

1977

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Recommended Citation

J. H. Wilkinson III, *Hon. Lewis F. Powell, Jr.: Five Years on the Supreme Court: Mr. Justice Powell: An Overview*, 11 U. Rich. L. Rev. 259 (1977).

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HON. LEWIS F. POWELL, JR.: FIVE YEARS ON THE SUPREME COURT

MR. JUSTICE POWELL: AN OVERVIEW

*J. Harvie Wilkinson III**

In January of 1977, Justice Lewis F. Powell, Jr., marked his fifth anniversary as an Associate Justice of the Supreme Court of the United States. Any definitive evaluation of Justice Powell at this hopefully still early stage of his judicial service is impossible. Yet the 1975 term of Court—Powell's fifth—marked him as a Justice of great collegial impact and, in terms of his own career, saw a coming of age: an end, if you will, to the beginning.

As with Justice Black during the Warren years, Justice Powell in the 1975 term saw the full Court adopt several of his important positions and viewpoints of earlier years. The judgment of the Court in the capital punishment cases,¹ of which Powell was triauthor, borrowed significantly from his earlier *Furman v. Georgia* dissent.² Powell's Court opinion in *Stone v. Powell*,³ which greatly restricted federal habeas corpus review of state prisoners' fourth amendment claims, was a direct outgrowth of his previous concurrence in *Schneekloth v. Bustamonte*.⁴ His effort in the elaborate separate opinion in *Keyes v. Denver School District*⁵ to limit the equitable discretion of federal district court judges in pupil assignment plans bore modest fruit in *Pasadena Board of Education v. Spangler*.⁶ And two of Powell's major dissents of the 1974 term, which rejected extensions of due process requirements⁷ and section 1983 liability⁸ to the actions of school officials, may have helped generate majority opinions authored by Powell which significantly limited those two

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1. *Gregg v. Georgia*, 96 S. Ct. 2909 (1976); *Proffitt v. Florida*, 96 S. Ct. 2960 (1976); *Jurek v. Texas*, 96 S. Ct. 2950 (1976); *Woodson v. North Carolina*, 96 S. Ct. 2978 (1976); *Roberts v. Louisiana*, 96 S. Ct. 3001 (1976).

2. 408 U.S. 238, 414 (1972).

3. 96 S. Ct. 3037 (1976).

4. 412 U.S. 218, 250 (1973).

5. 413 U.S. 189, 217 (1973) (concurring in part, dissenting in part).

6. 96 S. Ct. 416 (1976). The Court's opinion in *Spangler* was by Justice Rehnquist.

7. *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

8. *Wood v. Strickland*, 420 U.S. 308, 327 (1975) (concurring in part and dissenting in part).

doctrines just one term later,⁹ though admittedly outside the school context.

From the outset, commentators have seen in Justice Powell a jurist of special promise,¹⁰ and some newsmen recently have termed him the "dominant" figure on the Burger Court.¹¹ Such claims, though titillating to debate, are impossible and perhaps not really important to resolve. What seems certain is that historians of the Burger Court and of the Court's course in the twentieth century will find him worth prolonged attention.

One begins with Justice Powell as the Burkean judge. The Burkean or Whig model, wrote Alexander Bickel,

begins not with theoretical rights but with a real society, whose origins in the historical mists it acknowledges to be mysterious. The Whig model assesses human nature as it is seen to be. . . . The values of such a society evolve, but as of any particular moment they are taken as given. Limits are set by culture, by time—and place—bound conditions, and within these limits the task of government informed by the present state of values is to make a peaceable, good, and improving society. That, and not anything that existed prior to society itself and that now exists independently of society, is what men have a right to. The Whig model is flexible, pragmatic, slow moving, highly political. . . . [It] rests on a mature skepticism.¹²

Unlike many activists of the *Lochner* and Warren eras, Justice Powell remains mainly pragmatic, cautious, understated, traditionalist, mildly fatalistic, more at home with the ironies of human nature and the shades and tangles of individual human situations than with the lofty imperatives of grand and abstract constitutional rights. "Logic," he recently observed, ". . . would seem to dictate that arrests be subject to the warrant requirement at least to the

9. *Mathews v. Eldridge*, 96 S. Ct. 893 (1976); *Imbler v. Pachtman*, 96 S. Ct. 984 (1976).

10. See Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1972); Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972) [hereinafter cited as Gunther].

11. See, e.g., Denniston, *Where the Justices Stand at the End of a Tough Term*, Washington Star, July 8, 1976 § A, at 1, col. 1; Kohlmeier, *Justice Powell: For Business, a Friend in Court*, New York Times, March 14, 1976, § 3, at 5, cols. 1-3.

12. A. BICKEL, *THE MORALITY OF CONSENT* 4 (1975).

same extent as searches. But logic sometimes must defer to history and experience."¹³

Justice Powell is a believer in the limitations of human institutions in the face of human nature. Man, he suspects, is likely to outwit or outlast most concerted attempts to "improve" him. Thus the federal judiciary, our most remote and elite organ of government, must become more realistic, less ambitious. From the first, Powell has been concerned about the workload of the Supreme Court,¹⁴ not as a matter of personal pressure, but as an unrealistic matching of judicial aims to capabilities. He has often sought, in the name of federalism, to turn responsibility for decisions over to the states.¹⁵ He has limited the access to federal court of litigants pressing social reform.¹⁶ He has also regarded with some suspicion the equitable powers of the federal district court judge,¹⁷ which, in their breadth and discretion, have aroused in some Americans significant hostility and resentment.

Justice Powell has evinced a greater willingness to credit the judgment of lower level public functionaries, though his trust in them is by no means naive or absolute.¹⁸ Prosecutors should, in general, enjoy great latitude in initiating prosecution,¹⁹ police²⁰ and grand juries²¹ in uncovering evidence, state trial judges in conducting voir dire,²² welfare workers in removing recipients from the rolls,²³ school

13. *United States v. Watson*, 96 S. Ct. 820, 830 (1976) (Powell, J., concurring).

14. See *An Overburdened Supreme Court*, Address to the Fourth Circuit Judicial Conference, June 30, 1972, pp. 11-12.

15. See, e.g., *Stone v. Powell*, 96 S. Ct. 3037 (1976); *New York Dept. of Social Serv. v. Dublino*, 413 U.S. 405 (1973); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Powell, J., concurring).

16. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166, 180 (1974) (Powell, J., concurring).

17. *Keyes v. Denver School Dist.*, 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part). Note also Powell's "join" of Justice Rehnquist's Court opinions in *Rizzo v. Goode*, 96 S. Ct. 598 (1976) and *Pasadena Bd. of Educ. v. Spangler*, 96 S. Ct. 416 (1976).

18. See, e.g., *Procunier v. Martinez*, 416 U.S. 396 (1974); *Almeida-Sanchez v. United States*, 413 U.S. 266, 275 (1973) (Powell, J., concurring).

19. *Imbler v. Pachtman*, 96 S. Ct. 984 (1976).

20. *Neil v. Biggers*, 409 U.S. 188 (1972).

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

22. *Ristaino v. Ross*, 96 S. Ct. 1017 (1976).

23. *Mathews v. Eldridge*, 96 S. Ct. 893 (1976).

officials in enforcing discipline among their charges,²⁴ military officers in directing basic training,²⁵ and so on. The Warren Court, of course, took quite the opposite tack, believing that bright-line constitutional rules would help reform the insensitive, even brutal, treatment by police and petty bureaucrats toward those with whom they dealt.²⁶ To Powell, however, the law seems distinctly less likely to reform the behavior of such persons than to impede solutions of the very severe problems they confront. Those problems, for the most part, involve front-line maintenance of discipline and order. For Justice Powell, it is precisely the breakdown of such things as community order and individual self-discipline that most endanger the nation's health. "One who does not comprehend the meaning and necessity of discipline," he noted, "is handicapped not merely in his education but throughout his subsequent life."²⁷

Justice Powell's generally modest conception of the judicial reach influences his technique of opinion-writing, which often seeks to balance competing factors en route to narrow, fact-specific results. Consider, for example, the classic Powellian *per curiam*, *Spence v. Washington*,²⁸ which involved the right of a protester in the wake of the Cambodian-Kent State crisis to display a flag, to which was affixed a peace symbol, from the window of his apartment. Powell eventually upheld the protester's right, but only after painstakingly pointing out all that the case did *not* involve:

First, this was a privately owned flag. In a technical property sense it was *not* the property of any government. . . . Second, appellant displayed his flag on private property. He engaged in *no* trespass or disorderly conduct. *Nor* is this a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area. Third, the record is *devoid* of proof of any risk of breach of the peace. . . .

24. *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (Powell, J., dissenting).

25. *Greer v. Spock*, 96 S. Ct. 1211, 1219 (1976) (Powell, J., concurring).

26. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966).

27. *Goss v. Lopez*, 419 U.S. 565, 593 (1975) (Powell, J., dissenting).

28. 418 U.S. 405 (1974). Although one can never be entirely certain which Justice authored a *per curiam*, Powell had written a Court opinion just three months earlier in *Smith v. Goguen*, 415 U.S. 566 (1974), reversing a Massachusetts conviction of Goguen for wearing a small United States flag sewn to the seat of his trousers. Then, too, the careful interest balancing in *Spence* is characteristic of Justice Powell's approach to first amendment issues. *See generally* Healy v. James, 408 U.S. 169 (1972), and Gunther, *supra* note 10.

It may be noted, further, that this was *not* an act of mindless nihilism. . . .

. . . . [T]here was *no* risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully protesting the fact that it did not. Appellant was *not* charged under the desecration statute . . . *nor* did he permanently disfigure the flag or destroy it. . . .²⁹

The opinion thus ultimately came to rest on the head of a pin. Yet, ironically, *Spence* did propound a significant principle—that conduct, as well as speech, was to be subject to rigorous first amendment balancing. But the principle emerged almost in spite of itself, only after the exhaustive efforts at reducing it could proceed no further.

Spence stands in obvious contrast to the more sweeping approach of *San Antonio Independent School District v. Rodriguez*,³⁰ where Powell sought to establish two-tiered scrutiny as the dominant mode of equal protection analysis. Powell saw in *Rodriguez* and in the two-tiered test an opportunity to shield all but the most select and specifically enumerated subjects from close judicial review. The opinion was grandly conceived and grandly executed to contain an equal protection law that, only one term before, had shown definite signs of slipping out of control.³¹

From the beginning, however, there were difficulties. Justice Powell's early opinion in *Weber v. Aetna Casualty & Surety Co.*,³² was among those that appeared to advocate a balancing framework for equal protection claims that was in essence a third, intermediate standard of scrutiny, or at least a heightened version of the traditionally supine rational basis test.³³ Moreover, this middle-level

29. 418 U.S. at 408-10, 414-15 (emphasis added).

30. 411 U.S. 1 (1973). The Court in *Rodriguez* rejected a constitutional challenge to disparities in funding among public school districts in Texas.

31. See especially *James v. Strange*, 407 U.S. 128 (1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Reed v. Reed*, 404 U.S. 71 (1971), and the thoughtful discussion of these and others of that term's equal protection cases in 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).

32. 406 U.S. 164 (1972).

33. See also *James v. Strange*, 407 U.S. 128 (1972).

scrutiny has survived *Rodriguez*, most noticeably in the sex discrimination context.³⁴ Indeed Justice Powell's own concurrences in *Frontiero v. Richardson*³⁵ and *Cleveland Board of Education v. LaFleur*³⁶ and his votes in such cases as *Department of Agriculture v. Moreno*³⁷ and *Stanton v. Stanton*³⁸ — all after *Rodriguez* — can best be understood as tacit acknowledgements that the middle standard continued to exist. Events came full circle last term in *Mathews v. Lucas*³⁹ when Justice Powell joined Justice Blackmun's Court opinion which directly quoted and utilized the *Weber* middle-level balancing formula.⁴⁰

Fully as important as doctrinal developments are the qualities of mind and temperament evidenced in the Powell opinions. While some seem strained,⁴¹ bare⁴² or insufficiently instructive,⁴³ many more appear products of sustaining quality.⁴⁴ The opinions are, at their best, precise in expression, sound in construction, candid as

34. See, e.g., *Stanton v. Stanton*, 421 U.S. 7 (1975).

35. 411 U.S. 677, 691 (1973) (Powell, J., concurring in the judgment).

36. 414 U.S. 632, 651 (1974) (Powell, J., concurring in the result). Although in this case Justice Powell explicitly invoked a rationality standard, the maternity leave rules at issue seemed at least rationally related to the state's goal of keeping physically unfit teachers from the classroom. It is difficult to resist the conclusion, therefore, that Justice Powell implicitly employed an intermediate level of scrutiny.

37. 413 U.S. 528 (1973), referred to as yet another example of an "unacknowledged application of a stricter rationality test . . ." *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 133 (1973).

38. 421 U.S. 7 (1975).

39. 96 S. Ct. 2755 (1976).

40. The results in *Weber* and *Mathews* were different; *Mathews* rejecting the constitutional challenge and *Weber* affirming it.

41. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972).

42. *United States v. Miller*, 96 S. Ct. 1619 (1976); *Ristaino v. Ross*, 96 S. Ct. 1017 (1976).

43. *Barker v. Wingo*, 407 U.S. 514 (1972).

44. Among the best, in my view, are *Imbler v. Pachtman*, 96 S. Ct. 984 (1976); *Mathews v. Eldridge*, 96 S. Ct. 893 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (Powell, J., dissenting); *Procunier v. Martinez*, 416 U.S. 396 (1974); *United States v. Calandra*, 414 U.S. 338 (1974); *In re Griffiths*, 413 U.S. 717 (1973); *Keyes v. Denver School Dist.*, 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part); *Schneekloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring); *Furman v. Georgia*, 408 U.S. 238, 414 (1972) (Powell, J., dissenting); *Healy v. James*, 408 U.S. 169 (1972); *United States v. United States Dist. Court*, 407 U.S. 297 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (opinion of Powell, J.); and, collectively, the border search quartet: *United States v. Martinez-Fuerte*, 96 S. Ct. 3074 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266, 275 (1973) (Powell, J., concurring).

to premise and progression, more cogent and forceful than eloquent in argument. They are thorough, as distinct from compendious. Their essential characteristic is often an appealing modesty. Justice Powell does not over-work an argument,⁴⁵ and he is willing to admit quite openly the deficiencies of past performance.⁴⁶ The modesty is genuinely part of his broader outlook. Indeed, he poses the work of the present Court in prosaic and, perhaps, unfairly diminished terms:

Few would deny that the Warren Court, in a 15-year span, vastly expanded the role of the judiciary by construing the Constitution in dramatically bold and unprecedented ways. . . .

It was perhaps inevitable, even without major changes in personnel, that a period of consolidation and leveling-off would follow. Changes in personnel did bring, as they have in the past, fresh and different assumptions and perceptions as to the role of the Court and certain constitutional issues.

The present Court, mindful of preserving the vitality of democratic processes, may be more deferential to legislative judgments, it is more likely to give some weight to federalism, and it is more conventional in demanding compliance with jurisdictional and standing requirements.⁴⁷

Justice Powell's stature on the present Court is attributable, as much as anything else, to his independence. Independence on the Supreme Court is more than a matter of a conscientious vote on the merits of each case. It means, in the truest sense, a confident intellectual distinctiveness of the kind Justices Black, Harlan and Frankfurter have recently exhibited. Powell demonstrated a remarkable willingness, as a new Justice, to chart his own course on important questions in such areas as: school desegregation,⁴⁸ federal habeas corpus,⁴⁹ unanimous jury verdicts,⁵⁰ border searches,⁵¹ sex

45. Note, for example, the discussion of the degree of hardship worked by an erroneous termination in *Mathews v. Eldridge*, 96 S. Ct. 893, 906-07 (1976).

46. See especially *Hudgens v. NLRB*, 96 S. Ct. 1029, 1039 (1976) (Powell, J., concurring).

47. *Report on the Court*, Address to the Labor Law section of the American Bar Association, August 11, 1976, p. 11.

48. *Keyes v. Denver School Dist.*, 413 U.S. 189 (1973) (Powell, J., concurring in part and dissenting in part).

49. *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

50. *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (opinion of Powell, J.).

51. *Almeida-Sanchez v. United States*, 413 U.S. 266, 275 (1973) (Powell, J., concurring).

discrimination⁵² and abusive speech.⁵³ Indeed, no one can read the work of the important 1975 term without observing the large number of Powell concurrences.⁵⁴ It is always easier, of course, for a busy Justice simply to join the majority opinion if it at all approximates his own views. In fact, a concurrence may suggest some resitiveness with the way a colleague wrote the Court's opinion⁵⁵ or reduce a majority voice to that of a less authoritative plurality.⁵⁶ While these concurrences, predictably, are not all equally helpful, the fact that they were written demonstrates determination to vote and think independently upon each case.

Second, there is independence as to result. Justice Powell has not been preoccupied with how an opinion would be "received." Instead he has voted his convictions, conservative by philosophy though not by reflex. Each term, in fact, has produced at least one significant Court opinion by Justice Powell of a libertarian bent.⁵⁷ Finally, it was Justice Powell who greatly helped to make the term "Nixon Court" a misnomer. He disagreed with President Nixon's opposition to abortion⁵⁸ and with his support of public aid for parochial schools.⁵⁹ Long before *United States v. Nixon*,⁶⁰ Justice Powell wrote the opinion refusing the administration's request to wiretap the phones of domestic threats to the national security without a prior

52. *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (Powell, J., concurring in the judgment).

53. *Rosenfeld v. New Jersey*, 408 U.S. 901, 903 (1972) (Powell, J., dissenting); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (Powell, J., concurring in the result); *Brown v. Oklahoma*, 408 U.S. 914 (1972) (Powell, J., concurring in the result). On Justice Powell's approach to this question, see Gunther, *supra* note 10, at 1029-35.

54. The term concurrence is meant to embrace concurring opinions, opinions concurring in the judgment and opinions concurring in the result. There were twenty-one such Powell opinions in the 1975 term.

55. See, e.g., *United States v. Watson*, 96 S. Ct. 820, 828 (1976) (Powell, J., concurring).

56. See, e.g., *Hampton v. United States*, 96 S. Ct. 1642 (1976) (Powell, J., concurring in the judgment).

57. See, e.g., *Doyle v. Ohio*, 96 S. Ct. 2240 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

58. Justice Powell was, of course, a member of the majority in *Roe v. Wade*, 410 U.S. 113 (1973).

59. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973).

60. 418 U.S. 683 (1974).

court order.⁶¹ The opinion was an eloquent forewarning of the worst of Watergate:

History abundantly documents the tendency of Government—however benevolent or benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. . . . The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.⁶²

It is impossible in a brief introduction either to explore or to predict the full extent of Justice Powell's contribution as a Justice of the Supreme Court.⁶³ One parting hope does seem worth noting. It was crucial to the prospects of constitutional restraint that the change in direction from the Warren years be led by persons of stature, independence and intellectual substance. Justice Powell has, thankfully, supplied those commodities. Because of Justice Powell, and others like him, the present may yet come to be an era with its own significant character and message, more than a bidding of time between the Court's activist periods.

61. *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

62. *Id.* at 314.

63. I have further discussed this contribution in *SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW* (1974).

