (1973). The case dealt with a ruling by the Human Relations Commission that the newspaper could not put want ads in columns designated male-only or female-only because this violated a local sex discrimination ordinance. The newspaper claimed that this violated their first amendment rights, because it was a matter of editorial judgment where the paper put such ads and the headings it used.

protection to commercial speech in *Bigelow v. Virginia*[79] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[80] Justice Powell joined the Court in these decisions, thus making explicit what was at least arguably implicit in his holding in *Pittsburgh Press*. Justice Powell's sensitivity toward first amendment concerns and his dislike for simple categorizations in the resolution of first amendment problems would indicate that he had not been very comfortable with the commercial speech doctrine.[81]

c. Newsmen's Privilege

As with commercial speech, Justice Powell has refused to create a definitive test that would determine the question of the right of a newsman to keep his sources confidential. In *Branzburg* v. *Hayes*,[82] the Court held that newsmen must answer all relevant questions propounded by a grand jury even without a showing by the state of compelling need.[83]

Justice Powell filed a concurring opinion "to emphasize what seems to me the limited nature of the Court's holding."[84] Justice Powell stated that newsmen subpoenaed before a grand jury were not without constitutional rights with respect to news gathering or in maintaining the confidentiality

79. 421 U.S. 809 (1975). The Court held that commercial advertisements were entitled to some first amendment protection. Speech was not stripped of first amendment protection merely because it was a form of paid commercial advertising. *Id.* at 820-21. In the Court's opinion, Justice Blackmun cited *Pittsburgh Press* and said that the case reaffirmed the principle that commercial advertising enjoyed some degree of first amendment protection.

80. 96 S. Ct. 1817 (1976). The Court found that the first amendment protection due commercial speech was bound up with the right of prople to receive information. As such, commercial speech was within the first amendment, be it advertising of something of societal importance or a mere commercial transaction.

81. *Compare* Peebles, *Mr. Justice Frankfurter and The Nixon Court: Some Reflections on Contemporary Judicial Conservatism*, 24 AMER. U.L. REV. 1, 50-51 (1974), *with* DeVore & Nelson, *Commercial Speech and Paid Access To The Press*, 26 HASTINGS L. J. 745, 758-64 (1975).

82. 408 U.S. 665 (1972). This case actually involved three newsmen who made basically the same argument—that newsmen had a qualified constitutional privilege not to reveal their sources before grand juries absent the showing of a compelling state interest.

83. This was very similar to the majority's argument in *Pell* and *Washington Post* that newsmen are not given special treatment under the first amendment. If a rule applies to private citizens, it is valid against newsmen as well. The issue for Justice White was settled by this overriding importance of having everyone, be they newsman or other citizen, answer questions relevant to the grand jury investigation. *Id.* at 690-91.

Justice White did add, however, that "newsgathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." *Id.* at 707.

84. *Id.* at 709 (Powell, J., concurring).

of their sources.[85] He showed a more sensitive solicitude for the first amendment than did the plurality, since he felt that courts could not force newsmen to reveal their sources when the information sought bore only a remote relationship to the subject of the investigation. This, he believed, struck the fair balance between society's right to receive all relevant testimony concerning criminal conduct and the newsmen's need to be able to obtain as much information as possible.[86] But what Justice Powell was saying in the way of guidelines is unclear. Because he concurred in the plurality's result, it is probably fair to conclude that in most situations he would require a newsman who had witnessed a crime to testify and reveal all relevant information.[87] But until specific circumstances arise, he cannot predict how the balance will be struck. The importance of his concurrence is that he tempered the holding of the plurality to reflect a nebulous constitutional right for newsmen to keep sources confidential[88] whenever a fair balancing of the competing interests will allow.

2. *Libel and The First Amendment*

The area of libel long has been an area conducive to balancing, since there exists a strong tension between the right of the press not to be restrained in the information it publishes and the right of each individual to his or her privacy. The state's interest in compensating the individual for a breach of his privacy has also been an important factor. The Court's first major decision in this area was *New York Times Co. v. Sullivan.*[89] The Court held that the press can be held liable for the publishing of defamatory falsehoods concerning a public official only upon a showing of actual malice.[90] This actual malice rule was extended to the recovery of damages

85. *Id.*

86. *Id.* at 710.

87. Because Justice Powell has placed such heavy reliance on the case-by-case basis of decision making, there might well be extenuating circumstances that would outweigh the state's interest in even this information.

88. Justice Stewart dissented, joined by Justices Marshall and Brennan. Justice Stewart felt as if the Court had taken a "crabbed" view of the first amendment rights involved and that the Court was insensitive to the "critical role of an independent press in our society." *Id.* at 725. Justice Stewart would endorse a view that only in very narrow circumstances could a newsman be forced to reveal his source of information. *Id.* at 743.

See also Goodale, *Branzburg v. Hayes and The Developing Qualified Privilege For Newsmen*, 26 HASTINGS L. J. 709, 717 (1975). Taking Justice Powell's concurrence with Justice Stewart's dissent, Goodale felt confident in his thesis that a majority of the Court endorsed a qualified privilege for newsmen. This reading of Justice Powell's concurrence is justified by the great lengths Justice Powell went to in Saxbe v. Washington Post Co., 417 U.S. 843 (1974), to point out the limited holding in *Branzburg*.

89. 376 U.S. 254 (1964).

90. Actual malice was defined as knowledge that a statement was false or reckless disregard

for publishing defamatory falsehoods in the case where a public figure was libelled in *Curtis Publishing Co. v. Butts.*[91] A plurality opinion in *Rosenbloom v. Metromedia, Inc.*[92] sought to extend the actual malice rule to the situation where a publisher prints defamatory falsehoods about a private individual who was involved in an issue of general or public interest. Justice Powell rejected this extension of the *New York Times* rule of actual malice to private individuals in *Gertz v. Robert Welsh, Inc.*[93]

Justice Powell perceived a clear collision between the first amendment rights of a newspaper and the legitimate state interest in compensating private individuals for reputational injuries inflicted on them and the right of private citizens not to have their privacy shattered. He felt that, although "neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues,"[94] punishment of errors would run the risk of inducing an overcautious and restrictive use of first amendment freedoms. Erroneous statements of fact deserve no constitutional protection, but to make publishers strictly liable for erroneous statements would induce self-censorship. On this basis, Justice Powell felt that a scrutiny of the governmental and privacy interests involved was appropriate.

Justice Powell's approach was to accommodate all the interests in a fair and just way. To protect the reputational and privacy interests, he set up a standard whereby private citizens could recover on a showing of negligence for the defamatory falsehoods of the press.[95] But to assure enough "breathing space" for the press, he limited recovery to only actual damages

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as to whether a statement was false or not. *Id.* at 279-80.

91. 388 U.S. 130 (1967). The definition of public figure, as set out by Chief Justice Warren, was persons who by their fame shape events in areas of concern to society at large and persons who are intimately involved in the resolution of important public questions. *Id.* at 163-64 (Warren, C.J., concurring).

92. 403 U.S. 29 (1971).

93. 418 U.S. 323 (1974). Gertz was an attorney retained by the family of a murder victim to represent it in civil litigation. The convicted murderer was a policeman who was the subject of a magazine article claiming that the policeman was the victim of a Communist conspiracy to discredit police. The article falsely stated that Gertz was responsible for the frame-up, implied he had a criminal record and labelled him a Communist. Gertz sued for libel but the district court applied the actual malice test relying on *Rosenbloom* and found for the magazine.

94. *Id.* at 340.

95. "We hold that, so long as [states] do not impose liability without fault, the States may define for themselves the appropriate standard of liability. . . ." *Id.* at 347. *See* Time, Inc. v. Firestone, 96 S. Ct. 958, 970 (1976) (Powell, J., concurring), where, in explaining *Gertz*, Justice Powell said "there is no First Amendment constraint against allowing recovery upon proof of negligence."

and no punitive damages.[96] Justice Powell felt justified to narrow the application of the actual malice rule for two principal reasons. First, public officials and public figures usually have enjoyed significantly greater access to channels of communication than private citizens and have thus been able to counteract false statements more realistically. Second, public figures and public officials have voluntarily held themselves out for exposure to the public thereby lessening their expectation of privacy.

Justice Powell, through his balancing of interests, was not showing any less solicitude for the first amendment rights of the press than the Court in previous libel decisions. He announced a new rule "not because the media interest was less demanding, but because the state interest in protecting the private individual was more compelling."[97] For Justice Powell, the state interest and the interest of the private citizen in his reputational integrity required that he limit the *New York Times* rule to public figures and public officials.[98]

Justice Powell also had occasion in *Gertz* to define the critical question of who was a public figure. For Justice Powell, "voluntary notoriety" and "access to the media" constituted basic criteria of public figure status.[99] Also important was the extent of the participation in an event by an individual.[100] The Court in *Time, Inc. v. Firestone*[101] relied on Justice Powell's explanation of a public figure in *Gertz*. For first amendment purposes, public figures were held to be people who have "assumed roles of especial prominence in the affairs of society" or those people who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[102]

Justice Powell has had a profound effect on the Court's disposition of cases involving the clash of libel laws and the first amendment. He has stopped the expansion of the actual malice test to more and more situations and he has also narrowed the definition of public figures so that fewer people will be required to prove actual malice before recovery. The Justices are unanimous in holding a public official or public figure to the actual

96. 418 U.S. at 349.

97. Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment*, 26 HASTINGS L.J. 777, 796 (1975) [hereinafter cited as Brosnahan].

98. *See generally* Bogen, *supra* note 29.

99. *See* Brosnahan, *supra* note 97, at 794.

100. 48 TEMP. L.Q. 450, 458 (1975).

101. 96 S. Ct. 958 (1976).

102. *Id.* at 965, *quoting from* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

malice test and the majority agree with Justice Powell that private individuals can recover upon a showing of negligence.[103]

Facts of a private nature which are in a public record entitle the person to less protection, however, since the privacy expectation is diluted. In *Cox Broadcasting Corp. v. Cohn*[104] the right of a private citizen to maintain an invasion of privacy action for the truthful publication of matter contained in open court records was at issue. The Court found that the press was immune to suit for publication of information in open court records. Justice Powell concurred in this judgment of the court. However, he wrote separately to make two points. First, he felt that *Gertz* constitutionally mandated that truth be a complete defense to an action for *defamation* by a private individual against the media.[105] Second, Justice Powell did not feel that truth would necessarily be an absolute defense to all actions for *invasion of privacy*.[106] Justice Powell conceded that in some instances the right to privacy for private individuals may outweigh the press' first amendment rights, where the interest sought to be protected was the reputational integrity of the private citizen.

Justice Powell can be seen to evidence a strong desire to protect both the privacy of individuals and the state's legitimate interest in protecting people's reputation. Although first amendment press rights weigh heavily in Justice Powell's scales, other interests also must be weighed. Privacy is a theme that has run through many of Justice Powell's decisions,[107] and has been accorded significant weight. *Gertz* represented a marked departure from the Warren Court trend to expand the actual malice rule and showed clearly Justice Powell's willingness to consider governmental justifications even though the first amendment was implicated.

D. Freedom of Association

The right of free association is a recent development in constitutional law; nowhere is it mentioned in the first amendment.[108] Although implicit in some cases, freedom of association was not elevated to its present, sepa-

103. Bogen, *supra* note 29, at 612.

104. 420 U.S. 469 (1975).

105. *Id.* at 500.

106. *See* 420 U.S. at 500.

107. *See, e.g.*,Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (Powell, J., dissenting), where Justice Powell felt that the privacy interest of the captive audience outweighed the first amendment rights of the speaker.

108. U.S. Const. amend. I. Some of the background for this section was taken from Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964) [hereinafter cited as Emerson] and Rice, *The Constitutional Right of Association*, 16 Hastings L.J. 491 (1965).

rate status until 1958, in *NAACP v. Alabama ex rel. Patterson.*[109] Under the Warren Court, freedom of association was upheld by the available devices, such as vagueness[110] and overbreadth,[111] that were common to free expression cases. These have given way, generally, to a balancing of interests by the Court.[112] In his decisions, Justice Powell has taken heartily to the balancing test[113] and has shown an independence in determining which values should be weighed. More than in other areas, Justice Powell has been likely to dissent or concur.

Despite the great number of cases touching on the issue,[114] freedom of association has retained some aspects of its late origin. There are inconsistencies about when freedom to associate is burdened and what standards are to be used when it is found to be burdened. Now as before, there is no single key to the varying constitutional issues involving associational rights.[115] Many times delineation of the freedom is clouded by other issues in the particular case.

1. *Reaching the Issue of Association*

With one possible exception,[116] Justice Powell has been quick to perceive freedom of association issues when the lower courts and other Justices have not. This exceptional case was the most recent one, and it opened the question of whether Justice Powell was reconsidering his earlier stance as exemplified in *Healy v. James*[117] and *Rosario v. Rockefeller.*[118]

Healy v. James was typical of Justice Powell's early insight in reaching associational issues. Central Connecticut State College had refused to grant official recognition to a local chapter of the Students for a Democratic Society, which was organizing on campus. The federal district court, affirmed by the circuit court, held that only an official stamp of approval

109. 357 U.S. 449 (1958). Freedom of association was implicit and mentioned, though not as a separate right, in De Jonge v. Oregon, 299 U.S. 353 (1937).

110. NAACP v. Button, 371 U.S. 415, 432-35 (1963). *Cf.* Bates v. City of Little Rock, 361 U.S. 516 (1960).

111. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

112. Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); Healy v. James, 408 U.S. 169 (1972). *But see* Kusper v. Pontikes, 414 U.S. 51 (1973). The last case relied on the equal protection clause. *See also* Elrod v. Burns, 96 S. Ct. 2673 (1976).

113. *See, e.g.*, Healy v. James, 408 U.S. 169 (1972).

114. The cases since 1958 are collected in Annot., 33 L. Ed. 2d 865 (1972).

115. Emerson, *supra* note 108, at 3.

116. Elrod v. Burns, 96 S. Ct. 2673, 2691 (1976) (Powell, J., dissenting).

117. 408 U.S. 169 (1972).

118. 410 U.S. 752, 763 (1973) (Powell, J., dissenting).

had been denied.[119] Justice Powell disagreed, holding that the practical effect of the nonrecognition was to impede the local chapter's first amendment rights. No longer could they use bulletin boards or other campus facilities necessary to a student organization. The limitations may have operated indirectly, but Justice Powell was on firm precedent in holding that "the Constitution's protection is not limited to direct interference with fundamental rights."[120]

Justice Powell's dissenting opinion in *Rosario v. Rockefeller*[121] was an example of this same discernment of interests. The petitioners had challenged voter registration deadlines which were designed to eliminate "raidings" in the following primaries. The majority gave short shrift to their associational claims. To the majority, the rules set only a time deadline and were not a complete ban on the petitioners' associational rights.[122] Consistent with his view in *Healy*, Justice Powell dissented. A permanent ban on a fundamental right was not necessary, he felt, to breach the constitutional limitation. The length of time might have some effect on the weighing of interests, but it was not basic in itself to a finding of whether the freedom had been burdened.[123]

These two cases are to be contrasted with Justice Powell's dissent in the patronage case, *Elrod v. Burns*.[124] The majority, in holding the patronage dismissals to be unconstitutional, relied heavily on the employees' rights of association. Justice Powell later addressed this issue, but intimated strongly that he did not want to reach the constitutional implications. He observed that the decision might well disserve the core values of the first

119. Healy v. James, 319 F. Supp. 113 (D. Conn. 1970), *aff'd*, 445 F.2d 1122 (2d Cir. 1971).

120. 408 U.S. at 183. See Justice Harlan's opinion in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958). The case was the one which first held the right of association had separate constitutional content. *See* note 109 *supra*. Justice Powell also had to consider the setting of the right. First amendment freedoms have not always been guaranteed when on school property. Note, *Freedom of Political Association on the Campus: The Right to Official Recognition*, 46 N.Y.U.L. REV. 1149, 1156 n.46 (1971). Tinker v. DeMoines School Dist., 393 U.S. 503 (1969), brought the right to full flower, and Justice Powell followed it. 408 U.S. at 180.

121. 410 U.S. at 763-69.

122. *Id.* at 758.

123. *Id.* at 765. In Kusper v. Pontikes, 414 U.S. 51 (1973), *Rosario* was narrowly distinguished. The Court held that the rights of association could not be defeated by a mere showing of state interest. The statute was found to be too imprecise. 414 U.S. at 58-59.

124. 96 S. Ct. 2673 (1976) (Powell, J., dissenting). Respondents in the case, Republicans, had been hired for patronage jobs in the Chicago area. When the Democrats were elected to office, the respondents were asked to change affiliations or find a Democrat to sponsor them. Respondents did neither and were shortly dismissed. A good predecision account of the issues can be found in O'Neil, *Politics, Patronage and Public Employment*, 44 U. CIN. L. REV. 725 (1975).

amendment.[125] Justice Powell's wording in the dissent is difficult to comprehend. He appeared to be saying that the political employees when hired were receiving a political boon, and that they lost nothing when it was taken away. Yet, it is difficult to see how the origins of a job preclude examining the rights of association when it is lost. He may also have been referring to the historical process of patronage so well established. Justice Powell's dissent may be otherwise well-founded,[126] but the ominous tone of describing the denigration of core values is reminiscent of his limitations on fifth amendment rights "when they leap their proper bounds."[127] If that is the implication, fewer cases will reach this first amendment issue. issue.

2. *The Constitutional Standard*

Although the freedom of association was raised to its separate status almost twenty years ago, there has been no general agreement on what standards should be used to define the right. Rather, the problems have been framed and answered in terms of more traditional constitutional doctrines.[128] For Justice Powell, this has presented fewer problems than it might, since he has balanced most issues. In fact, freedom of association may be looked on as a rough, constitutional currency in balancing tests. It has significant value of its own, but may also be used to discover what value Justice Powell places on the concomitant and opposing areas of the law.

If that is taken as a premise, it may be said that the right to vote and the right to political representation occupy a vital area of Justice Powell's

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125. 96 S. Ct. at 2691. Essentially Justice Powell felt that the Court's decision needlessly constitutionalized another portion of American life. The politics of patronage had been practiced for 200 years and "it would need a strong case for the Fourteenth Amendment to affect it." *Id.* at 2697, *quoting* Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (Holmes, J.). The reasoning is very much like the historical conservatism of Edmund Burke:

> [I]t is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.

E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 74 (1790, Dolphin ed. 1961).

126. *See* note 145 *infra* and accompanying text.

127. Couch v. United States, 409 U.S. 322, 336 (1973). The phrase has marked the limitations on fifth amendment rights. See section III *supra*.

128. Freedom of association has seemed to absorb the analytical tools from whatever else was in the case; protectional devices and balancing as in *Healy v. James*, from first amendment free expression; equal protection strict scrutiny as in *Rosario v. Rockefeyler*, from the fundamental right to vote; accommodation of interests as in *Cousins v. Wigoda*, 419 U.S. 477 (1975), from competing legitimate claims. This uncertain situation has caused one author to write, "[t]he concept is essentially obscurantist." Emerson, *supra* note 108, at 14.

constitutional construction. In *Rosario v. Rockefeller,*[129] associational rights were appended to the right of enfranchisement in primary elections. The result was a powerful combination of values requiring strict scrutiny protection. Justice Powell castigated the majority for denying those fundamental rights without identifying the standard of scrutiny utilized. To him the state's interest in the prevention of "raiding" was less than a compelling interest, especially since the petitioners had never before voted.[130]

His position in *Cousins v. Wigoda*[131] shows a more subtle balance. In this case, the state's legitimate interests in protecting the electorate's right to vote were opposed to freedom of political association in the National Democratic Party. The facts of the case were complex.[132] In short, the majority held as paramount the associational interests of the Democrats. Justice Powell concurred in part and dissented in part. His decision was that the state could enjoin the unelected delegates from being seated as delegates *from Illinois* (thus upholding the state's legitimate interests), but that Illinois could not prevent the party from seating the unelected persons as delegates at large (thus upholding the Democrats' freedom of association in their task of selecting a presidential candidate).[133] Justice Powell in his decision maintained that a weighing which accommodated the powerful and legitimate interests of both sides was required.

Rights of association, when allied with the freedom of expression, have also represented important interests. However, in the context of *Healy v. James,*[134] that combination of rights was more easily overcome than either of the associational rights found in *Rosario* and *Cousins.* This was due to

129. 410 U.S. 752 (1972) (Powell, J., dissenting).

130. *Id.* at 764-69. Raiding occurs when voters of one persuasion cross over and vote in the opposing party's primary to give a distorted impression of the public sentiment.

131. 419 U.S. 477 (1975).

132. As briefly as possible, the facts were as follows: Cousin's delegates challenged the seating of Wigoda's delegates before the Democratic credentials committee at the 1972 National Convention. The committee decided in favor of Cousin's delegates because of infractions of the party's promulgated rules in the election of Wigoda's delegates. A Wigoda delegate sought an injunction from a Illinois circuit court, which granted it, and leave to appeal was denied by the Illinois Supreme Court. Another Wigoda delegate challenged the party rules in a federal court in the District of Columbia. Cousin's group cross-claimed for an injunction of the state court action. The district court denied both claims, but the circuit court reversed, granting the injunction, although still dismissing the claim of the Wigoda delegate. After a remand for a determination of mootness, the issue appeared before the Court. *Id.* at 478-87.

133. *Id.* at 496-97. A helpful article is Note, *Cousins v. Wigoda: Primary Elections, Delegate Selection, and the National Political Convention,* 70 NW. U.L. REV. 699 (1975).

134. 408 U.S. 169 (1972).

the fact that just as some of the strengths of free expression are included in the complex of values, so too are some of its weaknesses. Therefore, in outlining guidance for a lower court remand, Justice Powell found applicable many of the tests that had been developed earlier in the law. The college, though it had a legitimate interest in preserving a peaceful campus, could not deny the local SDS recognition because of national policies. Without some proof that the two were related, this was only "guilt by association,"[135] nor could the college deny the organization recognition on philosophical grounds.[136] On the other hand, the college could withhold recognition if the group openly incited violence under the *Brandenburg*[137] test or refused to obey reasonable regulations. There was a similar weighing and accommodation of interests in *Healy* as in *Rosario* and *Cousins*, but of a lower order. Instead of searching for compelling interests, there was a shifting in the burden of proof. Instead of a declaration of rights, there was a remand to determine if the students would follow reasonable regulations.[138]

Private property rights have also seemed to be at parity with freedom of association. In *Central Hardware Co. v. NLRB,*[139] Justice Powell remanded a case to find the "yield point" between the conflicting values of property owners and labor organizers. Consistent with his opinion in *Lloyd Corp. v. Tanner,*[140] *Food Employees v. Logan Valley Plaza*[141] was distinguished. The union and the employees had the right "to self-organization, to form, join, or assist labor organizations."[142] The employer could not interfere with the organization, but neither was he forced to aid it. The

135. *Id.* at 186. *See* United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); *cf.* Scales v. United States, 367 U.S. 203 (1961).

136. 408 U.S. at 187-88. *Cf.* NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

137. Brandenburg v. Ohio, 395 U.S. 444 (1969). *See* Noto v. United States, 367 U.S. 290 (1961). The distinction made in *Brandenburg* was between advocacy of the use of force generally and the direct incitement of lawlessness.

138. A point by point analysis was undertaken in Gunther, *supra* note 7, at 1015-23. *See* Note, *Freedom of Political Association on the Campus: The Right to Official Recognition*, 46 N.Y.U.L. REV. 1149 (1971), which gives a very close approximation of how Justice Powell decided the case. *See* Note, *Freedom of Association and the College Community*, 9 WAKE FOREST L. REV. 574 (1973).

139. 407 U.S. 539 (1972).

140. 407 U.S. 551 (1972).

141. 391 U.S. 308 (1968). *Logan Valley* and *Lloyd* are discussed in more detail in the freedom of expression cases. See section VI B(1) *supra*.

142. Central Hardware Co. v. NLRB, 407 U.S. at 542, *citing* section 7 of the National Labor Relations Act, *as amended*, 29 U.S.C. § 157 (1970). Although Justice Powell used this statutory right, the situation seemed sufficiently analogous to the constitutional right of association to have probably been impliedly present.

associational rights were accommodated to the private property interests of *Central* by holding that the property right would only have to yield during a campaign by union organizers and that access would be limited to prescribed nonworking areas.[143]

Rights of association are most disadvantaged in the eyes of Justice Powell when ties of political affiliation, which do not otherwise touch on fundamental rights, encounter a strong governmental need for stability. Thus in *United States Civil Service Commission v. National Association of Letter Carriers*, he joined the majority of the Court in upholding the Hatch Act.[144] And in his dissent in *Elrod v. Burns*,[145] he stated that the political appointees' rights were outweighed by the substantial governmental interest in the patronage system. Of particular importance in *Elrod* was the historical nature of patronage and its function in local politics. It could be easily argued that, since he utilized a balancing test, Justice Powell held the associational rights not less dear, but found a stronger governmental interest than did the plurality.

3. *Conclusion*

It is likely that Justice Powell will continue to produce separate decisions in free association cases. Among other things, he seems to perceive a stronger role for state and local governments than do the other Justices. Moreover, if the first paragraphs of his *Elrod* dissent are an indication, he may be arguing against reaching the issue at all.

Justice Powell's basic strength in this area is his handling of the balancing test. He is eminently practical and discerning, and he gives profound attention to detailing the possible arguments. He has a fine sense for accommodating the competing, legitimate claims, giving some life to each. His weakness may well be in not articulating further the policies and ideas behind the right of free association.

E. Establishment Clause

Since the early 1960's, there has been increasing litigation[146] on the first amendment's initial clauses: "Congress shall make no law respecting an

143. *Id.* at 544-45.

144. 413 U.S. 548 (1973). The postal workers were testing the provisions of the Hatch Act, 5 U.S.C. §§ 7324-25 (1970), which forbade them from being active in political campaigns. The Court held that the interest in keeping the federal service politically neutral supported the limitations on their associational rights. *See* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

145. 96 S. Ct. 2673 (1976).

146. *See* Annot., 37 L. Ed. 2d 1147 (1973).

establishment of religion, or prohibiting the free exercise thereof . . . ."[147] The first of these, the establishment clause, has been highlighted by the cases concerning prayer in the public schools,[148] but more important, if less dramatic, have been the cases questioning the constitutionality of governmental benefits to sectarian institutions.[149] Most of the programs recently considered have run afoul of the Burger Court's interpretation of the establishment clause, a stance prompting much criticism.[150] Nevertheless, in his decisions, Justice Powell has agreed with the interpretation given by the Court; indeed, he has helped shape it by writing three majority opinions during his second term—*Hunt v. McNair,*[151] *Committee for Public Education & Religious Liberty v. Nyquist*[152] and *Sloan v. Lemon.*[153] Although cautious of approval, Justice Powell has not disallowed legislation indiscriminately. The statute examined in *Hunt* survived while those in *Nyquist* and *Sloan* did not. These differing yet strict results warrant closer attention to Justice Powell's ideas on the establishment clause and his analysis of facts in each case.

1. *Background of Analysis*

As in most areas, Justice Powell has not been writing on an empty tablet. He has consciously acknowledged his indebtedness to the history of the establishment clause and the prior decisions of the Court for his "broad contours of . . . inquiry."[154] An important element in Justice Powell's analysis has been the well-recognized natural tension that has existed between the establishment and free exercise clauses of the first amendment.[155] For example, denying tax exemptions on church property imposes burdens on

147. U.S. CONST. amend. I.

148. *See, e.g.,* Engel v. Vitale, 370 U.S. 421 (1962). In this case, the reading of a nondenominational prayer was held to violate the establishment clause. The second clause is the "free exercise" clause. There has been little activity in this area lately, and it will be discussed only as is necessary to make clear the analysis of the establishment clause.

149. *See, e.g.,* Meek v. Pittenger, 421 U.S. 349 (1975); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971).

150. Boles, *The Burger Court and Parochial Schools: A Study in Law, Politics and Educational Reality,* 9 VAL. U.L. REV. 459 (1975); Mott & Edelstein, *Church, State, and Education, The Supreme Court and Its Critics,* 2 J. L. & EDUC. 535 (1973) [hereinafter cited as Mott & Edelstein]; Pfeffer, *Aid to Parochial Schools: The Verge and Beyond,* 3 J. L. & ED. 115 J. LAW & ED. 115 (1974).

151. 413 U.S. 734 (1973).

152. 413 U.S. 756 (1973).

153. 413 U.S. 825 (1973).

154. 413 U.S. at 761. Justice Powell has particularly relied on Tilton v. Richardson, 403 U.S. 672 (1971), Walz v. Tax Comm'n, 397 U.S. 664 (1970), and Lemon v. Kurtzman, 403 U.S. 602 (1971).

155. Walz v. Tax Comm'n, 397 U.S. at 668-69.

the rights of parishioners to exercise freely their beliefs, while allowing the exemptions raises establishment clause objections. In such circumstances, either action or inaction by the Court "occasions some degree of involvement with religion."[156] Nor, to Justice Powell's mind, has the nation's history been "one of entirely sanitized separation between Church and State."[157] Despite the broad terms of the amendment and the unbending interpretation of them given by some Justices "[i]t has never been thought either possible or desirable to enforce a regime of total separation."[158] Thus the first amendment itself, as well as the national history, belies an "impenetrable wall of separation" between religion and government. Although Justice Powell has occasionally referred to Jefferson's metaphoric wall,[159] those thoughts have not been the foundation of his ideas on the establishment clause, and they have played little part in his *ratio decidendi.*

Instead of viewing the clauses as banning all contracts, Justice Powell has required that the legislation exhibit an attitude of neutrality which neither advances nor inhibits religion.[160] Such an attitude has marked an intermediate course between the conflicting clauses of the amendment, whose purpose "was to state an objective . . . not to write a statute."[161] Neutrality has not been hostile indifference; incidental benefits have not destroyed otherwise sound legislation.[162] Although there is still a zone of laws that are impermissible as "respecting an establishment of religion," the idea of neutrality has better comported with the crosscurrents in the history of the country.[163]

Outside a few cryptic references,[164] Justice Powell has infused little of his own content into the idea of neutrality. Relying extensively on *Walz v. Tax Commission*[165] and *Lemon v. Kurtzman*,[166] he has seemed to accept the concept as a developed part of the case law.[167] Such acceptance has not

156. *Id.* at 672-73.

157. 413 U.S. at 760.

158. *Id.*

159. *See, e.g., id.* at 761 n.5.

160. *Id.* at 788.

161. Walz v. Tax Comm'n, 397 U.S. at 668. The words are those of Chief Justice Burger, but they reflect the attitude of Justice Powell equally as well.

162. Hunt v. McNair, 413 U.S. at 742-43. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968); Zorach v. Clauson, 343 U.S. 306 (1952).

163. *See* Zorach v. Clauson, 343 U.S. 306 (1952).

164. 413 U.S. at 771 n.28, 788, 793.

165. 397 U.S. 664 (1969).

166. 403 U.S. 602 (1971).

167. 413 U.S. at 770 n.28. Here Jutice Powell refered to Madison's *Memorial and Remonstrance* as a cornerstone of neutrality as if that were all that is possible. *But see* Piekarski, *Nyquist and Public Aid to Private Education,* 58 MARQ. L. REV. 247, 255-62 (1975) [hereinafter cited as Piekarski].

been free from difficulty; there have been many competing definitions of neutrality[168] and the cases have not always been consistent.[169] The Court itself has recognized that "the course of constitutional neutrality in this area cannot be an absolutely straight line . . . ."[170]

Despite its difficulties, the idea of neutrality has been fundamental to Justice Powell's analysis. If legislation has transgressed the boundaries of neutrality, it will be declared unconstitutional. That much has been orthodox establishment clause theory.[171] But where the application of the neutrality test has not been clear because the lines of demarcation have not been well settled,[172] Justice Powell has contributed to the establishment clause by providing guidance as to the application of the test.

2. *The Test*

Respect for the subtleties in applying the standard of neutrality has carried over into the three-part test by which Justice Powell and the Court determine whether or not a statute is sufficiently neutral. The parts are merely a shorthand for the cumulative criteria developed in the Court's long experience.[173] The test itself can be succinctly stated:

> [T]o 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 intanglement with religion. . . .[174]

a. Purpose

That a statute have a secular legislative purpose has been the easiest hurdle for it to pass. Consistent with his philosophy of judicial restraint and separation of powers[175] Justice Powell did not inquire deeply into the purposes of any of the statutes considered in *Hunt*,[176] *Nyquist*[177] or *Sloan*.[178]

168. *See* Piekarski, *supra* note 167. *See also* Mott & Edelstein, *supra* note 150, at 585.

169. *Compare* Zorach v. Clauson, 343 U.S. 306 (1952), *with* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). In *McCollum*, the Supreme Court struck down a "released time" program for religious instruction in the public schools. The instructors were not paid by the state, but they used the public facilities. In *Zorach*, the Court upheld a released time program for instruction off the public property.

170. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

171. Piekarski, *supra* note 167, at 261-67.

172. 413 U.S. at 761 n.5, *citing* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

173. *Id.* at 773 n.31.

174. *Id.* at 773.

175. J. WILKINSON, SERVING JUSTICE 117-18 (1974).

176. 413 U.S. at 741-42.

177. *Id.* at 773-74.

178. *Id.* at 829-30.

He did leave the door open to such scrutiny should the occasion arise,[179] but unless some egregious statute were before the Court this part of the test probably would not be involved. The litigants in *Hunt,* for example, did not even raise the issue.[180] The search for a pluralistic society,[181] the increased burden on the public schools should the parochial system fail,[182] a healthy and safe environment for all school children,[183] the indirect benefit of education to this and future generations[184] have all been acceptable to Justice Powell as secular purposes for aid to sectarian schools.

b. Primary Effect

Justice Powell has relied most heavily on the second strand of the test: if the legislation has a primary effect of advancing or inhibiting religion, it cannot withstand a constitutional challenge. The name is somewhat misleading since Justice Powell has refused to make "metaphysical judgments" about the ultimate effects of legislation.[185] Even if judges could ascertain which effects were primary, that could not serve today any more than "200 years ago to justify . . . a direct and substantial advancement of religion" by secondary effects.[186] This broad prohibition explains some of the stringency of the test as used by Justice Powell. This test has ensnared not only the statute in *Sloan,*[187] but also each section of the tripartite statute in *Nyquist.*[188]

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179. Hunt v. McNair, 413 U.S. at 741. Justice Powell said that a "legislature's declaration of purpose may not always be a fair guide to its true intent. . . ."

180. *Id.*

181. 413 U.S. at 764.

182. Sloan v. Lemon, 413 U.S. at 829.

183. 413 U.S. at 773.

184. Hunt v. McNair, 413 U.S. at 741.

185. 413 U.S. at 783 n.39. Justice Powell was responding to the dissenting opinion of Justice White. *Id.* at 823.

186. *Id.* at 785 n.39.

187. 413 U.S. at 830-32. The statute in *Sloan* was thought to be indistinguishable from the second part of the *Nyquist* statute. It provided for a tuition reimbursement program to the parents of students attending nonpublic schools. More than ninety percent of those nonpublic schools were controlled by religious organizations. Justice Powell wrote that the state had singled out a class of citizens for an economic benefit and, characterizations of the aid aside, its "intended consequence" was to preserve and support religious institutions. *Id.* at 831-32. There had been no attempt to restrict the benefit to the secular aspects of the schooling. *Id.* at 832. See notes 192-201 *infra* and accompanying text. Justice Powell did not explain why those "intended consequences" of supporting religious institutions were not impermissible purposes under the first part of the test (purpose scrutiny).

188. 413 U.S. at 774-94. The first part of the *Nyquist* statute allowed funds for repair and maintenance payable directly to nonpublic schools, eighty-five percent of which were church-affiliated. There was no attempt to restrict the funds to secular facilities. *See* notes 192-201 *infra* and accompanying text. Rather, a statistical guarantee was provided that the funds

In *Hunt*, Justice Powell explained that the effects of legislation breach the boundaries of the establishment clause when aid flows to a pervasively sectarian institution or when the legislature funds "sectarian activity in an otherwise secular setting."[189] There have been questions about the first of these, since what constitutes a pervasively sectarian institution has gone relatively untested. In dicta in *Hunt*, Justice Powell provided some guidance by indicating that religious qualifications for faculty or students, or a disproportionate representation of the sponsoring religion would evidence a forbidden sectarian character.[190] He also reaffirmed that institutions of higher learning have been less inclined to be pervasively sectarian than elementary or secondary schools.[191]

A large part of Justice Powell's analysis in determining what is the primary effect has been focused on what would constitute funding a religious activity in a secular setting. If not pervasively sectarian, parochial schools and religiously-backed colleges perform secular functions as well as religious ones. Benefits given to such schools must be carefully restricted to secular, neutral and nonideological purposes.[192]

Certain types of aid, to Justice Powell, have been more amenable to adequate safeguards than others. For example, books to be supplied by the

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could not exceed fifty percent of the costs of maintenance. This sort of guarantee was disposed of by citing Early v. DiCenso, 403 U.S. 602, 619 (1971), which rejected a fifteen percent salary supplement for teachers. Justice Powell also reasoned that since the goverment could not finance the construction of buildings which twenty years later would become sectarian, *a fortiori* they could not presently provide for the maintenace and upkeep of religious facilities. 413 U.S. at 777. *See* Tilton v. Richardson, 403 U.S. 672 (1971).

The tuition scheme, very much like that in *Sloan*, was struck down for the same reasons. *See* note 187 *supra*. The tax credit to the parents in the third part of the statute had no different effect than the reimbursement of tuition. "The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools." *Id.* at 789-91.

One important difference between the statutes in *Sloan* and *Nyquist*, and the acceptable one in *Hunt* was the form of the state aid. In the former cases, there was a direct application of state funds to the schools. In *Hunt*, the aid was of a special sort. The statute provided for no expenditure of state funds, no reimbursement and did not involve the state's credit. Rather, by creating an authority, the government had allowed all institutions to take advantage of favorable interest rates traditionally associated with government revenue bonds. 413 U.S. at 745 n.7.

189. 413 U.S. at 743.

190. *Id.* at 743-44.

191. *Id.* at 746. The Court has on a number of occasions taken notice that religious indoctrination may not be a substantial activity of church-related colleges. *E.g.*, Tilton v. Richardson, 403 U.S. at 687. Older students have been considered less impressionable than their younger counterparts.

192. Sloan v. Lemon, 413 U.S. at 833.

state may be read and thereafter purged if they are not secular.[193] Aid for the construction of college buildings has been acceptable, but only if the buildings would never be used for religious activities.[194] That funds saved by the schools from state aid might be diverted to religious purposes has not been enough of an effect to invalidate a statute.[195] Other types of aid, such as tuition reimbursements,[196] tax credits to the parents of parochial students[197] and unencumbered grants for repair and maintenance[198] have not been as susceptible to adequate restrictions. A tax credit to the parents, for example, might allow a child to attend a parochial school no matter what religious activities are performed at the institution. In disapproving of these forms of aid in *Nyquist* and *Sloan,* Justice Powell felt that there had been no effort to separate the secular from the religious and to supply benefits only to the secular, and without such an effort the aid must fail.[199]

Justice Powell also has inquired as to who has received the benefit, since this too may effect a statute's constitutionality. Of course, direct benefits to sectarian institutions have been the most conducive to forbidden effects, but a statute has not been necessarily saved by acting indirectly. That the parent and not the instiution received a tax credit was only one of many factors considered in *Nyquist.*[200] The question has been important in another way. Effects on the verge of unconstitutionality may be mitigated if religious institutions have not been the only objects of the legislation. If a statute has affected all school children or all colleges, public or private, it has been more likely that the benefits were merely incidental and not a primary effect of the legislation.[201]

c. Entanglement

The final strand of the test is the newest. It forbids excessive entanglement between church and state, or more specifically "a comprehensive,

193. Board of Educ. v. Allen, 392 U.S. 236 (1968).

194. *Compare* Hunt v. McNair, 413 U.S. 734 (1973), *with* Tilton v. Richardson, 403 U.S. 672 (1971). In *Tilton,* the possibility that facilities would be free to be used as religious places in twenty years offended the establishment clause. *Hunt* maintained an absolute ban. Only by judicial sale could the facilities be so used and that "speculative possibility" was not sufficient to defeat the statute.

195. Walz v. Tax Comm'n, 397 U.S. at 670-71.

196. Sloan v. Lemon, 413 U.S. at 827. This was also the second part of the statute in *Nyquist.* 413 U.S. at 764.

197. 413 U.S. at 765-69.

198. *Id.* at 774-80.

199. *Id.* at 783.

200. *Id.* at 781.

201. *Id.* at 782 n.38.

discriminating, and continuing state surveillance."[202] This requirement has presented something of a paradox when taken with the requirement that aid must be limited to secular functions. If there are no restrictions on the benefits, they have unconstitutional effects, and if the restrictions are too cumbersome, they will engender an unconstitutional entanglement with religion. The path between the two has been a narrow one, as the cases have shown. Justice Powell has attributed those results to the nature of the establishment clause itself even though they are paradoxical.[203]

Thus far in his career on the bench, Justice Powell has had little occasion to use the entanglement test as described. In *Hunt,* the record was attenuated and, therefore, this question received little attention.[204] The statutes in *Nyquist* and *Sloan* violated the primary effects part of the test, so anything said in them about entanglement was dictum. But given the opportunity, Justice Powell used the entanglement section in *Nyquist* to outline his thoughts on "[the] grave potential for entanglement in the

202. *Id.* at 794, *quoting* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

203. Sloan v. Lemon, 413 U.S. at 835. A difference in perspective on this paradox may well explain why Justice Powell and Chief Justice Burger obtain different results with the same analytical tools. In his theory, Justice Powell has relied heavily on formulations of the Chief Justice. See notes 154, 165 & 166 *supra* and accompanying text. However, the Chief Justice has often disagreed with the application of those formulations. 413 U.S. at 798 (Burger, C.J., concurring and dissenting). *See also* Meek v. Pittenger, 421 U.S. 349, 385 (1975) (Burger, C.J., concurring and dissenting). *But see* Roemer v. Board of Public Works, 96 S. Ct. 2337 (1976).

The Chief Justice has regarded these two tests, entanglement and effects, as part of a policy of "benevolent neutrality" towards religion. Walz v. Tax Comm'n, 397 U.S. at 669. In fact, the entanglement test, at its creation, helped the Chief Justice save the preferential tax treatment for churchs, because denying the preferences would have fostered excessive entanglement with the parishoners' rights of free exercise. *Id.* at 674-77. He saw that granting exemptions effected an economic benefit, *id.* at 674, but "benevolent neutrality was not restricted to a narrow channel." *Id.* at 669, *quoting* Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting).

Justice Powell, on the other hand, has taken each part of the test to be independently powerful. The doctrines are part of the constitutional command with which he cannot tamper, paradox or not. To him the channel of aid is a narrow one. 413 U.S. at 775. Given certain types of aid, the channel might be closed. *Id.* at 774. *See* notes 193-198 *supra* and accompanying text.

This stringency was apparent in Justice Powell's concurrence to Wheeler v. Barrera, 417 U.S. 402, 428 (1973). By statutory construction, the majority of the Court decided, among other things, that Title I of the Elementary and Secondary Education Act of 1965, *as amended,* 20 U.S.C. § 241(a) *et seq.* (1970), did not *require* states to furnish special teaching services to nonpublic as well as public schools. *Id.* at 419. Justice Powell, writing his only concurrence in an establishment clause case, emphasized his "serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools." *Id.* at 428.

204. 413 U.S. at 749.

broader sense of a continuing political strife over aid to religion."[205] What he outlined was a balancing test.[206] On one side of the scales were the acceptable purposes—the role of private education in society, the burden on low income families who wish their children to go to parochial schools and the grave fiscal problems engendered by such action. Against that must be weighed "the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State. . . ."[207] Especially important was the potentially divisive political effect of an aid program, which had a natural tendency to grow larger. Such potential might not, by itself, invalidate legislation, but Justice Powell understated his view by saying simply that it should not be ignored.[208]

The language on balancing is puzzling. The test as described does not seem to be a pure balancing test such as Justice Powell has used in other areas. Whether he was being candid about the Court's decision, or whether he was merely being descriptive of the policy engraved in the clause, or whether the language should be limited to entanglements is simply not known.

3. *Conclusion*

In the establishment clause and the existing cases, Justice Powell has found a large barrier to governmental aid to religious instructions. The ominous tone in *Nyquist* about political divisiveness shows how seriously Justice Powell takes this area of the law. It portends similar results in future litigation. His weaknesses, if any, are in failing to state more clearly what is meant by the amorphous word "neutrality" and what part a weighing of interests actually plays in his decisions. Among his many strengths are an assiduous answering of the competing arguments and a clear impatience with contentions not going to the heart of the matter. In these cases, Justice Powell has always kept before him the reasons for the first amendment. He has not allowed artificial distinctions or sophistical arguments to blind him to the substance of the legislation or the establishment clause.

F. Conclusion

Like Justice Harlan, Justice Powell has found that a balancing approach has been the best technique for first amendment adjudication. In these first amendment cases, he has carefully balanced the governmental inter-

205. 413 U.S. at 794.
206. *Id.* at 794-98.
207. *Id.* at 795.
208. *Id.* at 798.

ests and the individual interests against one another, striving always to arrive at a just accommodation of the conflicting claims. A balancing approach as used by Justice Powell requires the preception of every first amendment interest in any situation and a careful scrutiny of all justifications for restrictions of first amendment rights. As a balancer, Justice Powell has not avoided substantive issues in the areas of free speech and, to some extent, associational rights by invoking Warren Court techniques, such as overbreadth, but rather has focused his attention on the case before him. Justice Powell has rejected simple categorizations, thereby allowing himself much flexibility in his decisional process.

In some areas of first amendment concern, Justice Powell has been at the forefront of the Court's directional changes. He was responsible for curtailing the increasing enlargement of areas where actual malice was necessary as a condition precedent to recovery from the news media for libel. Justice Powell has also played a major role in the recognition by the Court of a first amendment right of newsmen to gather information. In other areas, such as the abrogation of the commercial speech exception or in applying the concept of neutrality, Justice Powell has shown some guidance and is certainly in the mainstream. Justice Powell has also gone in different directions than the Court on some problems. For Justice Powell, "fighting words" has been a sufficiently flexible concept to allow punishing the use of scurrilous language when used before a captive audience which has no reason to expect such language. He has not permitted absolute prohibition of so important a news gathering tool as personal interviews in the prison context. He has readily identified issues affecting associational rights.

Justice Powell has shown a marked consistency to strive to isolate the crucial factors in every situation and then to balance them according to their importance to a society founded on individual liberty. Balancing, for Justice Powell, has been and is the most potent judicial tool for the resolution of conflicts within our pluralistic society.

VII. CONCLUSION

As this examination of Justice Powell's opinions in the area of constitutional law has revealed, his chief tool in framing the result in any case has been a balancing test. The factors on each side of the scale have been weighed according to their value in the particular case. However, this value has been skewed by three overrriding concerns of Justice Powell: judicial restraint, the American system of federalism and the need for an ordered society. Whether one agrees or disagrees with these concerns, Justice Powell's opinions have been logically consistent with these points of view.