PROFILE

JUSTICE LEWIS F. POWELL, JR.: A PRAGMATIC RELATIVIST

CRAIG EVAN KLAFTER*

> It is not, what a lawyer tells me I *may* do; but what humanity, reason, and justice, tell me I ought to do.[1]

On August 25, 1998, Justice Lewis F. Powell, Jr. died and left a legacy of pragmatism, moderation, and gentlemanly conduct, which he exhibited during some of America's most fractious times. As a member and chair of the Richmond School Board and a member of Virginia's State Board of Education in the 1950s and 1960s, he steered a course toward eventual desegregation while avoiding the confrontations that marked attempts at racial integration in other states. As president of the American Bar Association during the mid-1960s, he expressed concern about civil disobedience and excessive efforts to protect the rights of criminals. At the same time, he was instrumental in creating the Office of Economic Opportunity Legal Services Program, which provided government-funded legal services to the poor. In his fifteen-year tenure on the United States Supreme Court, his search for pragmatic compromises often made him the swing vote on important cases. He was thus viewed by some as the most powerful member of the Court. To others, however, this pragmatism was a weakness. They believed that Justice Powell's lack of ideological consistency fostered a conception of constitutional law as independent of broad legal principles and precedent, a theory which made it difficult to predict the outcome of future cases. Justice Powell is not likely to be remembered among the greatest of the Supreme Court justices. He is likely, however, to be remembered as "a model of human kindness," who appeared to live by Robert E. "Lee's precept: Do your duty in all things."[2]

---

* Craig Evan Klafter is Assistant to the President and Adjunct Professor of Law at Boston University. From 1993 to 1994, he served as Associate Historian at the Federal Judicial Center in Washington, D.C. where he had the opportunity to converse with Justice Powell.

[1] Edmund Burke, *Second Speech on Conciliation with America: The Thirteen Resolutions.*

[2] R.H. Melton, *Lewis Powell's Life Celebrated; Former Justice Eulogized as a Patriot and a Gentleman,* WASH. POST, Sept. 1, 1998, at A8 (quoting remarks of Justice O'Connor at the funeral of Justice Powell).

Lewis Franklin Powell, Jr. was born in Suffolk, Virginia on September 19, 1907, to devout Baptist upper-middle class parents. Lewis, Jr. was a quiet, polite, and studious child. His parents instilled in him piety and a great sense of duty. He graduated from McGuire's University School in Richmond, Virginia in 1925. He then went on to Washington and Lee University where he earned a Bachelor of Science *magna cum laude* from the School of Commerce and Administration in 1929. Two years later, he graduated first in his class from the School of Law and shortly thereafter became a member of the Virginia Bar.[3]

Powell did not find Washington and Lee particularly challenging. The curriculum focused on learning legal principles. There was little discussion of legal policy, and case dissents were generally ignored. Powell's task as a law student was to learn the details of controlling decisions. That he did well. What he also learned, however, was that thoroughness, studious attention to details, and memorization were the tickets to law school success.[4]

After graduating Washington and Lee, Powell pursued a graduate degree in law at Harvard University. Powell's father had been disappointed by his son's decision to attend Washington and Lee over the University of Virginia and persuaded Lewis Jr. to upgrade his legal qualifications. Lewis Powell, Jr. was "awoken from his dogmatic slumbers"[5] at Harvard Law School. He was taught by three of the most dynamic legal educators in American history - Felix Frankfurter, Roscoe Pound, and Bull Warren. Together, these luminaries taught Powell to approach precedents very differently than he had been taught at Washington and Lee. They taught him not just to read cases and memorize legal principles, but to argue with and be skeptical of them. They taught him that precedents should be considered practically and judged with regard to their effects on society.[6]

By the time Powell received an LL.M. from Harvard in 1932, his view of the law had been transformed. The change that occurred, however, was not revolutionary. Although he learned to question the legal formalism he was taught at Washington and Lee, he did not abandon his profound respect for legal authority. The result was a personal jurisprudence that emphasized the doctrine of *stare decisis*, except when Powell was persuaded that justice demanded a different conclusion. This was the underlying philosophy of law that guided him through his practice of law, his public service, and his tenure on the United States Supreme Court.

After Harvard, Powell could have found excellent employment in New York. Instead, he chose to return to Richmond. He had found Felix Frankfurter's aggressive style in the classroom disturbing and perhaps did not cherish the thought of residing in the city that raised him. In Richmond, he found employment with the small law firm of Christian, Barton & Parker.[7]

---

[3] *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 13-43 (1994).

[4] *See id.*

[5] IMMANUEL KANT, THE CRITIQUE OF PURE REASON 1 (1781).

[6] *See id.*

[7] *See* JEFFRIES, *supra* note 3, at 44-59.

Powell was a tireless worker, and was soon asked by the senior partner to work with him on the biggest legal matter in Richmond at that time. Andrew Christian's clients were the receivers of the American Bank and Trust Company. The Bank had gone into receivership, a state proceeding similar to bankruptcy, in March 1933. Christian and Powell's responsibility was to help the receivers to maximize the Bank's assets in order to settle creditors' claims. The matter brought Powell to the attention of the Richmond Bar, which appeared to have most of its members engaged in representing the Bank's creditors. For Powell, the most important case to come out of this representation was a suit for negligent mismanagement of the bank, brought by the receivers against the Bank's former directors. In a hearing on the defendant's motion to dismiss, Powell impressively and successfully argued the case for the receivers.[8]

One of the receivers present for the oral argument was T. Justin Moore, a partner in the firm of Hunton, Williams, Anderson, Gay & Moore. Hunton, Williams was Richmond's leading firm and Moore was the firm's biggest rainmaker. Moore was so impressed with Powell's argument that he offered him an associate's position. On January 1, 1935, Powell joined the firm expecting to work for Moore. However, Thomas Benjamin Gay, Moore's senior in the firm, poached Powell. Under Gay's mentorship, Powell became an outstanding litigator known for the thoroughness of his research and his ability to bring that research to bear for the benefit of his clients. Three years to the day after joining the firm, Powell became partner.[9]

Although partnership brought Powell job security and a greater income, it did not alter his work habits. During the next three years, Powell continued to work long hours for Gay's clients. He did find the time, however, to court and marry Josephine Pierce Rucker and to father two daughters. He also found time to become an active member of the Junior Bar Conference of the American Bar Association, through which he helped organize a public information campaign in support of defense preparedness. Powell drafted speeches and memoranda on the history of the Constitution, labor and the national defense, in opposition to sentiments against Americans of German and Italian ancestry, and about the lack of civil rights in Germany and German-occupied France and Belgium. In 1941, Powell's efforts lead, in part, to his election as Chairman of the Junior Bar Conference. His efforts also persuaded him that he had a duty to serve his country in the war.[10]

From 1942 to 1946, Powell took a paid leave of absence from Hunton, Williams to serve in the United States Army Air Corp. He saw action in North Africa, France, and Germany, worked in Army Intelligence on the Ultra project, and headed United States Strategic Air Force Operational Intelligence. It was in this last role that Powell developed the skills of leadership that would later take him to the top of his profession. In 1946, he was discharged from the Army

---

[8] *See* JEFFRIES, *supra* note 3, at 44-59.

[9] *See id.*

[10] *See id.* at 60-114.

with the rank of colonel and resumed his practice at Hunton, Williams.[11]

Hunton, Williams had not changed significantly during Powell's absence. When he returned, Powell found Thomas Gay anxious to resume their working relationship just as it had been before Powell entered the service. Powell was determined, however, to get out from under Gay's shadow. In order to do this, he needed clients of his own. To attract clients, he needed to become known.[12]

Powell sought to further his reputation through the organized bar and through public service. This is not to suggest that his reasons for serving the bar and public institutions were purely selfish. Powell also viewed such service as a duty of citizenship. Over the next seven years, Powell took on numerous commitments including the chairmanship of the Richmond Charter Commission (1947), the presidency of the Richmond Bar Association (1949), and membership on (1950-1952) and chairmanship of the Richmond School Board (1952-1961). He also performed extensive *pro bono* work. Consequently, his reputation grew, he acquired an abundance of important clients, and, on June 1, 1954, he became a named partner of what was now called Hunton, Williams, Gay, Moore & Powell.[13]

On May 17, 1954, the United States Supreme Court in *Brown v. Board of Education*[14] ruled that the doctrine of "separate but equal" was unconstitutional with regard to public education. The Court did not order the immediate desegregation of public schools. Rather, it asked for further argument on how to begin. The process of desegregation would take more than two decades before substantial progress could be recorded.

To say that *Brown* unsettled Southern sensibilities is an understatement. J.R. Pole has noted that "this judgement aroused a storm of most bitter protest throughout the South."[15] This storm included race riots, increased Ku Klux Klan activity, and pledges by many Southern politicians to continue segregation. In Virginia, Governor Stanley stated that he would "use every legal means at [his] command to continue segregated schools in Virginia."[16]

As Chairman of the Richmond School Board from 1952 to 1961, Powell had some responsibility for implementing the Supreme Court's wishes in Richmond. A state agency was responsible for pupil placement, but the Richmond School Board helped it to implement pupil placement policy. Powell's biographer, John C. Jeffries, Jr., notes that Powell failed to desegregate Richmond's schools. "Richmond did not admit black children to white schools until the fall of 1960," and, Jeffries wrote, "The next spring, when Powell resigned from the school board on appointment to the State Board of Education, only two of Richmond's 23,000 black children attended school with whites."[17] Although statistics

---

[11] *See id.* at 60-114.

[12] *See id.* at 123.

[13] S. REP. NO. 92-17, at 1 (1971).

[14] Brown v. Bd. of Educ., 347 U.S. 483 (1995).

[15] J. R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 269 (1978).

[16] BENJAMIN MUSE, VIRGINIA'S MASSIVE RESISTANCE 7 (1961).

[17] JEFFRIES, *supra* note 3, at 140-41.

such as these would later be used by Powell's opponents to charge that he was a segregationist, Jeffries argues that Powell pushed through initiatives that eventually led the schools to desegregation.

On January 3, 1961, Powell resigned from the Richmond School Board to become a member of the State Board of Education. One of Powell's first actions was to give to local school boards full power over pupil placement. This was necessary if desegregation was going to succeed because only local school boards fully understood the demographics of their schools and communities. There was, however, another obvious benefit. The State Board would not have to deal with this politically-charged issue. Unfortunately, the local school boards did not deal with this issue either – at least not until 1968 when the Supreme Court held that school boards had an affirmative obligation to desegregate.[18]

Powell's service on the Richmond School Board and the State Board of Education revealed his tendency towards moderation and consensus. The work of these boards at this time in history was very difficult. Segregationists were determined to maintain the status quo, and the federal government and black leaders were determined to ensure that desegregation was implemented. Powell chose a middle course. Realizing that there was no consensus in favor of desegregation, he seldom publicly pushed the point. Privately, however, he did what he could to keep resistance to integration at a minimum. It is easy with the sensibilities of the 1990s to say that Powell should have done more. Given Virginia's political climate in the Fifties and Sixties, however, Powell probably did the most he could have accomplished. If he did more, he would have jeopardized his positions and thus would have lost the very power he needed to help Virginia down the road towards full compliance with *Brown*.

Although Powell devoted much of his time to public service, his principal commitment remained with his firm. As he was building a reputation as a Virginia public servant, he was building a national reputation as a lawyer. By 1965, Powell had included among his clients the Colonial Williamsburg Foundation, Philip Morris, United Virginia Bancshares (now Crestar), and the Albemarle Paper Company which became Ethyl Corporation.[19] His representation of clients such as these brought him into contact with lawyers and businessman from all over the country. Powell would use these contacts to help him rise to the top of his profession.

In 1957, Powell used his contacts in Virginia to gain election to the American Bar Association ("ABA") as Virginia's State Delegate. He was reelected without opposition in 1959 and 1962. In February 1963, he used his national contacts to win election as president-elect of the ABA. One year later, he became the ABA's eighty-eighth president.[20]

Powell's term as president of the ABA is notable. He committed the ABA to the establishment of standards for the administration of criminal justice. He oversaw the revision of the *Canons of Professional Ethics*, drafted in 1908, to

---

[18] *See* Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968).

[19] *See* JEFFRIES, *supra* note 3, at 188-93.

[20] *See id.* at 194.

relax the rules about soliciting clients (he argued that the old standards limited the availability of legal services), to establish clear guidance about dealings with the press, to provide for an obligation to represent unpopular clients, and to ensure greater enforcement to punish unethical lawyers. The result was the adoption of the *Code of Professional Responsibility* in 1969. He was instrumental in the drafting and adoption of the Twenty-fifth Amendment to the Constitution. He expanded legal services to the poor by successfully negotiating with Lyndon Johnson's Office of Economic Opportunity to obtain government funding for legal aid societies. While these initiatives were championed by liberal members of the ABA, Powell's criticism of the lawlessness of student radicals won him support from conservatives. This balance of activity earned the American Bar Association and its president respect from the American people and their leaders.[21]

Powell's service as president of the ABA made him a likely choice for other national service. In the late Sixties, he served on the National Advisory Committee on Legal Services to the Poor, the President's Commission on Law Enforcement and Administration of Justice (where he furthered his law and order credentials), and the Blue Ribbon Defense Panel (charged with recommending reforms on the structure and organization of the Pentagon). In 1969, he resumed leadership positions in the organized bar by becoming president of the American College of Trial Lawyers and the American Bar Foundation. Powell's record of public service, leadership of the organized Bar, anti-crime pronouncements, and reputation as one of the South's leading lawyers brought him to the attention of Richard Nixon.[22]

Richard Nixon assumed the presidency in 1969 and immediately had the opportunity to fill two positions on the Supreme Court – Chief Justice Warren had expressed his desire to retire as soon as a replacement could be found and Justice Abe Fortas had been driven from office by scandal. Nixon nominated Warren Burger as Chief Justice and Clement F. Haynsworth, a Southerner, as Associate Justice. Burger lacked political vulnerabilities and was quickly confirmed. Haynsworth, however, became the target of Democrats who believed that Republicans had unfairly driven Fortas from office. On November 21, 1969, the Senate rejected the Haynsworth nomination on ethics grounds. Senator Birch Bayh had successfully argued that Haynsworth, as a United States Court of Appeals judge, had failed to recuse himself from cases in which he had a financial interest. Powell was considered for the open slot, but asked the Attorney General to remove his name from consideration. Nixon then nominated G. Harrold Carswell, a less than stellar Southern candidate, who was rejected by the Senate. Harry A. Blackman was nominated next and was quickly confirmed.[23]

Within a year, two more vacancies appeared on the Court – Justices Black and Harlan retired. After twice failing to appoint a Southerner to the Court, Nixon was determined to succeed this time. Powell was, once again, the leading candidate. He was also, once again, reluctant. His concern had been that his

---

[21] *See id.* at 195-204.

[22] S. REP. NO. 92-17, 1-2 (1971).

[23] S. REP. NO. 91-12, 25-26 (1969).

school board activities made him vulnerable to Senate rejection. This time, however, he was told that he had a duty to serve. For Powell, there was no more effective argument. With the encouragement of his partners, he threw caution to the wind and was nominated by President Nixon on October 21, 1971.[24]

Under normal circumstances, Powell's record on desegregation would have caused him trouble. The circumstances of his appointment, however, were not normal, for Powell had a running mate. Nixon had appointed William H. Rehnquist to fill the seat left by Justice Harlan and the Senate simultaneously took up both nominations. In comparison to Rehnquist, Powell carried little political baggage. Rehnquist was a Republican party official who achieved prominence in Arizona as a strong opponent of school integration. He campaigned for Barry Goldwater during the 1964 elections and served in the Nixon administration as Assistant Attorney General. He was one of the most outspoken conservatives to be nominated to the Court.[25]

Rehnquist's confirmation did not go smoothly. He was attacked for his views on defendants' rights, his record on desegregation, and his strict constructionism. Representative John Conyers, Jr., testifying before the Senate Judiciary Committee, summarized the opposition to Rehnquist by asking, "Can this country afford at this perilous time in its history an individual on the Court with an ideology so out of tune with the times that if his philosophy should prevail, even in part, it would threaten to tear at the slender threads now holding us together?"[26] In spite of opposition such as this, Rehnquist was confirmed by a vote of 68 to 26.[27] More importantly for Powell, however, Rehnquist served as Powell's "straw man," allowing Powell to proceed through confirmation largely unscathed. Powell secured Senate approval on December 7, 1971, by a vote of 89-1[28], and took the constitutional oath of office on January 3, 1972.[29]

Lewis Powell, Jr.'s ideological position on the court was in the center. During his tenure, he sided with the majority in more cases than any other justice, in approximately ninety percent of the cases, and registered the fewest number of dissenting votes of any justice then on the Court.[30] This record is particularly remarkable because it was achieved during a period in which the Court was ideologically polarized. Indeed, this polarization gave Powell the opportunity to exercise considerable power.

---

[24] JEFFRIES, *supra* note 3, at 4-7; *The Oyez Project*, NW U. <http://oyez.nwu.edu/justices/justices.cgi?justice_id=99>.

[25] *The Oyez Project*, NW U. <http://oyez.nwu.edu/justices/justices.cgi?justice_id=100&pagebiography>.

[26] *Nominations of William H. Rehnquist and Lewis F. Powell, Jr., Hearings Before the Committee on the Judiciary, United States Senate*, 92nd Congress, 351 (1971)

[27] S. REP. No. 92-18, 56 (1971).

[28] S. REP. No. 92-17, 9 (1971).

[29] *The Oyez Project*, NW U. <http://oyez.nwu.edu/justices/justices.cgi?justice_id=99 >.

[30] Jacob W. Landynski, *Justice Lewis F. Powell, Jr.: Balance Wheel of the Court, in* THE BURGER COURT 310 (Charles M. Lamb and Stephen C. Halpern, eds., 1991).

As a pragmatist, Powell had a distinct advantage over the more ideologically consistent members of the Court. There was nothing but his own sense of justice to keep him from building a majority with justices on either side of the ideological spectrum. From the beginning of his tenure on the Court, Powell most effectively used this method to shape criminal law and the law concerning fundamental rights.

Powell's greatest impact on criminal law concerned helping to define unreasonable searches, fair trials, and "cruel and unusual punishment." In *United States v. United States District Court*, 407 U.S. 297 (1972), Powell authored the majority opinion in a case which considered whether a wiretap violated the Fourth Amendment. The case concerned the use, without a search warrant, of a wiretap to record the conversations of three people suspected of conspiracy to destroy government property and bomb a Central Intelligence Agency office. Powell weighed the President's domestic security role and the requirements of the Fourth Amendment. Writing for the Court, he reasoned that "[s]ecurity surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."[31] In a sharp rebuke to the government's argument, he rejected the claim that "internal security matters are too subtle and complex for judicial evaluation" and "prior judicial approval [would] fracture the secrecy essential to official intelligence gathering."[32] The Court held that the Fourth Amendment required that government officials obtain a warrant before beginning electronic surveillance, even if domestic security issues were involved.

In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), Powell was the swing vote in a case that further limited governmental search authority. *Almeida-Sanchez* concerned a Border Patrolman's warrantless search of an automobile twenty-five air miles north of the Mexican border without probable cause or consent. The vehicle was operated by a Mexican national who held a valid work permit. The search uncovered marijuana, which was used to convict the petitioner of a federal crime. The government claimed that the search was authorized by 287(a)(3) of the Immigration and Nationality Act, which provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States."[33] Writing for the Court, however, Justice Stewart rejected this claim, noting that the search of the petitioner's automobile was "by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border."[34] Thus, the Court held that the warrantless search of the petitioner's automobile, made without probable cause or consent, violated the Fourth Amendment.

Powell had the opportunity to write for the Court on this subject again in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). That case involved an-

---

[31] U. S. v. U. S. Dist. Court, 407 U.S. 297, 320 (1972).

[32] *Id.*

[33] Almeida-Sanchez v. U. S., 413 U.S. 266, 268 (1973).

[34] *Id.* at 273.

other roving Border Patrol which stopped a vehicle near the Mexican border, on suspicion that the occupants appeared to be of Mexican ancestry, and questioned its occupants about their citizenship and immigration status. Powell noted, "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."[35] Consequently, the Court held that the apparent nationality of the occupants did not justify the stop.

Powell drew the line at curtailing the government's search power, however, with the open fields doctrine. *Oliver v. United States*, 466 U.S. 170 (1984), involved two cases. In one, Kentucky State Police made a warrantless search of a farm field, over a mile from the petitioner's house, that had a locked gate with a "No Trespassing" sign and a footpath around one side. The search resulted in the discovery of a field of marijuana and the arrest and indictment of the petitioner. In the other, Maine police officers followed a path through the woods and found two marijuana patches fenced with chicken wire and having "No Trespassing" signs. After determining the ownership of the property and obtaining a warrant and seizing the marijuana, the respondent was arrested and indicted. In both cases, the trial courts ruled that the open fields doctrine did not apply on the grounds that the "No Trespassing" signs and secluded locations evinced a reasonable expectation of privacy. Writing for the Court, Powell disagreed,

> It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marihuana upon secluded land and erected fences and "No Trespassing" signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marihuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.[36]

The Court thus remanded the cases so that the open fields doctrine could be applied to determine whether the discovery or seizure of the marijuana was valid.

Powell's most significant impact on shaping the law concerning fair trials came during his first year on the Court, when his vote in two cases resulted in a reversal of long-standing precedent regarding jury trials. *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972) dealt with whether states could permit less-than-unanimous jury verdicts. The eight other justices were split on the cases and Powell's vote in favor of removing the unanimity requirement created the majority. Powell argued that abandoning jury verdict unanimity had benefits,

---

[35] United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975).

[36] Oliver v. United States, 466 U.S. 170, 182 (1984).

> Those who have studied the jury mechanism and recommended deviation from the historic rule of unanimity have found a number of considerations to be significant. Removal of the unanimity requirement could well minimize the potential for hung juries occasioned either by bribery or juror irrationality. Furthermore, the rule that juries must speak with a single voice often leads, not to full agreement among the 12 but to agreement by none and compromise by all, despite the frequent absence of a rational basis for such compromise. Quite apart from whether Justices sitting on this Court would have deemed advisable the adoption of any particular less-than-unanimous jury provision, I think that considerations of this kind reflect a legitimate basis for experimentation and deviation from the federal blueprint.[37]

Although federal courts had long required unanimity, based on common law precedent, Powell believed that this practice was not mandated by the Constitution because procedural rights are only incorporated into the Fourteenth Amendment to the extent that they are fundamental to a fair trial.

When it came to the subject of defining cruel and unusual punishment, Powell had the satisfaction of seeing his dissenting opinion in two cases subsequently become the Court's majority opinion. *Furman v. Georgia*, 408 U.S. 238 (1972), was a compilation of three death penalty cases involving an accidental murder committed in the course of a burglary, and two rapes. The question before the Court was whether the imposition and carrying out of the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Court found that it did and, in effect, struck down the death penalty, as it was applied, in most of the United States. Powell issued one of his most stinging rebukes. He complained about

> the shattering effect this collection of views has on the root principles of stare decisis, federalism, judicial restraint and - most importantly - separation of powers. Throughout our history, . . . Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics. I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent.[38]

In 1976, Powell saw the death penalty restored. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court held that a death penalty did not violate the Eighth and Fourteenth Amendments under all circumstances. In extreme cases, such as when there was a conviction for deliberately killing another, the death penalty might be appropriate if carefully and judiciously employed. It is important to note that Powell's states rights concerns played a role in the Court's change of heart. The Court chose not to question the Georgia legislature's findings that the

---

[37] Johnson v. Louisiana, 406 U.S. 356, 377 (1972).

[38] Furman v. Georgia, 408 U.S. 238, 417 (1972).

death penalty was a useful means of deterring future capital crimes and of providing social retribution against its most serious offenders.

Rummel v. Estelle, 445 U.S. 263 (1980), presented another opportunity for Powell to see his minority opinion triumph. The case involved a Texas recidivist statute that mandated life imprisonment for a three time felon. Rummel's three felonies were committed over a 15-year period, were all nonviolent, and involved a total of $230. The question presented to the Court was whether the application of the Texas recidivist law to Rummel constituted cruel and unusual punishment in violation of the Eighth Amendment. The Court upheld the statute in a 5-4 decision noting that Texas had the right to deal "in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society" and that there was a good chance Rummel would be paroled before serving a life sentence. Powell dissented stating that, "(i) the penalty for a noncapital offense may be unconstitutionally disproportionate, (ii) the possibility of parole should not be considered in assessing the nature of the punishment, (iii) a mandatory life sentence is grossly disproportionate as applied to petitioner, and (iv) the conclusion that this petitioner has suffered a violation of his Eighth Amendment rights is compatible with principles of judicial restraint and federalism."[39]

In *Solem v. Helm*, 463 U.S. 277 (1983), Powell wrote his dissent into law. The case involved a South Dakota recidivist statute. Helm was convicted of writing a check from a fictitious account, a crime carrying a five-year jail sentence. Since this was his seventh felony conviction since 1964, however, he was sentenced to life imprisonment without parole. The Court found the sentence unconstitutional. Powell, writing for the Court, found that Helm's "sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment."[40]

When it came to cases that concerned fundamental rights, Powell was guided by principles other than judicial consistency. He sided with the majority in *Roe v. Wade*, 410 U.S. 113 (1973), and, as such, upheld the existence of an implied right to privacy protected by the Fourteenth Amendment. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), however, he refused to establish a new fundamental right to equal expenditure on education. Also, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), he refused to extend the implied right of privacy to homosexual acts.

In *Bowers*, a Georgia statute that criminalized homosexual sodomy was challenged on constitutional grounds. Michael Hardwick was observed by a Georgia police officer while engaging in the act of consensual homosexual sex with another adult in the bedroom of his home. In a 4-4 decision, the Court found that there was no constitutional protection for acts of sodomy. In a concurring opinion, Justice Powell wrote, "I agree with the Court that there is no fundamental right - i. e., no substantive right under the Due Process Clause - such as that

---

[39] Rummel v. Estelle, 445 U.S. 263, 286 (1980).

[40] Solem v. Helm, 463 U.S. 277, 303 (1983).

claimed by respondent Hardwick, and found to exist by the Court of Appeals."[41] In 1990, after he retired from the Court, he acknowledged that he had been wrong in the case. "I think I probably made a mistake in that one," he said of *Bowers*. "I do think it was inconsistent in a general way with *Roe*. When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments."[42]

Bowers v. Hardwick was not, however, his most famous inconsistency. In *Estes v. Metropolitan Branches, Dallas NAACP*, 444 U.S. 437 (1980), Powell opined that forcing school integration at any cost on a community is without justification.

> A desegregation plan without community support, typically one with objectionable transportation requirements and continuing judicial oversight, accelerates the exodus to the suburbs of families able to move. The children of families remaining in the area affected by the court's decree are denied the opportunity to be part of an ethnically diverse student body . . . .The general quality of the schools also tends to decline when substantial elements of the community abandon them. The effects of desegregation can be even broader, reaching beyond the quality of education in the inner city to the life of the entire community. When the more economically advantaged citizens leave the city, the tax base shrinks and all city services suffer. And students whose parents elect to live beyond the reach of the court decree lose the benefits of attending ethnically diverse schools, an experience that prepares a child for citizenship in our pluralistic society.[43]

Many of these arguments can also be applied to affirmative action. Yet, when the most important affirmative action case of his career came before him, he saw little reason to apply the same principles.

Of all the opinions he wrote, the one Justice Lewis Powell is most likely to be remembered for is *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). This was an action brought by a medical school candidate claiming that the University of California's affirmative action policy violated the equal protection clause and the Civil Rights Act of 1964 by denying him admission to medical school on the basis of his race. Allan Bakke was a thirty-five-year-old white male who had twice been rejected for admission to the University of California Medical School at Davis. The University's affirmative action policy provided that sixteen places in each entering class of one hundred be reserved for "qualified" minorities. This application of the policy was aimed at redressing longstanding, unfair minority exclusions from the medical profession. Bakke's GPA and MCAT scores exceeded those of the minority students admitted in the years Bakke's applications were rejected. The question before the Court was whether the University of California violated the Fourteenth Amendment's equal

---

[41] Bowers v. Hardwick, 478 U.S. 186, 197 (1986).

[42] Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong; Powell on Sodomy*, 13 NAT'L L. J. 3 (1990).

[43] Estes v. Metro. Branches, Dallas NAACP, 444 U.S. 437, 451 (1980).

protection clause and the Civil Rights Act of 1964 by denying Bakke admission when less qualified minority candidates were accepted.

The Court was divided and there was no single majority opinion. Four justices argued that any system of affirmative action supported by government violated the Civil Rights Act of 1964 and four justices contended that race as a factor in higher education admissions decisions was constitutional. Justice Powell joined both sides and wrote the opinion for the Court. He found that the rigid use of racial quotas at the University violated the Equal Protection Clause and ordered the University of California to admit Bakke. He also held, however, that the use of race was permissible as one of several admission criteria and thus authorized the continued use of affirmative action to redress past racial inequalities.

Many would argue that affirmative action, even after *Bakke*, was much more intrusive than the school bussing Powell complained about in *Estes v. Dallas*. It has affected almost every American school and workplace and fostered racial, gender, and generational tensions throughout society. It also, however, has done more to integrate American society than any other single policy. In time, the Supreme Court may reverse *Bakke*, but no one can argue with the impact it has had on the United States.

Lewis F. Powell, Jr. retired from the court on June 26, 1987. Historians will note his power as the pragmatist in the middle of a divided court. Legal scholars and students will note the lack of ideological consistency throughout many of his arguments. Hopefully, over time, his gentlemanly conduct will not be forgotten. Lewis Powell once suggested to Justice O'Conner that he would like to be remembered as the first Supreme Court justice to dance with another Supreme Court justice.[44] That is a fine image for a man who truly graced the Court.

---

[44] *See* Melton, *supra* note 2, at A8.