Michigan Law Review

Volume 93 | Issue 6

1995

Justice Lewis F. Powell and the Jurisprudence of Centrism

Mark Tushnet

Georgetown University Law Center

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Judges Commons](#), [Legal Biography Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854 (1995).
Available at: <https://repository.law.umich.edu/mlr/vol93/iss6/37>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

JUSTICE LEWIS F. POWELL AND THE JURISPRUDENCE OF CENTRISM

*Mark Tushnet**

JUSTICE LEWIS F. POWELL, JR. By *John C. Jeffries, Jr.* New York: Charles Scribner's Sons. 1994. Pp. xii, 690. \$30.00.

I. INTRODUCTION

John Jeffries's¹ respectful biography of Justice Lewis F. Powell carefully describes how Powell found himself at the Supreme Court's center during his tenure. He was "the Supreme Court's center of gravity" (p. 404) and its "guiding spirit" (p. 405). Jeffries's work also provides an opportunity to reflect on the kind of centrism Powell endorsed — or, perhaps better, embodied. Powell "instinctively recoiled from extreme positions" (p. 409); his centrism was so deeply a part of his persona that he hardly chose it in the way the term *endorsed* suggests. As Powell became more comfortable in his judicial role, the balance that his centrism expressed turned out to be a rather direct reflection of his own views about what constitutes sound public policy.

His record on the Supreme Court demonstrates the limits of the social vision of the class he represented. Powell came from a relatively well-to-do background in the solid white Virginia middle class. His family was neither rich nor grindingly poor, though it experienced some tight moments during economic downturns. Powell's talents and his drive to achieve, which Jeffries stresses throughout, propelled him to the upper echelon of corporate America. For example, Powell's support for abortion rights, qualified by his refusal to find unconstitutional limits on public funding for abortions, reflects his experience with people who needed access to abortions and could locate private resources to pay for them, rather than experience with equally needful people who could not locate the necessary private resources. Powell's jurisprudence of balancing may be suitable only for a Court whose members have a more capacious social vision than Powell. Perhaps Justices like Powell would do better if they adhered to a more formalist jurispru-

* Professor of Law, Georgetown University Law Center. B.A. 1967, Harvard; J.D. 1971, M.A. 1971, Yale. — Ed. I would like to thank L. Michael Seidman for his comments on a draft of this review.

1. Emerson G. Spies Professor of Law, Horace W. Goldsmith Resident Professor of Law, and Academic Associate Dean, University of Virginia; law clerk to Justice Powell 1973-74.

dence, in which adherence to rules screens out some considerations that a "balancer" might take into account. Of course, the particular rules a formalist followed would matter a great deal; the hope, however, would be to develop rules that screen out invidious considerations that, perhaps subconsciously, influence a balancer's decisions.

To Jeffries, Powell was a "pragmatic conservative" (p. 470), whose opinions were a "mosaic of accommodation, highly differentiated and strongly variegated but of a generally conservative hue" (p. 403). Jeffries shows, however, that Powell's views on his judicial role changed somewhat during his tenure. Arriving at the Court essentially untutored in constitutional law, Powell began with his instinctive conservatism, which took the form of an undifferentiated posture of "judicial restraint" that he invoked in nearly all contexts without serious consideration of the possibility that restraint might be appropriate in some contexts but not others. As he gained experience, Powell became more confident in the propriety of judicial activism — at least when its results fit within his social vision (pp. 425, 499). As Jeffries puts it, "[t]he principle [of restraint] declined into an attitude" (p. 425).

In his analysis of Powell's work on the Supreme Court, Jeffries primarily concentrates on abortion, race relations, and capital punishment cases.² Because Jeffries limits his treatment of the Court's work so severely, his picture of Powell's centrism is slightly out of focus.³ By examining some materials Jeffries omits, I hope to adjust the focus in a way that brings out more clearly the limits of Powell's jurisprudence.

Describing a case early in Powell's tenure,⁴ Jeffries writes that Powell had "no interest in mak[ing] a deal" (p. 304) about what the law was or should be. Elsewhere, however, Jeffries shows Powell working with his colleagues to formulate a position acceptable to enough of them to constitute a majority or a plurality. So, for example, in the 1976 death penalty cases,⁵ Powell worked with Justices John Paul Stevens and Potter Stewart to uphold death penalty statutes that, in their view, sufficiently limited the states' discretion

2. There is also a chapter on the Nixon tapes case. Pp. 371-97.

3. This is *not* a severe criticism of Jeffries's well-written and engaging work, which is long enough to tax general readers. If Jeffries had included more legal detail, he might have made the book substantially less attractive to that audience. I do believe that a somewhat less austere treatment of Powell's work on the Supreme Court might have improved the book. This is particularly true because some other pages in the book seem to be padding. See, e.g., p. 27 (describing the Virginia Military Institute solely, it seems, because it was located in the same town as Powell's college); pp. 98-103, 109-12 (describing some aspects of military operations during World War II); pp. 353-69 (describing the consequences of *Roe v. Wade*, particularly its impact on constitutional theory).

4. *Keyes v. Denver Sch. Dist.* No. 1, 413 U.S. 189 (1973).

5. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

in the administration of the death penalty.⁶ Powell seems to have "made deals" in such instances, but close examination of Powell's actions shows that Jeffries is right: Powell rarely negotiated over opinions, in part because his position at the Court's center meant that his colleagues had to move to meet him, and in part because his perception of himself as a centrist led him to believe that the law must be what he thought it was. I use two cases, one quite obscure and one of renewed importance today, to illuminate Powell's jurisprudence of centrism.

II. *MURGIA* AND RESHAPING POWELL'S ROLE

In *Massachusetts Board of Retirement v. Murgia*,⁷ the Court rejected an equal protection challenge to a Massachusetts statute requiring all state police officers to retire at the age of fifty. Although the published majority opinion occupies only ten pages in the *United States Reports*, it resulted from an extended controversy within the Court that, in my view, affected Powell's understanding of his place on the Court's political and jurisprudential spectrum.

The majority agreed that the statute at issue in the case should be subject only to minimum scrutiny or rationality review.⁸ Chief Justice Warren Burger assigned the opinion to Justice William J. Brennan, probably believing that Brennan could do nothing in the opinion to advance the liberal cause. Brennan circulated a draft of the opinion in January of 1976 that immediately set Justice William Rehnquist on edge. Brennan used the occasion to reinterpret the Court's recent rationality review cases. Gerald Gunther had pointed out that the rationality review test the Court seemed to apply in its previous cases actually had some "bite" because several of the statutes invalidated in those cases could readily be justified by some imaginable state purposes.⁹ Brennan's reformulation of rationality review attempted to incorporate those cases in a new, more flexible standard.

Rehnquist tried a preemptive strike. Explaining that he would not write a separate opinion for "a couple of weeks," Rehnquist

6. Pp. 425-26; see also Letter from Justice Lewis F. Powell, Jr. to Chief Justice Warren Burger (Dec. 17, 1981), in William J. Brennan Papers, Library of Congress [hereinafter Brennan Papers], box 581, file 7 (discussing deliberations on *Nixon v. Fitzgerald*) ("[I]t is evident that a Court opinion is not assured if each of us remains with our first preference votes. . . . I am now prepared to defer to the wishes of you, Bill Rehnquist and Sandra and prepare a draft opinion. . . ."). Although it appears as if Powell were negotiating a compromise, he was merely reverting to one of the two "versions" of the Court's opinion that he had prepared when counsel had first argued the case.

7. 427 U.S. 307 (1976).

8. *Murgia*, 427 U.S. at 312-13.

9. Gerald 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, 18-20 (1972).

sent Brennan a letter “for [his] benefit (?)” expressing concern about the way in which Brennan stated the standard of rationality review, which would, in Rehnquist’s view, “give the courts more leeway in striking down state legislation.”¹⁰ Although Brennan drew his standard — “reasonable, not arbitrary, and . . . [resting] upon some ground of difference having a fair and substantial relation to the object of the legislation”¹¹ — from prior cases, Rehnquist thought that Brennan had transformed its meaning, particularly by restating the test to require a relationship between the law at issue and “the state’s announced objective.”¹² For Rehnquist, the standard “ought to be simply stated and ought to virtually foreclose judicial invalidation except in the rare, rare case where the legislature has all but run amok and acted in a patently arbitrary manner.”¹³

In his February 9 reply, Brennan agreed that his draft did indeed offer “a more flexible rule” of the “minimum scrutiny” standard than Rehnquist supported, but he argued that the Court’s cases had “evolved” to the point his draft described.¹⁴ Brennan pointed out that he could not explain several recent cases by relying on as loose a standard as the one Rehnquist suggested. The fair-and-substantial-relation standard, Brennan wrote, came from another half-dozen cases, which, although “fall[ing] into the twilight zone of equal protection,” were “part of the warp and woof of equal protection law.”¹⁵ Furthermore, though he thought that he and Rehnquist might disagree on whether courts should judge a statute only in relation to the purposes the state articulated, Brennan considered it unnecessary to determine in *Murgia* whether the Court should come up with purposes if the state had not; here, he said, the state *had* articulated a purpose sufficient to justify the statute.¹⁶

Brennan circulated his correspondence to the other Justices on February 12 with a cover letter stating that Rehnquist’s position was “at odds with statements in a number of equal protection cases

10. Letter from Justice William H. Rehnquist to Justice William J. Brennan 1 (Jan. 30, 1976), in *Thurgood Marshall Papers*, Library of Congress [hereinafter *Marshall Papers*], box 165, file 8. The file on *Murgia* is not included in Justice Brennan’s papers at the Library of Congress.

11. *Id.* at 2.

12. *Id.*

13. *Id.* at 3.

14. Letter from Justice William J. Brennan to Justice William H. Rehnquist 1 (Feb. 9, 1976), in *Marshall Papers*, *supra* note 10.

15. *Id.* at 2.

16. *Id.* at 3.

... over the past half century."¹⁷ Perhaps because the correspondence clarified Brennan and Rehnquist's disagreement about the appropriate amount of flexibility in the minimum rationality standard, the case made "little progress" toward disposition for a month.¹⁸

Meanwhile, a side issue — the political participation of the affected group — had come to distract some Justices. In explaining why the mandatory retirement statute did not have to satisfy any strict standard of review, Brennan referred to "the political clout of the aged."¹⁹ Justice Harry Blackmun thought that *lack* of "political clout" might justify more stringent review, but he was "hesitant to go beyond that."²⁰ Though Justice Powell agreed with "much" of Brennan's reasoning, he too rejected what he called Brennan's "central position that a high degree of political participation in itself is sufficient to support the conclusion that those of middle age do not form a suspect class."²¹

By the beginning of April it seemed that Brennan's opinion might not get a single additional vote. Powell circulated an opinion attempting to flesh out in some detail an analysis of political power adequate to the case. In the first section of the opinion, Powell claimed that neither "high numerical representation" nor "the existence of a body of remedial legislation" was enough to "remove a group that displays the other indicia" from the "suspect" category.²² He argued that relying on remedial legislation, for example, "could penalize those who properly seek legislative rather than judicial solutions to problems of discrimination."²³ Nonetheless, Powell offered other reasons why the Court should not apply heightened scrutiny in this case; because the statute forced retirement at age fifty, it encompassed more than "the elderly."²⁴ Furthermore, "persons of mature age," Powell wrote, "have not suffered any deprivation of political power," and "may have a unique influence" on legislation due to seniority systems.²⁵

17. Memorandum from Justice William J. Brennan to Conference (Feb. 12, 1976), in Marshall Papers, *supra* note 10. Justice Potter Stewart had circulated a concurring opinion taking issue with Brennan's draft, to which Brennan's cover letter also refers.

18. Letter from Justice Harry A. Blackmun to Justice William J. Brennan (Mar. 11, 1976), in Marshall Papers, *supra* note 10. Justice Thurgood Marshall, normally Brennan's ally, was in dissent, believing the statute to be unconstitutional.

19. Letter from Justice Brennan to Justice Rehnquist, *supra* note 14, at 1.

20. Letter from Justice Blackmun to Justice Brennan, *supra* note 18.

21. Justice Lewis F. Powell, Jr., Draft Opinion (*Mass. Bd. of Retirement et al. v. Murgia*) (Apr. 7, 1976), in Marshall Papers, *supra* note 10, at 2.

22. *Id.* at 3.

23. *Id.*

24. *Id.* at 4.

25. *Id.*

The second section of Powell's draft, citing Gunther's article, basically agrees with Brennan's proposition that the Court's application of "minimum rationality" review had become more flexible. Powell discussed the ways in which courts might identify "legitimate" state purposes and cautioned against "imagin[ing] policy where none has been indicated by the legislature."²⁶ Brennan conferred with Powell and adopted Powell's opinion.²⁷ Even then, "no Court developed,"²⁸ and Brennan turned the opinion over to Powell. Powell revised his draft "to attain as much unanimity as possible on a general formulation of the rational basis equal protection test."²⁹

Rehnquist continued to find the Powell-Brennan position unsatisfactory. Powell's test, he wrote, "is really a very significant departure from constitutional adjudication as developed in the decisions of this Court."³⁰ In a letter conveying in firm tones the depth of his disagreement with the Powell-Brennan position, Rehnquist stated that an extensive discussion of whether the statute affected a suspect classification was unnecessary, and he particularly objected to Powell's treatment of "the relative success of the aged in obtaining their wishes legislatively."³¹ Rehnquist understood, however, that this discussion of political participation was not central to the outcome, and he focused more on what he called the "expansion" of the rational basis test.³²

Rehnquist had two main concerns. Although he agreed that state statutes had to pursue "legitimate" purposes, he was unconvinced that the Court needed to elaborate on that requirement.³³ In particular, he thought that Powell's discussion of hypothesized state purposes was confusing. Here Rehnquist's tone became especially critical; he claimed that one implication of a phrase in a footnote was "difficult to support in law or logic"³⁴ and he complained that the basis for another suggestion "escapes me entirely."³⁵ Furthermore, Rehnquist had "the most serious reservations about that portion of [Powell's] memorandum which seems to contemplate the bodily assumption into the Equal Protection Clause of Professor

26. *Id.* at 7.

27. Memorandum from Justice Lewis F. Powell, Jr. to Conference (May 19, 1976), in Marshall Papers, *supra* note 10.

28. *Id.*

29. *Id.*

30. Letter from Justice William H. Rehnquist to Justice Lewis F. Powell, Jr. 9 (May 25, 1976), in Marshall Papers, *supra* note 10.

31. *Id.* at 3.

32. *Id.* at 3-4.

33. *Id.* at 5-6.

34. *Id.* at 8.

35. *Id.*

Gunther's article."³⁶ That article, Rehnquist wrote, "seems to me to be in the area of political science, rather than of constitutional law."³⁷ Here too Rehnquist focused on how to treat legislative purposes. Rehnquist concluded with a "peroration" because he had "gotten [him]self sufficiently worked up."³⁸ According to Rehnquist, the "basic shortcoming" of Powell's analysis was that

it sets up this Court . . . to evaluate a legislative decision to implement a particular purpose by enacting some provision of a given statute. It seems to me almost inconceivable that we could correctly conclude that a group of legislators, all devoting a good part of their time to the art of legislation, chose a means which was not "genuinely" related to their purpose.³⁹

Needing votes from Justices who had not yet responded, Powell removed most of the discussion of legislative purpose from the draft,⁴⁰ though he had earlier said that he did not believe the Justices were "far apart in substance."⁴¹ Even this did not comfort Rehnquist. But Rehnquist agreed "to do some accommodating of [his] own" and to "swallow [his] objections . . . if the resolution of this battle is by agreement to be left for another day."⁴² He was willing to let Powell's discussion of purpose stand only if the opinion also presented "both sides of the doctrinal dispute" by including a quotation of Rehnquist's preferred standard.⁴³ "Admittedly," Rehnquist wrote, "this is inconsistent with your analysis, but it will not be the first time that an Equal Protection opinion has contained verbal inconsistencies."⁴⁴

By this point it was clear that the Court was hopelessly divided on equal protection theory, or at least on the verbal formulations that conscientious Justices used to describe standards of review. Powell apparently was uncomfortable with writing an opinion that, in both his and Rehnquist's eyes, was internally inconsistent, and he circulated a final draft that was "about as blandly written as one can write."⁴⁵ The draft, he told his colleagues, left each of them "free to

36. *Id.* at 10.

37. *Id.* at 10-11.

38. *Id.* at 17.

39. *Id.* at 18.

40. Memorandum from Justice Lewis F. Powell, Jr. to Conference (June 7, 1996), in Marshall Papers, *supra* note 10.

41. Memorandum from Justice Powell to Conference (May 19, 1976), *supra* note 27.

42. Letter from Justice William H. Rehnquist to Justice Lewis F. Powell, Jr. 1-2 (June 9, 1976), in Marshall Papers, *supra* note 10.

43. *Id.* at 2.

44. *Id.*

45. Memorandum from Justice Lewis F. Powell, Jr. to Conference (June 15, 1976), in Marshall Papers, *supra* note 10.

'fight again another day.'"⁴⁶ This final draft became the Court's opinion.

Although the published opinion in *Murgia* reflects nothing of Powell's struggle with the case, the Court's contentious deliberations helped shape Powell's jurisprudence. When he circulated his final draft, Powell told his colleagues that "my zeal for writing has been so thoroughly dampened by this spring's experience, that it may be sometime before I venture forth again."⁴⁷ For the next few years he regularly referred to the "struggle" in *Murgia*.⁴⁸

Jeffries notes that Powell came to the Court knowing little about constitutional law (p. 334). He did, however, see himself as a reasonable person. In *Murgia* that reasonableness translated almost directly into constitutional doctrine. As Powell understood what had happened, Rehnquist stood on his right, refusing to adopt what Powell believed to be an entirely reasonable position and fighting for a purely theoretical point, while Brennan stood on his left, being as reasonable as one could ask. Because Powell equated centrism with reasonableness, he came to see Brennan as closer to him in judicial philosophy than his more conservative colleagues. Brennan's liberalism, in short, seemed to Powell more reasonable than Rehnquist's conservatism. The *Murgia* experience showed Powell that it might be relatively easy for an individual Justice like himself to maintain a centrist jurisprudence, but that it was another for the Court as an institution to do so — reasonableness could not always be equated with centrism for the Court as a whole. Moreover, the experience in *Murgia* contributed to what Jeffries describes as Powell's increasing willingness to set aside legislative judgments (p. 425) even though in that case Powell, Brennan, and Rehnquist all agreed that the Massachusetts statute was constitutional. Because Powell believed he was so reasonable, he believed that whatever judgments

46. *Id.*

47. *Id.*

48. See, e.g., Letter from Justice Lewis F. Powell, Jr. to Justice William H. Rehnquist (*United States R.R. Retirement Bd. v. Fritz*) (Nov. 10, 1980), in Brennan Papers, box 555, file 2 (mentioning "getting caught in a 'cross-fire' " in *Murgia*); Letter from Justice Lewis F. Powell, Jr. to Justice William J. Brennan (*United States v. Crews*) (Dec. 14, 1979), in Brennan Papers, box 523, file 6 ("This case reminds me a little bit of *Murgia*."); Letter from Justice Lewis F. Powell, Jr. to Justice John Paul Stevens (*McAdams v. McSurely*) (Apr. 12, 1978), in Brennan Papers, box 474, file 7 ("I have already spent as much time on this 'loser' as Bill Brennan and I did a couple of years ago in *Murgia*."); Letter from Justice Lewis F. Powell, Jr. to Justice William J. Brennan (*Craig v. Boren*) (Dec. 6, 1976), in Brennan Papers, box 439, file 5 ("Although I have some reservations as to the breadth of your discussion of the applicable standard for equal protection analysis (*Murgia* revisited!), I am in substantial agreement with you."). Although Powell revised his draft opinion in *Murgia*, I think his actions are not well described as dealmaking. His discomfort with the process, reflected in his later comments, suggests that Powell reluctantly acquiesced in a course his colleagues forced on him.

he reached on constitutional matters were by definition reasonable ones.

III. *PLYLER V. DOE* AND "ACCOMMODATING" POWELL

*Plyler v. Doe*⁴⁹ involved the constitutionality of a Texas statute denying a free public education to children of aliens who were present in the United States unlawfully. Several issues occupied the Court's attention. The Fourteenth Amendment's first sentence and its Privileges and Immunities Clause both refer to "citizens," though the Due Process and Equal Protection Clauses refer to "persons."⁵⁰ Were illegal aliens covered by the Amendment? Second, if the Amendment did cover illegal aliens, were illegal aliens or their children a "suspect class" so that the government could deny benefits to them only if the reasons for the denial were exceptionally strong? Third, even if Texas's statute did not have to satisfy the strict scrutiny given to laws adversely affecting suspect classes, was it a rational response to the problems Texas faced?⁵¹ Justices Brennan and Powell played crucial roles in resolving these questions.

Justice Brennan's typed notes for his conference presentation start with his conclusion that the Texas statute was unconstitutional.⁵² He thought that strict scrutiny "could be applied" because the statute "makes a suspect classification based on alienage."⁵³ "Alternatively," Brennan claimed, "we might follow the line we have taken in the illegitimate children cases," in which the Court did not invoke strict scrutiny but invalidated statutes "if they are not substantially related to permissible state interests."⁵⁴ He believed that "the state interests are insufficient to sustain" the Texas statute.⁵⁵ "The state interest in controlling illegal immigration" Brennan continued, "is simply not a permissible *state* interest — that is a federal matter."⁵⁶ He further stated that the evidence did not show that the state's interest in saving money was substantially related to the classification: "The state acknowledges that illegal

49. 457 U.S. 202 (1982).

50. U.S. CONST. amend. XIV, § 1.

51. Rattling around in the case was a question the Justices described as "preemption": Was the problem of illegal immigration so inherently a national matter that the federal government could prevent individual states from interfering with national policy even by adopting rules like Texas's that appeared to discourage illegal immigration? TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981).

52. Justice William J. Brennan, Typed Notes for Conference Discussion 1, in Brennan Papers, box 590, file 2.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

immigrants help to contribute financially to the school by property taxes and sales taxes," and there was no evidence that "children of illegal immigrants are more expensive to educate."⁵⁷

Although Justice Powell leaned toward striking the statute down, he found the case "hard."⁵⁸ Powell focused on the fact that the "classification is children," and, he said, "they have no responsibility for being there."⁵⁹ Indeed, Powell emphasized that it is "hard to think of a category more helpless."⁶⁰ Although he did not think that education was a "fundamental right," Powell did believe that "if some children get it," the state cannot "deny it to a narrowly drawn classification applicable to a real resident," as were the children in this case.⁶¹

As Brennan put it later, the conference discussion produced "no clear consensus" about the appropriate level of scrutiny.⁶² He set to work on an opinion that would gain the necessary five votes. In late January he took what he called "the unusual step of circulating" a draft opinion only to the Justices — Marshall, Blackmun, Powell, and Stevens — who had said they would strike the Texas statute down, rather than to the full Court.⁶³ The draft, he said, was driven by his "particular concern with a statute, such as this, that sought to deprive innocent children not remotely responsible for their plight of their right to an education."⁶⁴

As Brennan noted, the draft "relie[d] both on the nature of the classification, and on the importance of education."⁶⁵ The conference discussion had not focused on whether education was a fundamental right, and Powell, whose vote Brennan needed, said it was not. Brennan therefore explained that, though "a strong case for heightened scrutiny could be made simply on the basis of the class discriminated against," the opinion would be "less broad" if it invoked the importance of education as well.⁶⁶ Limiting the decision in this way, Brennan explained, would still leave the states "fairly broad prerogatives in legislating with respect to illegal aliens in

57. *Id.* at 1-2. Despite Brennan's mention of the federal interest in controlling illegal immigration, he was not enthusiastic about relying on a straight preemption theory, which, he thought, would have to deny states authority more broadly than the precedents indicated. *Id.* at 2.

58. Justice William J. Brennan, Notes on Conference Discussion, in Brennan Papers, *supra* note 52.

59. *Id.*

60. *Id.*

61. *Id.*

62. Letter from Justice William J. Brennan to Justice Thurgood Marshall 1 (Jan. 25, 1982), in Brennan Papers, *supra* note 52.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

other contexts.”⁶⁷ This approach, which rooted the right to education in the particular history of the Fourteenth Amendment, was “for that very reason largely self-limiting and unlikely to force us down any uncharted paths in the future.”⁶⁸ He concluded that the Texas statute “would fail under even an intermediate standard of review,”⁶⁹ and he suggested how he could rewrite his draft on that theory. But, he warned, “exclusive reliance on the ‘innocent children’ rationale, [sic] would truncate our real concern here — that whatever else the state may do with respect to illegal aliens, barring the innocent children among them from basic education is most perverse.”⁷⁰

Brennan’s cover letter and draft opinion clearly indicate that Powell was his primary target.⁷¹ The introduction to the opinion provides a general review of the different standards for equal protection review, concluding that “in this context an understanding of both the nature of the classification, and the right denied, are integral” to determining the standard of review.⁷²

The first main part of Brennan’s draft argues that the statute involved a suspect classification.⁷³ It begins with a general overview: “Certain classifications are empirically more likely than others to reflect deep-seated prejudice rather than legislative rationality,” Brennan wrote.⁷⁴ “The experience of our Nation has taught us that a conscious or unconscious, but in any event constitutionally unacceptable, prejudice is likely to manifest itself in the legislature’s treatment of some groups.”⁷⁵ Brennan then pointed out that “illegal aliens display many of the characteristics of those ‘discrete and insular minorities’ for which the Constitution offers a special solicitude.”⁷⁶ For example, “[l]awfully resident aliens may have some access to political forums,” while “illegal aliens are understandably reluctant to risk exposure by bringing their complaints to the attention of public agencies . . .”⁷⁷ Because of “lax enforcement” of the immigration laws, Brennan explained, there was a “very real specter of a permanent caste of persons, welcomed as a

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1-2.

71. *Id.*; Justice William J. Brennan, Draft Opinion (*Plyler v. Doe*) (Jan. 25, 1982), in Brennan Papers, *supra* note 52.

72. Justice Brennan, Draft Opinion, *supra* note 71, at 17.

73. *Id.* at 18-23.

74. *Id.* at 18.

75. *Id.* at 19. On unconscious prejudice, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

76. Justice Brennan, Draft Opinion, *supra* note 71, at 19.

77. *Id.*

source of cheap labor, but nevertheless unable to participate in the benefits that our society makes available to citizens and lawful residents.”⁷⁸

After describing why the class *illegal aliens* might warrant strict scrutiny, Brennan turned to the issue of scrutiny of laws affecting their children — “special members of that class.”⁷⁹ Perhaps state legislatures had “unusual prerogatives” in connection with “persons whose presence within the boundaries of the United States has been the product of their wrongful conduct.”⁸⁰ But, Brennan argued, that could not be true about imposing “particular disabilities on the children of such unlawful entrants.”⁸¹ The parents, who “elect[ed] to enter our territory by stealth and in violation of law[,] might be asked to bear the burden of legislation designed to deter their unlawful entry,” but their children were “hardly similarly situated.”⁸² Legislation “directing the onus of parent’s [sic] misconduct on his children does not comport well with our most fundamental conceptions of justice.”⁸³

This first part of Brennan’s opinion concludes by agreeing that “undocumented status” was not irrelevant to all permissible purposes, and therefore that it would be inappropriate to give heightened scrutiny whenever statutes adversely affected illegal aliens.⁸⁴ “Nevertheless,” Brennan continued, “immigration status is a characteristic over which the undocumented children . . . have little or no control.” Brennan concluded that the class *undocumented children* shared “many of the more significant factors” that led the Court to apply heightened scrutiny in other cases.⁸⁵

The second part of Brennan’s opinion examines whether “the absolute denial of basic education” was “an interference” with a fundamental right.⁸⁶ Brennan conceded that the Constitution does not explicitly guarantee the right to an education. But, quoting *Meyer v. Nebraska*, he pointed out that “the American people have always regarded education and the acquisition of knowledge as matters of supreme importance.”⁸⁷ Children deprived of education suffer, but “our Nation suffers too when select groups are denied the opportunity to contribute to the community of ideas within

78. *Id.* at 20.

79. *Id.* at 21.

80. *Id.*

81. *Id.* at 22.

82. *Id.*

83. *Id.*

84. *Id.* at 23.

85. *Id.*

86. *Id.* at 23-24.

87. *Id.* at 24-25 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)).

which freedom and democracy thrive.”⁸⁸ For Brennan, “public schools provide the primary vehicle by which individual initiative and merit are allowed to overcome the circumstances of birth.”⁸⁹

Justice Brennan then offered a rather extensive survey of “[t]he debates and actions of the Reconstruction Congress” to show that it acknowledged “the importance of basic education as a means of advancing the material and spiritual well-being of the individual” and “the Nation’s need for education in fulfilling its commitment to equality.”⁹⁰ He compiled statements from the Reconstruction Congress indicating a special concern that the South had denied African-Americans access to education, and recognizing that “education is essential to the national welfare.”⁹¹ Education, to some members of Congress, was “necessary to a republican form of government.”⁹² Although the generation that adopted the Fourteenth Amendment might have “hesitated before imposing upon the States the federal duty, and fiscal burden, of establishing a state-wide system of free public education,” they did believe that “equal access to basic education” was “an essential aspect of the framework of equality embodied in” the Fourteenth Amendment.⁹³

Taking the two parts of his analysis together, Brennan concluded that heightened scrutiny was appropriate: “The Framers recognized that by denying certain disfavored groups access to basic education, we deny to the members of those groups the ability to advance their material well-being, to contribute productively to society, and the means to protect themselves *within* the structure of our social and civic institutions.”⁹⁴ Brennan stated that Powell’s opinion for the Court in *San Antonio Independent School District v. Rodriguez*,⁹⁵ which rejected an equal protection challenge to Texas’s system of school financing, was “far on the other end of the equal protection spectrum.”⁹⁶ Denying basic education to “a discrete and historically demeaned group, solely on the basis of personal status . . . parallels in significant respects the type of ‘class or caste’ legislation with which the Equal Protection Clause is most directly concerned.”⁹⁷ The statute therefore had to “advance[] some vital state need.”⁹⁸ The remainder of the opinion examines

88. *Id.* at 25.

89. *Id.* at 26.

90. *Id.* at 27.

91. *Id.* at 29 n.23 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 70 (1867)).

92. *Id.* at 31.

93. *Id.* at 33-34.

94. *Id.* at 34-35.

95. 411 U.S. 1 (1973).

96. Justice Brennan, Draft Opinion, *supra* note 71, at 35-36.

97. *Id.* at 36.

98. *Id.*

the purported state interests and finds them inadequate to support the statute.⁹⁹

Powell replied to the draft on January 30.¹⁰⁰ "I view this case," he wrote, "in rather simplistic terms."¹⁰¹ Because some undocumented aliens were bound to remain in the United States, "[t]heir children should not be left on the streets uneducated."¹⁰² He agreed that heightened scrutiny was appropriate because the case involved a class of "innocent children, uniquely postured," but he did want to emphasize that the classification was "a unique one."¹⁰³ He therefore disagreed with Brennan's discussion of suspect classifications. As written, Powell observed, Brennan's draft "come[s] very close to saying that *all* illegal aliens" are a discrete and insular minority.¹⁰⁴

Turning to the issue of the right to an education, Powell began by noting his nineteen years of service on public school boards in Virginia, which led him to "share [Brennan's] view as to the importance of education, particularly in a democracy."¹⁰⁵ But, as he had written in *Rodriguez*, he did not think there was a constitutional right to an education, and so would not call education "a 'fundamental' right in the constitutional sense."¹⁰⁶ He suggested emphasizing that "the state's own interest in not *creating* a subclass of illiterate persons many of whom will remain in Texas" weighed against Texas's statute.¹⁰⁷

Powell ended his letter by calling Brennan's draft "an impressive piece of work" that he had "enjoyed reading."¹⁰⁸ He stated, however, that he was "a little uneasy" about the broad sweep of the draft, which might lead to "inferences . . . in other connections not clearly foreseeable."¹⁰⁹ He said that he would join the judgment, and he offered to join the opinion as well if Brennan reworked it to "focus[] . . . specifically on this uniquely discrete class."¹¹⁰

99. *Id.* at 36-41.

100. Letter from Justice Lewis F. Powell, Jr. to Justice William J. Brennan (Jan. 30, 1982), in Brennan Papers, *supra* note 52.

101. *Id.* at 1.

102. *Id.*

103. *Id.*

104. *Id.* at 2.

105. *Id.*

106. *Id.*

107. *Id.* Among the "[r]elatively [m]inor [p]oints" Powell made was a concern that Brennan's statements about unconscious prejudice might not easily be "square[d] with" the Court's insistence that only intentional discrimination violated the Constitution. *Id.* at 3.

108. *Id.*

109. *Id.*

110. *Id.*

A few days later Brennan responded to Powell.¹¹¹ Displaying his usual style, Brennan said that it seemed clear to him that "it will not be difficult to find common ground," and he perceived "the most appropriate opinion for the Court[] in very nearly the terms" Powell suggested.¹¹² Diplomatically, Brennan suggested that his own draft did not really "wander very far afield."¹¹³ He pointed out several places in his draft stating expressly that there were good reasons not to hold *illegal aliens* to be a suspect classification. Passages that Powell read as analogizing illegal aliens to other suspect classifications should be read, Brennan wrote, to "highlight the unique nature of the subclass of 'undocumented children.'"¹¹⁴ Moreover, Brennan suggested, the draft's emphasis on the interaction between the classification and the right actually narrowed the opinion's breadth. He did think, however, "that the discrete nature of the class heightens for them the significance of education."¹¹⁵

Brennan attached a redrafted discussion of suspect classifications.¹¹⁶ The new version omitted the sentence about unconscious prejudice and moved to a long footnote the point about the reluctance of illegal aliens to bring their complaints to public authorities. He thus downplayed the general treatment of illegal aliens, but it remained in the opinion. Brennan did ask Powell to "suggest a way to abbreviate the discussion of this aspect of the children's unique circumstance still more."¹¹⁷

Brennan's letter also addresses Powell's concerns about the draft's discussion of the right to education. He emphasized that his draft stated, and the evidence included in it showed, that "there is just no support in [the congressional] debates . . . for the idea that a state has any affirmative obligation to establish a system of public education."¹¹⁸ Here too he invited Powell to "suggest any wording that you think might better state these conclusions if you feel that the slightly obscure statements presently in the text are unsatisfactory."¹¹⁹ But, Brennan continued, he did want to "preserve" the conclusion that "the history . . . *confirms* our shared view that we

111. Letter from Justice William J. Brennan to Justice Lewis F. Powell, Jr. (Feb. 2, 1982), in *Marshall Papers*, *supra* note 52.

112. *Id.* at 1.

113. *Id.*

114. *Id.*

115. *Id.* at 2.

116. Justice William J. Brennan, Proposed Revisions to Draft Opinion (*Plyler v. Doe*) (Feb. 2, 1982), attached to Letter from Justice Brennan to Justice Powell, *supra* note 111.

117. Letter from Justice Brennan to Justice Powell, *supra* note 111, at 2.

118. *Id.*

119. *Id.* at 3.

are to look closely on the absolute denial of education to certain discrete groups of children.”¹²⁰

Brennan’s strategy seems clear enough. As he said, his first draft did incorporate pretty much all that Powell expressly wanted. As Powell understood, though, the draft contained phrases and general discussions that Justices and lawyers could detach from the case’s “unique” setting and use in later opinions and briefs. Brennan tried his best to preserve the statements that might have had broader implications by pointing out that the draft indeed dealt with Powell’s express concerns. But, on the whole, neither the letter nor the revised part of the draft was a large concession to Powell’s concerns. Perhaps Brennan was testing the depth of Powell’s commitment to his own views.

After receiving Brennan’s letter and the redrafted discussion of suspect classifications, Powell responded by saying that he thought the revision was “a substantial clarification,” but that he had decided to write separately.¹²¹ Powell explained: “My concern as to the ‘open endedness’ of equal protection prompts me to be extremely cautious in this case as to the reach of the precedent we set.”¹²² Because the case was “quite unique,” Powell “thought it prudent to write less exhaustively than [Brennan’s] opinion.”¹²³ He acknowledged that Brennan too had tried “to circumscribe [the Court’s] holding narrowly,” but in the end Powell wanted to “focus solely on the unique status of these children.”¹²⁴

Brennan then shortened his draft and circulated it to the entire Court.¹²⁵ Although Brennan told Powell that he believed that the revisions “effectively preserve, and support,” Powell’s position in *Rodriguez*,¹²⁶ actually none of the changes affected the matters that concerned Powell.

Powell circulated his own separate opinion the following day.¹²⁷ Like the opinion Powell eventually published,¹²⁸ his draft stresses that the case involved “a form of discrimination against children for the acts of their parents,” and he relied more explicitly than Bren-

120. *Id.*

121. Letter from Justice Lewis F. Powell, Jr. to Justice William J. Brennan (Feb. 4, 1982), in Brennan Papers, *supra* note 52.

122. *Id.*

123. *Id.*

124. *Id.*

125. Justice William J. Brennan, Draft Opinion (*Plyler v. Doe*) (Feb. 8, 1982), in Brennan Papers, *supra* note 52.

126. Letter from Justice William J. Brennan to Justice Lewis F. Powell, Jr. (Feb. 8, 1982), in Brennan Papers, *supra* note 52.

127. Justice Lewis F. Powell, Jr., Draft Opinion (*Plyler v. Doe*) (Feb. 9, 1982), in Brennan Papers, *supra* note 52.

128. *Plyler v. Doe*, 457 U.S. 202, 238 (1982) (Powell, J., concurring).

nan had on the Court's decisions invalidating some statutes discriminating against the children of unmarried parents.¹²⁹ Most notably, he included a long footnote disagreeing with the application of "strict scrutiny" and with the suggestion he drew from Brennan's draft that *illegal aliens* formed a suspect classification.¹³⁰ Powell "wholly reject[ed]" Brennan's "intimation" that "adult illegal aliens guilty of violating our laws may be entitled to 'heightened judicial solicitude.'" ¹³¹ Furthermore, he expressly disagreed with the suggestion that education was a fundamental right.¹³²

There matters rested, at least in writing, for about a month until the other Justices formulated their views. In early March Justice Blackmun started the discussion up again, reminding Brennan that in the early discussions Blackmun had been the only Justice interested in pursuing a preemption analysis because "*any* equal protection route seems to encounter analytical difficulties."¹³³ In the hope of getting a majority opinion by inducing Powell to join, Blackmun suggested "address[ing] the case squarely in traditional equal protection fundamental rights terms."¹³⁴

Blackmun's suggestions tried to address Powell's expressed concerns by eliminating the suspect classification analysis entirely and bolstering the fundamental rights analysis.¹³⁵ Unfortunately for Blackmun and Brennan, Powell had merely focused on the suspect

129. Powell, Draft Opinion, *supra* note 127, at 1.

130. *Id.* at 3 n.2.

131. *Id.*

132. *Id.* at 4 n.2.

133. Letter from Justice Harry A. Blackmun to Justice William J. Brennan 1 (Mar. 10, 1982), in Brennan Papers, *supra* note 52.

134. *Id.*

135. Blackmun thought that "some modicum of education" would be "fundamental" because it "is necessary to preserve rights of expression and participation in the political process, and therefore to preserve individual rights generally." *Id.* He suggested a preemption-like response to the objection that "illegal aliens have no individual rights to preserve": some of the children in the case were going to be permanent residents, and some were "not presently deportable." *Id.* at 1-2. As a result, "[m]any of these children . . . have, or will have, political and related rights." *Id.* at 2. Furthermore, the state had no way to identify *which* children would be in that group, and therefore could not "deprive the entire group of the right to attend school." *Id.* If the Court followed this analysis, Blackmun wrote, "one could delete the reference to illegal aliens as a suspect class and, also, the analogy of illegal alien children to illegitimates." *Id.*

Not surprisingly, Justice Marshall added his voice in support of "almost all" of Blackmun's suggestions: Marshall had always wanted to emphasize the importance of the connection between education and political rights, from his argument before the Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), to his dissent in *Rodriguez*. Letter from Justice Thurgood Marshall to Justice William J. Brennan (Mar. 10, 1982), in Brennan Papers, *supra* note 52.

Justice Stevens, stating that "there are several different lines of legal analysis that require the result that you reach," said that he would accept either a fundamental rights analysis or a suspect classification analysis, whichever Brennan found necessary to get a majority opinion. Letter from Justice John Paul Stevens to Justice William J. Brennan (Mar. 10, 1982), in Brennan Papers, *supra* note 52.

classification analysis without meaning to suggest that he could go along with treating education as a fundamental right. Brennan's second draft de-emphasized the former but retained the latter. Not having heard from Powell about the fundamental rights analysis, Blackmun perhaps believed that Powell did not have misgivings about it. Powell, however, soon disabused his colleagues of that idea. Two days after Blackmun sent his letter to Brennan, Powell wrote that it had "prompted [him] to reexamine [his] position."¹³⁶ He indicated that "[a]s important as education has been in the life of my family for three generations, I would hesitate before creating another heretofore unidentified right."¹³⁷ He "inclined" to Stevens's position that the Texas statute was simply irrational, "*penalizing* these children" in pursuit of an "insubstantial" state interest¹³⁸ — saving money now without attention to the costs the state would have to bear later if the children grew up without an education. Here he thought that the analogy to illegitimate children was appropriate.

Powell concluded his letter with the thought that a majority opinion might not be so important in this case: "The very fact that we have not identified any prior case, or even any established principle, that controls this unique case suggests that the precedential force of a *judgment* alone will not be great."¹³⁹ Without a majority opinion, he added, the Court would be "free to meet unforeseeable situations without being bound by a decision tailored to redress a peculiar and unprecedented type of injustice."¹⁴⁰

Powell's argument was not enough, however, to stop Brennan. A month later Brennan sent Powell, but not his colleagues, a third version of the opinion.¹⁴¹ Structurally the first draft had two main parts: (i) a general discussion of why undocumented aliens might be a suspect classification followed by an application of general principles to the special case of children of undocumented aliens, and (ii) a general discussion of why education might be a fundamental right followed by an application to the special case of denying education to a group like those children. The second draft eliminates both the general discussion of suspect classifications and the general discussion of undocumented aliens. Brennan's third draft then eliminates the general discussion of education as a fundamental right. Claiming that he had incorporated Powell's analysis, Brennan concluded

136. Letter from Justice Lewis F. Powell, Jr. to Justice Harry A. Blackmun 1 (Mar. 12, 1982), in Brennan Papers, *supra* note 52.

137. *Id.*

138. *Id.*

139. *Id.* at 2.

140. *Id.*

141. Justice William J. Brennan, Draft Opinion (*Plyler v. Doe*) (Apr. 5, 1982), in Brennan Papers, *supra* note 52.

that he "no longer required any lengthy discussion of legislative material or any complex analytic framework."¹⁴² But, in response to an argument he found implicit in the proposed dissents, Brennan at last added a discussion of preemption. He told Powell that such a discussion was appropriate because the dissenters apparently believed that "undocumented status, without more, carried with it a State prerogative to deny these children an education," a belief that "rests, at heart, on the implications of federal law."¹⁴³

Powell immediately responded to Brennan's new draft, thanking Brennan "for making this substantial effort to accommodate [his] thinking."¹⁴⁴ He "suggested minor language changes" to "reflect [his] strongly held conviction that an adult illegal alien is here in willful violation of our laws."¹⁴⁵ Although he "share[d] — and applaud[ed] — [Brennan's] sympathy for peoples all over the world who would like nothing better than to live in our country," he argued that this "understandable desire is no justification for violating our laws."¹⁴⁶ Powell added parenthetically: "I wish a good many of our own citizens, who seem to make a career out of criticizing the United States, were more appreciative of the privilege of living in this wondrous land of freedom and comparative plenty."¹⁴⁷

After receiving Powell's letter and making the changes he suggested, Brennan circulated the opinion to the Court. As one of Marshall's clerks noted, "[t]he 'scuttlebutt' is that [Powell] has agreed to join this draft,"¹⁴⁸ which Powell immediately did.¹⁴⁹ Powell then revised his separate opinion, converting it from a concurrence in the result to a simple concurrence and eliminating the now-unnecessary criticism of treating illegal aliens as a suspect classification.¹⁵⁰

The Court handed down its opinion on June 15, 1982. The next day Powell sent Brennan a handwritten note congratulating him for

142. Letter from Justice William J. Brennan to Justice Lewis F. Powell, Jr. (Apr. 5, 1982), in Brennan Papers, *supra* note 52.

143. *Id.*

144. Letter from Justice Lewis F. Powell, Jr. to Justice William J. Brennan (Apr. 7, 1982), in Brennan Papers, *supra* note 52.

145. *Id.*

146. *Id.*

147. *Id.* That comment suggests one of the difficulties Brennan faced: that Powell was firmly committed to his position for "reasons" that may well have been other than rational, which made accommodating them in any way other than complete acquiescence almost impossible.

148. Note on Second Printed Draft Opinion (Plyler v. Doe) (Apr. 7, 1982), in Marshall Papers, box 295, file 2.

149. Letter from Justice Lewis F. Powell, Jr. to Justice William J. Brennan (Apr. 8, 1982), in Brennan Papers, *supra* note 52 (consisting only of the words "[p]lease join me").

150. Justice Lewis F. Powell, Jr., Draft Opinion (Plyler v. Doe) (June 7, 1982), in Brennan Papers, *supra* note 52.

the opinion, "especially on the painstaking and generous way you wrote an opinion that accommodated our several differing views, and finally obtained a Court."¹⁵¹ The final opinion, Powell said, "will be in every text and case book on Constitutional law."¹⁵²

Two aspects of the deliberations in *Plyler* are noteworthy. First, of course, Powell did not really negotiate. He held his position and watched Brennan move toward it.¹⁵³ Second, the opinion drafting process had several stages. At the outset Brennan articulated a two-pronged theory to justify invalidating a statute that he and Powell firmly believed was a seriously misguided public policy. Powell insisted that Brennan first dilute one prong and then the other. What resulted was an opinion that on one level had almost no generative or doctrinal significance because it invoked too many considerations. On another level, the opinion had profound doctrinal significance because one could interpret it to hold that the Supreme Court will strike down statutes that are unconstitutional when a majority of the Court thinks those statutes are unwise social policy. Powell's jurisprudence produced an opinion that was almost nothing more than a direct reflection of *his* views of social policy. The Framers designed the Constitution, it appears, to allow judges to strike down statutes that are, to as reasonable a person as Powell, not sensible.

IV. THE LIMITS OF POWELL'S SOCIAL VISION

Moderation and balance characterized Powell's understanding of his centrist jurisprudence. Those terms, however, do not define themselves. In *Plyler*, the moderate position came down to treating a misguided social policy as unconstitutional. Powell did have doctrinal concerns, of course, but they were negative: he wanted to ensure that the Court's decision did not express a doctrine that might have troublesome implications for other cases. Powell's bal-

151. Letter from Justice Lewis F. Powell, Jr. to Justice William J. Brennan (June 16, 1982), in Brennan Papers, box 590, file 3.

152. *Id.*

153. Brennan had a similar experience with Justice Powell once before. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), Brennan could not persuade Powell to join an opinion characterizing gender as a suspect classification. Instead of recasting it, Brennan let the opinion go as a plurality opinion. See pp. 508-10. The contrast between the experience in *Plyler* and *Frontiero* is intriguing. One possible explanation for the differences is that the Court decided *Frontiero* in 1973. The Warren Court era had ended, but in 1973 the Court did not fully realize the import of that fact — it was, after all, the Term of *Roe v. Wade*, 410 U.S. 113 (1973). The possibility of planting seeds for later, liberal development remained open, or so Brennan might have thought. The Court decided *Plyler* almost a decade later. Liberal victories were by then few and far between. A transformed federal judiciary was in the making, and there was little reason to think that the new judges would develop statements in plurality opinions in a liberal direction. Brennan might have thought it would be better to get an authoritative precedent in *Plyler*, no matter how narrow, than to hope for an opinion that would encourage further liberal development.

ancing was his bulwark against a rule-based formalism, but it did little to explain why the statute in *Plyler* was bad social policy, let alone unconstitutional. In *Murgia*, the moderate position was simply being reasonable about things. Not infrequently, Powell's centrism amounted to taking the Constitution to mean what any person as reasonable as Powell thought it to mean. Jeffries's description of the course of Powell's thought about affirmative action provides an example (pp. 469-78). As the cases came to the Court, he began to understand the varying circumstances in which affirmative action programs were adopted. Powell's "policy" was "to allow some affirmative action, but not too much; to permit race-consciousness, but only where necessary" (p. 500).

In the employment context, Powell concentrated on the impact of affirmative action programs on those he called "innocent employees,"¹⁵⁴ and he was less sensitive to the impact on those Justice Brennan called "*equally innocent* victims of racial discrimination."¹⁵⁵ For Powell, affirmative action programs affecting hiring were easier to support than those affecting promotions, and those affecting layoffs were the most questionable.

Although Powell often stated that affirmative action programs had to satisfy the highest standard of review,¹⁵⁶ his views of the equities of the varying situations meant that he applied that standard in a manner more consistent with the flexibility he and Brennan had sought in *Murgia* than with the rigidity ordinarily associated with strict scrutiny. The result, as one of Marshall's law clerks put it, was that "it [was] hard to tell whether . . . [lower courts had] 'misread' [a Powell opinion], since nobody knows what that opinion stands for now that Justice Powell has retired."¹⁵⁷ Powell's desire to achieve balance meant that the law he articulated reflected the balance *he* struck, not a balance accessible to any fair reader of the cases.

Powell's most important discussion of affirmative action came in *Regents of the University of California v. Bakke*,¹⁵⁸ in which the fact that he spoke only for himself is symptomatic of what it meant to be a centrist. He was, in his words, "a ['chief'] with no ['indians']"

154. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 788-89 (1976) (Powell, J., concurring in part and dissenting in part).

155. Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers*, 36 WM. & MARY L. REV. 473, 539 n.399 (1995) (quoting Memorandum from Justice William J. Brennan to Conference 3 (Jan. 29, 1976), in Marshall Papers, box 162, file 5).

156. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986).

157. Tushnet, *supra* note 155, at 540 (quoting Carol Steiker, Bench Memo (City of Richmond v. J.A. Croson Co.), in Marshall Papers, box 429, file 4).

158. 438 U.S. 265 (1978).

when he announced the Court's judgment.¹⁵⁹ Powell quickly concluded that the strictly numerical program adopted by the University of California at Davis's medical school violated the Constitution, but he wanted to preserve some flexibility for affirmative action programs that "[took] race into account."¹⁶⁰ Early in the Court's deliberations, Justice White made the cogent and unanswerable point that race-sensitive programs were indistinguishable in principle from the Davis program: on the margin — that is, as between two otherwise equal candidates for admission — a race-sensitive program operated to prefer the African-American candidate over the white candidate just as rigidly as Davis's did.¹⁶¹ For Powell, however, race-sensitive programs were more moderate than Davis's in *Bakke*, and, apparently for that reason alone, the Court should consider race-sensitive programs constitutional (pp. 484-85).

Jeffries is appropriately critical of Powell's stance in the *Bakke* case (pp. 469-73, 484). Powell approved the affirmative action program at Harvard College, which "merely" treated race as a "plus factor" in admissions, but he disapproved of the apparently more rigid plan challenged in *Bakke*. Jeffries understands that the Harvard program was a more genteel way of accomplishing the same results as the plan in *Bakke*, and that on the margins a plus factor has precisely the same effect as that plan; Powell's position was, as Jeffries says, "pure sophistry."¹⁶²

The very gentility of the Harvard program, though, is what may have mattered to Powell. Reviewing Powell's career as a whole, one can see a pattern in which Powell could appreciate claims made by those with whom he could readily identify, but he could not fully appreciate claims made by those who seemed different from him.

Powell's actions during the process of desegregation in Virginia illustrate the pattern. Powell was chair of the Richmond school board in the years following *Brown v. Board of Education*¹⁶³ and was an important behind-the-scenes figure in the state's political life. Virginia was the home of "massive resistance"¹⁶⁴ to desegregation, and Powell did nothing in public and little in private to oppose such resistance. Jeffries concludes that Powell "never really identified himself with the needs and aspirations of Virginia's black school-children" (p. 172). More broadly, Powell's views on desegre-

159. P. 494 (alteration in original); cf. BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 141 (1988).

160. SCHWARTZ, *supra* note 159, at 96-97.

161. Tushnet, *supra* note 155, at 518-19.

162. P. 484. For a more extended discussion, see Tushnet, *supra* note 155.

163. 347 U.S. 483 (1954).

164. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 247-48 (1994).

gation were shaped by a social vision in which "the neighborhood school" took on an almost iconic significance, whether or not it accomplished much of value, and whether or not it interfered with the alternative social vision of integration's proponents.

Virginia's massive resistance to desegregation had two aspects. One was a flashy but legally meaningless public relations campaign developed by James Jackson Kilpatrick, editor of the *Richmond News-Leader*. Kilpatrick revived the constitutional theory of interposition, according to which state governments could interpose themselves between the national government and the state's citizens when the national government acted unconstitutionally.¹⁶⁵ James Madison and Thomas Jefferson had been associated with a version of interposition during the controversy over the Federal Alien and Sedition Acts at the end of the eighteenth century. Their version, though, was more complicated than Kilpatrick's, who drew his arguments primarily from John C. Calhoun. In the nullification crisis of 1832-33, Madison, at least, expressly rejected Calhoun's version.¹⁶⁶

By the 1950s, the theory of interposition lacked any serious constitutional support. Powell found it completely ridiculous. He wrote letters to Virginia's governor decrying the theory (pp. 146-49), and he engaged in a debate with Kilpatrick at a prestigious Richmond private club (pp. 145-46). He even drafted a thirty-page article challenging the theory as "a doctrine of chaos — not of law" (p. 149). Notably, however, he withdrew the article from submission (pp. 149-50).

In private, then, Powell attacked the most extreme aspect of massive resistance. In public, however, he did nothing. Jeffries writes that "there was nothing Powell could have done" to thwart massive resistance in 1956 (p. 150), but perhaps an important figure like Powell could have reduced some of the political force behind massive resistance if he had come out against interposition. To do so, however, Powell would have had to engage in political discussions with people rather unlike himself. It was one thing to debate James Jackson Kilpatrick at a Richmond private club; it would have been quite another for Powell to take on the racist politicians — and, even worse, their supporters — who sincerely believed in interposition.¹⁶⁷

165. *Id.* at 240-41.

166. For Jeffries's discussion of the theory, see pp. 137-39.

167. I say "sincerely believed" to exempt the leaders of Senator Harry Byrd's political machine, who supported massive resistance because it was politically expedient. JAMES W. ELY, JR., *THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE* (1976).

Massive resistance had another aspect. Virginia's legislature enacted statutes making it exceedingly difficult for local school districts to take even the most modest — or, as it was later put, token — steps toward eliminating segregated schools. The state took the power of assigning students to particular schools away from local boards and placed immense procedural obstacles in the way of any individual student who sought to challenge his or her school assignment. The ultimate threat was to force schools to close rather than desegregate.

Here Jeffries's argument that Powell could do little to thwart massive resistance has more force. As a member of the Richmond school board, Powell might have done something to begin the desegregation process there (p. 141). But the massive resistance statutes resulted from a large-scale political mobilization, in which legislators from outside Richmond had the largest role. By the time local districts were willing to begin desegregation, as in the state's northern suburbs of Washington, D.C., and in Charlottesville, or by the time the federal courts forced other districts to do so, Powell was a member of the state board of education. There his power to influence desegregation in any particular district was quite small. As Jeffries puts it, on the state board Powell was "willing to accept desegregation but was also supremely tolerant of the status quo" (p. 170).

Jeffries shows that Powell's actions in Virginia during the desegregation process were prudent and cautious. Powell was "disengaged" (p. 177) and "never took a leading role" on the issue of desegregation (p. 172). These were, in Jeffries's terms, "sin[s] of omission" (p. 172), which seems a fair assessment.¹⁶⁸ Powell's sins resulted from a temperament that sought balance and tried to hold the extremes — those promoting massive resistance and those seeking integration — at equal distance. It is not that Powell actively opposed desegregation, or that he disregarded the "aspirations" (p. 172) of Virginia's African Americans; it is just that he could not quite give them the same weight he gave to the aspirations of those seeking to preserve neighborhood schools. When one seeks to balance interests, the result is likely to be distorted to the extent that one systematically undervalues the interests on one

168. Jeffries does discuss one "sin of commission," Powell's agreement with the state school board's decision to waive a procedural requirement so that the Prince Edward County School Board could reimburse parents for a portion of their expenses in sending their children to segregation academies while the county's schools were closed in the state's most dramatic expression of massive resistance. Pp. 175-77. As Jeffries shows, though, the state board's action in waiving the procedural requirement was routine. For Jeffries, Powell's vote is "a particularly striking example of Powell's general disengagement from the problems of desegregation." P. 177.

side of the balance while giving full weight to the interests on the other side.

Powell's limited social vision may account for his decisions in abortion cases. Jeffries closes his discussion of the abortion cases with an anecdote explaining that Powell understood the impact of restrictive abortion laws because a messenger in his law firm had helped someone obtain an illegal abortion that ended in the woman's death (p. 347). Jeffries also stresses that Powell's conversations with one of his daughters "reinforced" his views (p. 347). It is not hard to interpret Powell's votes in abortion cases as reflecting the limits of his social vision. To the extent that restrictive abortion laws adversely affected people like him and his family, he found them unconstitutional; to the extent that they adversely affected women who were not part of his social vision — the poor — he found them constitutional.¹⁶⁹

Similarly, Powell's now-famous comments during the deliberations over *Bowers v. Hardwick*¹⁷⁰ are consistent with the view that his social vision was limited. Powell believed that he had never known a homosexual, and he said so to his gay law clerk (p. 521); Justice Harry Blackmun perhaps unfortunately resisted the urge to correct Powell's misunderstanding (p. 528). Not knowing who he knew, Powell voted to uphold Georgia's statute making sodomy a criminal offense.

Such limits emerge even in passing comments. *Rhodes v. Chapman*¹⁷¹ involved a challenge to overcrowded conditions at an Ohio prison. The Court, in an opinion by Powell, rejected the challenge. At one point, Powell inserted a sentence purporting to support the Court's conclusion: "Many persons not confined in prisons, and not always compelled by poverty, would welcome comparable sleeping quarters" to those in the Ohio prison.¹⁷² Justice Marshall replied:

I know of no one who would voluntarily spend most of his time with only 30 square feet to call his own, unless compelled by poverty or by the State. It is perhaps unnecessary to add that no one would contend that the conditions in which the poor are forced to live represent our nation's standards of decency.¹⁷³

169. Compare *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (invalidating a twenty-four hour waiting period and other restrictions on the availability of abortions) with *Harris v. McRae*, 448 U.S. 297 (1980) (upholding a federal statute denying reimbursement through the Medicaid system for abortions).

170. 478 U.S. 186 (1986).

171. 452 U.S. 337 (1981).

172. Justice Lewis F. Powell, Jr., Draft Opinion (*Rhodes v. Chapman*) (May 4, 1981), in Marshall Papers, box 277, file 3, at 10.

173. Justice Thurgood Marshall, Draft Opinion (*Rhodes v. Chapman*) (May 15, 1981), in Marshall Papers, box 227, file 3, at 8 n.8.

Powell tinkered with the sentence, and in the end he omitted it from the published opinion. That he thought to write it in the first place and that he persisted with it even after Marshall's initial comment, shows the limits of Powell's social vision.

There is an underside to balance and centrism that Powell's work on the Court also illustrates. Both principles can degenerate into an effort to have things two ways. Too often on crucial matters Powell tried to do this.

Powell's repudiation of his vote in *Bowers* is well-known. Soon after his retirement, Powell said that, on reflection, he believed that he had erred in casting the fifth vote to uphold Georgia's antisodomy statute (p. 530). Jeffries describes Powell's "waffl[ing]" on the question of gay rights and his effort, feebly expressed in his concurring opinion in *Bowers*, to develop a compromise position that would allow states to criminalize homosexual sodomy but not to impose substantial criminal sentences for engaging in homosexual activities (pp. 514-19).

Jeffries explains Powell's vote in *Bowers* by referring to Powell's age — which in this context must mean his politically conservative instincts — and the weakness of the Eighth Amendment theory he developed to claim the center against the advocates of gay rights on the left and the bigotry of Chief Justice Warren Burger's position on the right (pp. 520-24). But, as Jeffries acknowledges, in *Bowers* Powell "failed to act on his own best judgment" (p. 527).

Powell's change of heart on *Bowers* was known before Jeffries's book. Jeffries reveals that Powell had second thoughts about the death penalty as well. In an interview with Jeffries, Powell stated that he now believed that the Court wrongly decided *McCleskey v. Kemp*¹⁷⁴ — not because he was wrong in rejecting McCleskey's evidence of racial discrimination in the administration of capital punishment, but because he could not justify capital punishment itself (pp. 451-52). While on the Court, Powell characteristically had attempted to define a middle ground for death penalty jurisprudence. Trying to work within a jurisprudence that was concerned with avoiding the arbitrary imposition of death sentences, Powell agreed that it was unconstitutional to require a capital sentence in any class of cases — even though mandatory penalties would eliminate discretion at the sentencing stage¹⁷⁵ — and that courts should allow defendants facing the prospect of a death sentence to introduce any mitigating evidence they had even though it reintroduced the possibility of arbitrary jury sympathy.¹⁷⁶

174. 481 U.S. 279 (1987).

175. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

176. *Lockett v. Ohio*, 438 U.S. 586, 604-08 (1978).

The difficulties of sustaining a centrist position on the death penalty are perhaps best illustrated by the short-lived rule first articulated in a Powell opinion that juries could not hear evidence about the impact of a murder on the victim's family and friends, because, as Powell wrote, that would encourage juries to show mercy to killers whose victims were especially unsympathetic.¹⁷⁷ Powell appears not to have understood that victim-impact evidence was hardly necessary for that to happen or not to have seen the connection between the concern he expressed in the victim-impact case and *McCleskey v. Kemp*. In *McCleskey*, he could have interpreted the statistical evidence to establish that juries were more likely to impose the death penalty in cases in which the victim was, as they saw it, "sympathetic," that is, white, than in cases in which the victim was "unsympathetic," that is, African-American.

Powell eventually got impatient with the difficulty in actually carrying out executions. Death penalty cases were a form of legal guerrilla warfare that cast the legal process in a bad light. He thought that lawyers for those under sentence of death had figured out how to "manipulate[]" the Court's rules, and urged his colleagues to consider changing those rules.¹⁷⁸ For a while Powell hoped that the Court and Congress might defeat the death-penalty guerrillas by speeding up the legal process and by closing off opportunities to raise new issues. But, according to Jeffries, the "bitter education of the cases" and Powell's own declining regard for judicial restraint led Powell to the judgment that the middle ground he regularly sought was simply untenable on the death penalty (pp. 452-53). In a memorandum to his colleagues in 1985, Powell suggested that "unless the habeas corpus statute is substantially changed . . . the states should rescind their capital punishment laws."¹⁷⁹ He had "no doubt as to the constitutionality of capital punishment," he wrote, "but I have grave doubts as to whether it now serves the purposes of deterrence and retribution."¹⁸⁰

On *Bowers* and capital punishment, Powell openly expressed his change in views. His record on his actions during the process of desegregation in Richmond is more troubling. During his confirmation hearings, Powell presented himself as firmly committed to the principles of *Brown* and as having acted in Richmond to implement

177. *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

178. Letter from Justice Lewis F. Powell, Jr. to Colleagues 2 (Sept. 4, 1985), in Brennan Papers, box 700, file 7 (discussing *Darden v. Wainwright*); see also Memorandum from Justice Lewis F. Powell, Jr. to the Conference 1 (Mar. 6, 1986), in Brennan Papers, box 719, file 16 (referring to "a gross abuse of the processes of our Court by counsel for Adams").

179. Letter from Justice Powell to Colleagues, *supra* note 178, at 2.

180. *Id.*

Brown (pp. 234-36). As Jeffries shows, that was an exercise in self-revisionism (pp. 297-98).

Commenting on Powell's retrospective self-justifications, Jeffries notes Powell's "uneasiness about personal responsibility" and his "attempt to distance himself from the consequences of his own acts" (p. 429). Charitably put, the contrast between Powell's actions in *Bowers*, in the death penalty cases, and during the desegregation process in Richmond on the one hand, and his later understanding of what the right thing to have done was on the other, shows a failure of Powell's moral imagination.

It also shows Powell's concern that those whose judgments he valued regard his actions well. When he actually had authority to make decisions — as an important figure in Richmond's public life and as a Justice — he could reasonably expect that the social groups with which he was affiliated would see his decisions as sensible. Afterwards, though, he had to worry about the verdict of history. By repudiating actions that either had not stood the test of time, for example his behavior in Richmond, or that might not do so, for example his votes in *Bowers* and death penalty cases, Powell could at least hope that historians would see him in a better light than they would if all they had to go on was what he had actually done.¹⁸¹

I find myself quite ambivalent about Powell's career. If asked to assess Powell's performance, I am inclined to focus on what he did when he had power, not on what he later said he should have done. James Russell Lowell's verse comes to mind: "Once to every man and nation comes the moment to decide, in the strife of Truth with Falsehood, for the good or evil side[.]"¹⁸² Powell had more than one moment to decide, and on balance he did not choose the good side.

That conclusion, however, seems unduly harsh. We could not reasonably expect that a person with Powell's affiliations would have acted much differently. His social vision was limited, but one part of it surely was a concern for historical reputation. His retrospective reconstructions of his views are therefore quite understandable. Although one might want a bit more self-awareness and even embarrassment on Powell's part about the distance between what he did and what he said he should have done, even that is probably too much to ask of a person like him. Jeffries describes Powell as a man of "ambition and reserve" (p. 220). His ambition

181. At least with respect to *Bowers*, Powell's "recantation" indeed seems to have improved his reputation. See, e.g., p. 530 (quoting Laurence Tribe as admiring Powell's willingness to admit error).

182. James Russell Lowell, *The Present Crisis*, in 7 THE WRITINGS OF JAMES RUSSELL LOWELL 178, 180 (Boston, Houghton, Mifflin 1891).

led him to act as he did when he had power and afterward; his reserve made it impossible for him to understand his actions.

V. SOCIAL VISION AND THE JURISPRUDENCE OF CENTRISM

Powell's jurisprudence of centrism suggests some broader conclusions. Perhaps balancing competing interests is a suitable way for people with a capacious social vision to decide cases. They can appreciate the relevant considerations no matter what case people present to them: In desegregation cases they would appreciate the aspirations of those seeking high-quality integrated schools and of those seeking to preserve a social order with which they were comfortable; in affirmative action cases they would appreciate the concerns of innocent white victims of affirmative action programs and of innocent African American victims of a historically embedded system of race discrimination; in a capital punishment case they would appreciate the conditions that led a murderer into the situation in which killing seemed the right thing to do and the devastation that criminal conduct wreaks on our society. Furthermore, they would appreciate the value of developing a legal rule with sufficient generality to guide officials and citizens.

It would be senseless to believe that only those who come from disadvantaged backgrounds can possibly have an appropriately capacious social vision to engage in the balancing of interests. After all, everyone's social vision is limited, and we are all to some extent the captives of our backgrounds. Powell's social vision was not as narrow as it could have been: His empathy for the children of undocumented aliens in *Plyler*, his endorsement of the basic right of women to choose in abortion cases, his acceptance of some degree of affirmative action, and his opposition to victim-impact statements all show that he did appreciate the impact of law on people with whom he had little contact. Powell's dedication to programs designed to secure adequate legal services for the poor (pp. 197-201), which led Jean Camper Cahn to stress his capacity for empathy in a letter supporting his nomination to the Court (p. 236), further illustrates Powell's ability to transcend his background in some ways. But another part of Powell's difficulty with *Bowers* seems symptomatic of the deeper limitations on Powell's vision. Not only did Powell not know that he had worked with gays; according to Jeffries's account of a conversation Powell had, Powell simply could not comprehend either the emotional or the physical dimensions of sexual attraction between men (p. 521).

Here Powell's experience as a lawyer is suggestive. Biographies of lawyers-turned-judges regularly confront a problem in describing their subjects' lives as lawyers: Neither the subjects nor their law firms can release information on the lawyer's legal practice without

the permission of clients and their successors. When, as with Powell, the clients are large corporations, it is basically impossible to obtain detailed information about the lawyer's legal practice — what he did between the time he arrived in the office each morning and the time he left late in the evening.¹⁸³

Jeffries's description of Powell's career before his appointment to the Court, however, contains some hints about Powell's legal practice. At least from the time Powell was a successful corporate lawyer, his private practice of law may well have consisted of his public career in the Richmond, state, and national bar associations; service on the Richmond and state boards of education; service on other public commissions; and service on corporate boards of directors. Being a successful corporate lawyer, that is, appears to consist of rounds of meetings, some of which are designed to attract clients, others of which consist of holding the hands of existing clients.¹⁸⁴ Jeffries emphasizes how lonely Powell felt life at the Court to be, precisely because there were no meetings (p. 335). At one point in his career, Powell had been a successful civil trial lawyer, but by the time he went on the Court, the actual lawyering he did appears to have consisted of reviewing the work of his subordinates, dictaphone in hand, commenting on what they had produced and suggesting revisions or additions.¹⁸⁵

Powell's legal practice, then, did not expose him to the wide range of human experiences that might have expanded his social vision. As a lawyer, Powell "worked chiefly with people" (p. 335), but the people he worked with were drawn from a relatively narrow range. His public service also might have exposed him to a wider range of people, but in fact it did not. During the 1950s and 1960s, a lawyer who was successful in the internal politics of bar associations had to have certain political skills, but he did not need to reach out to widely diverse constituencies for support.

Powell might have transcended the limitations of his background by engaging in the rough-and-tumble of public politics. To do so, however, he would have had to be quite a different person. In making this suggestion, I am not arguing we ought to draw our

183. Jeffries provides a few anecdotes about Powell's legal work. One culminates in a visit by Powell to an alumnus of his own college, who expedited the approval of a securities registration Powell was seeking — an example of lawyering as the use of "[t]he old-boy network." P. 52.

184. Powell's experience as a lawyer made him comfortable with the business and commercial cases on the Court's docket. Understandably, Jeffries devotes no attention to those cases.

185. Jeffries describes Powell's style of working on opinions in a similar manner. P. 295; see also p. 478.

Justices solely from the ranks of experienced politicians.¹⁸⁶ My suggestion is more limited and conditional: If a judge adheres to a jurisprudence of balancing, as Powell did, it would be desirable for that judge to have a capacious social vision. Judges who lack such a vision may not do a good job in balancing competing interests because they do not fully appreciate the range of interests at stake. Perhaps a judge like Powell would have done better as a formalist.¹⁸⁷

186. I have made something like that suggestion before, see Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747 (1992), but I now believe that my argument was too broad.

187. I am indebted to my students in constitutional law during the fall quarter of 1994 for helping me see this point.