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Centrist Judging and Traditional Family Values: Or Why Papa Can't Be a Rolling Stone Symposium: Contempory Challenges to Judging-History-Politcs-Values

Steven H. Hobbs
University of Alabama - School of Law, shobbs@law.ua.edu

Mary F. Mulligan

CENTRIST JUDGING AND TRADITIONAL FAMILY VALUES: OR WHY PAPA CAN'T BE A ROLLING STONE

STEVEN H. HOBBS*
MARY F. MULLIGAN**

INTRODUCTION

Many important cases involving the state's regulation of family relationships were decided during Justice Lewis Powell's tenure on the United States Supreme Court. Justice Powell played a pivotal role in much of this jurisprudence on the family, often serving as the reasoned voice of traditional family values in a rapidly changing society. In this sense, he could be called the consummate centrist. This article will consider how Justice Powell used his centrist constitutional analysis to balance traditional values, the rights of individuals to form traditional and nontraditional family relationships, and the proper role of the state in family matters. Although the general focus will be on constitutional jurisprudence involving family relationships and responsibilities, specific attention will be placed on the roles and responsibilities of fathers.

I. THE SHAPE AND STYLE OF CENTRIST JUDGING

The theme of centrist judging conjures up images of geometric forms and mechanical principles. One sees a circle with a radial arm of justice rooted at a given center point sweeping out to touch all the relevant and sometimes competing interests in a given case. The circumference can be lengthened or shortened as the needs of justice demand. Or imagine an equilateral triangle constructed with sides which represent the autonomy and rights of the individual, the proper authority of the state, and the basic tenets of the Constitution. The three-sided simplicity gives fundamental strength to constitutional analysis and interpretation.

Consider further the physical principles of leverage; perhaps best illustrated by the see-saw of our childhood playgrounds. We attempted to balance the lever of the see-saw against a set point or fulcrum. If the weight on one side is too heavy, we can either add more weight to the lighter side or shift the board on the fulcrum so that the heavy side is shorter in length. Accordingly, a centrist judge would have the flexibility to shift the weights of values and principles to achieve a balance of constitutional imperatives.

These images resonate in many of Justice Lewis Powell's opinions concerning family and family relationships. In *Zablocki v. Redhail*,[1] the

* Professor of Law, Washington and Lee University School of Law.
** Washington and Lee University School of Law, Class of 1993.

1. 434 U.S. 374 (1978).

Court considered the constitutionality of a Wisconsin statute prohibiting entering into a second marriage if the party has continuing, unmet financial obligations in a previous marriage.[2] While Powell concurred that the statute was unconstitutional, he wrote a separate opinion explaining why the majority went too far:

> I write separately because the majority's rationale sweeps too broadly in an area which traditionally has been subject to pervasive state regulation. The Court apparently would subject all state regulation which "directly and substantially" interferes with the decision to marry in a traditional family setting to "critical examination" or "compelling state interest" analysis. . . . Since state regulation in this area typically takes the form of a prerequisite or barrier to marriage or divorce, the degree of "direct" interference with the decision to marry or to divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight.[3]

In other words, the Court has drawn the circle too broadly making it difficult for the state to perform its traditional function of regulating marriage.[4]

The equilateral triangle model is aptly illustrated by the *Mathews v. Eldridge*[5] case involving a consideration of the procedures used in an administrative hearing to terminate Social Security disability benefits. The following three part test announced by Powell and used often in cases involving family matters, helps identify and measure the competing concerns in constitutional analysis:

> . . . our prior decisions indicate that identification 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.[6]

During Powell's tenure on the Court, the three factors articulated in *Mathews v. Eldridge* were used in several significant cases involving family matters. In *Little v. Streater*,[7] an alleged father in a state-sponsored paternity

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2. Zablocki v. Redhail, 434 U.S. 374, 375-76 (1978).

3. *Id.* at 396-97.

4. *See id.* at 398 (differentiating *Loving v. Virginia* because that case dealt with complete denial of fundamental right because of race rather than traditional state regulation of marriage and divorce).

5. 424 U.S. 319 (1976).

6. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

7. 452 U.S. 1 (1980).

suit unsuccessfully requested that the state pay for a blood grouping test.[8] The Court, in a unanimous opinion by Chief Justice Burger, found a violation of his Due Process rights using the *Mathews v. Eldridge* factors. It held:

> Assessment of the *Mathews v. Eldridge* factors indicates that appellant did not receive the process he was constitutionally due. Without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks "a meaningful opportunity to be heard."[9]

The Court used the same analysis in cases concerning the termination of parental rights. In *Lassiter v. Department of Social Services*,[10] the Court found that the Due Process Clause did not necessarily require the appointment of counsel for an indigent mother in a parental termination case.[11] In *Santosky v. Kramer*,[12] the Court considered what standard of proof was constitutionally required in parental termination hearings. Justice Blackmun found that "the three *Eldridge* factors compel the conclusion that the use of a 'fair preponderance of the evidence' standard in such proceedings is inconsistent with due process."[13] His opinion, joined by Justice Powell, went on to hold that "before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."[14] Clearly, Justice Powell's *Mathews v. Eldridge* opinion stands as a significant landmark in the constitutional analysis of family law issues.

Consider further how Powell carefully weighs competing family values when examining children's constitutional rights. Powell recognizes that while the Constitution is for everyone, children should not be treated equally

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8. Little v. Streater, 452 U.S. 1, 3 (1980).

9. *Id.* at 16 (citing Boddie v. Connecticut, 401 U.S. 371, 377 (1971)).

10. 452 U.S. 18, 31 (1981).

11. Lassiter v. Department of Social Serv., 452 U.S. 18, 31 (1981). Using the three part analysis the Court concluded as follows:

> To summarize the above discussion of the *Eldridge* factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

Id.

12. 455 U.S. 755 (1982).

13. Santosky v. Kramer, 455 U.S. 755, 758 (1982).

14. *Id.* at 747-48. *See id.* at 768-70 (justifying clear and convincing evidentiary standard).

under the law in certain instances because they are in need of parental guidance.[15] In *Bellotti v. Baird*,[16] Powell writes that "legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for full growth and maturity that make eventual participation in a free society meaningful and rewarding."[17] Powell qualifies his approach to legal restorations by stating that abortion must be dealt with cautiously: if a minor girl proves that she is sufficiently mature to make this decision, she should be treated as an adult and be allowed to make the decision.[18]

Powell differs from the opinion of other Justices in that he believes children should not have the same legal rights as adults. In *Carey v. Population Services International*,[19] the Court considered a law pertaining to the distribution of contraceptives to persons under sixteen.[20] The statute was held unconstitutional because it interfered with the fundamental liberty right of procreation.[21] They should also have the individual right to choose the "adult" option of procreation.[22] Powell concurred in the decision, but felt these women should not have been given "adult" standing because the State justly has a stronger interest in regulating activities of minors and protecting children.[23] This statute is overbroad because married women between fourteen and sixteen should have this right,[24] however, other minors should not have this much discretion so soon.[25] The family unit should be protected.[26] If a parent wants to distribute contraceptives, fine, but some parental guidance is necessary to keep the family unit and society's values in place.[27]

Similarly, in *H.L. v. Matheson*,[28] Powell concurs that a Utah statute which requires all physicians, if possible, to contact dependent unmarried

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15. *See infra* notes 16-32 (discussing need for parent's roles in their children's decision making process).

16. 443 U.S. 622 (1979).

17. Bellotti v. Baird, 443 U.S. 622, 639-40 (1979). "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* at 634.

18. *Id.* at 643-44.

19. 431 U.S. 678 (1977).

20. Carey v. Population Serv. Int'l, 431 U.S. 678, 683 (1977).

21. *Id.* at 693.

22. *Id.*

23. *Id.* at 709. "Requiring minors to seek parental guidance would be consistent with our prior cases." *Id.*

24. *Id.* at 707.

25. *Id.* at 709. Powell states, "[S]ociety has long adhered to the view that sexual intercourse should not be engaged in promiscuously, a judgement that an adolescent may be less likely to heed than an adult." *Id.*

26. *Id.* at 708.

27. *Id.*

28. 450 U.S. 398 (1981).

girls' parents prior to abortion is unconstitutional.[29] However, he states that while parents of the girls the Court deems mature enough to make their own decisions do not require parental notification, parental consent is a good idea for minors in general.[30] Because parents have a traditional and substantial interest in the welfare of their children, especially during immature years, notifying them of an abortion, a possible traumatic experience for their daughters, is constitutional.[31] Powell believes that a statute providing some parental guidance in this area would be constitutional and desirable. Wherever birth control and abortion are concerned, Powell believes that the family should have some knowledge of the children's actions since parents have a traditional and substantial interest in the welfare of their children.[32]

II. Searching for Traditional Values and Principles

Two major themes run through Justice Powell's opinions: the importance of the "traditional" family structure in society and the importance of individual liberty as it applies to traditional legal principles.

A. Traditional Values of the Family

First, Powell places great emphasis on the importance of the family unit in American history. In *Moore v. East Cleveland*,[33] Powell held that extended families have the fundamental right to share the same dwelling.[34] "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[35]

In *Bellotti v. Baird*, Powell speaks of the traditional values of the family unit and parenting as follows:

> While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[36]

The family is also the place where children are traditionally supported and cared for by parents regardless of the parents marital status. Basic traditional needs, such as food, shelter, clothing and health care are met

29. H.L. v. Matheson, 450 U.S. 398, 412 (1981) (Powell, J., concurring).
30. *Id.* at 419.
31. *Id.*
32. *Id.* at 419-20.
33. 431 U.S. 494 (1977).
34. Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977).
35. *Id.*
36. Bellotti v. Baird, 443 U.S. 622, 638 (1979) (citation omitted).

within the family unit. Accordingly, the State has created programs to assist with the fulfillment of family support and care obligations. Justice Powell would protect the right to participate in these programs as long as the claimants were involved in a familial relationship dedicated to fulfilling the traditional family functions of care and support.

For example, in *United States v. Clark*,[37] the Court considered whether a deceased federal employee's illegitimate children qualified for survivors benefits under the Civil Service Retirement Act. At issue was the statutory meaning of a provision that "children born out of wedlock [qualified for survivors' benefits] only if they 'lived with the employee . . . in a regular parent-child relationship.'"[38] The critical question was whether the children were actually dependent for their care on the employee as demonstrated by actually *living with* the employee at the time of his death or merely had lived with the deceased at some time.[39] The Court found that Congress did not intend to create a dependency requirement for children born out of wedlock.[40] To do so would be a violation of equal protection principles.[41] Justice Marshall writing for the Court held "we conclude that the "lived with" requirement is satisfied when a recognized natural child has lived with the deceased employee in a "regular parent-child relationship," regardless of whether the child was living with the employee at the time of the employee's death."[42]

In a concurring opinion, Justice Powell agreed that the children qualified for the benefits, but stated the Court had too broadly expanded the "lived with" requirement.[43] He concluded that "Congress intended the 'lived with' requirement to serve as a means through which illegitimate children may prove actual dependency on the deceased parent."[44] What impressed Justice Powell in this case was that the father had lived together with the children and their mother as a family.[45] The employee was the judicially determined father of the children with support obligations and had "provided monthly support payments up to the time of his death."[46] In other words, the employee had, on behalf of his children, earned the right to receive survivors' benefits because he fulfilled his traditional duty of support and care.

In *Serving Justice: A Supreme Court Clerk's View*,[47] J. Harvie Wilkinson III, quotes Powell's view on the value of the family:

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37. 445 U.S. 23 (1980).
38. United States v. Clark, 445 U.S. 23, 27 (1980).
39. *Id.* at 28-29.
40. *Id.* at 32.
41. *Id.* at 32-33.
42. *Id.* at 33.
43. United States v. Clark, 445 U.S. 23, 35 (1986) (Powell, J., concurring).
44. *Id.* at 35.
45. *Id.* at 24, 35-36.
46. *Id.* at 24.
47. J. HARVIE WILKINSON III, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW (1974).

> Today, we are being cut adrift from the type of humanizing authority which in the past shaped the character of the people. I am thinking, not of governmental authority, but rather the more personal forms we have known in the home, church, school, and community. These personal authorities once gave direction to our lives. They were our reference points, the institutions and relationships which molded our character.[48]

One senses in Powell's opinions his belief in traditional family values and responsibilities. The family unit must survive and be the locus for important decisions especially those concerning abortion and education as they impact adolescents.[49] It must also be the place where support, care and love are freely given.

B. The Traditional Values of the Constitution

The second theme which repeats through Powell's opinions is that personal liberty often outweighs state law where "traditional" constitutional issues are being decided. Personal liberty is especially important where the private realm of family life is involved.[50] Powell often writes that where the law has traditionally permitted freedom of choice, these freedoms should continue to be respected. The Court should protect those fundamental liberties which are "deeply rooted in this Nation's history and tradition."[51]

The constitutionality of state abortion laws is an area where Justice Powell has written several opinions which reflect his traditional jurisprudence. Where a statute attempts to unjustly limit the fundamental right to abortion granted in *Roe v. Wade*,[52] Powell consistently finds the statute unconstitutional.[53] In *Akron v. Akron Center for Reproduction Health*,[54] Powell found an abortion statute unconstitutional because it basically cut off the right of indigent women to have abortions and increased health risks.[55] It also limited the traditional doctor-patient rule of confidentiality.[56]

However, where the law has not expanded the rights of women to abortion, Powell is unwilling to interpret the Constitution as extending women's rights. For example, traditionally and legally the Social Security

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48. *Id.* at 106-107 (quoting Lewis Powell SPEECH TO PRAYER BREAKFAST OF AMERICAN BAR ASSOCIATION (1972), *reprinted in U.S. News & World Report* 10-11 (Aug. 28, 1972).

49. *See supra* text accompanying notes 15-32.

50. Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L. REV. 1, 40 (1987); *see* Bellotti v. Baird, 443 U.S. 622, 642 (1979) (stating that abortion decisions by minors are unique and deserve particular sensitivity by state legislatures).

51. *See* Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

52. 410 U.S. 113 (1973).

53. *See* Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 426-27 (1983) (stating that *Roe* had strong history of judicial support).

54. 462 U.S. 416 (1983).

55. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 450 (1983).

56. *Id.* at 445.

Act does not require states to fund nontherapeutic abortions.[57] In *Beal v. Doe*,[58] Powell could find no legal history nor any precedent suggesting that states must fund this type of abortion.[59] Because women never had this privilege in the past, Powell wrote that it would be up to Congress to expand the law, not the Supreme Court.[60] Powell claims that the sole purpose of the court is to interpret laws, not to expand upon them.[61] His opinions lean towards conservatism and what he feels is part of the America's traditional past.[62]

In *Stump v. Sparkman*,[63] Powell dissents because he believes that Judge Stump had no right to give a mother permission to have her partially retarded daughter undergo tubal ligation surgery.[64] Powell writes that there is a complete absence of normal judicial process in Judge Stump's decision.[65] Parents do not normally seek a judge's petition to have an operation such as this performed on their child, and there is no Indiana precedent suggesting judges ever acted in this capacity. Parents and judges have not traditionally had this right over another capable individual.[66] Therefore, the judge should not be immune from prosecution for this decision. Immunity is often justified because there are several other means of protecting individual rights. Here no other methods exist so the decision violates the Equal Protection Clause.[67]

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57. 42 U.S.C. § 1396a (1992 & Supp. II 1992).

58. 432 U.S. 438 (1977).

59. Beal v. Doe, 432 U.S. 438, 445 (1977).

60. *Id.* at 447.

61. *Id.*

62. *See* Maher v. Roe, 432 U.S. 464, 476 (1977) (discussing prior decisions regarding constitutionally protected liberty interests); Burns v. Alcala, 420 U.S. 575, 581-82 (1975) (discussing original purposes of statute). Powell concurs in Bowers v. Hardwick, 478 U.S. 186, 197 (1986), that a Georgia statute criminalizing sodomy is not unconstitutional because it is not a traditional, fundamental right under the 14th Amendment. *Compare* Caban v. Mohammed, 441 U.S. 380, 388 (1979) (rejecting traditional gender differentiation between mothers and fathers in dealing with their children) *with* Fiallo v. Bell, 430 U.S. 787, 792-800 (1977) (accepting statutes that effectively excluded relationships between illegitimate children and their natural fathers while allowing relationship with mothers).

63. 435 U.S. 349 (1978).

64. Stump v. Sparkman, 435 U.S. 349, 369 (1978) (Powell, J., dissenting).

65. *Id.* at 370.

66. *Id.* at 365.

67. *Id.* at 370. Powell's unwillingness to go beyond the traditional bounds of the Constitution is also evident in Lehman v. Lycoming County Children's Servs., 458 U.S. 502 (1982), where he held that the "federal courts properly have been reluctant to extend the writ of Habeas beyond its historical purpose." *Id.* at 512-13. In Orr v. Orr, 440 U.S. 268, 285-89 (1979), Powell dissents, finding that the majority has not given enough weight to the Article III "case and controversy" problem which this case involves. In Martinez v. Bynum, 461 U.S. 321, 329 (1983), Powell states, "no single tradition in public education is more deeply rooted that local control over the operation of schools. . . ." Local control has been thought to be essential to the maintenance of community concern and quality of public education. *Id.* at 329. Therefore, the Texas statute is constitutional. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 642-53 (1975), where Powell held that Social Security is designed to help the family. Therefore, both men and women wage earners who head households must be treated equally.

Wherever personal liberties rooted in the Constitution are involved, Justice Powell sways towards individual freedom over government control. Whether the topic is abortion, paternity, Social Security benefits or divorce, traditional legal principles are key to Powell's decision-making process.[68]

III. Powell and the Traditions of Fatherhood

If Justice Powell is a centrist, then his sense of tradition is at the heart of his jurisprudence. Tradition controls the radial sweep of the court's actions. Tradition maintains the trilateral symmetry of rights, authority and constitutionalism. Tradition is the fulcrum for the careful, judicious weighing of competing values and principles.

A. Earning Fatherhood Rights

A proper demonstration of this can be seen in Justice Powell's exploration of the traditional values of fatherhood. His tenure on the Court fell between the cases of *Stanley v. Illinois*[69] and *Michael H. v. Gerald D.*[70] He took no part in the consideration of either of these cases. However, these two cases symbolize an era in which the constitutional essence of fatherhood was vigorously debated by the Supreme Court with Justice Powell playing a major role.

Stanley was a watershed case because for the first time the Court expressly recognized that in spite of the traditions of society, men can be primary caretakers of their children. Emphasizing this, Justice White held "it may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children."[71]

The Court found that even though Peter Stanley was not married to the mother of his children, he deserved the opportunity to prove that he was a fit parent.[72] This was especially true for Stanley because he had been actively involved in the parenting of his children.[73] In *Michael H.*, Justice Scalia seriously considered the proposition of a whether or not a child can in fact have two *DADS*. Michael, the biological father who was also actively involved in the care of his daughter, Victoria, was found to have no cognizable constitutional rights to participate in the parenting of his child because the mother was married to Gerald at the time of the child's birth.[74]

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68. *See* Kahn, *supra* note 50, at 46-47 (discussing influence of tradition on Powell's adjudication).

69. 405 U.S. 645 (1972). *See infra* notes 70-87 and accompanying text (discussing fatherhood rights).

70. 491 U.S. 110 (1989).

71. Stanley v. Illinois, 405 U.S. 645, 654 (1972).

72. *Id.* at 658.

73. *Id.* at 654-55.

74. Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

The Court upheld the presumption that the husband and the mother of a child born during a valid marriage are in fact and in law the parents of that child.[75]

Had Justice Powell still been on the Court, we are certain that he would have provided the fifth vote needed to hold for Michael. Powell vigorously argued that a man's right to participate in parenting is protected by the Constitution. This is so even where proof of paternity is an issue as was the situation in *Trimble v. Gordon*[76], *Weber v. Aetna Casualty & Surety Co.*[77], *Parham v. Hughes*[78], and *Lalli v. Lalli*[79]—cases where Justice Powell filed an opinion. In those cases Powell asserted that the father should be able to achieve the final act of caring for his children—the father had the right to leave a financial legacy for his children's benefit.

However, balanced against this right is a system of deep values. The extent of the constitutional protection is determined in large part by the fulfillment of the traditional duties and obligations of fatherhood. Fathers ought to have a "natural affinity"[80] for their children who should "be nourished and loved."[81] Fathers are further obligated to provide financial support to any children they bring into the world. The support obligation is not only a legal duty but also a moral duty derived from the traditional mores of our society.[82] Powell reflected on this in *Zablocki v. Redhail* by stating "the State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people."[83]

This is why Powell filed a stirring dissent in *Ridgeway v. Ridgeway*.[84] There a service man agreed in a divorce settlement to maintain a life insurance policy with his children as beneficiaries.[85] Upon remarriage, he made his new wife the sole beneficiary, excluding his children.[86] The Court, viewing this in part as a contracts case, held that the Servicemen's Group Life Insurance Act permitted the father to freely change his beneficiary, thereby preempting any state divorce law to the contrary.[87] Powell believed that the insurance proceeds should have been held in trust for the benefit of the children. In his dissent he said:

> In my view, the Court is plainly wrong in concluding that Richard's conduct was "nothing more than a breach of contract" and that

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75. *Id.* at 127.
76. 430 U.S. 762 (1977).
77. 406 U.S. 164 (1972).
78. 441 U.S. 347 (1979).
79. 439 U.S. 259 (1978).
80. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 169 (1972).
81. *Id.* at 174.
82. Trimble v. Gordon, 430 U.S. 762, 769-72 (1977).
83. 434 U.S. 374, 399 (1978).
84. 454 U.S. 46, 49 (1981) (Powell, J., dissenting).
85. Ridgeway v. Ridgeway, 454 U.S. 46, 48 (1981).
86. *Id.*
87. *Id.* at 60.

> his obligation was like that of "any commercial" debtor who defaults on a judgment. Familial obligations are not merely commercial. Few legal duties are more universally acknowledged than the duty of a father to support his children. This duty existed in this case by law before the divorce. As a result of the divorce, it was recognized explicitly by Richard's contract with his family and by the divorce decree ordering him to discharge that duty by maintaining the insurance at issue for the benefit of his children. Yet, the Court today analogizes a father's support duty to that of a commercial debtor! This holding ignores the difference not only in character of the duties but also in their consequences. A defaulting debtor . . . may not be sent to jail. But a father who defaults on his duty to support his children or who violates a court decree enforcing that duty may be imprisoned for contempt.[88]

B. Caban v. Mohammed[89]—*A Study in Centrist Judging*

Perhaps the vintage case which illustrates Powell's centrist jurisprudence is *Caban v. Mohammed*.[90] The facts and circumstances of the family in this case could stand as the metaphor for all the challenges that currently confront American families. There was nonmarital cohabitation because Abdiel Caban was still married to another while living with Maria Mohammed. There was marriage and remarriage after separation and divorce creating new blended families with step-parents and step-children. The couple had a difficult custody battle after an apparent parental kidnapping of the children. The extended family of both parties played significant roles as temporary custodians or as grandparents with informal visitation privileges.

Abdiel Caban and Maria Mohammed lived together without the benefit of marriage for over five years.[91] During that time they produced two children. After they separated, Maria married Kazim Mohammed.[92] Caban continued to support his children and to be involved in their lives.[93] When Kazim Mohammed attempted to adopt the two children, Caban could not object because unwed fathers have limited rights under New York adoption statutes. Caban claimed that he had been denied equal protection because other parents can withhold consent to adoption.[94] He also had been denied "the Due Process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents."[95]

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88. *Id.* at 67-68.
89. 441 U.S. 380 (1979).
90. Caban v. Mohammed, 441 U.S. 380, 391 (1979).
91. *Id.* at 382.
92. *Id.*
93. *Id.*
94. *Id.* at 385.
95. *Id.*

Justice Powell clearly understood the competing values and principles and balanced them against the fulcrum of the Fourteenth Amendment. In his traditionalist way, he equally measured the authority and concerns of the state, the fatherhood rights of Caban and the wisdom of the constitutional doctrine which requires due process before the deprivation of that fatherhood right.

For him, the radial reach of the Court encompassed fathers like Caban who demonstrate:

> . . . that an unwed father may have a relationship with his children fully comparable to that of the mother. Appellant Caban, appellee Maria Mohammed, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the care and support of their children. There is no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father.[96]

Society cannot ask more of a man than that he, with love and affection, take care of the children he produces. It is not only a constitutional right, it is also a constitutional duty. *Michael H.*, however, turns the *Caban v. Mohammed* analysis on its head. The decision ignores both social and biological fact to achieve a rigid, formalistic result which denies reality and the fatherhood rights of Michael. Ironically, Victoria will always know who her *real Dad* is even though the law ignores Michael H. Relationships of love are not easily broken by judicial fiat. Ultimately, Victoria may be the one who decides if she can have two loving dads.

CONCLUSION

The centrist judging style of Justice Powell has a proper place in a society beset by rapid change. The fluidity of centrism accommodates a broad vision of individual rights against the constant mooring of traditional constitutional doctrine. His methods of constitutional balancing allow us to preserve traditional family responsibilities and yet recognize the ever changing nature of familial relationships. Ultimately, Justice Powell's tenure on the Court will be remembered for judicially articulating the values of responsible fatherhood. Men received the constitutional privilege and duty to be equal participants in raising the next generation.

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96. *Id.* at 389.