

The Yale Law Journal

Volume 97, Number 1, November 1987

Articles

The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell

Paul W. Kahn†

Justice Lewis Powell often cast the critical fifth vote on a severely divided Supreme Court. In this article, Professor Kahn argues that Justice Powell's jurisprudence is characterized by a balancing approach that seeks to accommodate competing claims. He asserts that this "representative balancing" methodology derives from Justice Powell's belief that the role of a Justice is to reflect in adjudication the existing distribution of values and authority among the competing factions that constitute the contemporary community. Professor Kahn concludes that representative balancing is an unacceptable foundation for judicial review, because it fails to provide principled explanations for results and, therefore, is open to the charge that it usurps the functions of the political institutions of government.

On June 26, at the end of the 1986 Term, Justice Lewis Powell announced his retirement from the Supreme Court. Political and legal com-

† Associate Professor, Yale Law School. Research on this paper was done in connection with the Center for Philosophy and Public Policy Project on Judicial Ethics and Responsibility. A shorter version will appear in *JUDGING JUDGES* (D. Luban ed.) (forthcoming). I would like to thank Bruce Ackerman, Akhil Amar, Lea Brilmayer, Robert Burt, Owen Fiss, Paul Gewirtz, Catherine Iino, Anthony Kronman and David Luban for their many helpful suggestions. I would also like to thank Paul Wolfson and Edward Lazarus for their research assistance.

mentators were quick to note the dramatic significance this particular resignation may have for the work of the Court.¹ Justice Powell had long been the critical fifth vote on a severely divided Court.² Powell was not just the deciding fifth vote; rather, he brought with his vote a particular jurisprudence. The question now is not simply which particular decisions may be reversed as a result of Justice Powell's departure, but whether his jurisprudential approach will survive.³ More important still, should it survive?

Powell was not just at the center statistically.⁴ His jurisprudence accepted that central role as its defining feature. For Powell, the goal of constitutional adjudication was to find the center, to strike the balance between competing interests. The model of the judicial "balance" appeared over and over again in Powell's opinions. He pursued a balancing approach to issues of federalism,⁵ free speech,⁶ free press,⁷ equal protection,⁸ separation of powers,⁹ criminal procedure,¹⁰ and criminal punishment.¹¹ In fact, apart from issues of the Court's own jurisdiction, no area of constitutional law was immune from Powell's balancing approach.¹²

1. See TIME, July 6, 1987, at 10; Wash. Post, June 27, 1987, at A1, col. 1; N.Y. Times, June 27, 1987, at A1, col. 6.

2. Over the last five years, Powell voted with the majority in almost three-fourths of the Court's 5-4 decisions (118 of 161). He was in the majority in those 5-4 decisions more than any other Justice, both over the whole period and in each year separately. Notably, in the 1986 Term, Powell joined the conservative Justices (Rehnquist, White, O'Connor and Scalia) on 18 occasions, yet also voted with the liberal four (Brennan, Marshall, Blackmun, and Stevens) seven times. No other coalition emerged in more than four cases. Similarly, in the 1985 Term, Powell joined the conservatives (then including Burger rather than Scalia) 13 times and the liberals six times, while no other coalition emerged more than three times. These data are drawn from statistics compiled between 1982 and 1987 by the Harvard Law Review.

3. Remarkably, there is little scholarly work on the jurisprudence of contemporary Justices. The literature on Justice Powell is, however, more substantial than that on most Justices. See *The Symposium in Honor of Justice Lewis F. Powell, Jr.*, 68 VA. L. REV. 161-458 (1982) (includes articles by Be Vier, Estreicher, Freund, Martin, Merrill, Oaks, Stephan, & Whitman); Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972); Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1972); Maltz, *Portrait of a Man in the Middle—Mr. Justice Powell, Equal Protection, and the Pure Classification Problem*, 40 OHIO ST. L.J. 941 (1979); Vrofsky, *Mr. Justice Powell and Education: The Balancing of Competing Values*, 13 J.L. & EDUC. 581 (1984); Yackle, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICH. L. REV. 181 (1975).

4. Of Powell's seven concurrences in the 1986 Term, for example, three provided the majority in 5-4 decisions.

5. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting).

6. *Young v. American Mini Theatres*, 427 U.S. 50, 73 (1976) (Powell, J., concurring).

7. *Gannett Co. v. DePasquale*, 443 U.S. 368, 397 (1979) (Powell, J., concurring).

8. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.).

9. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

10. *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (Powell, J., concurring).

11. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2847 (1986) (Powell, J., concurring).

12. This does not mean that Powell invoked a balance in every opinion. Interestingly, in some instances he adopted a categorical or non-balancing approach and subsequently attempted to construe the opinion as employing a balance. Compare *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (non-balancing) with *American Mini Theatres*, 427 U.S. at 73 (Powell, J., concurring) (balancing); compare *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (non-balancing) with *Reeves, Inc.*

The concept of "balancing" is itself both a metaphor and an abstraction. The metaphor is ambiguous. It describes both a process of measuring competing interests to determine which is "weightier" and a particular substantive outcome characterized as a "balance" of competing interests.¹³ The abstract concept of balancing, furthermore, tells us nothing about which interests, rights, or principles get weighed or how weights are assigned.

While balancing has emerged as the jurisprudential model at the center of the modern Court's work,¹⁴ few commentators have analyzed what goes on within the "black box" of the judicial balance.¹⁵ To invoke a balance is to recognize that legitimate, judicially cognizable interests are in tension and that not all can be completely satisfied. That is true, however, in all difficult moral and political situations. Balancing as a method of decision-making is not unique to the judicial role. Not whether, but how, one balances is the interesting question. This Article attempts to focus scholarly attention on this question by exploring Justice Powell's employment of a variety of forms of balancing and then subjecting to critical analysis that form which best characterizes his jurisprudence.

Within the broad category of "balancing" are three distinguishable models, which I term "representative," "administrative," and "zero-sum" balancing. The representative and zero-sum balances refer to two different perspectives on the problem of resolving conflicts among competing claims. Representative balancing seeks to accommodate each claim; it does not completely reject any claim. Zero-sum balancing, in contrast, makes an exclusive choice rather than an accommodation. Instead of a "balanced" outcome, zero-sum balancing determines which claim is weightier and elevates that claim over others.

The distinctive quality of the administrative balance is its quantitative character. It presents a quantitative assessment and comparison of com-

v. Stake, 447 U.S. 429, 447 (1980) (Powell, J., dissenting) (balancing).

13. See Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946 (1987).

14. Although at best a very rough measure of the prevalence of the balancing model, the word "balance" or "balancing" does appear in 214 of the 473 cases decided in the last three years.

15. See Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1046 (1978) ("It is time to begin to disentangle the web of balancing, penetrate its rhetoric, and analyze and sort out its doctrinal elements."). The best of the contemporary works on balancing are C. DUGAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 116-92 (1978), and Aleinikoff, *supra* note 13. An older literature on balancing reflects primarily the debate between Justice Black and Justices Harlan and Frankfurter on whether the First Amendment should be interpreted within an absolutist or a balancing framework. See Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428 (1967). An even older literature on balancing is found in the writings associated with legal realism. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1923).

peting claims. A quantitative approach to balancing can be used to achieve either a representative or a zero-sum balance. It is representative if used to determine the point at which each interest achieves its maximum satisfaction consistent with the recognition and equal respect of competitive claims. This is, for example, roughly the model behind the economists' concept of pareto optimality. Alternatively, the administrative balance is zero-sum if used to determine which of a number of competing interests has the greatest weight under the particular circumstances and is thus entitled to recognition to the exclusion of the others. The administrative balance usually appears in judicial decisions in the zero-sum form. But even then, the model promises that each competing interest will be given appropriate weight in the process of adjudication itself, if not in the result.

Although this three-fold typology is useful for understanding the structure of judicial balancing in general, and specifically the structure of Powell's decisionmaking, I will argue that for Powell the representative balance was fundamental. Administrative balancing was attractive to him because it promises objectivity in the process of accommodation. Zero-sum balancing, while often employed by Powell, was, because of its exclusive rather than inclusive nature, inconsistent with his deepest beliefs about the judicial role. This inconsistency led Powell to refocus adjudication on management of conflict, rather than resolution of the individual case. The case itself became only a moment in a larger process of balancing competing interests.

Once Powell's approach to judicial decisionmaking is clear, I shall argue that his balancing methodology was directly tied to his understanding of the substantive role of a Justice. That role was to impart to adjudication the existing distribution of values and authority among the competing factions that constitute the community. The key to understanding Powell's claim to represent the contemporary community is understanding the methodology of balancing as a means of locating the Justice within the community. The appeal of balancing to Justice Powell rested upon the methodological assumption that all substantive values must derive from the free competition of interests within the community. The appeal of representative balancing, in particular, is its requirement that the Justice regulate that competition among interests by reference to the value of pluralism, of openness to all factions.

Finally, I will argue that this is an unacceptable foundation for the constitutional function of judicial review. Balancing, for Powell, was an attempt to stay within the community, to claim legitimacy as a member of the community. That community is a product of historical factors that cannot be comprehended in principled argument. For just that reason, a Powell opinion inevitably falls silent at the critical moment of decision. It is based ultimately on an intuition of justice, rather than an articulate argument.

Balancing cannot provide an adequate foundation for judicial review because the Court must explain and justify its results. Articulate argument, not silent intuition, is the only possible source of legitimacy for judicial review. Without such an explanation at the heart of the judicial decision, the Court is open to charges that it has usurped the functions of the political institutions of government. Powell himself seemed to recognize this when he narrowly interpreted Article III standing requirements to impose a strict injury test on litigants. Powell's standing jurisprudence excluded many interests in the community and was thus inconsistent with the representative balancing that characterized much of his work.

Powell's balancing approach confused the role of juror and Justice, the role of legislator and Justice, and ultimately the role of citizen and Justice. Although the roles of juror, legislator, and citizen may call upon the same virtues and values, the Justice must stand apart from all three and from the community itself. He represents the Constitution to the community, not the community to the Constitution.

I. WORKING THE BALANCE: JUSTICE POWELL AND THE REPRESENTATIVE BALANCE

Representative balancing is marked procedurally by the consideration of a wide range of interests with a stake in a particular decision.¹⁶ Substantively, it aims to give voice to each interest by setting forth a rule that accommodates all of them. Ideally, that rule allows each interest its maximum realization consistent with recognition of and respect for other competing interests. Such a result can be described as a "balance" among competing interests. Failure to reach that balance, or a shift in the nature or strength of competing interests, results in a "disequilibrium," leading to reconsideration and the drawing of a new balance at another point.

The theoretical foundations for this model of the judicial role were laid in the writings of Pound and Cardozo in the early part of this century.¹⁷ Pound argues that the goal of law, including adjudication, should be to "secure all interests so far as possible with the least sacrifice of the totality of interests or the scheme of interests as a whole."¹⁸ Elsewhere, he explains, "I do not believe the jurist has to do more than recognize the problem . . . presented to him as one of securing all social interests so far as

16. Both courts and legislatures are subject to the charge that they systematically ignore certain interests—particularly the poor and unrepresented. See, e.g., *Maher v. Roe*, 432 U.S. 464, 483 (1977) (Brennan, J., dissenting) (criticizing Justice Powell's opinion for its "distressing insensitivity to the plight of impoverished pregnant women"); *Beal v. Doe*, 432 U.S. 438, 457 (Marshall, J., dissenting) (emphasizing Court's insensitivity in *Maher*); see also Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1310 (1976).

17. For a perceptive discussion of the roots of balancing in legal realism and American pragmatism, see Aleinikoff, *supra* note 13, at 948-63, and see C. DUCAT, *supra* note 15, at 119.

18. 3 R. POUND, JURISPRUDENCE 334 (1959).

he may, of maintaining a balance or harmony among them that is compatible with the securing of all of them."¹⁹

Although the theoretical foundation is old, no Justice prior to Powell so clearly adopted the approach.²⁰ Powell's acceptance of this approach, however, is not based on the arguments of legal theorists. In fact, when Powell explicitly reflects on the judicial role, he denies the Justice this broad responsibility.²¹ Rather, Powell's attraction to the model lies in a habit of personal governance.²²

Perhaps the most famous of Powell's opinions is that in *Regents of University of California v. Bakke*,²³ concerning affirmative action in university admissions programs. Typically, Powell finds himself squarely in the middle. He is the deciding vote within a polarized Court and a polarized national community. To hold that middle, he adopts the technique of representative balancing.

Powell starts by embracing the interests of those burdened by affirmative action plans. He rejects the argument that racial discrimination against non-minorities should be subject to a weaker standard of constitutional review than classifications that discriminate against blacks: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."²⁴ Since contemporary equal protection law has essentially identified "exacting" judicial scrutiny with judicial invalidation,²⁵ Powell appears to accept the principle that the equal protection clause protects every individual of every racial group against any race-based burdens. In fact, he is doing no such thing.²⁶

19. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 46 (1954); see also McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOLUTION 337, 343 (1960) ("The comprehensive community goals we recommend for postulation are . . . at highest abstraction, a public order which is designed to promote the greatest production and widest sharing of all values . . ."); Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 39 (1943) ("[L]aw is an attempt . . . to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.")

20. Justices Harlan and Frankfurter, also closely identified with a balancing approach, fall more clearly within the "zero-sum" model. See *infra* notes 128-32 and accompanying text. For them, the representative balance remains primarily a legislative responsibility. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting); *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); *Baker v. Carr*, 369 U.S. 186, 278 (1962) (Frankfurter, J., dissenting). Although this Article examines in detail only a sample of Powell's representative balancing opinions, the list could easily be extended. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982) (due process rights of institutionalized mentally retarded); *Trimble v. Gordon*, 430 U.S. 762 (1977) (rule on place of illegitimate children in intestate succession); *Procunier v. Martinez*, 416 U.S. 396 (1974) (rule on censorship of prisoner mail).

21. See *infra* notes 279-92 and accompanying text.

22. See Howard, *supra* note 3, at 448 (discussing Justice Powell's background within social class of Virginia patriarchs).

23. 438 U.S. 265 (1978).

24. *Id.* at 291.

25. See 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, 8 (1972) (scrutiny "strict in theory" but "fatal in fact").

26. For a similar move with respect to the First Amendment principle of no content-based distinc-

In the representative balance, principles are nothing more than markers of interests.²⁷ For Powell, claims of rights derived from principles are indistinguishable from the interests of any other individual or subgroup within the social order. The principle of state "color-blindness" and the corresponding claim to a right to non-discrimination, accordingly, become a factional interest in equal treatment. Thus, Bakke gains nothing, as a practical matter, from Powell's seeming recognition of a principle of color-blindness. Bakke remains, for Powell, a representative of a faction, the interests of which are to be balanced against the interests of competing groups.

Having canvassed Bakke's interests, Powell then turns to the interests of the school. His assessment of those interests locates one that must be balanced against the color-blindness principle. The judicial balance must give a place to the school's competing interest in "obtaining the educational benefits that flow from an ethnically diverse student body."²⁸

Formal doctrine requires that this interest be "compelling" if it is to survive "exacting judicial scrutiny."²⁹ But Powell provides no serious explanation of why this interest is of such a commanding constitutional magnitude.³⁰ Powell's support for the proposition that there is a link between the racial diversity of the student body and the quality of higher education consists of a single reference to a statement by the president of Princeton in that school's *Alumni Weekly*.³¹ There is no consideration of whether, or to what extent, educational quality should be sacrificed to the constitutional principle of equal treatment. After all, nowhere does the Constitution guarantee anyone a right to the highest quality education.³²

tions on speech, see *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J., concurring), in which Justice Powell rejects Justice Stevens' position that non-obscene, sexually explicit speech is entitled to a lower standard of protection than other kinds of speech, yet nevertheless permits a content-based intrusion on that speech by applying a balancing test. See also P. BOBBIT, *CONSTITUTIONAL FATE* 222-23 (1982) (on the "expressive" function of Powell's opinion in *Bakke*).

27. The denial of a distinction between rights and interests is an essential point in the realist tradition. See R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 90-119 (1956); M. EDELMAN, *DEMOCRATIC THEORIES AND THE CONSTITUTION* 96-97 (1984); J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 250-55 (1950).

28. 438 U.S. at 306. The University of California had advanced three other purposes for the special admission program: "(i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,' . . . (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved . . ." *Id.* (citation omitted). Powell rejected as legally non-cognizable each of these purposes. Because the end of representative balancing is recognition and accommodation of competing factions, however, there is no clear relationship between the number of interests recognized and the character of the accommodation among factions that is reached.

29. See Gunther, *supra* note 25, at 13; see also *Bakke*, 438 U.S. at 287.

30. There is some irony in the argument Powell presents. He finds support for affirmative action, in the face of an equal protection challenge, in the First Amendment right of association. Of course, it had been argued for twenty years that the desegregation principle supported by the Court offended just this right of association. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 34 (1959).

31. 438 U.S. at 312-13 n.48.

32. In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), Powell explicitly rejects

Nor does Powell consider the importance of racial diversity relative to other sorts of diversity. If non-racial diversity remains possible, what stands to be lost in terms of educational quality if the principle of color-blindness is followed?³³

Just as the assertion of a constitutional principle means nothing more than judicial recognition of a "cognizable interest," so the characterization of a state interest as "compelling" means nothing more than the recognition of a competing interest. In neither case is the characterization the result of a serious legal examination or argument. Thus, the fact that diversity of student population is a "compelling" interest hardly means that racial diversity can be pursued directly through the use of quotas. Terms or categories that might serve as rules for decision—a *principle* of color-blindness or the identification of a *compelling interest*—have become only factional interests to be represented within the balance.³⁴

Representative balancing always undermines such categorical rules, because its end is recognition and reconciliation, not exclusion. *Bakke* is critical to understanding the depth of Powell's commitment to this balance because there he rejects the most firmly rooted of the Court's categories—strict scrutiny and compelling interest—as grounds for decision.³⁵ Traditionally, identification of a compelling state interest marked a boundary of judicial authority. A court was not to interfere with an interest of compelling importance to the political branches. For Powell, however, identification of a "compelling" interest signifies only judicial recognition of an interest that must fit into a larger accommodation that gives voice to competing interests.

Having located and articulated competing interests, Powell now works the balance. Racial diversity, he tells us, may not be sought through a system of a "prescribed number of seats set aside for each identifiable

appellee's contention that education is a "fundamental" right for the purposes of equal protection analysis, *id.* at 30, and refuses to apply strict scrutiny to a claim of disparate treatment with respect to educational opportunity.

33. Ignoring the specific issue of racial diversity, Powell writes that the University can claim a First Amendment interest in the "right to select those students who will contribute the most to the 'robust exchange of ideas . . .'" *Bakke*, 438 U.S. at 313. Powell cannot mean this literally. The University of California is a public university, and at issue is a regulatory policy adopted by that institution as a state actor. The First Amendment protects private parties from the reach of such regulatory actions; it does not protect the state itself from the requirements of the Fourteenth Amendment. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1505 (1975).

34. The prevalence of balancing in equal protection cases has seriously eroded the more traditional classification system for judicial review. See *infra* note 154. Just as Powell's balancing approach in *Bakke* undermines the "compelling state interest standard," so the Court's balancing approach in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), undermines the "rational basis" standard.

35. Balancing and a categorical approach could be combined by limiting balancing to particular categories of state action or state interests. See Ely, *supra* note 33, at 1500-01. Powell does not combine the two, but rather subsumes the categories within the balance. Categories do not mark the boundaries of the balance, but are simply markers of interests within the balance.

category of applicants."³⁶ Rather, it may only be accomplished by an individualized consideration of each applicant in which "race or ethnic background may be deemed a 'plus.'"³⁷ Each interest is given voice—both equal treatment and racial diversity are affirmed.

Why, where, and how does the Constitution or constitutional law make such distinctions between quotas and goals? Silence. Powell does not cite any traditional, or even non-traditional, legal materials—text, precedent, constitutional history, constitutional structure, or moral and political theory³⁸—to support this balanced outcome. Instead, he tells us only that Princeton and Harvard have managed under this system. That this may be good policy or even good politics—at least in the Ivy League—does not tell us why it is good adjudication.³⁹

This analysis represents a characteristic pattern in Justice Powell's jurisprudence. He welcomes every side to the controversy but resolves the issue in a pronouncement that fails to appeal to anything beyond his own intuition of a fair outcome. His use of the representative balance is analogous to the legislative model of hearing, debate, and then closure of the issue by the vote.⁴⁰ Justice Powell sets the pattern for every university admissions affirmative action program in the country, but we cannot explain the constitutional norms.⁴¹

This silence at the center means the rules that emerge are of uncertain

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

37. *Id.* at 317. Powell's representative balancing methodology leads him to a standard of administrative discretion that might give others pause, given the history of abuse in this area. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discretionary enforcement of licensing ordinance unconstitutionally applied to Asians). In *Bakke*, Justices Brennan, White, Marshall and Blackmun can see no constitutional distinction between the two approaches contrasted by Powell: "In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis." 438 U.S. at 378 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).

38. *See Fallon, A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-209 (1987) (discussing types of authority for constitutional arguments).

39. *See G. CALABREST, IDEALS, BELIEFS, ATTITUDES AND THE LAW* 90 & nn.324-31 (1985) (discussing abuse of affirmative action goals in Ivy League schools).

40. It is also analogous to the decisionmaking process he assigns to the university admissions officer, which he describes as follows: "[A]n admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Bakke*, 438 U.S. at 317. An admissions officer must equalize footings, but may distribute weights—hardly the traditional language of legal rules. But this is precisely what Powell is doing in *Bakke* itself. He is placing the competing interests of the parties on an equal footing (both have cognizable claims that he acknowledges) and distributing weights—educational diversity may be pursued at some cost to racial color-blindness.

41. In fact, all we can do is quote Justice Powell. The Yale Law School affirmative action policy, for example, was explained to the admissions committee as follows: "Read *Bakke*." Powell's use of the representative balance resembles Justice Frankfurter's description of the legislative process: "Matters of policy . . . are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy." *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 557 (1949) (Frankfurter, J., concurring).

weight and scope. Each new configuration of interests presents an occasion for the formulation of a new rule. The proliferation of new rules may, in turn, cause a reconsideration of the earlier rules. The post-*Bakke* line of affirmative action cases has taken just this form. The Court faces an endless series of variations; in each of these, it must reassess the competitive interests and reconsider the adequacy of the old rule. The competition of interests in terminations,⁴² in promotions,⁴³ and in set-asides⁴⁴ may each require a new balance.

The proliferation of rules produced by this methodology is well illustrated by Powell's opinion in *Bellotti v. Baird*,⁴⁵ which addresses the issue of state regulation of a minor's access to an abortion. *Roe v. Wade*,⁴⁶ where Powell joined the majority opinion, is itself an example of representative balancing in which the Court accommodates the competing interests of mother and state by formulating a rule that gives voice to each.⁴⁷ In *Bellotti*, the Court considers a Massachusetts law that requires a minor desiring an abortion to seek the consent of both her parents. If that consent cannot be obtained, she can go to state superior court and obtain permission for the abortion by showing "good cause." The problem is to adjust the rule of *Roe* to reflect this new configuration of interests.⁴⁸

Powell's analysis canvasses the various interests at stake: the child's interest in asserting her constitutional right to an abortion; the parents' interest in preserving parental authority, including the supervision of the physical and moral "upbringing" of the child; and the state's interests in protecting the child from ill-considered decisions and in encouraging

42. See *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986) (plurality opinion) (striking down collective bargaining agreement extending preferential treatment against layoffs to minority employees).

43. See *United States v. Paradise*, 107 S. Ct. 1053 (1987) (plurality opinion) (upholding a judicial remedy of preferential promotions for minority employees).

44. See *Local 28 of Sheet Metal Workers Int'l Ass'n v. E.E.O.C.*, 106 S. Ct. 3019 (1986) (upholding affirmative action in union membership program); see also *Days, Fullilove*, 96 YALE L.J. 453 (1987) (evaluating minority set-asides as remedy for racial discrimination).

45. 443 U.S. 622 (1979) (plurality opinion).

46. 410 U.S. 113 (1973).

47. See *infra* note 295. The use of trimesters to mark the balance of competing interests in *Roe* has been the object of considerable academic criticism. See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924-25 (1973). The technical character of the lines drawn, in particular, opened the opinion up to the same kind of institutional criticism that is directed at administrative balancing by the Court. See Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 644-48, 655-58 (1986).

48. As in the affirmative action example, *Roe* has been followed by repeated reconsideration of the balance as interests shift in diverse circumstances. The rule for adults is not that for minors, *Bellotti*; the rule of recognition for parents is not that for spouses, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (portion of statute requiring spousal consent for abortions held unconstitutional); the rule for state prohibition of abortions is not that for state discouragement of abortions, *Maier v. Roe*, 432 U.S. 464 (1977) (state may constitutionally refuse to pay for nontherapeutic abortions); and the rule for state burdens on the right to an abortion is not that for state actions that discourage the exercise of the right, *Harris v. McRae*, 448 U.S. 297, 315-17 (1980). This fact-specific approach to balancing means that the lower courts receive little guidance from the decisions of the Supreme Court. No one knows which rules will serve as stable precedents, which situations will serve as occasions for a new rule, or which situations may serve as occasions for reconsideration of the initial rule of *Roe* itself.

child-parent communication. The rule Powell sets forth provides a set of guidelines designed to give voice to each competing interest within the context of an individual request for an abortion.

Thus, the parents may not have an absolute right to bar the abortion, but they are assured that a decisionmaker will consider whether the particular circumstances require their involvement for an appropriate resolution. The minor is not given an unrestricted right to an abortion but is assured that the decisionmaker will consider the strength of her claim that she is sufficiently mature to make the decision, as well as her claim that the decision should be made without parental notification. Finally, the state is assured that its interest in encouraging parental communication will be recognized.⁴⁹ Each faction gets something, but no one faction gets everything.

A detailed set of guidelines emerges for a system of state regulation of minors seeking abortions. Where does any of this come from? Once again, simply from Justice Powell.⁵⁰ He does not rely on, or even refer to, objective legal resources at any point in his discussion of these guidelines.⁵¹ Massachusetts was trying to satisfy its interest in ensuring parental notice and involvement in the decision of a minor to abort, while meeting the demands of *Planned Parenthood v. Danforth*,⁵² which held that a state could not grant the parents an absolute veto over that decision. Massachusetts had itself sought to balance the constitutional right of the minor, on the one hand, against parental and state interests, on the other. Yet the only precedents that Powell cites in his discussion of whether Massachusetts had reached a proper balance are *Danforth* itself, simply to repeat its holding,⁵³ and *Roe*—for the trivial point that pregnancy creates a “potentially severe detriment.”⁵⁴

Bakke and *Bellotti* illustrate a particular approach to the representative balance. Voice is given to all competing interests both at the appellate level of formulating abstract guidelines or rules and at the moment of

49. The plurality opinion also advances the state's interest in improving the quality of decisions. Powell does not, however, acknowledge a state interest in discouraging abortions by minors—an indication of the selective character of interest recognition in balancing. That this is not an “illegitimate” interest is clear from *Maher*. While accumulation of interests may not matter when they are parallel or mutually supporting, here the state's interests are in significant tension. Powell provides a more comprehensive list of the interests to be balanced in this context in *H.L. v. Matheson*, 450 U.S. 398, 419 (1981) (Powell, J., concurring).

50. See *Bellotti v. Baird*, 443 U.S. 622, 656 n.4 (1979) (Stevens, J., concurring in judgment) (accusing Powell of rendering an “advisory opinion”).

51. Cf. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984). Bennett distinguishes “objectivity” from “authoritativeness” in constitutional law. A decision is “objective” when it appeals to sources outside of personal values of the decisionmaker. “Authoritativeness” requires distinguishing among these “objective” resources in terms of some normative criteria of correctness.

52. 428 U.S. 52 (1976).

53. *Bellotti*, 443 U.S. at 639.

54. *Id.* at 642.

application of those rules in the individual case.⁵⁵ The general rule formulated in each case calls for an individualized decision process in which each interest is considered. Representative balancing, however, may also take the form of settling on a rule that is designed to accommodate competing claims in general, without further acknowledgement of those claims at the moment of individual application.⁵⁶ The Court's treatment of libel law illustrates this form of representative balancing.

In *Gertz v. Robert Welch, Inc.*,⁵⁷ Powell applies the technique of the representative balance to determine the extent of First Amendment protection, if any, to which a publisher is entitled when it publishes defamatory falsehoods concerning a private individual involved in matters of "public concern."⁵⁸ Writing for the Court, Powell formulates the issue as that of defining "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."⁵⁹ The method of "accommodation" is that of the representative balance.

55. Powell frequently appeals to this model of particularistic decisionmaking. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (plurality opinion) (balancing state regulatory interests against burdens on interstate transportation); *Argersinger v. Hamlin*, 407 U.S. 25, 51 (1972) (Powell, J., concurring in result) (arguing for exercise of judicial discretion in appointment of attorneys for indigent defendants in misdemeanor cases); *Barker v. Wingo*, 407 U.S. 514 (1972) (right to speedy trial determined by ad hoc balancing).

56. Much of the balancing literature addressing the controversy associated with Justices Black and Frankfurter attempts to distinguish between two levels of balancing: an abstract level of articulation of constitutional principle—variously called "exegetic" or "definitional"—and a concrete level at which the actual interests involved in the particular case are weighed. See Frantz, 71 *YALE L.J.*, *supra* note 15, at 1434-35; Fried, *Two Concepts of Interests: Some Reflections on The Supreme Court's Balancing Test*, 76 *HARV. L. REV.* 755 (1963); Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 *CALIF. L. REV.* 935, 942-45 (1968). These works generally approve of abstract balancing to determine rules of general applicability, but disapprove of concrete, or ad hoc, balancing because it is inevitably infected with subjective preferences. The distinction, however, is not very helpful as an analytic device to explore the balancing methodology. The nature of the balancing enterprise is such that it can be applied at any level of generality from the most concrete to the most abstract. Traditional models of equitable relief, for example, present balancing in the most concrete terms. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part) (using equity model). But balancing of abstract constitutional categories or principles is also standard fare for the Court. Each model of balancing that I describe can occur at any level of abstraction, and the same problems arise at each level. Thus, representative balancing occurs at an abstract level in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), but a concrete level in *Keyes*. Similarly, Powell pursues zero-sum balancing at an abstract level in *United States v. United States Dist. Court*, 407 U.S. 297 (1972), but at a more concrete level in his dissent in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting). Finally, there is nothing in the administrative balance of *Mathews v. Eldridge*, 424 U.S. 319 (1976), or *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), that itself dictates the level of generality at which the balance should be applied. In *Mathews*, for example, it is unclear whether the balance should be applied to the class of all welfare applicants or to each individual applicant. See *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 49-52 (1981) (Blackmun, J., dissenting).

57. 418 U.S. 323 (1974).

58. *Id.* at 325. The balancing debate in constitutional law has long focused on the First Amendment. See, e.g., Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine—Some Fragments of History*, 27 *STAN. L. REV.* 719 (1975); Linde, *'Clear and Present Danger' Reexamined: Dissonance in the Brandenburg Concerto*, 22 *STAN. L. REV.* 1163 (1970); and works cited *supra* note 15.

59. *Gertz*, 418 U.S. at 325.

Once again, Powell canvasses the competing interests: "The need to avoid self-censorship by the news media is . . . not the only societal value at issue."⁶⁰ Alongside this interest is that of the libeled individual in receiving compensation "for the harm inflicted . . . by defamatory falsehood."⁶¹ This interest, Powell writes, is particularly strong here because private individuals, unlike public officials or public figures, do not have much access to the media to "counteract false statements,"⁶² nor have they invited media attention and comment by thrusting "themselves to the forefront of particular public controversies."⁶³ From this, Powell concludes that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."⁶⁴

This constellation of competing interests therefore requires a different "accommodation" than that between the press and state libel law achieved in *New York Times v. Sullivan*.⁶⁵ Instead of the "actual malice" and "reckless disregard" standard of that case, Powell concludes for the Court that the appropriate rule in *Gertz* precludes: (1) liability without fault; (2) presumed damages; and (3) punitive damages in the absence of knowing falsity or reckless disregard of the truth. Correspondingly, state libel law can establish liability for mere negligence and can permit awards to compensate actual injury.⁶⁶ The interests of each competing faction are thus recognized, given voice, and accommodated.

Representative balancing at the level of general rules is no more stable than representative balancing at the level of concrete interests. As circumstances change, the weights assigned to the variety of interests change and thus the balance, expressed in the general rule, changes. The *Gertz* rule is different from the *Sullivan* rule, which is different yet again from the rule Powell supports in the recent case of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁶⁷ which involves a private person and "no issue of public concern."⁶⁸ Each new variation among the competing interests requires a new balance.

The central place of representative balancing in Powell's work is evident once again in his treatment of school desegregation. In his opinion in *Keyes v. School District No. 1*,⁶⁹ he argues that the Court should abandon

60. *Id.* at 341.

61. *Id.*

62. *Id.* at 344.

63. *Id.* at 345.

64. *Id.*

65. 376 U.S. 254 (1964).

66. *Gertz*, 418 U.S. 345-47.

67. 472 U.S. 749 (1985).

68. Under those circumstances, Powell adopts a rule that allows presumed and punitive damages on a showing of less than actual malice. *Id.* at 761-63.

69. 413 U.S. 189 (1973). *Keyes*, the Court's first desegregation decision dealing with a northern school system, holds: (1) that only de jure segregation, "a current condition of segregation resulting from intentional state action," violates the equal protection clause, *id.* at 205; (2) that "a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a

the distinction between de jure and de facto segregation of public schools: "Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle."⁷⁰ From this argument he concludes that there should be an affirmative constitutional obligation to desegregate all public school systems.

This conclusion appears, at first, to stand on a principle insulated from a balance of competing interests. In fact, this principle requiring desegregation is no more secure than his stand for color-blindness in *Bakke*. Justice Powell makes this clear in his vision of the appropriate remedy for a failure to desegregate. Once again, Powell appeals to the representative balance:

[W]ith school desegregation, reasonableness would seem to embody a balanced evaluation of the obligation of public school boards to promote desegregation with other, equally important educational interests which a community may legitimately assert.⁷¹

Remedial interests, accordingly, must be balanced against other "educational interests which a community may legitimately assert."⁷²

Powell then ranges freely over a variety of concerns that might, if empirically sound, support his assertion that neighborhood schools are superior to the alternatives in metropolitan area-wide desegregation plans. He fails, however, to explain why these competing "community aspirations and personal rights"⁷³ are of constitutional significance. Local schools may be traditional and may even represent good public policy, but there is no constitutional right to attend a local community school. Further, even if

presumption that other segregated schooling within the system is not adventitious," *id.* at 208; (3) that this presumption can be rebutted by proving that the government's actions had no segregative intent or that past government acts did not "create or contribute to the current segregated condition." *Id.* at 211. Powell concurs in that part of the holding which requires system-wide desegregation of the Denver school system, but disagrees with the reasoning of the majority opinion. *Id.* at 217 (Powell, J., concurring in part and dissenting in part). He also takes a dramatically different view of what remedies a court might order for the constitutional violation. *Id.* at 240-52.

70. *Id.* at 227.

71. *Id.* at 240. In this context, Powell writes:

The relevant inquiry is "whether the costs of achieving desegregation in any given situation outweigh the legal, moral, and educational considerations favoring it . . . [T]he Constitution should not be held to require any transportation plan that keeps children on a bus for a substantial part of the day, consumes significant portions of funds otherwise spendable directly on education, or involves a genuine element of danger . . ."

Id. at 240 n.19 (quoting Comment, *School Desegregation After Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421, 422, 443 (1972)). The suggestion that the constitutional problem can be reduced to a cost/benefit problem demonstrates the connections between the representative and administrative balances.

72. Powell is somewhat ambiguous in *Keyes* on the appropriate level of generality at which this balancing is to occur. While he seems generally to recommend ad hoc balancing "under [the] circumstances" of the particular case, 413 U.S. at 244, much of his opinion is a discussion of the appropriate balance of interests in school desegregation remedies in general, *see, e.g., id.* at 248-52.

73. *Id.* at 242.

Powell is correct in his assessment of possible costs, no one has suggested that constitutional remedies are cost-free. Powell fails once again to draw any distinction between kinds of interests, rights, or values. The failure to focus on or explain the constitutional interest transforms the *right* to a remedy into simply an *interest* in desegregation. This interest, however, is just one among many, all of which must be given voice and balanced.⁷⁴

Powell elaborates on this position in his dissent in *Columbus Board of Education v. Penick*,⁷⁵ and *Dayton Board of Education v. Brinkman*.⁷⁶ In both of these cases, the Court upholds lower court orders requiring system-wide desegregation plans designed to terminate and dismantle the continuing effects of the earlier operation of a dual school system.

The Court's approach to school desegregation remedies, Powell argues, "ignores other relevant factors in favor of an exclusive focus on racial balance in every school."⁷⁷ For Powell, the overriding goal is "to have quality school systems."⁷⁸ The right to a remedy becomes, in Powell's mind, simply an interest in diversity within the schools—"ethnic and racial diversity in the classroom is a desirable component of sound education in our country of diverse populations."⁷⁹ That interest in diversity, however, exists wholly apart from a judicial finding of a constitutional violation. With that, constitutional law as a unique social function articulating a unique institutional perspective simply disappears.

Once Powell conceives of the remedial right as one interest among many, striking the appropriate balance among competing interests becomes a matter of social policy. The problem of doing justice to remedy a past wrong is thus displaced by the contemporary task of accommodating competing interests to achieve a "quality education."⁸⁰

At the heart of each of these examples of the representative balance is an intuition, not an argument. The accommodation of qualitatively distinct, competing interests is accomplished through an intuition of what is reasonable and fair. That intuition is contingent upon both the particular pattern of competing claims and the character of the decisionmaker. Be-

74. In the seminal title VII case, *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), the Court recognizes but excludes from consideration the effects of remedial, retroactive or competitive seniority on the expectations of third-party co-workers. *Id.* at 774-79. Notably, Powell laments the majority's refusal to weigh the interests of third-parties in fashioning the title VII remedy. *Id.* at 787-91 (Powell, J., concurring in part and dissenting in part).

75. 443 U.S. 449 (1979).

76. 443 U.S. 526 (1979). Powell also joins Justice Rehnquist's dissent, arguing that the Court erred in finding a constitutional violation of system-wide effect. *Id.* at 542-44 (Rehnquist, J., dissenting).

77. 443 U.S. at 484 (Powell, J., dissenting).

78. *Id.* at 486.

79. *Id.*

80. See Chayes, *supra* note 16, at 1298-302, discussing an emerging model of public law litigation that shifts its focus from relief for past wrongs to the creation of an "affirmative regime of conduct [which] is *pro tanto* a legislative act." *Id.* at 1302. Chayes introduces a model of "negotiation" among the parties at trial to legitimate this judicial result. *Id.* at 1313-16.

cause character and situation, not argument, shape the rule of accommodation, there is an inarticulate quality to the resolution of conflict in each case. The outcome is without explanation.

In this method of decisionmaking two characteristic forms of traditional legal argument—the “slippery slope” and the use of precedent—lose their force.⁸¹ Both forms of argument present informal tests of a principle of decision against a norm of objectivity. The “slippery slope” argument tests judicial willingness to adhere to a proposed principle for decision in a series of hypothetical, hard cases.⁸² The argument based on precedent asks a judge whether that principle of decision can explain past actions of the court.⁸³ The former points to the future; the latter to the past.⁸⁴

In Powell’s view, the absence of these forms of argument creates no danger, because his own moderation, his own reasonableness under all the circumstances, provides the security that no extremes will be reached in the name of judicial consistency.⁸⁵ The line can always be redrawn to reflect new circumstances. Each case, then, produces an ad hoc rule with no past and an uncertain future. Without explanation or justification, each outcome remains at risk. Its longevity is a function of Court personnel rather than of the institution itself.

In the context of representative balancing, a stand on principle becomes an obstinate narrowness, a refusal to acknowledge competing interests.⁸⁶ The balance does not invite argument, but rather subsumes all disagreement. It does so by recasting every assertion of principle into merely another competing interest. There is no constitutional high ground; all par-

81. A “slippery slope” argument appears in *Bakke* where Powell rejects the claim that the equal protection clause grants a higher level of protection to “particular racial or ethnic minority” groups. 438 U.S. at 295–99. Such a claim is rejected because it would require of judges an endless “variable sociological and political analysis,” *id.* at 297, of each minority group. The rule that emerges from *Bakke*, however, is based on a balance which may have effectively the same result. Thus, the slippery slope argument does not play any role in the effective holding of the cases. *But see* *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1847 (1986) (plurality opinion) (Powell, J.) (rejecting role-model theory of affirmative action because it “has no logical stopping point.”).

82. On slippery slopes, see Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 382 (1985) (“A slippery slope argument . . . emerges as an appeal that forces decisionmakers to focus on the future implications of what they do today.”); Wechsler, *supra* note 30, at 15.

83. On precedent, see Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 988–89 (1978); Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979); Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043 (1975).

84. *But see* Schauer, *Precedent*, 39 STAN. L.J. 571 (1987) (arguing that a system of precedent points equally to the future).

85. For an examination of the self-regulating, institutional character of the Court as a legislative body, see Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 16 (1978) (“Such an institution would be ultimately accountable in the same way that an individual is ultimately accountable—not by process of external assessment but by the process of self-judgment and self-control.”)

86. *See, e.g.*, *Keyes v. School Dist. No. 1*, 413 U.S. 189, 240 (1973) (Powell, J., concurring in part and dissenting in part) (“[O]verzealousness in pursuit of any single goal is untrue to the tradition of equity and to the ‘balance’ and ‘flexibility’ which this Court has always respected.”).

ticipants in the debate are leveled and thus reconciled by authority, not by reason.⁸⁷

The measure of success of the representative balance is not to be found in reasoned criticism, but in political stability. A successful balance would leave all interested parties sufficiently satisfied to end the process of seeking an equilibrium. The troubled history of the examples discussed here suggests that this equilibrium is not easily achieved. Indeed, it cannot be achieved because such stability would imply that the underlying process of political and social change has itself ceased. As long as interests continue to develop and change, stability can only be located in a process of decisionmaking and not in a particular substantive outcome.

Powell seems to pursue this political stability directly by employing a methodology that itself gives voice to what might otherwise appear as "losing" interests.⁸⁸ Powell as Justice can play a role similar to that played by minority participants in the electoral and legislative process. Participation in the process may itself serve to hold the whole together by reconciling disfavored interests with their position in the actual outcome.⁸⁹

This model of adjudication casts the Court in a managerial role—it must manage the constant interplay of competing interests. While I later argue that this is an illegitimate role for the Court,⁹⁰ the important point here is that it is an unrealistic role for the Court.

The very fact that a Justice constructs the rules of factional accommodation may make it less likely that such an equipoise will be reached.⁹¹ Each moment of judicial balancing represents a rejection of the accommo-

87. See Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1035-40 (1984) (comparing "levelling democracy" and "dualist democracy").

88. See A. BICKEL, *POLITICS AND THE WARREN COURT* 184 (1965). According to Bickel:

[T]he heart of democratic government . . . is that it rests on consent. And the secret of consent is only in part a matter of control, of the reserve power of a majority to rise up against decisions that displease it. It is, perhaps more importantly, the sense shared by all that their interests were spoken for in the decision-making process, no matter how the result turned out.

Id. Michelman identifies this as an important feature of a balancing approach in his discussion of Justice O'Connor's dissenting opinion in *Goldman v. Weinberger*, 106 S. Ct. 1310, 1324 (1986) (O'Connor, J., dissenting): "Justice O'Connor's use of such balancing displays both its reconciliatory spirit and its dialogic force: she can acknowledge as 'unquestionably' real and legitimate the major interests asserted by the losing party . . ." Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986) (citation omitted); see also Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 487-89 (1984) (discussing "dialogic exchange" as a way of achieving consent).

89. After *Bakke*, for example, non-minority candidates may continue to be denied entry by university admissions officers, but now under a system that appears to treat them "equally." 438 U.S. at 317-18.

90. See *infra* text accompanying notes 106-27.

91. Recognizing this tension in the social perception of a judicial balancing approach, Greenwalt writes, "Open interest weighing alone may provide some reassurance [to losing litigants and the larger community], but observers unsympathetic with the result may believe that the judge's finger is on the scales." Greenawalt, *supra* note 83, at 1000; see also Frantz, *supra* note 15, 51 CALIF. L. REV. at 749 ("[H]ow can the losing litigant look at balancing language and feel any assurance that the judge succeeded in keeping his personal preferences out of his 'scales'? How can the public do so? How can the judge himself do so?").

dation achieved among those same interests in the political institutions of government. The Court must convincingly explain why its accommodation should be authoritative. It must do so, moreover, to those who were successful in the realm of majoritarian politics. Those unhappy with the Court's result—starting with the dissenters in the Court itself—will always charge judicial usurpation of a legislative function. Further, the lack of articulate principle will always be an easy object of attack. A representative balancing approach, then, is likely to be undermined by challenges from both directions: more politics, pressing for reevaluation of competing interests, and more principle, pressing for reasoned explanation.

Administrative balancing represents, at least in part, a response to this challenge.

II. WORKING THE BALANCE: JUSTICE POWELL AND THE ADMINISTRATIVE BALANCE

The representative balance views each controversy as raising a unique cluster of competitive interests. Its aim is to accommodate qualitatively incommensurable interests. Each variation in circumstances changes the nature or strength of the competing interests and thus presents a new occasion for rule creation. Balancing remains a metaphor for an intuitive adjustment of interests. The administrative balance, on the other hand, seeks a method of accommodating interests that substitutes technique for intuition. Each new occasion for adjudication is understood not as an opportunity for adjustment of a rule but rather as an opportunity for the rule's application.

Two characteristics mark administrative balancing. First, the standard by which the balance is accomplished must be described at a level sufficiently abstract to allow for repeated application to diverse controversies. Second, application of those standards requires an objective task of measurement, not an exercise in normative judgment. Quantitative measurement, rather than reconciliation of qualitative conflict, is the task of the administrative balance. Administrative balancing aims to transform adjudication into a process of applying a common objective measure to conflicting interests.⁹²

The representative balance translates rights into interests; the administrative balance goes a step further and suggests that these interests are quantifiable. The paradigmatic model of administrative balancing is cost/benefit analysis. It provides an abstract standard capable of quantitative application to diverse controversies.⁹³

92. See J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 100-01 (1985) (describing move in due process analysis from model of "appropriateness" to one of "competence" as move from "suspicious silence" at heart of constitutional adjudication to "general, rational, and transparent rules").

93. There is no necessity that administrative balancing take the form of cost/benefit analysis. In

If *Bakke* is Powell's most important opinion, *Mathews v. Eldridge*,⁹⁴ is surely a close second. While *Bakke* exemplifies the representative balance, *Mathews* typifies the administrative balance. Powell's use of the technique, however, is hardly limited to issues of procedural due process.⁹⁵

Mathews concerns the procedural due process requirements that attach to the termination of social security disability benefits. Relying on the Court's holding in *Goldberg v. Kelly*,⁹⁶ that the due process clause requires an "evidentiary hearing" prior to any termination of welfare benefits, respondent successfully argued in the lower courts that similar procedures must be followed prior to termination of disability benefits.⁹⁷ Powell's opinion for the Court recognizes both that some form of process is due prior to the termination and that a hearing is required prior to a final termination. The question is whether to extend the hearing rule of *Goldberg* to the initial decision to terminate disability benefits—a decision already subject to a hearing on appeal.

To answer that question, Powell first canvasses the competing interests: "[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected."⁹⁸ The end of this inquiry, however, is no longer an intuitive accommodation. Instead, the argument turns dramatically to the administrative balance, explicitly appealing to a cost/benefit model:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁹⁹

Solem v. Helm, 463 U.S. 277, 290-95 (1983), for example, Powell argues that application of the cruel and unusual punishment clause can rest on "objective" factors of comparison that do not appear "economic." See also *Argersinger v. Hamlin*, 407 U.S. 25, 44-66 (1972) (Powell, J., concurring) (applying multifactor analysis); *Barker v. Wingo*, 407 U.S. 514 (1972) (borrowing from cost/benefit model).

94. 424 U.S. 319 (1976).

95. Powell often applies an administrative balance to issues of criminal procedure. For example, concurring in *Argersinger*, he argues for administrative analysis of an indigent's right to counsel. 407 U.S. at 44-46. *Argersinger* was followed quickly by *Barker*, in which Powell, writing for the Court, applies the administrative technique to the right to a speedy trial. 407 U.S. at 515. Powell reaffirmed *Barker's* approach in *United States v. Loud Hawk*, 106 S. Ct. 648, 655-56 (1986). Some of Powell's most important opinions apply the same method of analysis to determine the scope of federal habeas review. See *infra* text accompanying notes 157-75.

96. 397 U.S. 254 (1970).

97. *Mathews*, 424 U.S. at 323-26.

98. *Id.* at 334 (citation omitted).

99. *Id.* at 335; cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971), in which Justice Harlan analyzes the due process issues raised by a divorce statute in terms of the interests of the individual litigant,

Borrowing from the work of Richard Posner,¹⁰⁰ Powell suggests an economic calculus to work the balance. The costs of the present system—determined by the value of the private interest multiplied by the probability of error under current procedures—is to be measured against the net benefits that would accrue from an increase in procedural protections—determined by the decrease in error costs which, in turn, is discounted by the additional procedural costs.¹⁰¹ Both characteristics of administrative balancing are evident: first, an abstract structure for working the balance in all due process cases; second, application of that structure through quantification of competing interests.

Like the intuitive accommodation in representative balancing, this model of objective measurement is intended to give appropriate recognition to each interest. In theory, the ideal accommodation of all competing interests would be reached through repeated application of the three-fold calculus to each possible procedural innovation. The optimal result would be the set of procedures that could neither be increased nor decreased without incurring additional costs. As it appears in an individual case, however, administrative balancing asks only whether the benefits of the particular procedure at issue outweigh the costs.

Cost/benefit analysis appeals to Powell, because it promises objectivity in assessing and comparing competing interests. That promise, however, is far from fulfilled. The *Mathews* calculus necessarily ignores all those interests that cannot be assigned hard values.¹⁰² What, for example, are the dignitary costs of being forced to accept welfare, and where does this factor figure in the analysis?

If such interests are not to count, we need more of an explanation than the statement that they are difficult to quantify. The move from representative to administrative balancing was not intended to eliminate competitive interests but only to provide an objective means of comparison. If objectivity can be achieved only by failing to give voice to certain interests, the technique undermines its own justification.

Even the interests that are included in the calculus are not really capable of any hard economic measure. Powell admits that projections of the

rejecting both the cost arguments of the state, *id.* at 382, and the suggestion that the procedures need only be adequate to the general class of affected individuals. *Id.* at 379-80.

100. See Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 401 (1973) ("Error costs . . . may here be regarded as the product of . . . the probability of error and the cost if an error occurs. . . . The increment in error costs must be compared with the direct costs of a hearing.").

101. *Mathews*, 424 U.S. at 340-49. For a critique based on the Court's avoidance of questions of value, see Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). See also J. MASHAW, *supra* note 92, at 121-26 (discussing problems of *Goldberg-Mathews* calculations).

102. See Mashaw, *supra* note 101, at 46.

probability of error, in this single case, vary between 58.6% and 3.3%.¹⁰³ This leads Powell to conclude that “[b]are statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process.”¹⁰⁴ Although this is true, it necessarily undermines the objectivity for which Powell had turned to administrative balancing.

Powell implicitly recognizes the limits of cost/benefit analysis when he tempers the whole approach with the following condition: “In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.”¹⁰⁵ Surely this does not follow from the cost/benefit model itself. If costs and benefits can be measured, then there is no place for deference. The accuracy of the calculation, not the identity of the calculator, is the only value implicit in the methodology.

There can be two reasons for this deference. First, deference may be appropriate because judicial intervention in legislative or administrative policy may itself entail costs. One of the competing interests that must go into the balance is the interest in preserving the authority of the political institutions of government. This authority is undermined whenever a statute or regulation is declared unconstitutional. This cost of judicial intervention, however, is precisely the kind of soft cost that the administrative balancing of *Mathews* sought to avoid.

Second, deference may be appropriate because the courts are no better, and perhaps worse, at assessing costs and benefits than the bureaucracy. If there is no reason to prefer the calculation of the courts, then something more than disagreement on the outcome of the calculus is necessary to justify judicial intervention.¹⁰⁶ If the reason that the courts are no more likely “to get it right” than the bureaucrats or politicians is that there is no right answer, then the calculation cannot itself justify displacing the result of the political process.

Both of these reasons point to a fundamental problem with the methodology. The administrative balance described in *Mathews* is nothing other

103. 424 U.S. at 346 & n.29. Powell's assessment of other costs and benefits in the opinion are equally soft. See, e.g., *id.* at 347 (“No one can predict the extent of the increase [in costs], but . . . experience with the constitutionalizing of government procedures suggests that the ultimate additional cost . . . would not be insubstantial”); see also J. MASHAW, *supra* note 92, at 115 (“The model of competence has an enormous appetite for data that is disputable, unknown, and, sometimes, unknowable.”).

104. 424 U.S. at 346.

105. *Id.* at 349.

106. Of course, there may be special circumstances in which the courts are more likely to get the cost/benefit analysis right. Certain constitutional provisions—including, most importantly, the dormant commerce clause—can be interpreted as requiring judicial evaluation of costs and benefits precisely because of structural characteristics that may prejudice the political calculations. See *infra* note 118.

than an account of the rule that a rational administrator would follow. That judicial recalculation under that same rule does not adequately express the Court's constitutional role is vividly demonstrated in *Kassel v. Consolidated Freightways Corp.*,¹⁰⁷ in which the Court considered the constitutionality, under the dormant commerce clause, of Iowa's ban on 65-foot double tractor trailer trucks.¹⁰⁸ Powell's plurality opinion in *Kassel* starts by asserting that "a State's power to regulate commerce is never greater than in matters traditionally of local concern," and that a "strong presumption of validity" attaches to local safety regulations.¹⁰⁹ But this categorical approach rapidly gives way:

Regulations designed for that salutary purpose [local safety] nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause. . . . This "weighing" by a court requires—and indeed the constitutionality of the state regulation depends on—"a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce."¹¹⁰

Working this balance, according to Powell, requires measurement and comparison of the regulation's incremental benefits to highway safety and the additional costs it imposes on interstate trucking. Thus, the judge must evaluate expert testimony on the safety of 65-foot doubles with respect to time required to pass; ability to back up; likelihood of jackknifing; ability to brake, turn, and maneuver; production of splash and spray; and finally susceptibility to "off-tracking" and wind.¹¹¹ All of these become "constitutional facts"—facts that the Supreme Court must itself reconsider because they are determinative of the constitutional issue.¹¹² The cumulative result of these determinations must then be "balanced" against the \$12.6 million in additional costs incurred each year by the trucking companies as a result of the Iowa regulation.¹¹³

The practical difficulty of this judicial assessment is graphically demonstrated by the fact that the hearing in the trial court consisted of fourteen

107. 450 U.S. 662 (1981).

108. The dormant commerce clause has spawned numerous approaches. *See, e.g.*, *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (balancing local interest against burden on interstate commerce); *South Carolina v. Barnwell*, 303 U.S. 177 (1938) (commerce clause prohibits discrimination against interstate commerce); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) (only Congress can regulate subjects "in their nature national," or which "admit only of one uniform system, or plan of regulation"). In *Kassel* itself there is no majority opinion; three different approaches to the dormant commerce clause are presented.

109. *Kassel*, 450 U.S. at 670 (citations omitted).

110. *Id.* at 670-71 (citations omitted).

111. *Id.* at 672-75.

112. On the similar "constitutional fact" doctrine in First Amendment law, see *Bose Corp. v. Consumer Union of United States*, 466 U.S. 485, 506-11 (1984).

113. *Kassel*, 450 U.S. at 674-75. Presumably the \$12.6 million is also a constitutional fact.

days of conflicting expert testimony. This sort of proceeding in the trial courts is precisely what Powell envisions and encourages in his opinion.¹¹⁴ This position, however, is rejected by a majority of the Court.¹¹⁵ Justice Brennan, concurring separately, writes that “[t]he courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation.”¹¹⁶ Justice Rehnquist, dissenting, writes that under the dormant commerce clause:

The Court does not directly compare safety benefits to commerce costs and strike down the legislation if the latter can be said in some vague sense to “outweigh” the former. Such an approach would . . . arrogate to this Court functions of forming public policy, functions which, in the absence of congressional action, were left by the Framers of the Constitution to state legislatures.¹¹⁷

Brennan and Rehnquist, with the majority of the Court, believe that the role of the Court cannot be simply to consider again those factors that should inform a rational public policy choice by the political decisionmakers. A difference in cost/benefit calculations cannot justify judicial intervention, because judicial “second-guessing” is not based on a claim of greater expertise.¹¹⁸ They suggest further that even if the claim to expertise were plausible, the institutional role is wrong: Constitutional adjudication, even in the area that most readily lends itself to economic analysis—the dormant commerce clause—cannot simply be a matter of

114. Thus, Powell distinguishes *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429 (1978), on the ground that the state there failed to make a “serious [enough] effort to support the safety rationale of its law.” *Kassel*, 450 U.S. at 671.

115. Justice Brennan’s concurring opinion was joined by Justice Marshall. Justice Rehnquist’s dissent was joined by Chief Justice Burger and Justice Stewart.

116. *Id.* at 679. Brennan also invokes a balance, but instead of measuring the local benefits achieved by the state statute, he measures the importance of the “local benefits actually sought to be achieved by the State’s lawmakers . . .” *Id.* at 680. He asks only whether the legislature could rationally have believed the measure would promote its intended purpose and thus avoids the fact-finding involved in Justice Powell’s approach. He does not explain how he would balance the intended benefits against the actual costs.

117. *Id.* at 691 (Rehnquist, J., dissenting).

118. *Id.* at 679 (Brennan, J., concurring). In *Kassel*, the argument can be made that even if Powell’s framework of analysis and that of the state legislature are the same, because the costs fall primarily outside of the state, the legislature’s application of that framework will be distorted. See Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 20–22 (1940); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 438–43 (1982); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 134–35. While the facts of *Kassel* provide some support for such an argument, they do not provide sufficient support. First, the Iowa legislature had consistently agreed to application of national standards on its highways. In this case, the governor had vetoed a bill that would have brought Iowa up to that standard. 450 U.S. at 666 n.6. There is no reason to think that in the normal political process of the state, which is open to the influence of the trucking companies, the issue would not be repeatedly reconsidered and perhaps resolved differently. Second, Powell’s cost/benefit analysis is the same as that which a rational Congress, or federal administrative agency, would apply. Congress can address substantial burdens on the nation’s highway system. In fact, shortly after *Kassel*, Congress did just that, requiring states to accept the larger double-trailer trailers in order to receive federal highway funds. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 127, 96 Stat. 2097, 2123–24 (1983).

displacing the numerical calculations of the state legislatures with those of an unelected Court.

Not only is Powell's approach in *Kassel* rejected by a majority of the Court, but it also exhibits the same problem of internal inconsistency evident in the analysis of *Mathews*. Once again, cost/benefit analysis forces Powell to ignore those interests that cannot easily fit within the social utility balance of the economist. Thus, Powell's opinion fails to address what was obviously the true interest behind Iowa's regulation. Iowa had declined to act as a bridge linking East and West because there is a direct relationship between the amount of traffic on its highways and the number of accidents and injuries that occur in the state.¹¹⁹

The real issue in the case is whether Iowa has a constitutional obligation to assume its "fair share" of the national highway fatalities. Put differently, does Iowa have to value out-of-state lives in the same way that it values resident lives? This is surely not an easy question when one considers the myriad ways in which a state limits benefits—for example, schools, health care, police services—to its own residents. Curiously, a majority of the Court recognizes the issue, but fails to reach a single resolution of it.¹²⁰ The issue cannot appear in Powell's balancing of costs and benefits, however, because there is simply no way to discuss this concept of a "fair share" within this methodology.¹²¹

Mathews and *Kassel* are natural products of the balancing approach that characterizes Powell's judicial decisionmaking. That process is always subject to the charge that the accommodation of interests upon which the balanced outcome depends represents nothing more than the Justice's personal value choices.¹²² To escape this charge of subjectivity, there is inevitably a search for techniques that introduce objectivity, and particularly quantification, into the balance.¹²³ The social utility function captured in

119. To the degree that Iowa participated in an economic market in which 65-foot trucks serviced its own community, Iowa allowed both in-state and out-of-state interests to use such trucks. Only the trucker just "travelling through" was denied entry.

120. This issue emerges clearly in both Brennan's opinion, *Kassel*, 450 U.S. at 686 ("Iowa may not shunt off its fair share of the burden of maintaining interstate truck routes, nor may it create increased hazards on the highways of neighboring States in order to decrease the hazards on Iowa highways.") and Rehnquist's opinion, *id.* at 706 ("If a neighboring State chooses *not* to protect its citizens from the danger discerned by the enacting State, that is its business, but the enacting State should not be penalized when the vehicles it considers unsafe travel through the neighboring State.").

121. Powell indirectly approaches the subject when he speaks of "discrimination": The suspicion of intentional state discrimination against out-of-state interests should lead the Court to give less deference to the state's legislative assessment of costs and benefits. *Id.* at 675-78. But to say that Iowa is "discriminating" is to assume a legal conclusion, without analyzing the issue of whether Iowa may seek to protect the lives of its citizens over those of other states.

122. See, e.g., *Rochin v. California*, 342 U.S. 165, 175-76 (1952) (Black, J., concurring); J. ELY, *DEMOCRACY AND DISTRUST* 44-48, 63-70 (1980); Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 878 (1960).

123. Linde identifies this tension in what I have called the representative balance: "The dilemma of the realist tradition lies in confusing a theory of critical description with a theory of judicial action. Realism sees the norm as the product of the institution. But the institution must, by the logic of its own legitimacy, see its action as the product of the norm." Linde, *Judges, Critics, and the Realist*

the model of cost/benefit analysis seems to offer just such a non-subjective principle of aggregation.¹²⁴ It is, therefore, extremely attractive to Powell.¹²⁵

If the move to objectivity through quantification of values were truly feasible, however, the application of constitutional norms could be left to bureaucrats.¹²⁶ Ironically, the more colorable the claim that the norm can be quantified, the more the Justice is open to charges of usurpation of legislative or administrative tasks. The Justice is remaking a decision that has already been made, but he cannot show that he is making it "better." This is the lesson of *Kassel*, in which a majority of the Court rejects the administrative balance of Powell's plurality opinion.

If the Justice is doing something other than remaking that decision, balancing costs and benefits is not a revealing way of characterizing that role. Balancing costs and benefits may remain a form of rhetoric behind which a majority may coalesce, but it is not itself the basis of decision. This is the lesson of *Mathews*, in which economic analysis quickly gives way to institutional deference.

Powell turns to administrative balancing as one form of response to the problems of representative balancing. In place of an intuitive accommodation of qualitatively distinct interests, he proposes a technical task of quantification and comparison. This method of balancing, however, presents a new set of problems that are as severe as those it was meant to resolve.¹²⁷

If quantification cannot solve the problems of judicial accommodation of interests, then perhaps the idea of accommodation itself must be abandoned. Zero-sum balancing introduces an alternative model of judicial resolution of conflict among competing interests.

Tradition, 82 YALE L.J. 227, 252 (1972).

124. I do not mean to suggest that cost/benefit analysis is the only possible source of judicial objectivity. On the contrary, the startling lack of other sources of judicial objectivity—precedent, history, constitutional text and structure, and political and moral theory—in Powell's opinions is a major theme of this essay. See Bennett, *supra* note 51. What is particularly attractive about cost/benefit analysis for Powell is the direct link of quantification to a balancing methodology.

125. See, e.g., *Stone v. Powell*, 428 U.S. 465, 486-89 (1976) (discussed *infra* at note 175); see also *supra* note 71 (discussing *Keyes*).

126. The fact that the Supreme Court has so often itself had to apply the *Mathews* balancing test indicates that the balance is substantially less quantifiable than it might appear. See, e.g., *Lassiter v. Department of Social Serv.*, 452 U.S. 18 (1981) (counsel for indigent parents in proceeding to terminate parental status); *Little v. Streater*, 452 U.S. 1 (1981) (blood test for indigent father in paternity suit); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) (removal of a child from foster home); *Dixon v. Love*, 431 U.S. 105 (1977) (revocation of driver's license). Accordingly, the administrative balancing rule is simultaneously a rule of decision for the lower courts and for the Supreme Court. The Court may treat itself as the "administrator" of its own self-imposed rules.

127. My critique of cost/benefit analysis has focused particularly on whether this method can satisfy the demands which Powell places upon it. More elaborate discussions of the role of cost/benefit analysis in constitutional argument, particularly in the framework of the Realist tradition, can be found in B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 78-94 (1984); J. MASHAW, *supra* note 92, at 113-41; Aleinikoff, *supra* note 13, at 974-75; Schlegel, *American Legal Realism and Empirical Social Science: From The Yale Experience*, 28 BUFFALO L. REV. 459 (1979).

III. WORKING THE BALANCE: JUSTICE POWELL AND THE ZERO-SUM BALANCE

The zero-sum balance is the model typically associated with the assertion that constitutional rights are "not absolute." The process of recognizing an exception to a general constitutional norm is described as a process of balancing: The Court must determine whether competing interests "outweigh" the norm. The controversy is framed such that the choice is exclusive: either the norm or the exception is recognized, but not both.

A classic expression of the zero-sum balance is found in the debate over First Amendment jurisprudence between Justices Frankfurter and Harlan, on one side, and Justice Black, on the other.¹²⁸ Black argued that government restrictions on speech could not be justified through an appeal to countervailing interests. The First Amendment, he argued, was an absolute restraint on government and not an invitation to the Court to balance competing governmental interests against an assessment of the importance of free speech. Harlan and Frankfurter, on the other hand, argued that the extent of the burden on free speech and the importance of the governmental interests had to be balanced.

The goal of that balance was *not* reconciliation of competing interests, but resolution of conflict through a judicial choice. Frankfurter, for example, summarized his view:

To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve.¹²⁹

Learned Hand captured this balancing metaphor in a formula adopted by Chief Justice Vinson: "In each case [courts] must ask whether the gravity

128. See *Scales v. United States*, 367 U.S. 203 (1961); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959).

129. *Communist Party*, 367 U.S. at 91; Frankfurter expressed a similar view in *Konigsberg*:

As regards the questioning of public employees relative to Communist Party membership it has already been held that the interest in not subjecting speech and association to the deterrence of subsequent disclosure is outweighed by the State's interest in ascertaining the fitness of the employee for the post he holds, and hence that such questioning does not infringe constitutional protections. *Beilan v. Board of Pub. Educ.*, 357 U.S. 399; *Garner v. Board of Pub. Works*, 341 U.S. 716. With respect to this same question of Communist Party membership, we regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented.

Konigsberg, 366 U.S. at 52.

of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."¹³⁰

In each of the cases, the claim was made that an assertion of governmental authority violated the First Amendment interests of some individual or group.¹³¹ The Court responded by weighing the relative merits of the governmental interest and the individual's First Amendment interest. One interest would be held to "outweigh" the other and that interest alone would be given force and effect. Thus, while representative balancing aims at an outcome in which there are no winners or losers, zero-sum balancing seeks to produce clear winners and losers.¹³²

Powell's treatment of the conflict between the interest of the press in free access to criminal proceedings and that of the defendant in excluding the press is a good example of his use of the zero-sum balance. Each side appeals to a constitutionally guaranteed right: the press, to a First Amendment right; the defendant, to the right to a fair trial. In his concurrence in *Gannett Co. v. DePasquale*,¹³³ Powell describes this conflict of interests:

The right of access to courtroom proceedings . . . is not absolute. It is limited both by the constitutional right of defendants to a fair trial and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants

In cases such as this, where competing constitutional rights must be weighed . . . the often difficult question is whether unrestrained exercise of First Amendment rights poses a serious danger to the fairness of a defendant's trial.¹³⁴

In this last paragraph, Powell writes of "striking this balance" between contrasting and competing constitutional rights. The language is typical: Choice is framed as an issue of "weighing;" balancing is required because

130. *Dennis*, 341 U.S. at 510 (plurality opinion) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, J.)).

131. Although I mention the First Amendment rights of "groups" along with individuals, the group interest was regularly translated into the interests of individual members. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458 (1958) ("We think that petitioner argues more appropriately the rights of its members").

132. Indeed, one of the objections to judicial balancing was that the communists always lost, while the NAACP always won. See *Frantz*, *supra* note 15, 71 *YALE L.J.* at 1441-42.

133. 443 U.S. 368, 397-403 (1979) (Powell, J., concurring).

134. *Id.* at 398-99 (citations omitted). In *Gannett*, the majority did not reach the issue of a First Amendment right of access to criminal proceedings, holding only that the press and general public had no right of access under the Sixth Amendment. *Id.* at 384-93. In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Court, with Justice Powell not taking part, held that the First Amendment does provide a right to attend criminal trials, despite the defendant's motion for closure. See also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (right of access to voir dire proceedings despite objections of defendant and prosecution); *Globe Newspaper v. Superior Court*, 457 U.S. 596 (1982) (First Amendment right of access to criminal trials does not preclude closing trial where there is a real risk of psychological damage to a minor).

constitutional rights are "not absolute." The decision requires recognition of the "weightier" interest.¹³⁵

One does not have to go beyond Powell's argument in *Gannett* to raise substantial questions about the accuracy and function of the balancing metaphor in this context.¹³⁶ Powell describes the problem of the case as follows: "unrestrained exercise of First Amendment rights poses a serious danger to the fairness of a defendant's trial."¹³⁷ This is no doubt true. But a "balanced" view of the two constitutional principles involved would require equal recognition of the other side of the problem: Unrestrained exercise of the defendant's right to a fair trial may pose "a serious danger" to the press's First Amendment rights.

If the competing claims cannot coexist, it is not obvious that the First Amendment right must yield to the right to a fair trial. The alternative, after all, is not to convict the defendant after an unfair trial, but rather to forgo the trial. That a defendant must be released to preserve a constitutional value is hardly an oddity in our legal system.¹³⁸ The real question of the case is which constitutional right we should value more highly. Which right should yield, and when?

The balancing metaphor could point us, and the Court, toward this problem of a choice among values,¹³⁹ but it can also be used to avoid explicitly focusing on that issue.¹⁴⁰ The latter more accurately characterizes Powell's approach. To justify outcomes simply by employing the rhetoric of balancing suggests that assessing the value of competing interests is not problematic. In fact, determining values is the only problem.

The problem of determining values is well illustrated in Powell's recognition of a competing, and apparently compelling, interest of the prosecution in obtaining convictions and preserving confidentiality. Here, we are dealing not with a competing constitutional interest but rather with a criminal enforcement interest of the state. While this is surely a legitimate

135. *Gannett*, 443 U.S. at 398.

136. See Fried, *supra* note 56, at 777. Fried describes the problem the Court faces in allocating competencies between institutions such as the press and the criminal courts and concludes: "The balancing test, unless much more fully elaborated, is a most unhappy formulation of that role, raising—it would seem—unjustified hopes, and—one can only wish—unnecessary apprehensions." *Id.*

137. *Gannett*, 443 U.S. at 399.

138. Consider, for example, the results of the exclusionary rule, the Fifth Amendment privilege against self-incrimination, or the legislative privilege.

139. Mendelson defends balancing on just such grounds:

Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them—more particularized and more rational at least than the familiar parade of hallowed abstractions, elastic absolutes, and selective history. Moreover, this approach should make it more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason.

Mendelson, *supra* note 15, 50 CALIF. L. REV. at 825-26. *But cf.* Frantz, *supra* note 15, 51 CALIF. L. REV. at 748-49. See also Michelman, *supra* note 88, at 34 (describing particular balancing approach, although presumably not all such approaches, as "communicative practice of open and intelligible reason-giving as opposed to self-justifying impulse and ipse dixit").

140. Professor Henkin notes perceptively that "balancing seems to emerge as an answer instead of a process, and the metaphor of balancing as the whole message." Henkin, *supra* note 15, at 1048.

interest, so, according to Powell, is the interest of the press. The issue is precisely when should the constitutionally protected rights of the press yield to competing interests? The metaphor of the balance does not tell us anything about how to answer this question.

Powell's answer in *Gannett*, therefore, reflects nothing more than his starting point: The First Amendment interest must yield to the competing interests.¹⁴¹ The metaphor of balancing, however, effectively masks the choice that accounts for the outcome. Balancing suggests a process of reasoning, when in fact there is nothing in his argument but a choice among conflicting claims.

A case from Powell's first term further illustrates his use of the zero-sum balance and its masking quality. In *United States v. United States District Court*,¹⁴² the Court considers whether there should be an exception to the Fourth Amendment warrant requirement for domestic security wiretaps. Powell describes the problem as one of resolving a zero-sum balance:

As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression.¹⁴³

On one side, Justice Powell perceives the "needs of citizens for privacy and free expression . . . protected by requiring a warrant before such surveillance is undertaken."¹⁴⁴ On the other side, he sees the possibility that "a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow . . ."¹⁴⁵ The latter interest is given a constitutional dimension as well: "[T]he most basic function of any government is to provide for the security of the individual and of his property."¹⁴⁶

Powell develops this tension in some detail. He describes the historical foundations and reasons behind the Fourth Amendment's warrant requirement concluding that "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."¹⁴⁷ However, he also can-

141. See also *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring) (describing a balancing approach to the conflict "between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct"). Once again, a "fair balance" for Powell subordinates the press interest whenever there is a "legitimate need" within the criminal proceeding.

142. 407 U.S. 297 (1972).

143. *Id.* at 314-15.

144. *Id.* at 315.

145. *Id.*

146. *Id.* at 312 (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)).

147. *Id.* at 317.

vasses the government's claims that prior judicial review in this area would (1) "obstruct the President in the discharge of his constitutional duty to protect domestic security;"¹⁴⁸ (2) exceed the competence of the courts;¹⁴⁹ and (3) endanger domestic security by creating a danger of leaks.¹⁵⁰ Thus, the Court again confronts a conflict between two seemingly compelling, yet mutually exclusive, constitutional interests: Either domestic security outweighs personal privacy or it does not.

Having set forth the conflict, the Court's task is to establish a hierarchy of values. Without such a hierarchy, the equipoise could not be broken. But instead of addressing this problem, Powell works the balance simply by asserting judicial authority to decide: "We recognize . . . the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure."¹⁵¹ Why does the balance come out this way?¹⁵²

Powell offers no explanation. He does explicitly reject the government's claims with respect to judicial competence and the danger of leaks. They offer no weight to balance against the Fourth Amendment privacy interest. But he fails even to treat the critical first point in the government's position—that the warrant requirement will "obstruct" the presidential duty to protect domestic security.¹⁵³ Thus, he fails explicitly to address the critical question in the case: how much presidential obstruction to suffer for the sake of individual privacy, or how much of an intrusion on individual privacy to suffer for the sake of domestic security?

Once again, the rhetoric of balancing masks an exercise of raw judicial power. The metaphor, moreover, obstructs a clear vision of the process of choice. It focuses attention on the outcome rather than on the premises that make the outcome possible.¹⁵⁴ The image of the Justice as "balancer"

148. *Id.* at 318.

149. *Id.* at 319.

150. *Id.*

151. *Id.* at 320.

152. Powell's assertion that the President's domestic security role must be exercised "in a manner compatible with the Fourth Amendment" is hardly more than a tautology. Whatever the Court decides in the case is the measure of such compatibility.

153. Perhaps this is why he conditions his conclusion with the ambiguous phrase "in this case," which can mean either in the context of domestic security wiretaps or on the showing of obstruction in these particular circumstances.

154. In equal protection doctrine, the priority of valuation over balancing has been recognized in the Court's reliance on formal standards of review: the "rational basis" and "compelling state interest" tests. Both tests recognize that the outcome turns on the issue of valuation. The former reduces the problem of value to a trivial issue by assuming that any legitimate state interest is adequate; the latter makes the problem so serious as to be virtually insurmountable by positing that virtually no legitimate interest is sufficiently "valuable." Powell's opinion in *Bakke* represents a serious assault on this function of these standards, because he asserts that one fairly routine interest of the state—diversity of a medical school class—is "compelling." The function these categories serve in eliminating the need for comparative evaluations suggests that traditional equal protection doctrine should not be confused with a straightforward balancing approach. *Cf.* Aleinikoff, *supra* note 13, at 970-71.

suggests that the weights to be balanced are presented to the Justice, and that they exist prior to, and apart from, the choice of outcome. A close analysis of the balancing argument, however, finds a lack of judicial resources with which to support a hierarchy of values and even a failure to inquire into that hierarchy.¹⁵⁵

A final example of the zero-sum balance demonstrates the underlying connections between the variety of forms of balancing as deployed by Justice Powell. In *Stone v. Powell*,¹⁵⁶ the Court considered whether state court exclusionary rule holdings are reviewable in federal habeas corpus proceedings.¹⁵⁷ Powell framed the question as whether the "policies behind the exclusionary rule are . . . absolute,"¹⁵⁸ and concluded that they are not: "[T]hey must be evaluated in light of competing policies."¹⁵⁹ The alternatives were seen as mutually exclusive. Habeas review was either available or it was not.

The analytic problems of the zero-sum balance decrease as one side of the balance approaches zero. For just that reason, Powell concentrates on arguing that the only interest furthered by the exclusionary rule is deterrence of "future unlawful police conduct,"¹⁶⁰ and that this interest is not advanced by federal habeas review. Accordingly, he rejects both the claim that the exclusionary rule represents "a personal constitutional right,"¹⁶¹ and the claim that it advances an interest in "judicial integrity."¹⁶² To be balanced against the *de minimis* benefit to deterrence, then, are the costs of habeas review to the "truthfinding process," to punishment of the guilty,¹⁶³ to judicial resources, to respect "for the law and administration of justice,"¹⁶⁴ and to the interest in minimizing friction between the state and federal systems of justice.¹⁶⁵ Thus, "[o]n collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves."¹⁶⁶ With one side approaching no weight at all, the balance is clear.¹⁶⁷

155. Compare *United States District Court with Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In his opinion for the Court in *Fitzgerald*, Powell applies the technique of the zero-sum balance to the claim that the President is absolutely immune in civil damages actions arising out of his official conduct. Powell writes that "before exercising jurisdiction [over the President]," a court "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 754. The balancing of presidential functions against individual protection from executive misconduct in *Fitzgerald*, however, produces precisely the opposite result from that of *United States District Court*.

156. 428 U.S. 465 (1976).

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

158. *Stone*, 428 U.S. at 488.

159. *Id.*

160. *Id.* at 484.

161. *Id.* at 486.

162. *Id.* at 484.

163. *Id.* at 490.

164. *Id.* at 491.

165. *Id.* at n.31.

166. *Schneckloth*, 412 U.S. at 269 (Powell, J., concurring).

167. Powell takes the same approach to the question of whether challenges to the composition of a

Powell's employment of the zero-sum balance, however, provides a radically incomplete account of the grounds of decision. Focus on deterrence as the sole benefit of the exclusionary rule cannot explain the exception the Court recognizes for cases in which the state did not provide an opportunity for full and fair litigation of the Fourth Amendment issue at trial.¹⁶⁸ Nor does Powell respond to Justice Brennan's argument that the claim of *de minimis* benefits ignores a variety of factors, such as the increased likelihood that state courts will adhere to constitutional rules in the face of possible habeas review,¹⁶⁹ the strengthening of *stare decisis*,¹⁷⁰ and the need for judicial deference to congressional decisions¹⁷¹—benefits wholly apart from the issues of “judicial integrity” and “personal rights.”¹⁷² In the absence of a consideration of these factors, moreover, the opinion seems unresponsive to the arguments of both Justice Brennan and Justice White that *Mapp v. Ohio*,¹⁷³ which applied the Fourth Amendment exclusionary rule to state criminal proceedings, controls this case: As long as *Mapp* remains good law, they argue, federal habeas review must be available.¹⁷⁴

The dissents' objections suggest the need for a second look at Powell's argument to see how he reconciles *Mapp* and *Stone*.¹⁷⁵ Reconciliation, for Powell, is not to be found in any simple principle given effect by both cases, but by a change in perspective. Powell understands the two cases as parts of a larger whole. From this more general perspective, the problem

grand jury can be brought in federal habeas actions. See *Rose v. Mitchell*, 443 U.S. 545, 585-88 (1979) (Powell, J., concurring in judgment) (claims of discrimination in grand jury composition should not be cognizable in federal habeas cases because costs of habeas review to “society, our system of justice, and our federal fabric” are not outweighed in these circumstances by benefits traditionally associated with habeas relief—i.e., freedom of an innocent individual).

168. See *Stone*, 428 U.S. at 481-82, 494.

169. *Id.* at 520-21 (Brennan, J., dissenting).

170. *Id.* at 522.

171. *Id.* at 525-26.

172. See *supra* text accompanying notes 155-62.

173. 367 U.S. 643 (1961).

174. See *Stone*, 428 U.S. at 515 (Brennan, J., dissenting); *id.* at 537 (White, J., dissenting).

175. Initially, Powell appeals to the technique of the administrative balance to reconcile *Mapp* and *Stone*. Thus, he casts the balance in *Stone* in cost/benefit terms: “[T]he answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review . . .” *Id.* at 489. *Stone* is distinguished from *Mapp* through quantitative measurement of the relevant costs and benefits. Brennan's accusation that Powell ignores a variety of factors in performing this calculation suggests again the unstable foundation of the administrative balance. Brennan further condemns the move by which Powell reconciled *Stone* and *Mapp* as follows:

This denigration of constitutional guarantees and constitutionally mandated procedures, relegated by the Court to the status of mere utilitarian tools, must appall citizens taught to expect judicial respect and support for their constitutional rights. Even if punishment of the ‘guilty’ were society's highest value—and procedural safeguards denigrated to this end—in a constitution that a majority of the Members of this Court would prefer, that is not the ordering of priorities under the Constitution forged by the Framers . . .

Id. at 523.

Cf. *Rose v. Mitchell*, 443 U.S. 54 (1979) and the disagreement between Powell, *id.* at 588, and the majority, *id.* at 557-58, over costs and benefits of habeas review of charges of discrimination in grand jury selection.

is to accommodate the competing interests of the criminal defendant and the larger community. Together, *Stone* and *Mapp* give voice to each factional interest. The accommodation is to make federal review of the state court decision available in direct but not in collateral proceedings. Thus, the seemingly exclusive outcome, the choice of the "weightier" interest in *Stone*, is only an appearance that results from an artificial narrowing of perspective.

Understanding *Stone* as a part of an intuitive accommodation of conflicting interests explains the strained quality of Powell's argument assessing the weights of the conflicting interests. The intuition that drives his analysis is not that deterrence is the only relevant interest advanced by the exclusionary rule, but rather that the criminal defendant has already gotten his "due." This intuitive sense of justice explains the one exception to the no-review rule of *Stone*—an exception that cannot be explained in terms of the deterrence rationale. Habeas review *remains* available where the state did not provide an opportunity for full and fair litigation of the Fourth Amendment claim, even though an occasional denial of such an opportunity would not have any effect on deterrence.¹⁷⁶

This move from a zero-sum to a representative balance is typical of Powell's methodology. Each particular outcome can be recast as a moment within a larger effort to accommodate all the competing interests. For example, while in *Gannett* Powell works the balance to require exclusion of the press from pretrial proceedings, he simultaneously reveals a larger vision of a judicial accommodation of the press and the criminal justice system. For Powell, precisely because *Nebraska Press Association v. Stuart*¹⁷⁷ protects the press against gag orders, in *Gannett* the Court can be more attentive to the interests of the criminal justice system than to those of the press. Thus, while Justice Blackmun finds in *Nebraska Press* a precedent,¹⁷⁸ Powell sees it as a counterpoint to be balanced against the resolution in this case.¹⁷⁹ The effort to balance, in other words, keeps a kind of running ledger. The balance sheet becomes the model of justice.

This backdrop of representative balancing also lies behind Powell's recent dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁸⁰ which overruled *National League of Cities v. Usery*.¹⁸¹ These cases also

176. Cases after *Stone* have shown an increasing enthusiasm for cost/benefit analysis in determining the scope of the exclusionary rule. See, e.g., *United States v. Leon*, 468 U.S. 897, 907 (1984) (court must weigh "the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective."). For a critique of that analysis, see Dripps, *Living With Leon*, 95 YALE L.J. 906, 916-18 (1986).

177. 427 U.S. 539 (1976).

178. *Gannett Co. v. DePasquale*, 443 U.S. 368, 440-46 (Blackmun, J., concurring in part and dissenting in part).

179. *Id.* at 400.

180. 469 U.S. 528 (1985).

181. 426 U.S. 833 (1976).

involved resolution of a conflict between competing constitutional principles: Congress' Article I authority over interstate commerce versus state sovereignty protected by the Tenth Amendment and general principles of federalism.

Confronted with that conflict in *National League of Cities*, the Court came down on the side of state sovereignty. For at least four members of the majority, that choice was not based on a balance, but on a theory of the constitutional priority of federalism. They understood federalism to be a first principle of the American constitutional system, which could not be slighted by a congressional choice under an indeterminate grant of constitutional authority.¹⁸² That theory of constitutional structure is rejected by the Court in *Garcia*.

In his *Garcia* dissent, Justice Powell describes this act of judicial choice as a "familiar type of balancing test."¹⁸³ The task of that balance is to test the strength of the national interest at stake against the "injury done to the States if forced to comply,"¹⁸⁴ and to choose, in each case, the weightier interest.

In seeking a justification for *National League of Cities* through balancing, Powell distinguishes himself from both the old plurality and the new majority.¹⁸⁵ Both disavow a judicial role in making comparative assessments of different federal and state interests.¹⁸⁶ Despite the raging battle over first principles of American federalism, Powell offers no answer to the question of how the Court can make the comparative assessments required to work the balance he suggests.¹⁸⁷

182. Justice Blackmun, while joining the majority opinion, also wrote separately. In his concurring opinion, he expressed some nervousness over what he was joining: "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach . . ." 426 U.S. at 856. As an interpretation of Rehnquist's opinion for the Court in *National League of Cities*, this was clearly wrong. See *Garcia*, 469 U.S. at 579 (Rehnquist, J., dissenting) (rejecting Powell's description of *National League of Cities* as adopting a balancing approach). Nevertheless, as the fifth vote for the majority opinion, Blackmun introduced the concept of balancing to this area. That concept was regularly cited in the pre-*Garcia* cases, in which the *National League of Cities* minority plus Blackmun consistently formed a majority to reject state claims of federalism limits on national authority. See *EEOC v. Wyoming*, 460 U.S. 226, 237 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 684 n.9 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 n.29 (1981).

183. *Garcia*, 469 U.S. at 562.

184. *Id.* at 563 n.5.

185. Although Powell is joined by Rehnquist and Chief Justice Burger, Rehnquist specifically distances himself from the balancing approach. See *supra* note 182.

186. For the *Garcia* majority, in the absence of a principled basis for assigning such values, balancing should be left to the political branches. 469 U.S. at 552 ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."). In support of this position, the majority cites two classic works: J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175-84 (1980); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of The National Government*, 54 COLUM. L. REV. 543 (1954). 469 U.S. at 551 n.11.

187. Powell does cite *The Federalist* Nos. 17 (A. Hamilton) and 46 (J. Madison) in support of the high value he places on state and local government. 469 U.S. at 571. He fails, however, to cite *The Federalist* No. 10 (J. Madison) on local government as a source of the factionalism that has destroyed previous democracies. Furthermore, the issue is not whether state and local governments are valuable

Powell's appeal to the zero-sum balance in *Garcia*, however, must be interpreted in light of his understanding of the cases that followed *National League of Cities*.¹⁸⁸ For Powell, the entire line of cases constitutes a process of accommodating competing federal and state interests. Only from the more general perspective that encompasses all of the cases can one perceive the managerial role of continuous accommodation that Powell assigns to the Court.¹⁸⁹ All of the cases together constitute a "balanced" outcome, which in total gives voice to both federal and state interests. Only from the perspective of the single case does the balance appear to produce winners and losers.

Similarly, in *United States District Court*, Powell concludes by inviting Congress to draft regulations to govern the warrant requirements for domestic security wiretaps.¹⁹⁰ The case itself, he suggests, should be simply one step in a larger process of accommodating, rather than excluding, the government interest.¹⁹¹

Behind Powell's use of the zero-sum balance, then, stands the representative balance. This representative balance is spread out over time and the individual case becomes simply a moment in a longer process. This temporal expansion is itself a consequence of those characteristics of representative balancing identified earlier—specifically, the rejection of precedent and slippery slopes as forms of legal argument.¹⁹²

The twin concepts of precedent and slippery slope remove the individual case from the ordinary course of political and social history. The case is seen as an ordering event that simultaneously recasts history and determines the future. In representative balancing, however, the case loses this atemporal quality; it becomes simply a moment within the ordinary course of time. This loss dramatically affects the Justice's own understanding of the temporal character of his task.

Instead of understanding judicial intervention as an extraordinary event, Powell perceives it as entirely ordinary. Because nothing is ever settled, every area of controversy requires constant judicial supervision. The unit that defines the Court's role is no longer the single case; rather, the process of adjudication is spread out over time. Cases are related to

institutions within the American polity, but how to assess the relative merits of the interests of the federal government when they are in conflict with those of state and local government.

188. See *EEOC v. Wyoming*, 460 U.S. 226 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981).

189. See 469 U.S. at 562 n.4 (Powell, J., dissenting) ("Having thus considered the cases out of context, it was not difficult for the Court to conclude that there is no 'organizing principle' among them.").

190. 407 U.S. at 322-24.

191. Even the rule of absolute presidential immunity in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (discussed *supra* at note 155), fits within a larger accommodation of the various competing interests: Fitzgerald retains access to administrative relief, while the President is responsible to Congress and to history. *Id.* at 757-58.

192. See *supra* notes 81-85 and accompanying text.

each other not as precedent to application, but as elements of a single pattern of accommodation.

Nowhere is this more evident than in Justice Powell's deciding votes in *Parham v. Hughes*¹⁹³ and *Caban v. Mohammed*.¹⁹⁴ These cases, decided on the same day, involve the rights of fathers of illegitimate children in situations in which the state recognizes maternal but not paternal rights. In *Parham*, Powell votes to uphold a state law that denies the father of an illegitimate child, whom he has not legitimated, the right to sue for wrongful death.¹⁹⁵ In *Caban*, Powell votes against a state law permitting an unwed mother, but not an unwed father, to block the adoption of their child by withholding consent. To try to explain these votes by distinguishing the cases is to miss the point of representative balancing.¹⁹⁶ Together, the cases give voice to the interests of the unwed father; together, they give voice to the competing claims as well. They are pieces of a single whole.

Accordingly, Powell's zero-sum balancing is silent because it cannot be explained on its own terms. It rests upon the representative balance that is at the heart of the judicial task for Powell. What appears at first to be a weighing and selection of interests in the individual case reveals itself as part of a broader, intuitive accommodation of conflict; it points to the incorporation of a "temporal spread" into adjudication through representative balancing.

This movement through the different forms of balancing illustrates the underlying unity of the different modes of balancing for Justice Powell. For him, all forms of balancing are united in the assumption that conflict is always between competing interests, that claims of principle or right can be reduced to claims of factional interest and that the point of constitutional adjudication is reconciliation.¹⁹⁷

The only principle to which Powell can adhere, given this understand-

193. 441 U.S. 347 (1979).

194. 441 U.S. 380 (1979).

195. 441 U.S. at 359 (Powell, J., concurring).

196. Powell distinguishes the cases by focusing on the availability of "a simple, convenient mechanism by which the father of an illegitimate child" can legitimate the child in *Parham* and the absence of any similar procedures available to the unwed father to gain rights comparable to those of the mother in *Caban*. *Parham*, 441 U.S. at 360 (Powell, J., concurring). For arguments on why the procedure in *Parham* serves no legitimate state purpose, see *id.* at 362-68 (White, J., dissenting), and on why the discrimination against men in *Caban* does serve such purposes, see *Caban*, 441 U.S. at 407-10 (Stevens, J., dissenting). Most important, in each case the Court confronts an individual claimant who does not meet the stereotype of the "unwed father" which the statutes envision. In each case, the father had been involved in the support and raising of the child. In *Caban*, Powell is responsive to the claims of the involved father; in *Parham*, he is not. See *id.* at 411-12 (Stevens, J., dissenting) (criticizing Powell in *Caban* for judging a "general classification" by virtue of its arbitrary effect "in an isolated case").

197. If zero-sum balancing collapses ultimately into representative balancing, then arguably the two irreducible forms of balancing for Powell are representative and administrative. As argued above, these represent essentially a contrast between an intuitive and a quantitative approach to the problem of accommodating conflicting interests. The central place of this conflict is suggested in Fiss, *The Death of the Law?* 72 CORNELL L. REV. 1, 15 (1986) (contrasting Critical Legal Studies' "particularistic" approach to adjudication with law and economics "instrumental" approach).

ing of the nature of social conflict, is that of accommodation. Although accommodation is the virtue of the representative balance,¹⁹⁸ it is not inherent in, or a necessary aspect of, judicial balancing. A Justice of the law and economics school, for example, might find the administrative balance to be primary,¹⁹⁹ while a Justice of the "preferred freedoms" school might find the zero-sum balance to be the primary meaning of balancing.²⁰⁰

If the primacy of representative balancing is not a necessary part of a balancing approach, then the reasons for Powell's position must be found not in methodology but in substance, in his understanding of the end of constitutional law. Section IV analyzes the vision Justice Powell brings to constitutional adjudication, and the connection between that substantive vision and his methodological approach. In the final section, I examine the strength of that vision as a foundation for judicial review.

IV. BALANCING AND THE DEFENSE OF THE STATUS QUO

Although a representative balancing approach always leaves open the possibility of redrawing the balance, there are still substantive themes to the work of Justice Powell. The most apparent theme is the protection of local government.²⁰¹ Because this theme is so prevalent, one key to understanding Justice Powell's vision of constitutional adjudication is an inquiry into those circumstances under which Powell works the balance to defeat the interests of local government. Focusing on the exceptions provides a richer understanding of the general approach. The vision that emerges is peculiarly well captured by the adjective "balanced," because it seeks to preserve the existing distribution of authority among competing factions of the community. There is, in other words, a deep connection between the methodology of representative balancing and the values that are given form and effect in that process.

In 1974, Powell joined the majority in *Village of Belle Terre v.*

198. The primacy of representative balancing within Powell's methodology corresponds to that of the legislature more generally. If the problem of social order is to accommodate competing interests, then legislative techniques and institutions will be most important.

199. See, e.g., Posner, *Wealth Maximization and Judicial Decision-Making*, 4 INT'L REV. L. ECON. 131, 132 (1984).

200. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion). In *Marsh v. Alabama*, 326 U.S. 501 (1946), Justice Black envisions such a balance: "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . we remain mindful of the fact that the latter occupy a preferred position." *Id.* at 509.

201. His enthusiasm for local government is vivid in his dissent in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting). It appears again in his description of the interests that enter the balance in the areas of criminal procedure and federal habeas review, see, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 44-66 (1972) (Powell, J., concurring); *Barker v. Wingo*, 407 U.S. 514 (1972); *Stone v. Powell*, 428 U.S. 465 (1976), in the recognition afforded administrative costs and convenience in the due process balance, see, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 347-49 (1976), and in his concern for local school board autonomy in the school desegregation cases, see, e.g., *Keyes v. School District No. 1*, 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part).

Boraas,²⁰² which held that a small, suburban village could exclude households of more than two unrelated persons. Justice Douglas, writing for the Court, rejected the claim of a group of college students that they were constitutionally entitled to live together as a household, declaring that the zoning regulation was a legitimate attempt to maintain a community in which "family values, youth values, and the blessings of quiet seclusion and clean air" predominate.²⁰³

Two years later, Powell wrote the plurality opinion in *Moore v. City of East Cleveland*,²⁰⁴ in which the Court held unconstitutional a similar zoning ordinance. Powell rejects the argument of the lower court that the holding in *Belle Terre* should be determinative of the outcome in *Moore*: "[O]ne overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only *unrelated* individuals."²⁰⁵ *East Cleveland*, on the other hand, defined a permissible family unit to exclude households consisting of certain relatives, including that of a grandparent living with grandchildren who were cousins rather than siblings.

To protect the family, Powell argues, "this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."²⁰⁶ To explain this judicial balance of family interests against those of local government, Powell appeals to the formulation of Justice Harlan in *Poe v. Ullman*:

The best that can be said is that through the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.²⁰⁷

202. 416 U.S. 1 (1974).

203. *Id.* at 9. Douglas saw the alleged overinclusiveness—some students could live together without offending these values—as an unfortunate but necessary consequence of legislative line-drawing: "[W]hen it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Id.* at 8 n.5 (quoting *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)).

204. 431 U.S. 494 (1977).

205. *Id.* at 498 (emphasis in original). Powell's opinion was joined by Justices Brennan, Marshall and Blackmun. Brennan and Marshall, dissenters in *Belle Terre*, could consistently defend the individual choice of living arrangements in both cases. Justice Stewart, *id.* at 531–41, and Justice White, *id.* at 541–52, thought the issue the same as in *Belle Terre*, but sided with the local government in each case. Blackmun was the only other Justice, participating in both cases, who seemed to agree with Powell that the cases were distinguishable. Justice Stevens, who joined the Court between the *Belle Terre* and *Moore* decisions, saw an important distinction between transient and non-transient residents, rather than family and non-family households. *Id.* at 513 (Stevens, J., concurring).

206. *Id.* at 499.

207. *Id.* at 542–43 (quoting *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting)). See Gunther, *supra* note 25 (comparing Powell's decisionmaking in his first term to that of Justice Harlan).

Powell has suddenly cast the issue of the case at the highest level of the judicial enterprise. The balance defended by Powell is to be the defining balance of our political and social life.²⁰⁸ Powell, writing only for a plurality, does not hesitate to strike that balance.²⁰⁹

In fact, Powell fundamentally recasts the balance that Harlan pursued. For Harlan, the concept of balancing referred to the juxtaposition of an individual claim to a protected liberty interest against the competing interests of the society considered as a collectivity.²¹⁰ Balancing was the method of charting the limits of a liberal society's legitimate claims on the individual.²¹¹ Balancing, therefore, was most at home in the area of the First Amendment, the constitutional rights that most directly protect the individual from the demands of the community. Powell's balancing, however, focuses not on the conflict between the individual and the society, but on the structure of the social order itself, on the competing claims of institutions and factions to articulate the values of the community.

The critical issue in *Moore* is not whether the family deserves some protection, but whether every variation on the extended family deserves priority over the city's interests. Addressing this issue, Powell notes both that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family,"²¹² and that this tradition is in "decline."²¹³ In effect, he acknowledges that past and future collide in this case.

Powell does not leave it to local government, however, to determine the path of future values. He does not appear in *Moore* as the defender of

208. For a radically different view of the importance of the issue in the case, see Justice Stewart's dissent:

The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

431 U.S. at 537.

209. Powell acknowledges the lesson of the *Lochner* era, citing the danger that judicial intervention will be limited only by the "predilections of those who happen at the time to be Members of this Court." *Id.* at 502. The history of the *Lochner* era, he writes, "counsels caution and restraint" but "it does not counsel abandonment." *Id.* If the "lesson" of *Lochner*, however, is the danger of uncritical acceptance of the status quo, see Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. — (1987) (forthcoming), then Powell has learned little from that case.

210. Accordingly, in his opinion in *Poe*, Harlan consistently frames the issue as one involving a right of "privacy." He quotes with approval Justice Brandeis' statement that the Framers "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." 367 U.S. at 550 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Of course, setting the boundaries of the "private" is itself a governmental function and this leads Harlan to discuss the relative strength of government claims to regulate a variety of forms of sexual conduct. See 367 U.S. at 539–55. *But cf.* Aleinikoff, *supra* note 13, at 998 n.308 (arguing that Harlan collapses the public/private distinction in *Poe*).

211. See Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 742–43 (1963) (criticizing judicial balancing for readjusting on an ad hoc basis the constitutional balance "between the individual and the community.").

212. *Moore*, 431 U.S. at 504.

213. *Id.* at 505.

local authority.²¹⁴ Neither, however, does he appear as the defender of individual liberty; that was the issue in *Belle Terre*.²¹⁵ Rather, Powell wants to have it both ways: He wants to defend Mrs. Moore without having to defend the college students in *Belle Terre*.

The two positions are reconciled when we recognize that Powell is not defending the individual's right to choose to live in an extended family. Rather, he is defending the family itself. The balance that Powell seeks in *Moore* is not between the individual and the state—the issue in *Belle Terre*—but between the variety of manifestations of social authority in the institutions of society. The family is one such institution. It is, for Powell, an institution that competes with the local government as a source of values.²¹⁶

Powell defends the institution of the family by appealing to the same values used to defend the political institutions of the local community against the individual in *Belle Terre*. He views the family as the institution through which “we inculcate and pass down many of our most cherished values, moral and cultural,”²¹⁷ a phrase that cannot help but recall the praise of the local community as the domain of “family values, youth values, and the blessings of quiet seclusion” in *Belle Terre*.²¹⁸ For Powell, both family and local community government are to be defended. The judicial challenge is to accommodate the conflicting claims by giving voice to each.

A series of cases focusing on First Amendment interests illustrates Powell's shift of the terms of the balance from the individual against the social order to the constituent elements of the social order itself. This series begins with Powell's dissent in *Elrod v. Burns*,²¹⁹ in which the Court holds that a patronage-related discharge of a nonpolicymaking county employee is unconstitutional.

For Justice Brennan, writing for a plurality, the case requires “the resolution of conflicting interests under the First Amendment”—a conflict

214. An interesting comparison can be made with Justice Rehnquist's consistent defense of state and local governments. See Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982).

215. See *Belle Terre*, 416 U.S. at 16 (Marshall, J., dissenting) (“The choice of household companions—of whether a person's ‘intellectual and emotional needs’ are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home.”).

216. The same move from the liberal model of individual versus state, of private versus public, to the focus on family as an institution that competes with the state is found in *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977), in which the Court strikes down a state law prohibiting distribution of contraceptives to minors. Brennan's plurality opinion locates the constitutional defect of the statute in its impact on the fundamental rights of a minor. *Id.* at 684–86. While Powell agrees with the outcome, he finds the constitutional flaw in the statute's impact on the family: The statute contains no exception for married minors or for parents who distribute contraceptives to their children. *Id.* at 707–08 (Powell, J., concurring in part and concurring in judgment).

217. *Moore*, 431 U.S. at 503–04 (footnote omitted).

218. 416 U.S. at 9.

219. 427 U.S. 347 (1976).

between the interest in effective political campaigning and management, furthered by a patronage system, and that in free individual belief, burdened by that system.²²⁰ Brennan argues that the individual's interest in freedom of belief has to prevail over society's interest in efficient organization: "The illuminating source to which we turn in performing the task [of resolution of the conflict] is the system of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern."²²¹ Powell disagrees, not just with the outcome, but with the conceptual structure Brennan applies to the case.²²²

While Brennan casts the case as a conflict between governmental authority and individual liberty, Powell perceives the fundamental issue in the case as the protection of the institution of the political party. The conflict he sees is not between the individual and public authority, but between the political parties and the institutions of government: "[P]atronage hiring practices have contributed to American democracy by stimulating political activity and by strengthening parties, thereby helping to make government accountable."²²³

Of course, in defending patronage practices, Powell is also defending the judgment of local government institutions that such practices are useful. He may be too quick to identify this local judgment as one founded on an interest in furthering "the democratic process in light of local conditions,"²²⁴ when in fact it may be founded on an interest in party entrenchment. Nevertheless, the point remains that Powell views the issue as fundamentally involving the viability of the political party system and only secondarily involving the parochial self-interests of local government. Most importantly, he does not perceive an individual liberty interest to be protected against government.

Powell's position is further illuminated by comparing his opinion in *First National Bank of Boston v. Bellotti*²²⁵ with that in *Elrod*. Writing for the Court in *Bellotti*, Powell strikes down, on First Amendment grounds, a state criminal statute that forbade expenditures by banks and

220. *Id.* at 371-72. Justice Brennan was joined by Justices Marshall and White. Justices Stewart and Blackmun concurred in the judgment, but expressly distinguished the question of patronage firings from hirings. *Id.* at 374-75 (Stewart, J., concurring in judgment).

221. *Id.* at 372.

222. *Id.* at 380-81 (Powell, J., dissenting). Powell elaborates on this disagreement in *Branti v. Finkel*, 445 U.S. 507, 521 (1980) (Powell, J., dissenting), in which the majority holds that the dismissal of two assistant public defenders, solely because they are Republicans, violates the First Amendment. In defending patronage appointments, Powell argues that they build stable political parties, which in turn reduce the possibility of unrestrained factionalism and, by guaranteeing vigorous campaigning, strengthen the democratic process. *Id.* at 528-29. Powell also extols "political clubhouses," which at the local level ensure that constituents obtain benefits from their elected officials. *Id.* at 529 n.11.

223. 427 U.S. at 382 (Powell, J., dissenting) (citation omitted).

224. *Id.* at 386 n.9.

225. 435 U.S. 765 (1978).

business corporations for the purpose of influencing votes on state referenda.²²⁶

One might think that there would be considerable difficulty in reconciling Powell's positions in *Elrod* and *Bellotti*. Certainly a prohibition on corporate expenditures raises the same kind of threat to political expression as that raised by conditioning public employment on party affiliation.²²⁷ The distinction between requiring expression and prohibiting expression is surely not the determinative factor in Powell's mind.²²⁸ The difference in outcomes, however, reflects a deeper unity. In both, he is protecting the institutional arrangement of authority within the existing social order. In *Elrod* he defends the political party structure; in *Bellotti*, he defends the property structure and, with it, corporate power within American society.

Powell demonstrates his institutional perspective in his rejection of the *Bellotti* dissent's focus on individual liberty. When the dissent describes the statute as an attempt to protect the individual in the political process by "preventing institutions which have been permitted to amass wealth . . . for certain economic purposes from using that wealth to acquire an unfair advantage in the political process,"²²⁹ Powell counters that "the fact that advocacy may persuade the electorate is hardly a reason to suppress it."²³⁰ To speak of "persuasion" here is to accept a model of discourse that ignores the state's concern for the disproportionate access of the modern corporation to the media of persuasion.²³¹ To accept this

226. The Massachusetts statute forbade any "corporation carrying on the business of a bank" to "directly or indirectly give, pay, expend or contribute . . . any money or other valuable thing for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977), quoted in *Bellotti*, 435 U.S. at 768 n.2 (emphasis omitted). The bank wanted to spend money to oppose a proposed state constitutional amendment authorizing a graduated individual income tax. *Id.* at 769. The statute specifically provided that no question solely concerning the taxation of individual income "shall be deemed materially to affect" the corporation. *Id.* at 768 n.2.

227. Justice White's dissent in *Bellotti* frames the issue as follows:

The question posed by this case, as approached by the Court, is whether the State has struck the best possible balance, *i.e.*, the one which it would have chosen, between competing First Amendment interests What is inexplicable, is for the Court to substitute its judgment as to the proper balance for that of Massachusetts where the State has passed legislation reasonably designed to further First Amendment interests in the context of the political arena where the expertise of legislators is at its peak and that of judges is at its very lowest.

435 U.S. at 804 (citation omitted). The problem of balancing competing First Amendment interests, of acknowledging local government's political expertise, and of recognizing the Court's own lack of knowledge all echo Powell's argument in *Elrod*.

228. Powell was perhaps the strongest defender on the Court of negative speech rights, even extending them to corporations. See *Pacific Gas & Elec. v. Public Util. Comm'n*, 106 S. Ct. 903, 908-09 (1986) (Powell, J.); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 98-100 (1980) (Powell, J., concurring).

229. 435 U.S. at 809 (White, J., dissenting).

230. *Id.* at 790.

231. Powell writes that "if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment." 435 U.S. at 792. The Framers, however, did not foresee the modern corporation, the

model is implicitly to reject the attack on corporate power in defense of individual liberty that lay behind the Massachusetts statute.

Powell's defense of the institutions of local government, then, is really only part of a broader defense of that set of social institutions within the society which together constitute the status quo. The unique aspect of Powell's balance is this displacement of the individual as constituting one side of the balance. This displacement is vividly demonstrated in his dissent in *Board of Education v. Pico*,²³² in which a majority of the Court holds that the First Amendment limits the authority of a local school board to remove books from a school library.²³³ Removal of books because they offend community values would be, according to the Court, a form of ideological censorship forbidden by the First Amendment.

The plurality does not hold against the Board in order to recognize a competing institution within the social order; rather, it appeals to a vision of individual liberty that opposes all authority. Powell rejects this vision. For him, the case does not raise an issue of government censorship of the individual, but rather an issue of preserving the community's values and institutions. He writes with a certain fury that the Court's "decision symbolizes a debilitating encroachment upon the institutions of a free people."²³⁴

A democratic social order, he suggests, does not rest upon individual liberty, but upon a set of values that are given effect in the institutions of that society. By focusing on the individual alone, Powell argues, the Court will undermine the critical responsibility of the Board "to instill in its students the ideas and values on which a democratic system depends."²³⁵ Social structure, not individualism, is the foundation of democracy and, correspondingly, of constitutional law.²³⁶

In the same term as *Pico*, Powell joined the majority in holding that the equal protection clause forbade Texas from excluding the children of illegal aliens from its public schools.²³⁷ While Powell seems to defend the individual child against the school board, this is not the way he perceives

modern media, or the modern public relations firm. See Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

232. 457 U.S. 853 (1982).

233. Arguably, only a plurality reaches the constitutional issue. Justice White concurs in the judgment, stating that there is a material issue of fact to be resolved at trial and that there is no "necessity" to reach the First Amendment issue "at this point." 457 U.S. at 883. However, unless some constitutional limits apply to book removal, there would seem to be no point to resolving any factual issues at trial.

234. *Id.* at 897.

235. *Id.* at 896.

236. See also *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (distinguishing the institutional role of the press from individual claims under the First Amendment); Be Vier, *Justice Powell and the First Amendment's "Societal Function": A Preliminary Analysis*, 68 VA. L. REV. 177 (1982) (distinguishing process-protective, societal-function approach to First Amendment from individual-rights approach).

237. *Plyler v. Doe*, 457 U.S. 202 (1982).

the issue. Rather, he sees in *Plyler* the same issue as in *Pico*: the transmission of social values embedded in an institutional structure.

Of *Plyler*, Powell writes: "By denying to illegal aliens the opportunity 'to absorb the values and skills upon which our social order rests' the law under review placed a lifelong disability upon these illegal alien children."²³⁸ His concern, however, is not with the individual "disability" itself, but with its effect on the class structure of the community. The Texas law, he writes, "threatens the creation of an underclass of future citizens and residents."²³⁹ Moreover, "the creation within our borders of a subclass of illiterate persons many of whom will remain in the State [will add] to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime."²⁴⁰

Thus, Powell views the issue not in terms of the right of a particular child to an education, but in terms of the larger institutional consequences that will follow if the Texas statute is allowed to stand.²⁴¹ The uneducated child will become a member of a new and threatening institution—"the underclass." Such an underclass poses a threat to the status quo—to the maintenance of those values that define the local, as well as the national, community. Thus, for Powell, *Plyer* is analogous to *Pico*: The task of constitutional law in both is to defend existing institutions against the possibility of revolutionary disturbance that could emerge either from an unrestrained individualism or from the development of a new social class outside of the community.²⁴²

The absence of an individualistic perspective leaves Powell free to adjust the balance to reflect the viewpoint of the speaker. The factional interests speaking, and not the fact of speech alone, matter in Powell's balance. This is graphically illustrated in his concurrence in *Abood v. Detroit Board of Education*.²⁴³

238. *Pico*, 457 U.S. at 896 (quoting *Plyler*, 457 U.S. at 221).

239. *Plyler*, 457 U.S. at 239 (Powell, J., concurring).

240. *Id.* at 241.

241. Cf. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) ("[N]o charge fairly could be made that the [Texas school] system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.").

242. Powell's defense of the closure of the system in *Pico* and his insistence on openness in *Plyler* are an interesting example of the patrician values described by Robert Burt in *TWO JEWISH JUSTICES* (forthcoming). As a Richmond patrician, Powell understands that there is a status quo to defend against outsiders, but he also understands that there are times when the only way to defend that status quo is to invite in the outsiders who are threatening its very existence.

243. 431 U.S. 209, 244 (1977) (Powell, J., concurring in judgment). See also *Young v. American Mini Theatres*, 427 U.S. 50, 73 (1976) (Powell, J., concurring); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (Powell, J.) (distinguishing right of Vietnam protestors to picket in private shopping plaza from that of labor protestors recognized in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968)). That the content-based distinctions of this approach are too much for a majority of the Court is evident from the fact that just four years later, with Powell joining the majority, the Court holds that *Lloyd* had, in fact, overruled *Logan Valley*. *Hudgens v. NLRB*, 424 U.S. 507 (1976). In an ironic comment on his own methodology, Powell concedes in *Hudgens* that the prior cases "cannot be harmonized in a principled way." 424 U.S. at 524 (Powell, J., concurring).

In *Abood*, the Court upheld, over a First Amendment challenge, an agency-shop agreement between a union and a public school board to the extent that union service charges assessed against non-members were used to finance employment-related activities by the union. Non-union teachers could not be compelled to contribute to support the ideological and political activities of the union, but neither could they receive a "free ride" from the union's employment-related activities.

This holding is obviously in some tension with that of *Elrod*. There, the Court held that political party membership could not generally be made a condition of public employment; here, the Court holds that support of a union can be made such a condition.²⁴⁴ Powell, having dissented in *Elrod*, should have little trouble with *Abood*. That is, having argued in *Elrod* that the state can condition employment on participation in a political party, he could be expected to argue that it can also condition employment on support of the union. The intrusion on an individual's free speech interest seems the same in the two cases. Nevertheless, in *Abood* he rejects the majority's support of the closed-shop agreement, arguing that the public employee cannot be made to contribute support to the union at all.²⁴⁵

In both *Elrod* and *Abood*, Powell uses the rhetoric of balancing. But in *Abood*, he gives no weight at all to the governmental interest in avoiding the "confusion" and "conflict" that would confront a public employer that had to deal with rival unions: "I would have thought that 'conflict' in ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment."²⁴⁶ Surely, the same could have been said in *Elrod*.²⁴⁷ And, nowhere does he suggest that the union, like the political party, might serve as a useful check on the authority of local government.²⁴⁸

The relevant difference is not in the individual speech interest or in the interest of local government per se, but in the need of the competing institutional interest to maintain its traditional position. In *Elrod*, Powell argues that historically the patronage system has been a critical element in

244. Justice Rehnquist, for example, writes: "Had I joined the plurality opinion in *Elrod v. Burns*, I would find it virtually impossible to join the Court's opinion in this case." 431 U.S. at 242 (Rehnquist, J., concurring) (citation omitted).

245. Powell's position in *Abood* is a reverse image of that of the majority: Both are inconsistent with positions taken in *Elrod*, but the inconsistency runs in the opposite direction. Powell's inconsistency cannot be explained by assuming his acceptance of the majority position in *Elrod* as a matter of *stare decisis*. In *Branti v. Finkel*, 445 U.S. 507, 521 (1980) (Powell, J., dissenting), Powell indicates that he still adheres to his position in *Elrod*.

246. 431 U.S. at 261 (Powell, J., concurring in judgment).

247. Powell also writes that because the case is before the Court on a motion to dismiss, "the record is barren of any demonstration by the State that excluding minority views from the processes by which governmental policy is made is necessary to serve overriding governmental objectives." *Id.* at 262. But *Elrod* came before the Court in exactly the same procedural posture. In that case, too, there was no record on the strength of the local government interest in the patronage system.

248. See *supra* text accompanying note 223.

the maintenance of an active party system. But in *Abood*, he implies that the union-shop agreement is not needed to protect the union. The union-shop agreement, then, becomes an abuse of power by the union. It is not the individual teacher, but the school board that is the true object of Powell's concern.

His defense of the First Amendment interests of the individual teacher in *Abood* has much the same effect as his defense of the First Amendment interest of the corporation in *Bellotti*. In each case, certain institutions of authority are protected from a challenge by political opponents who control the local governmental power structure. Here, the school board is protected from the labor union; in *Bellotti*, the corporation is protected from populist political forces.

In all of these cases, Powell's interests and efforts emerge as distinctly representative. One traditional theory of the legislative function holds that the representative assembly should be a microcosm of the larger community, designed to produce a legislative product that reflects the relative strength of various factional interests within the community.²⁴⁹ Powell aims for a similar result in constitutional adjudication.²⁵⁰ The Justice's role is to conserve the community's values by conserving the existing distribution of authority within the social order.²⁵¹

Powell rejects the view that constitutional law reveals a set of ideals against which the social order is to be measured and toward which the social order is to be directed. Neither, however, does he believe that constitutional law is wholly set against change. Rather, change will be tolerated at the margins, with a due awareness of its social cost and the substantial community interest in stability.²⁵²

249. Theories of proportional representation, for example, reflect this understanding. See, e.g., R. DAHL, A PREFACE TO DEMOCRATIC THEORY 133-35 (1956); Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1293-300 (1984); H. PITKIN, THE CONCEPT OF REPRESENTATION 84 (1967) ("Representing may be seen as an accurate correspondence between legislature and nation . . . to ensure that the legislature does what the people themselves would have done if they had acted directly.").

250. Perhaps the most vivid example of this connection between Powell's model of constitutional adjudication and a model of legislative structure is his opinion in *Davis v. Bandemer*, 106 S. Ct. 2797, 2831-32 (1986), in which he argues for a multi-factorial test of the constitutionality of political gerrymanders. Powell's test would apply a substantially stronger constitutional constraint on apportionment plans than that of the plurality, leading Justice White to accuse Justice Powell of supporting a constitutional requirement of proportional representation: "Stripped of its 'factors' verbiage, Justice Powell's analysis turns on a determination that a lack of proportionate election results can support a finding of an equal protection violation, at least in some circumstances." *Id.* at 2814.

251. The conservative cast Powell puts on representation locates him in the Whig tradition of western political thought. See A. BICKEL, THE MORALITY OF CONSENT 3-30 (1975); Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1599-605 (1985). "The first responsibility of the politician . . . is to promote consent by balancing or adjusting the different factions of which his society is composed." *Id.* at 1604. While Bickel located the prudential values of the Whig tradition in the Supreme Court's use of "passive virtues" to adjust principle to democratic majoritarianism, Powell locates the prudential virtues at the heart of the judicial opinion itself. See A. BICKEL, THE LEAST DANGEROUS BRANCH 238-40 (1962). Whether this is a supportable model for judicial review in a democratic order is considered below.

252. See *supra* notes 237-41 and accompanying text (discussion of *Plyer v. Doe*, 457 U.S. 202

This is a position appropriately described as "balanced." The status quo is a balance of competing institutions and interests. Powell draws upon the balance that he perceives in the social order. Judging becomes a matter of intuition, not argument, because the existing order has no principled explanation. Rather, that order is historically contingent, a product of a constant competition among competing interests that are changing in both quality and quantity. The process of adjudication reflects that inexplicable contingency.

V. BALANCING AND THE ROLE OF THE COURT

In the jurisprudence of Justice Powell, three images of virtue coincide: the good man, the good citizen, and the good judge.²⁵³ The President of the American Bar Association is the President of the Richmond School Board, and both are the Justice on the Supreme Court.²⁵⁴ This unity of morality, politics and law is central to Justice Powell's concept of democracy. Central to his concept of the judicial role is balancing. In this final section, I examine the relationship between these two points: why balancing should be the role of the judge in a democratic society.

The first step in this inquiry is a brief examination of Powell's model of democratic unity. The second is a consideration of the function of his judicial balance in light of this model of democratic unity. The common link between democracy as a form of government and balancing as a form of judicial decisionmaking is their mutual reliance on community as a social structure that mediates between the individual and government. The third step is a consideration of the strength of the judicial claim to represent the community in a democratic polity. This requires an examination of Justice Powell's surprisingly formalistic view of the limits on jurisdiction. Analysis of the disjunction between Powell's formal view of the role of the Justice and what he actually does in judging will lead to the

(1982)).

253. Cf. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 133-34 (1921) (writing in chapter on "the judge as a legislator," "that the judge is under a duty . . . to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."); see also E. ROSTOW, *THE SOVEREIGN PREROGATIVE, THE SUPREME COURT AND THE QUEST FOR LAW* 22-23 (1962) ("The lawyer, the legislator, the judge, and the law professor have different functions, different degrees of discretion . . . But they confront the same standard of duty and responsibility. The modern lawyer can find no workable boundary between law and policy . . ."); cf. Fried, *supra* note 56, at 761 ("authority cannot be conceded to persons because they are right—the authority must preexist their right or wrong judgment and must survive it too—and judges decide cases by virtue of their authority and not because they are more likely to be right than other people").

254. Before joining the Supreme Court, Powell served as President of the American Bar Association, the American Bar Foundation, the American College of Trial Lawyers, and the Richmond Bar Association, as a member of President Johnson's Commission on Law Enforcement and the Administration of Justice, as President of the Virginia State Board of Education and Richmond School Board, as Chairman of the Colonial Williamsburg Foundation, and as Trustee of Washington and Lee University. See 2 *WHO'S WHO IN AMERICA* 1986-1987 2248 (44th ed. 1986).

conclusion that this model of balancing is an inappropriate basis for judicial review.

A. *Democracy and Community*

For Justice Powell, the virtue of democratic government lies in a unity between the government and the governed. The greater the division between government and citizen, the more authoritarian—and the less democratic—is the political form. Political leadership is most democratic when it functions as nothing more than a reflection of the community's own values. This is the clear message of Powell's dissenting opinion in *Board of Education v. Pico*.²⁵⁵

Powell writes that "School boards are uniquely local and democratic institutions It is fair to say that no single agency of government at any level is closer to the people whom it serves" ²⁵⁶ The function of this uniquely democratic institution is to "instill in its students the ideas and values on which a democratic system depends,"²⁵⁷ and this means distinguishing "our ideas or values" from those ideas that have a power and political life "repugnant to a democratic society."²⁵⁸

Democratic government is that political arrangement in which there is no distance between the community's values and the values defended and promoted by the coercive authority of government. A "democratic society" is both the condition and the product of such a government. In a democracy the individual does not stand in opposition to his government, but rather understands government as an expression and reflection of the community of which he is a part. This view explains Powell's vehement objection to the *Pico* plurality's framing of the issue as one in which government stands opposed to individual—an opposition between authority and freedom.

Community, for Powell, brings together government and individual. Accordingly, he sees a coincidence of localism and democracy. As government becomes more distant from the community, the gap between government and individual is likely to grow. Powell extolls this model of democracy in *Garcia*:

[M]embers of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and

255. 457 U.S. 853, 893 (1982) (Powell, J., dissenting).

256. *Id.* at 894.

257. *Id.* at 896.

258. *Id.* at 897; see also *Goss v. Lopez*, 419 U.S. 565, 593 (1975) (Powell, J., dissenting) (on role of schools in inculcation of community's values).

local levels—not in Washington as the Court so mistakenly thinks—that “democratic self-government” is best exemplified.²⁵⁹

In *Garcia*, the interference with democracy came from Congress: It was Congress that extended the Fair Labor Standards Act to state and local government. But the same problem of creating a polarity in place of a union can arise from interference by the federal courts.²⁶⁰ Congress and the Court stand equally distant from the community.

Thus, in *Pico*, the Court’s interference with the decisions of the local school board is described by Powell as “a debilitating encroachment upon the institutions of a free people.”²⁶¹ A free people is not measured by the extent of its protection against the institutions of government; instead, it is measured by the degree of its identification with the institutions of government. A condition of such identification is government “responsiveness,” precisely the virtue lost as government becomes more bureaucratic and thus more distant.

Pico is quite revealing in this respect, because it concerns school board censorship of books. Such censorship has been a vivid symbol of the distance between government and citizen: a symbol of governmental interference with individual freedom of inquiry and belief, and a symbol of the need for the individual to struggle against government in an effort freely to define oneself.²⁶² The case thus had enormous emotional and symbolic value as an example of judicial protection of liberal values.²⁶³ Powell clearly recognizes that “in different times, the destruction of written materials has been the symbol of despotism and intolerance.”²⁶⁴ But this was in societies in which government stood opposed to the populace, where there was no community that linked the individual to the government.²⁶⁵

259. 469 U.S. at 577 (Powell, J., dissenting); see also *Ball v. James*, 451 U.S. 355, 373-74 (1981) (Powell, J., concurring) (recognizing “necessity of permitting experimentation with political structures to meet the often novel problems confronting local communities” and condemning judicial interference with “democratic process”).

260. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 484-85 (1979) (Powell, J., dissenting) (arguing that “displacement of professional and local control that occurs when courts go into the business of . . . operating school systems” may have resulted in a breakdown of community support for public schools and a decision by many parents to turn from public to private schools).

261. *Pico*, 457 U.S. at 897.

262. See *supra* text accompanying notes 233-36 (comparing Brennan’s framework of analysis).

263. Newspaper accounts of *Pico*, for example, focused on the book-banning aspects of the case. See, e.g., *High Court Limits Banning of Books*, N.Y. Times, June 26, 1982, at A1, col. 1; *Court Allows Trial in Book Banning*, Wash. Post, June 26, 1982, at A8 (noting that case came during “nationwide wave of book censorship”). Academic writers criticized the Court for not going far enough—for conceding too much in recognizing a school board responsibility to inculcate civic values. See, e.g., Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1653-54, 1680 (1986) (“[The school] is no longer the institution pictured by Justice Powell The school is not the extension of the parent, but of the government.”); van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 237, 292-93 (1983).

264. *Board of Educ. v. Pico*, 457 U.S. 853, 897 (Powell, J., dissenting).

265. One begins to see here some of the potential danger in the concept of community as a legal

The absence of such a community is the very model of despotism. To confuse a despotic with a democratic regime is to confuse censorship with moral education. The Court's failure to understand the difference, Powell suggests, itself raises the threat of despotism. The despotic threat to democracy can arise from both ends of the political spectrum, from both factions of the Court.²⁶⁶ The middle ground is held by the community of values, which Powell claims to represent.

Powell had addressed the same problem of democratic legitimacy in his dissent in *Furman v. Georgia*,²⁶⁷ in which he opposed the Court's decision to strike down all existing death penalty statutes. There, too, he feared that judicial interference would polarize government and citizenry. "In a democracy," he argued, "the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives."²⁶⁸ The danger he perceives in judicial interference is that once disconnected from the community, judicial judgment is guided by nothing but subjective preferences:

[W]here . . . the language of the applicable [constitutional] provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of the more or less universally held standards of decency.²⁶⁹

Between the community and the Justice, then, there seems to be either no space at all or a wholly unbridgeable space.

For Powell, the problem of judicial legitimacy, therefore, is the problem of locating judicial review in a community of values that bridges the po-

ideal. The "community" can too easily subsume the minority; it can fail to recognize a place for diversity. Thus, book burning may be not only an act of a government disconnected from a popular base, but an act of majority tyranny directed at a minority.

266. In *Pico*, Powell perceives the threat to community from the liberal bloc on the Court. But the nature of Rehnquist's dissent suggests that a parallel threat may arise from the government. Unlike Powell, who insists that the board of education will represent the community's values, Rehnquist writes that it is a matter of constitutional indifference whether that board—i.e., government—acts on the community's values or on values personal to board members. 457 U.S. at 909 (Rehnquist, J., dissenting).

267. 408 U.S. 238, 414 (1972) (Powell, J., dissenting).

268. *Id.* at 436-37. Interestingly, Powell turns to both referenda and jury verdicts as evidence of community values to support his claim that there is a link between those values and the death penalty statutes. *Id.* at 438-43. He concludes that "the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition." *Id.* at 443.

269. *Id.* at 431. See also *id.* at 458 ("This Court is not empowered to sit as a court of sentencing review, implementing the personal views of its members on the proper role of penology. To do so is to usurp a function committed to the Legislative Branch and beyond the power and competency of this Court."). Judicial interference with legislative judgment in the face of this evidence of legislative responsiveness to community values represents, for Powell, a "basic lack of faith and confidence in the democratic process." *Id.* at 465. *But cf.* *Bowers v. Hardwick*, 106 S. Ct. 2841, 2847 (1986) (Powell, J., concurring).

tential tension between individual and government. He must make plausible the claim that the Court defends the community against governmental decisions when those decisions do not reflect the community's values.²⁷⁰ Balancing presents a model of the judicial role that is designed to address this problem.

B. *Judicial Balancing and Community*

In broad terms, one can speak of two competing models of the nature and function of the political order: an economic and a public interest model.²⁷¹ In the former, all ends are regarded as subjective, meaning that they are of no value in themselves, but valuable only because they are the choice of some individual or group of individuals. Government, in this view, is one institutional form—the market is another—through which a society of private individuals with conflicting interests makes public choices among these multiple desires. The process of governing is understood as a particular form of the general process of bargaining; its value is only as an instrument for achieving private ends.

In the public interest model, on the other hand, values are understood as objective. That an individual or a group has an end is not yet a reason for political action to effectuate that end. The end must still be measured against some standard of the public interest. The process of governing is no longer that of bargaining, but now that of deliberating about the content of public values. The model for government is the debate, not the negotiation. The political decisionmaker is the trustee, not the agent, of his constituency.²⁷²

The role of the judge differs considerably in the two models. In the public interest model, a judge may have some claim to special expertise. Deliberation about public values and principles may be a role for which he is particularly suited. Even if he is not more acute in his philosophical insight, the very appearance of a court engaged in deliberation about the public interest may serve the function of announcing to the community and particularly to the other governmental decisionmakers that they must act on a basis other than private interest.²⁷³

270. Traditionally, not the judge, but the jury, or at least the jury venire, has been understood to represent a fair cross-section of the community and thus to protect the community's values against potentially deviant governmental decisions. *Batson v. Kentucky*, 106 S. Ct. 1712, 1717 & n.8 (1986); *Taylor v. Louisiana*, 419 U.S. 522, 526-27 (1975); *Smith v. Texas*, 311 U.S. 128, 130 (1940).

271. For an insightful discussion of the two models and their appearance in the law of local government, see Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145 (1977-78).

272. The new republicanism emerging in contemporary legal scholarship embraces this model of the political order. See, e.g., Ackerman, *Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984); Michelman, *supra* note 88; Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985). For a critique of this movement's effort to link the public interest model with a theory of participatory democracy, see Kronman, *Cooley Lectures* (1987) (unpublished) (on file with author).

273. See Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *HARV. L.*

In the economic model, a judge cannot claim any special expertise in the ends of government. If public choices are nothing more than the products of bargaining over private interests, then the judge has little to say with respect to the value or appropriateness of the choices made. He would be doing nothing beyond expressing his own private interests, because by definition there is no objective measure. In this model, the role of the judge, to the degree that it is involved with governmental ends at all, is primarily that of correcting for market failure in the process of governmental bargaining.²⁷⁴

Powell's balancing combines these two models. On the one hand, he believes in the economic model of ends: Ends have value only as they express the interests of particular individuals and groups. There are no absolute values, no objective goods, apart from a particular group's adoption of those values. On the other hand, he believes that there is a public interest apart from particular factional interests. The public interest is simply that all such private interests be accorded respect by the community. The first principle of the community must be openness to all competing interests. Thus, the public interest is empty of all substantive meaning, beyond the principle of accommodation or openness—a value that must itself be given form and effect in the competition of private interests.²⁷⁵

The metaphor of balancing captures this combination of the two models of government in its essential ambiguity between process and outcome. The balancing process suggests a free competition between competing interests; the balanced outcome suggests an ideal of mutual respect for opposing interests. Thus, Powell does not defend any right or principle as absolute: that would suggest an objective value protected from the competitive market of community interests. Yet he measures the public choice that is the outcome of the political process against his own vision of a balanced accommodation of interests. The zero-sum balance captures the first part of this vision; the representative balance captures the second part.

The judicial role may be corrective of the political process, operating

REV. 1, 14 (1979) ("The task of a judge . . . should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated."); Michelman, *supra* note 88, at 74 ("[T]he courts, and especially the Supreme Court, seem to take on as one of their ascribed functions the modeling of active self-government that citizens find practically beyond reach.").

274. For a corrective, process-based theory of constitutional law, see J. ELY, *DEMOCRACY AND DISTRUST* (1980).

275. Accommodation is a public interest value that distinguishes this approach from traditional utilitarianism. Utilitarianism depends on a means of intersubjective comparison of utility. As with any market model, some interests may lose to more powerful, competitive claims. Accommodation, on the other hand, does not rely on such a claim of objective comparison. It aims at an openness that may not maximize utility. For this reason, Powell's attempts to embrace cost/benefit analysis are not, and cannot be, successful. See *supra* notes 101-06 and accompanying text (discussing failure of cost/benefit analysis in *Mathews*).

when the balance within the community is disturbed by the seizure of the institutions of coercive power by a faction, or when the community closes itself off to a factional interest.²⁷⁶ But there is nothing about this model of the judicial function that limits it to a narrow remedial role. Representative balancing is not a doctrine of judicial restraint. There may not be substantive public values apart from competing private interests, but there is still an accommodation to be reached within that competition. Representative balancing claims for the Justice a responsibility for designing the rule of accommodation among the competing interests.²⁷⁷

The Court appears as an alternative forum for establishing the balance among competing interest groups and institutions.²⁷⁸ In a case like *Bakke*, Powell's role is surely not best understood as corrective; rather, he views the Court as the forum in which the different interests will be given a voice. The lawsuit becomes the occasion for action but not the justification for that action. The Justice is within, not without, the community. He is not measuring the public choice by a standard external to the community, but rather expressing the values of the community itself. Yet, this view is not reflected—in fact, it seems to be rejected—in Justice Powell's formal theory of federal court jurisdiction.

C. *Jurisdictional Limits: Injury and Voice*

Justice Powell led the way in the development of strict standing rules by the contemporary Court. Powell is the author of the Court's opinion in *Warth v. Seldin*,²⁷⁹ in which the Court substantially tightens the injury requirement as a test of standing.²⁸⁰ At issue in *Warth* is a challenge to the constitutionality of a zoning ordinance of the town of Penfield, which plaintiffs allege excludes low- and moderate-income residents. Essentially,

276. The state may not, for example, act upon simple prejudice and refuse to recognize the interests of a particular faction, because that would deny the premise of a pluralist community. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 292-93 (1978) (opinion of Powell, J.) (equal protection clause reaches prejudice against any racial group); *Trimble v. Gordon*, 430 U.S. 762 (1977) (state must recognize interests of illegitimate children in inheriting from intestate fathers); *Healy v. James*, 408 U.S. 169, 187 (1972) (state university may not refuse to recognize a chapter of Students for a Democratic Society based on "mere disagreement . . . with the group's philosophy"). Neither may a faction express an interest that is inconsistent with this image of community. In both *Healy* and *Bakke*, for example, Powell rejects factional claims to exclusive rights or manifestations of factional interests that are not open to competing claims. The same is true in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

277. *Cf. Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) ("But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors . . . Full responsibility . . . cannot be given to the courts. Courts are not representative bodies."). Powell, at times, invokes similar language of restraint. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 464 (1972) (Powell, J., dissenting). Such restraint, however, is hardly typical of his judicial activity.

278. *See Fiss, supra* note 273, at 41 ("I place adjudication on a moral plane with legislative and executive action. I . . . treat courts as a coordinate source of government power . . .").

279. 422 U.S. 490 (1975).

280. *Warth* invoked both Article III and the Court's prudential standing rules. *Id.* at 498-502.

their claim is that the interests of those groups were not given voice in the political process or in the product of that process. Neither, however, are they given voice before the Court. According to Powell, none of the diverse parties has standing.

Private parties who allege that they are unable to afford property within the town are rejected because the purchase of a residence depends upon "the efforts and willingness of third parties to build low- and moderate-cost housing."²⁸¹ Parties who live in a neighboring city and claim that the Penfield ordinance results in an increase in their taxes, because of the additional burden of housing the poor kept out of Penfield, are rejected because the asserted injury is nothing more than an "ingenious academic exercise in the conceivable."²⁸² An organization that includes residents of Penfield is rejected because the interest of those residents is indirect, relying on injury to those directly excluded by the ordinance. Finally, organizations of building concerns are rejected because their members are not currently pursuing projects in Penfield, despite the fact that the existing ordinance makes such projects futile.

In *Simon v. Eastern Kentucky Welfare Rights Organization*,²⁸³ Powell goes even further, holding this narrow reading of injury to be an Article III requirement and thus beyond the control of Congress. In *Simon*, low-income individuals and representative organizations challenge an IRS ruling as violative of the Internal Revenue Code and the Administrative Procedure Act. They allege that the controverted ruling encourages hospitals to deny services to the indigent—services upon which plaintiffs depend. Although Powell acknowledges that the plaintiffs alleged an injury-in-fact and that Congress provided a cause of action to challenge the agency regulation, he nevertheless holds that the allegations fail to demonstrate the requisite Article III injury because "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."²⁸⁴

Injury is a test of uncertain scope and, accordingly, one that is subject to substantial manipulation—or at least the charge of manipulation—in order to control the Court's docket. Powell is, indeed, open to the charge

281. *Id.* at 505.

282. *Id.* at 509 (quoting *United States v. SCRAP*, 412 U.S. 669, 688 (1973)).

283. 426 U.S. 26 (1976).

284. *Id.* at 42-43. The degree of "speculation" would seem to go to the likelihood of success on the merits, not standing. Powell relies on *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), which held that the mother of an illegitimate child did not have standing to challenge a state practice of prosecuting only fathers of legitimate children under a child support statute. *See Simon*, 426 U.S. at 44. But as Justice Brennan points out, the requirement of a direct nexus in *Linda R.S.* was probably understood as a prudential, not a constitutional, aspect of the law of standing, appropriate in the particular context of a criminal prosecution in which the legislature has not created a cause of action. *Id.* at 58-59 & n.7 (Brennan, J., concurring).

of just such manipulation.²⁸⁵ The interesting point here, however, is the jurisdictional theory itself and not its application.

Powell clearly states his reasons for strict standing requirements: "Relaxation of standing requirements is directly related to the expansion of judicial power [resulting in] a shift away from a democratic form of government."²⁸⁶ As Powell explains in *Warth*, establishing strict limits on the kind, quality, and directness of justiciable injury is intended to "limit the role of the courts in resolving public disputes."²⁸⁷

Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.²⁸⁸

The strictness of the injury requirement defended in *Warth* and *Simon*, however, is not likely to contribute to the protection of individual rights. Neither the allegedly discriminatory zoning nor prejudicial IRS regulation were likely to be remedied by political institutions that were themselves the alleged wrongdoers. More important, the function of judging which most characterizes Justice Powell's work is precisely that of deciding "abstract questions of wide public significance." There is, in short, a sizable gap between his actual jurisprudence and the jurisdictional theory offered to support that jurisprudence.²⁸⁹

This narrow focus on injury has little to do with the role Justice Powell actually plays in balancing.²⁹⁰ That balancing enterprise requires that the Court allow in the broadest range of interests. The Court must give each

285. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 280-81 n.14 (opinion of Powell, J.) (student has standing to challenge medical school's admissions criteria, although student has not alleged that he would have been admitted in the absence of those criteria); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72-74 (1978) (Powell joins majority holding that appellees have standing to challenge constitutionality of Price-Anderson Act limiting liability of nuclear power plants for nuclear accidents despite speculativeness of such accident); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260 & n.7 (1977) (Powell writes for Court that respondent has standing to challenge zoning practices under equal protection clause despite suspension of federal housing assistance program upon which respondent intended to rely).

286. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). Judicial balancing seems always to raise this worry among its proponents. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 650 (Frankfurter, J., dissenting) (arguing that judicial review may be an "undemocratic aspect of our scheme of government" and "serves to prevent the full play of the democratic process").

287. 422 U.S. at 500.

288. *Id.* (citation omitted).

289. There might be a tendency to view Powell's theory of injury as serving the same role as Bickel's theory of the prudential virtues of the Supreme Court. See A. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 251, at 111-98. But the prudential virtues for Bickel were virtues only insofar as they affected the substantive norms of constitutional adjudication: They were means to that end. *Id.* at 69-71. The same cannot be said of Powell's theory of injury, which is simply unrelated to the judicial task of balancing.

290. See Chayes, *supra* note 16, at 1305 (on tension between standing doctrine of *Warth* and public law litigation role of federal district courts).

competing interest a voice; it must consider all costs and benefits; and it must have unhindered access to the values attached to competing interests by the community. Representative balancing should be marked by an openness to the widest possible array of parties and conflicting interests. Furthermore, representative balancing requires this openness not just in the particular case, but over a series of cases over a period of time.²⁹¹ Without such openness, the claim of Justice Powell to stand in, and not apart from, the community is impossible to justify. The legitimacy of his balancing, in short, depends not on injury but on voice. Injury, in this view, appears to be an arbitrary trigger for judicial intervention.²⁹²

As a representative institution within the domain of politics, the Court cannot explain itself. At least, Justice Powell cannot offer a positive explanation of this role—one that justifies judicial action as an element of a system of representative democracy. Instead, he offers a remedial model of judicial legitimacy within a democratic polity. In the final Section, I explain why this tension between the substance of the judicial role and the justification of that role emerges.

D. *Democracy and Judicial Balancing*

There is in the balancing jurisprudence of Justice Powell an unresolvable tension, reflecting the uncertain role of constitutional adjudication in a democratic community. Objectivity is to be found in the community, but the Justice has no easy way to get out of the Court and into the community. Judicial intervention always threatens to appear as interference with the "institutions of a free people."²⁹³ Powell's use of the variety of forms of balancing constitutes a response to the charge of judicial subjectivity and hence political illegitimacy. The instability of each form of balancing indicates that there is no peace to be found in any of them.

The attempt to accommodate each interest gives the representative balance an inescapably political appearance, which, at its best, is a kind of statesmanship.²⁹⁴ But the more statesmanlike the Justice appears, the more insecure his position is likely to become. When the Justice addresses "abstract questions of . . . wide public significance," there always appears to be a "shift away from a democratic form of government."²⁹⁵ To

291. See *supra* notes 176-96 and accompanying text.

292. Cf. *United States v. Richardson*, 418 U.S. 166, 183-85 (1973) (Powell, J., concurring) (criticizing Court's test for taxpayer standing as unrelated to any meaningful criterion).

293. *Board of Educ. v. Pico*, 457 U.S. 853, 897 (1982) (Powell, J., dissenting).

294. See Kronman, *supra* note 272, on the role of statesmanship in the legal profession.

295. This appearance is well illustrated by Powell's opinion in *Bakke*, but it is also found in another classic example of the representative balance which Powell did not write, although he did join: Justice Blackmun's opinion for the Court in *Roe v. Wade*, 410 U.S. 113 (1973).

Blackmun follows exactly the methodology of representative balancing. He starts with a survey of the variety of competing interests—the privacy interest of the mother, and the interest of the state in health and in potential life. He then designs a rule that recognizes each of these competing interests. Each interest is given a voice, is recognized as legitimate and given a place in the final rule. Blackmun

hold onto the goal of recognition and accommodation, Powell turns to the administrative balance and its promise of objectivity through cost/benefit analysis.²⁹⁶ But if Justices are in a poor position to claim the virtues of the statesman, they are in an even poorer position to claim those of the bureaucrat. To the extent that the task of judging can be made to approximate that of the bureaucrat, it is no longer one for the Justice. At that point, either analysis gives way to deference to the bureaucrats themselves, or cost/benefit analysis becomes merely a form of rhetoric that obfuscates the "soft," nonquantifiable values that are at the heart of the judicial enterprise.²⁹⁷ In either case, the Court loses the claim to objectivity in balancing.²⁹⁸

Finally, the Justice looks for a legitimate role in a vision of irreducible conflict: the conflict to which the zero-sum balance responds. This model of conflict resolution, however, is fundamentally inconsistent with the model of community to which the balancing enterprise was intended to respond. For Powell, the community is irreducibly pluralistic, not exclusionary. Zero-sum balancing, therefore, merges into representative balancing: exclusion gives way to inclusion.²⁹⁹

Representative balancing locates the Court alongside the political institutions of society, within the domain of competing factional interests. It suggests that values are unidimensional and that a court need not reflect on the differences among moral, social, political, and legal values. Thus, over and over again, one finds at the critical section of a Powell opinion, at the point at which the balance is struck, a complete lack of reliance upon traditional, or even non-traditional, legal materials—text, precedent, constitutional history, constitutional structure, or moral and political theory. Specifically legal sources cannot be determinative because that would

attempts to support the weighting of these competing interests in the community's own valuation through a long discourse on historical standards and community values. But that statesmanlike attempt at a grand accommodation has become the symbol of an unrestrained judicial activism which is based on nothing more than judicial subjectivity. See *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 456–58, 460–61 (1983) (O'Connor, J., dissenting); Ely, *supra* note 47, at 924–25; Rhoden, *supra* note 47, at 644–47, 656–58; Tribe, *The Supreme Court, 1972 Term—Foreword: Toward A Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4–5, 10 (1973).

296. Ducat notes that the "criterion for choice among competing interests can be qualitative or quantitative." C. DUCAT, *supra* note 15, at 176. He fails, however, to see the dialectical relationship between the two forms of balancing.

297. In theory, the Court could play a useful checking function on bureaucratic cost/benefit analysis. The majority's sound rejection of Powell's position in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) is, however, an explicit, practical rejection of this theoretical possibility.

298. With what must be deliberate understatement, Ducat writes: "[I]n fact the criteria for choosing among competing interests have never been stated with precision, or even reasonable clarity, for that matter." C. DUCAT, *supra* note 15, at 124. Indeed, they cannot be stated at all. See also Greenawalt, *supra* note 83, at 997 ("There is, regrettably, no exact scale for weighing competing considerations as one weighs oranges."). Greenawalt suggests that "[a]n explicit weighing process may itself be something of a corrective to the bias reflected in an intuitive decision . . ." *Id.* At least for Justice Powell, balancing is an exercise in intuition, not a device to mitigate the effects of intuition.

299. This is precisely the move that one finds in *Roe*: having set the problem up as one of mutually exclusive alternatives—whether the mother's right to privacy should yield to the state's interests or vice versa—the Court ends with a rule that gives voice to all interests.

suggest that law provides values against which social interests can be evaluated, that legal values stand apart from other social interests.³⁰⁰

Representative balancing sets the wrong task before the Court. Instead of calling on legal argument and the unique virtues of the Justice, it calls upon the virtues of statesmanship. But a Justice is not likely, at least in our political order, to be able to compete successfully with other political decisionmakers in the domain of statesmanship.³⁰¹ The best evidence of this is Justice Powell's own attack, in his standing jurisprudence, on the undemocratic character of that judicial process which is most characteristic of his own approach.³⁰² If Powell cannot claim for himself the virtues of statesmanship as the ground of judicial legitimacy, then surely the political order will not recognize that ground.

A court engaged in representative balancing will always appear illegitimate because it offers nothing new to the political debate. Discussion is not terminated, but the kind of discussion the judicial opinion invites is simple disagreement, rather than explanation and justification. This kind of Court or Justice is always open to consideration of a new set of circumstances or a slightly different set of interests. Justice Powell can distinguish, but he cannot justify. In justification, and not in distinction, however, lies the only possible ground of legitimacy for judicial review.

The role of the Court must be to speak, not to intuit. The purpose of the judicial opinion is not to enter the political debate but rather to change the terms of that debate, to speak to that debate from a different perspective.³⁰³ While there is always going to be disagreement about the "right" judicial perspective, the Justice must make an effort to justify the perspec-

300. Powell's use of *stare decisis* as a principle of decision seems entirely arbitrary. He has written several opinions that imply that he is a strong advocate of *stare decisis*. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557-58, (1985) (Powell, J., dissenting); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20 & n.1 (1983); *White v. Weiser*, 412 U.S. 783, 798 (1973) (Powell, J., concurring) (expressing disagreement with principles of "mathematical exactitude" in legislative apportionment announced before he joined the Court, but agreeing that instant cases were indistinguishable from earlier cases and thus concurring). By contrast, in *Solem v. Helm*, 463 U.S. 277 (1983), where Powell's opinion for the Court holds that a life sentence without possibility of parole for a recidivist passing false checks violates the Eighth Amendment, the dissenters accuse him of "blithely discard[ing] any concept of *stare decisis* . . ." *Id.* at 304 (Burger, C.J., dissenting). In *Stone v. Powell*, 428 U.S. 465 (1976), Justice Brennan accuses the Court of overruling at least eleven cases *sub silentio*. *Id.* at 518-19 & n.14 (Brennan, J., dissenting). And in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), Justice Stevens accuses Powell, writing for the Court, of repudiating "at least 28 cases, spanning well over a century . . ." *Id.* at 127 (Stevens, J., dissenting).

301. See R. BERGER, *CONGRESS V. THE SUPREME COURT* 337-46 (1969); Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 667-70 (1985); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 27-28 (1980); H. COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* (1943); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 24-25 (1964); L. HAND, *THE BILL OF RIGHTS* 39-40 (1958); Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 98-99 (1959); Wechsler, *supra* note 30, at 15-17.

302. See *supra* notes 279-92 and accompanying text.

303. See Ackerman, *supra* note 87 (contrasting constitutional politics, which informs the language of the Court, with ordinary politics).

tive offered. And, to succeed, that justification must speak a language different from that of ordinary politics.

The Court in our democratic system is inevitably outside of, not within, the community. The Justice is not the jury.³⁰⁴ He represents the law to the community, not the community to the law. The Court alone of all the institutions of government is qualified through its construction and location to articulate principle as a limit on power.³⁰⁵ If it fails to do this, it has neither the qualifications nor the structure to wield power. If it no longer believes in principle, then it will be the poor stepchild to other institutions that can make a stronger claim to power.

The uncertain status of the balancing court is marked again and again in the silence at the heart of a Justice Powell opinion. One cannot engage a Powell opinion; one can only point to the mysterious gap between its beginning and its end. Powell is partaking of power itself, for there is no speech. That power may be wielded for benevolent ends, to be sure, but it is still mere power.

The benevolent use of power, of course, can be attractive; it may produce agreeable results.³⁰⁶ Articulate argument is not a complete answer in itself, for there may be poor arguments and wrong principles, just as surely as there may be good arguments and right principles. But ultimately, a Court dedicated to constitutional adjudication cannot exercise power unjustified by principle.

VI. CONCLUSION

The Court must stand apart from the community, not within the community, if it is to judge the products of power. A balancing court will always appear as an uncertain usurper of the reins of power. And this uncertainty will inevitably infect the Court's own vision of and confidence in itself. This uncertainty produces the dissonance found in Justice Powell's theory of standing. Judicial power without articulate principle will appear illegitimate even to those who wield that power.

A Court with little to say will become a Court with little to do. A Court that cannot defend judicial activism by appeal to articulate principle will become a passive Court. In a democratic political order, a consti-

304. There is no function of the judge or Justice analogous to jury nullification. See Chayes, *supra* note 16, at 1287 (discussing distinction between roles of judge and jury with respect to law and "changing community mores" in traditional litigation). See also H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 8-9 (1966).

305. See A. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 251, at 23-28 (1963) (on virtues of judges compared to legislatures and executives).

306. The strong negative response to Justice Powell's retirement was based almost exclusively on consideration of the results, and not the process, of his decisionmaking. For many, Powell's balancing approach within a severely divided Court is preferable to resolution of the ideological split in a way with which they disagree. I have not tried to address arguments concerning the merits of the results of particular cases.

tutional court will act only to the limits of those principles that it can articulate, principles which justify intervention against the products of majoritarian politics. As those principles diminish, so does the role of the Court.

Justice Powell has not left the Court with adequate grounds to justify judicial readjustment of the political balance to achieve a more just and humane outcome. Representation of the community, therefore, is likely to be left by the future Court to the representative branches.

If the Court is to limit government, it cannot do so in the name of the community. In the competition to represent the community, the Court will always lose. A Justice who cannot distinguish individual rights against the community from interests of the community cannot speak of constitutional truth, and without this, he has little to say to us.