The editors of the Harvard Law Review respectfully dedicate this issue to Justice Lewis F. Powell, Jr.

Chief Justice William H. Rehnquist*

The Supreme Court enforces a unique form of equality upon its members — the vote of each member counts exactly the same as that of every other member regardless of one’s background or experience before coming to the Court. The views of each member are judged only by the persuasiveness with which they are expressed — not by any previous pedigree that the Justice brings to the job.

Lewis Powell’s career was characterized by a willingness to serve his country, his state, and his city. He was by no means an eager seeker after public office — public office sought him. At the age of 64 — already occupying a secure place among the leaders of the American bar — he reluctantly accepted appointment to the Supreme Court of the United States.

The Supreme Court also imposes a rigid seniority system at its conferences. The discussion of each case proceeds from the Chief Justice to the most junior — again with no regard for pedigree. When Lewis Powell took office in 1972, he was eighth in seniority, and he expressed his views at conference the last but one. Because I came to the Court at the same time he did, he was spared the indignity of being the very last — he never had to answer knocks on the conference room door.

Other widely known and distinguished lawyers had been appointed to the Court in the past, but many of them did not thrive under this

* Chief Justice of the United States. Chief Justice Rehnquist delivered the following eulogy at the memorial service for Justice Powell at Grace Covenant Presbyterian Church in Richmond, Virginia, on August 31, 1998.
regime. Lewis Powell did. He combined a fair-minded willingness to see both sides of a question with an impressive ability to persuade others to his own views. As a result, he was an extraordinarily influential member of the Court. He often wrote the opinion of the Court in important cases. Whether writing for the Court or in dissent in controversial cases where feelings ran deep, his opinions forcefully presented their points of view, but they never took any "cheap shots" at those expressing opposing views. His remarkable influence resulted from a combination of ability, fair-mindedness, and personal grace.

The Supreme Court appointment was not the first call to duty heeded by Lewis Powell. Seven years out of law school, he had become the tenth partner in the Hunton & Williams firm, and by the time of the Japanese attack on Pearl Harbor, he was well on his way to a successful and lucrative law practice here in Richmond. He was 33 years old and married with two children — he was in no danger of being drafted. Yet he volunteered for service in the Army Air Force, rising in rank from First Lieutenant to a full Colonel, and winning the Legion of Merit and the Bronze Star.

It seems to me that both his decision to accept the Supreme Court appointment, and his decision to volunteer in World War II, were cut from the same cloth. Lewis Powell was a patriot in the old-fashioned meaning of that term, responding when his country needed him. This deep-seated devotion to duty — not some legally enforceable duty, but a moral duty — in combination with his fair-mindedness and graciousness, were largely responsible for his success as a lawyer and as a judge. Every bit as importantly, they endeared him to all of us who worked with him.

Chief Judge J. Harvie Wilkinson III*

The remarkable thing about Lewis Powell’s last years is how sweet they were. In front of his home stood a circle of large boxwood, around which the Justice would walk five or six times each day. His back lawn sloped gently to the James River, whose distant bridge traffic flowed as quietly as its waters. In the evenings, he would watch the news, sip wine, and read the paper in the very study where he made his reputation as a young attorney. He had time now to notice its furnishings and photographs — the pressures of the next challenge had at last made way for the pleasures of recollection.

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In his book, American Sphinx: The Character of Thomas Jefferson, Joseph Ellis notes that Jefferson's home became a national shrine in the sage's last years: "Members of Congress, foreign dignitaries, Indian agents, retired army and naval officers, Protestant missionaries, itinerant booksellers, aspiring Virginia politicians — all felt the obligation to make the pilgrimage to Monticello." Powell's Rothesay Road home was never that, but the visitors were welcome and numerous: Katherine Graham and Sandra O'Connor; members of the Fourth Circuit; former law clerks; Hunton & Williams partners; and above all, lifelong friends and family. Many honors also made their way to his doorstep. The Fourth Circuit dedicated its courthouse to him; Washington and Lee University, the American Inns of Court, the American College of Trial Lawyers (to name but a few) all found ways to acclaim his place in the profession. The Justice never mentioned or kept track of these accolades. He seemed appreciative but also mystified to have struck such a chord in the profession he so loved. To the end, he never quite comprehended all the fuss.

I am not sure that we fully understand it either. A small part of it, I think, has to do with sheer longevity. Lewis Powell was a participant, sometimes a very important one, in the century's epic struggles and salient debates. In the Great Depression, he was a young lawyer working at fifty dollars a month. In World War II, he served first in North Africa, then in London breaking German intelligence. In the 1950s, Powell headed the Richmond School Board in the difficult aftermath of Brown v. Board of Education. The Sixties saw him leading the efforts of the American Bar Association on behalf of legal aid. For the next two decades, his voice was that of a Supreme Court Justice, weighing the grave and combustible issues of capital punishment, abortion, affirmative action, and the like.

But many Americans have traversed this long expanse of twentieth-century history. And some have, as Lewis Powell did, negotiated the shoals of difficult times and volatile issues with dignity and skill. All the qualities that are justly ascribed to him — his ability to listen, his considerateness of others, his search for consensus — describe a good and decent man, but not necessarily a great one. We sense, however, that a great man has departed, and we grope to express the elusive qualities that made him so.

We cannot deny that Lewis Powell was an aristocrat. He lived in the most sequestered section of Richmond, Virginia. He managed the city's most prominent law firm. He represented its most affluent corporate clients, belonged to its most exclusive country clubs, sent his


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children to its most privileged schools, and became its most revered and reputable public servant. For long periods of his life, however, Lewis Powell’s values were hopelessly out of vogue. The Sixties in particular were not hospitable to courtly representatives of the southern establishment. There was always the temptation for him to curry favor with fashion, to put down his background of privilege, to distance himself from his Richmond roots, to disown the friends whose backward views on social progress caused him private embarrassment. This he never did. He lived instead a life defined by the length and constancy of its loyalties — to his city, state, region, and country, to his family and friends, to his profession, to the code of honor and manners and civic virtue that made one worthy of the name of gentleman. His self-measure was tightly tied to time and place. He could not conceive, he told me, of ever being anything other than a Virginian.

It would be remiss, also, to think that anyone’s judicial life could be wholly unaffected by background. Justice Powell began his Supreme Court career at age sixty-four. To note that he was a conservative Justice on most criminal, labor, and corporate matters is to say simply that one does not jettison a lifetime of principles upon reaching the Supreme Court. At age eighty, the Justice commenced a second distinguished career on the Fourth Circuit. It was there that I had a personal experience of the Justice’s innate conservatism. He and I came to disagreement over, of all things, a T-shirt.4 The shirt featured a mildly ingenious take-off on a Budweiser beer can, with beach slogans replacing beer slogans in the design. Justice Powell did not think much of the doctrine of “trademark parody,” which had influenced the jury’s verdict for the defense. The Budweiser label, he wrote, had been used “by Anheuser-Busch as a trademark on beer cans since 1876 and on clothing since 1967. It has been the subject of extensive advertising. And it has been used to market several thousand products, including T-shirts sold in seaside stores. In short, it is, as the district court observed, ‘one of the strongest marks in this country, indeed in the world.’”5 For the defendant to “parody” such a trademark, the Justice admonished me, was almost like trampling the flag.

By seeing the Justice as a creature of background, one can come to appreciate the true majesty of the man. This man with the deepest roots I have ever known also had the broadest horizons. Time after time, he came to espouse causes that had no analogue in his personal experience and to champion persons whose circumstances he could hardly have glimpsed. Who can explain the genteel Powell’s special empathy for Leon Chambers6 or Inez Moore7 or for a “reprobate”?

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5 Id. at 325 (Powell, J., dissenting).
seven-time felon named Jerry Helm? And how did the privately schooled Powell come, in the 1950s, to champion public education over racial segregation? How did this most patrician of Virginians become the man "who all but invented the diversity rationale for affirmative action in the 1978 Bakke case"? And how did it happen that the deeply patriotic Powell came to cast the deciding vote in Plyler v. Doe to extend a constitutional right to public education to the children of illegal immigrants? The Plyler and Bakke opinions display a practical, unsentimental bent — in Plyler, Powell worried openly about the problems that a "subclass of illiterate persons" posed for "unemployment, welfare, and crime." But the opinions also display a devotion to education as a gateway to opportunity, lamenting the injustice of punishing parents by leaving their children "on the streets uneducated."

How then does one both perfectly reflect background and powerfully transcend it? How is it that the Powell character was set so firmly in Virginia, and the Powell mind so easily stretched to other worlds of time and space? His colleague, Justice John Paul Stevens, aptly described the Justice as "an extraordinarily patriotic man" with "a feeling for his country that is quite exceptional." But the country was never the self writ large. It was Powell's special sense, long before the advent of multiculturalism, that any one life was but a small and unrepresentative strand in a large and incredibly variegated land. His opinion in Bakke is remarkable because the profound dangers of race-based means, reiterated throughout the opinion, moved Powell to emphasize that racial and ethnic differences are not the only form of diversity America has to celebrate. Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." Powell's ideal of diversity included "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed [by school administrators to be] important. The respect for educational diversity in its grander non-racial sense expressed the Justice's abiding faith that the American

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11 Id. at 241 (Powell, J., concurring).
12 Id. at 238.
13 JEFFRIES, supra note 2, at 114 (internal quotation marks omitted).
15 Id. at 317.
destiny was a common one — that our lives were interwoven and our fates were intertwined, and that the good of the whole of this country would not be achieved through the neglect of opportunity for any less fortunate part.

Some Supreme Court Justices are known for their giant footprints on the jurisprudence. Lewis Powell must be remembered not just for what he thought, but for who he was. The Justice lived through a century of convulsive change with an unchanging set of values. He cherished a personal and regional identity that no sweeping national trends or tides could ever have erased. Notwithstanding his pride in that identity, he came to respect fellow Americans far removed and quite different from himself. The great challenge for our country is to remain one nation, bound in mutual regard, at a time of bewildering technological and demographic change. What better example than Lewis Powell could we Americans expect to have? It is fitting that the Justice who loved education still has so much to teach.

Judge T.S. Ellis, III*

I knew Justice Powell in two distinct incarnations: first as a law firm partner and leader and then as a Justice. In both incarnations, he inspired and enriched my life.

My first recollections of Justice Powell date from the summer of 1969, when as a newly graduated lawyer, I arrived at what was then Hunton, Williams, Gay, Powell & Gibson.1 He was, at the time, the primus inter pares of the firm’s then-ruling duo.2 He was also, to me and to every other associate (and, I would wager, to most partners as well), an austere figure, as commanding and intimidating as any I had encountered, even counting my five years of military service.3 His firm sobriquet, never to his face, of course, was “Iceman.”4

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1 For a history of the firm’s origins, see Anne Hobson Freeman, The Style of a Law Firm: Eight Gentlemen from Virginia (1989), with an introduction by Justice Powell.

2 The other member of this duo was George Gibson, the dean of the nation’s electric utility bar.

3 He was never more so to me than when his briefcase went missing after a meeting we attended in Washington and I turned up as the chief suspect in the loss. To my overwhelming relief (I thought my legal career was over), Mr. Powell was characteristically gracious, though his graciousness, as I recall, became more evident after he confirmed that his draft tax returns were not in the never-recovered briefcase.

4 Another sobriquet, “the Mahatma,” was our feeble effort in the firm to acknowledge his immense stature at the bar and in the firm.
So it was with a mixture of fear and excitement that I greeted the first of several opportunities to do work for him. The fear was unfounded; the excitement was justified. Although no less severe and austere up close than he was at a distance, I found it exciting to work for him. As with most effective leaders, he led by example. He demanded long hours of hard work from all of us, but few worked longer hours than he did. He demanded thoroughness in research and analysis and meticulous attention to procedural and factual details, but again, no one was any more thorough in pursuing analysis or had a greater command of the details than he had. I particularly remember the importance he placed on writing, the principle goals of which, he taught me, were clarity and brevity. In this regard, I recall he favored short, declarative sentences. And, like many who live by the written word, he had some pet peeves, split infinitives and beginning sentences with "however" chief among them. In his view, simple, lucid writing reflected a writer's correct grasp of a problem. Put another way, clear writing, to him, meant clear thinking, and the rigor of writing to a high standard of clarity and simplicity helped ensure the integrity of the writer's analysis.

It seems to me in retrospect that the firm-wide high standard of excellence and diligence that I found in effect when I arrived at Hunton & Williams was attributable in large measure to his personal example and leadership. Today, the firm, now grown nearly ten-fold and spanning three continents, continues to thrive, a result attributable to the talents and efforts of many, but also no doubt owing much to the momentum imparted to it by the force of Justice Powell's leadership and example.

None of my memories of this period have him laughing or smiling or saying anything frivolous or humourous. Yet, in describing him in this fashion I do not mean to suggest that he was ever rude or inconsiderate; to the contrary, he was unfailingly courteous and considerate, the epitome of Virginia Gentleman in the best sense of the expression. I recall with special pleasure the few occasions when he invited me to lunch with him at what seemed to be his favorite luncheon haunt, the Miller and Rhoads Tea Room in Richmond. There, I discovered what I should have suspected: Mr. Powell held strong views on subjects which, of course, he had studied thoroughly. In particular, I recall that in 1969, on the eve of my departure for a visit to what was still the Soviet Union, he made no bones about the malignancy of communism and the failure of the American educational system to appreciate this fact. He also gave me his view on the ingredients for success in the law, which I will save for the end of this piece.

Excitement in working for Mr. Powell, as he then was, peaked for me in 1971 when, as a still-junior associate, I was asked by the firm's partners on his confirmation team to help in a small way. Although I was not near the center of the confirmation effort, it was apparent to
me that he approached this matter with his characteristic thoroughness and attention to detail. My task was to prepare a summary of the Supreme Court's most significant criminal procedure decisions of the previous two or three decades. Predictably, for some cases, he asked me to review not just the opinions, but briefs and commentary as well, and then to distill the essence of the opinion in a concise paragraph or two. Equally predictable was his thorough knowledge of the cases, which was evident to me when we met to discuss the summary. On some cases, he sought additional procedural and factual details, probing further, it seemed to me, to see whether the broad principle for which the case might be known was warranted given the facts and procedural context. It appeared to me that he was preparing not for confirmation, but for service on the Court.

Justice Powell, as I knew him in his judicial incarnation, dates from about 1987, after he had been on the Court for fifteen years. By this time, I had been sworn in as a district judge and saw him on various visits to his Court chambers. Later, after he retired from the Court, we saw each other in Richmond, where he routinely sat by designation with the Fourth Circuit and where I did the same by invitation once or sometimes twice a year. In this incarnation, I found him warmer and not at all severe or austere. My mind's eye picture of him during this period includes, more often than not, a warm and genuine smile. When we saw each other he always inquired with genuine interest about the sometimes bumpy progress of my sons through adolescence. My most treasured memory of this period is the time we sat together on a Fourth Circuit panel with Judge Wilkinson, now the circuit's Chief Judge. I remember how cheerful Justice Powell was, how much he enjoyed sitting with the circuit judges and, of course, how thoroughly prepared he was, certainly seeing more deeply into the case than I had. Typically gracious, he supported Judge Wilkinson's equally gracious suggestion that the opinion be assigned to me.

Let me close by recounting a piece of wisdom he imparted to me during a lunch at the Tea Room. I had fatuously asked him what was required for success at the bar. The essence of his response: success requires intelligence. But many lawyers are quite bright, so this is only a necessary but not sufficient requirement. Success also requires hard work, diligence, and tenacity. Again, many lawyers have these

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5 Another confirmation-related matter illustrates well his sensitivity to ethical issues. Taylor Reveley, then a fellow associate and now Dean of the William & Mary Law School, and I were charged with preparing a memorandum addressing whether Justice Powell should recuse himself in cases in which Hunton & Williams was counsel. We concluded, as I recall, that he should do so only for five years, but not thereafter. Justice Powell chose to do so permanently, a reflection of his view that the appearance of impartiality was paramount.

6 In a typically gracious gesture, Justice Powell came to Richmond to present me to the judges of the Eastern District of Virginia for the administration of the judicial oath.

qualities, so they too are necessary, but not sufficient. Successful lawyers must have good judgment: in today’s vernacular (not his words), one must know “when to hold them and when to fold them.” But even this quality, coupled with the rest, is only necessary, not sufficient. Finally, he said, you must be lucky.

Of course, he was quite right. And certainly we whose lives he touched have been very lucky, and any success, in the broadest sense, we have enjoyed is surely attributable in significant measure to our good fortune in having known this admirable and honorable man.

John C. Jeffries, Jr.*

Lewis F. Powell, Jr. and the Art of Judicial Selection

Lewis F. Powell, Jr. served on the Supreme Court from 1972 through 1987. On the crucial issues of that time, his was the decisive voice. More than those of any other Justice, Powell’s views determined the scope and content of the constitutional right to abortion, as he was in the majority in Roe v. Wade1 and in every other abortion case decided during his tenure.2 In his famous Bakke opinion, Powell created a “majority of one” to tolerate racial preferences but only as a contested deviation from the ideal of color-blindness.3 The Court tracked his delicate attempt to allow but constrain racial preferences, as Powell found himself in the majority in every affirmative action de-

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1 410 U.S. 113 (1973).

2 Information about Powell’s voting record is compiled in an Appendix to JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 565–72 (1994). The Appendix charts agreement among Justices during Powell’s service on the Supreme Court and the frequency with which each Justice voted in the majority in five general areas (business law, civil rights, criminal law, free speech, and privacy). Additionally, the Appendix lists agreement with outcome in 21 specific categories, including abortion, affirmative action, and capital punishment.


3 See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The “majority of one” came about when Powell found himself flanked by four Justices prepared to allow racial preferences more or less without constraint and by four Justices prepared to forbid them more or less categorically. Powell’s intermediate position cast the deciding vote in both directions.
cision. Powell also took the lead in capital punishment. There he tried to find a tenable middle ground between judicial defiance of the legislative will on capital punishment and judicial complicity in the inevitable arbitrariness of its administration. In this area as well, Powell was the Justice most often in the majority.  

Abortion, affirmative action, and capital punishment have been so long with us and the passions and resentments they arouse so durable a feature of our political life that we might think it was always so. But in November 1971, when Powell went before the Senate Judiciary Committee for hearings on his nomination to the Supreme Court, none of these issues played a role. Once, as an afterthought, he was asked whether he had taken a position on capital punishment. When he said "no," the matter was dropped.  

He was not asked about abortion or about affirmative action. Not one question.

This was not because the hearings were perfunctory or brief. In the aftermath of the rejected nominations of Clement Haynsworth and G. Harrold Carswell, the Democratic majority in the Senate viewed President Nixon's candidates with as much suspicion as respect. Unlike Byron White, whose 1962 appearance before the Senate Judiciary Committee lasted a grand total of eleven minutes, Powell was examined in depth.

The reason the Senators did not ask about these crucial issues was not lack of interest but failure of foresight. In 1971, abortion had not yet surfaced as a national political issue. On the last day of Powell's hearings, a few right-to-life groups showed up, chiefly to complain about legislative liberalization of abortion laws, but no one paid any attention.

Even a year later, U.S. News & World Report would list abortion as an "off-beat" issue in the 1972 presidential election, alongside such momentous questions as public funding for the Olympics and a local ban on hunting doves. Affirmative action was similarly obscure. Only seven years had passed since blacks had won the right to

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4 This statement describes the percentage of agreement with outcome in the 66 capital cases in which Powell participated in the years 1972–1987. It excludes Justice Potter Stewart, who sat with Powell in a much smaller number of capital cases decided before Stewart's retirement in 1981.

5 See Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Comm. on the Judiciary, United States Senate, 92d Cong. 287 (1971) [hereinafter Confirmation Hearings].


7 Specifically, Powell testified on November 8, 1971, from 10:30 a.m. to 4:20 p.m., with a break for lunch. See Confirmation Hearings, supra note 5, at 200–88. Witnesses for and against the nominee testified on November 3, 4, 9, and 10.

8 See id. at 473–82.

9 See The Yea and Nays on Off-Beat Issues, U.S. News & World Rep., Nov. 20, 1972, at 50; see also The Real Issues of '72, Newsweek, July 10, 1972, at 21–37 (revealing that of eight commentators asked to address the "real issues" of the 1972 campaign, only Gloria Steinem mentioned abortion).
eat at a white lunch counter or sleep in a white motel. The Supreme Court's all-out attack on southern school segregation was only three years old, and busing had just begun. Under the circumstances, it would have required prescience (if not imagination) to identify reverse discrimination as the fighting issue in the law of race relations. Finally, in November 1971, the constitutionality of capital punishment seemed settled. It had been practiced since the beginning of the Republic and had never been seriously questioned by the Supreme Court. Earlier that year, the Court had upheld death penalty statutes against a challenge based on unconstrained jury discretion, the same ground on which the Justices would strike down these laws one year later. Given this misdirection, the Senators could not foresee capital punishment as a constitutional battleground.

That the Senators failed to probe Powell's views on abortion, affirmative action, or capital punishment seems surprising, given that all three issues surfaced almost immediately, but in a larger sense, their inability to foresee future controversies is unremarkable. The Justices who comprised the Supreme Court when Powell took office served on average more than twenty-five years (and in the case of Chief Justice Rehnquist, still counting). Even the most astute political analyst could not predict the decisive issues two, three, or four presidential elections in advance, and the Senators did not try. Like French generals, they fought the last war.

Even if the Senators had had the foresight to question Powell about abortion, affirmative action, and capital punishment, and even if he had answered more fully and candidly than a well-advised nominee ever would, he could not have predicted his future decisions. Powell had never heard of abortion as a constitutional issue nor given the matter a moment's thought. Although well schooled in the difficulties of desegregation, he had never confronted minority preferences nor considered their validity. If asked, he probably would have thought racial preferences in favor of minorities violative of that same principle of color-blindness to which the South had so recently been forced to

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10 Green v. County School Board, 391 U.S. 430 (1968), announced the long-overdue demise of "all deliberate speed" in favor of a command to desegregate "now." Id. at 436, 439.
14 The Supreme Court heard argument in the abortion cases three weeks before Powell and Rehnquist were sworn in, but put the decision off until the next Term because the Justices were unable to agree on an opinion. See JEFFRIES, supra note 2, at 332-39. Affirmative action surfaced in DeFunis v. Odegaard, 416 U.S. 312 (1974), which was dismissed as moot. Arguments in the death penalty cases were heard two weeks after Powell and Rehnquist joined the Court, and the decision dominated Powell's first term. See JEFFRIES, supra note 2, at 405-12.
15 The "last war" in Powell's confirmation hearings was criminal investigation and police powers, including Miranda v. Arizona, 384 U.S. 436 (1966), and wiretapping. See Confirmation Hearings, supra note 5, at 205-17, 225-29, 244-56, 274-75.
adhere. Powell likely would have known, had he been forced to say, that he would vote to sustain the constitutionality of the death penalty, if only because of its long history and its express contemplation in the words of the Constitution. These arguments figured prominently in his forceful dissent from the invalidation of capital murder statutes in 1972.16 What Powell could not have anticipated was that, despite his best arguments, his colleagues would strike down those statutes, that thirty-five states would promptly enact new laws, and that seventeen of them (in an attempt to meet the Court’s concern for arbitrariness of administration) would make execution mandatory for broad classes of criminal homicide.17 And Powell could not possibly have foreseen that, faced with this vast expansion of capital punishment for which the Court itself was directly responsible, he would abandon his prior position and join Justices Stewart and Stevens in a compromise that would respect legislative insistence on capital punishment but require case-by-case scrutiny of the fairness of its administration.18 No amount of introspection could have revealed this future to the nominee in the fall of 1971.

What Powell’s history suggests is that basing Supreme Court appointments on the current political “litmus tests” is not only unseemly, but futile. The issues of the day are just that. In three or five or twenty years, they will have changed, perhaps radically. The Senators in 1971 who could not foresee abortion, affirmative action, and capital punishment would be followed by Senators in 1981 who could not foresee term limits, homosexual sodomy, and the right to die, and by Senators in 1991 who could not foresee cloning, civil suits against a sitting President, and whatever else lurks just beyond our view. Neither Presidents nor Senators nor nominees can predict what the unfolding future will bring, nor can they know what they will do (or will want done) in unknowable situations. Of all decisions made in our political system, none has a longer time horizon than an appointment to the Supreme Court, and none is so likely to defeat political calculation.

The example of Lewis Powell commends a different approach. Supreme Court appointments might be viewed less as a way of entrenching political platforms in life-tenured judges and more as an opportunity to entrust individuals of exceptional ability and wisdom with a position of exceptional influence in our Nation’s future. In this frame of reference, the crucial consideration is character. Political issues come and go and may change with surprising velocity, but — at

16 See Furman, 408 U.S. at 417–21 (Powell, J., dissenting).
17 The post-Furman enactments are cited in the ALI’s Model Penal Code and Commentaries § 210.6 commentary at 153–67 (1980).
least for the accomplished adults who are plausible candidates for the Supreme Court — the essential attributes of the individual personality will endure. These qualities may prove not only more reliable, but ultimately more valuable, than any checklist of political allegiance.

Of Powell’s qualities, most often remarked was his courtesy. In hundreds of interviews, he was described as a “gentleman.” The word sounds faintly anachronistic, evoking a standard of civility, refinement, and good manners perhaps only attainable in (and perhaps only relevant to) a privileged past. Courtesy in this superficial sense Powell certainly had. Even as a Justice, he always had to be invited to enter a doorway first. And he had the peculiar habit, when walking with another, of skipping a step so that he could bring his stride into sympathetic alignment with that of his companion. Such courtesies Powell accorded equally to high and low. He showed the same graciousness and generosity, the same slightly formal reserve, the same personal engagement to fellow Justices, secretaries, law clerks, and drivers. For many, such interactions proved memorable. If one could backtrack through Powell’s life, as I have tried to do, one would find thousands of people who have warm recollections of their encounters with a true gentleman.

The sense of obligation to others that pervaded Powell’s personal life was also the hallmark of his judging. To advocates and colleagues alike, Powell paid the compliment of listening. At oral argument, he spoke rarely, asking questions only when he wanted to hear the answers. He read and reread briefs, underlining and writing notes, making sure that he considered every point the lawyers raised. Respect for others also surfaced in the civility with which he voiced disagreement, in the candor with which he acknowledged competing concerns, and in the care he took to avoid arguments that were opportunistic or merely clever. Within the constraints of judicial formality, Powell spoke the truth. The reasons he gave in his opinions were not invented for the occasion; they were elaborated statements of the reasons that made up his mind. For Lewis Powell, there was no discontinuity between public and private personalities. As a judge and as a man, he practiced civility, candor, respect for others, the commitment to open-mindedness that such respect requires, and the instinct for compromise that it produces.

Not everyone will see virtue in these traits. Some are convinced that the unruly future can best be tamed by ideological steadfastness. For them, moderation is weakness, and compromise risks defeat. Those who hold this view will never be attracted to Powell’s blend of pragmatism and restraint. They are not, of course, oblivious to the values of civility, integrity, decency, and hard work, but they relegate those virtues to the realm of the personal, preferring for the public sphere the harder stuff of fixed belief. And they will not always be wrong.
But those who approach the future with more humility and less certainty, who place statesmanship above consistency and value wisdom more than brilliance, will see Powell as the model of judicial selection. They will see in him an exemplar of a man who brought personal virtues to bear in public life and helped teach the nation who we should be. Other Justices will bring other strengths to the Supreme Court, and many different talents can contribute to that institution, but the Republic will be blessed if there is always a Lewis Powell.

Nina Totenberg*

I came to know Justice Powell, oddly enough, over lunch. The lunches were only occasional when he was on the Court, and more frequent after he retired. The first one came shortly after his appointment to the Court. I was a rather brash young reporter, painfully aware that a woman was an oddity in the press room, and probably paranoid about being left out by “the big boys.” And so it was that when I learned that some of the men who covered the Court had been invited to a reception after Justice Powell’s swearing-in and I had not, I dashed off a hot and intemperate note to the new Justice, informing him that he had put me at a distinct competitive disadvantage. God knows how I had the nerve, but that is what youth is for. Sometime thereafter, Justice Powell invited me to lunch in his chambers. It was a generational and gender mismatch — he, the courtly gentleman of the old school, and I, the rough-edged young female reporter trying to make up with toughness for youth and inexperience.

It is a tribute to the Justice that he somehow saw through that veneer and asked me to have lunch with him again.

Over the years we would have many lunches. The menu was always the same at the Monocle restaurant, a few blocks from the Court. He would order a hamburger and accompanying goodies with ice cream for dessert, while I would order a salad and look longingly at his meal. I ate all of mine. He picked at his and always urged me to share from his plate. More importantly, and especially after he retired, he would share his thoughts, some of his memories, and his wisdom. And what I learned over the years was that this Virginia aristocrat, born and bred in the heart of the Confederacy, a man who was very much a product of the Old South, had transcended that background in

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ways few could imagine. It wasn’t that he abandoned his conservative views; it was that even in his eighties he could look beyond the emotion of the moment and apply his intellect, his rationality, and his sense of decency.

That was never more apparent than in a conversation I had with him about the 1986 case of Rankin v. McPherson. The facts of the case were precisely the kind of thing that would repulse a patriotic gentleman like Powell. The respondent, Ardith McPherson, was a nineteen-year-old clerk in the Dallas sheriff’s office when President Reagan was shot. When the news bulletin came across the radio, McPherson turned to her fiancé at the next desk and said, “If they go for him again, I hope they get him.” Someone overheard the remark, and she was fired. She sued to get her job back, contending that she had been punished under color of state law for exercising her right of free speech. The Court agreed with her in a 5-4 decision, with Justice Powell casting the fifth and decisive vote. And so, as I sat at lunch with him, I wondered how it was that this man, the very essence of civility, a man who believed firmly in order, discipline, and respect, would countenance keeping a person like McPherson on the public payroll.

“Oh pooh, Nina,” he responded, “You can’t go around firing people for saying things like that in a free country. That case wasn’t hard at all!” Or as he put it in his concurring opinion: “The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful.” Some who knew the Justice believe that this reaction was the product of his belief in precedent and that reading precedent for all those years had changed many of his views. I am not so sure. His reaction when I asked him about the case was so swift, so sure, so instinctive that it seemed to me to be one of the many ways in which his thinking-self dominated the self of his rather insular upbringing.

In some ways, it was not such an insular background. We all know about Powell’s stint on the Richmond School Board, and how in defiance of his old friend Harry Byrd and “massive resistance,” he kept the public schools open. But there are some less well-known parts of Powell’s life that demonstrate the many ways he somehow always seemed to push the envelope of the known to the unknown. When he was a young lawyer before World War II, he told me, he was quite an

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1 483 U.S. 378 (1986).
2 See id. at 380-81.
3 Id. at 381 (internal quotation marks omitted).
4 See id. at 381-82.
5 See id. at 379.
6 Id. at 393 (Powell, J., concurring).
Anglophile, and in the years before the U.S. involvement in the war, he would go around the country preaching to local bar associations about the necessity for getting into the fight against the Nazis and helping the British. After Pearl Harbor, he immediately enlisted, though he was a thirty-five-year-old father with terrible eyesight and could easily have avoided the service. Instead, he spent the next four years in army intelligence, much of it working on the Enigma project. It was, he often said, the most exciting time of his life, and for my part, I can only say that when I could get him talking about that time, he would glow.

The Enigma experience made him deeply deferential to claims of national security, as in the case of former CIA agent Frank Snepp,7 who published a book about his experiences in South Vietnam without submitting it for the pre-publication review he had committed to at the time he signed up with the Agency.8 I have often wondered how Justice Powell would have ruled in the Pentagon Papers case.9 He freely admitted that in hindsight, the publication of the papers did no harm. But the tug to protect intelligence information was deeply engrained in his soul from the experience of his war years.

To my surprise, also deeply engrained was his belief that women should have the right to have abortions. One day, I cautiously approached the subject at one of our lunches. Sitting there picking at his hamburger, he told me the following amazing story.

Some time in his career as a young Richmond lawyer, he had received an urgent call from one of the messengers at Hunton, Williams asking him to come to the office. He arrived and found the messenger, a boy of 19, in tears. "It seems he had become involved with an older woman," Justice Powell said (by older he meant about twenty-five). She had become pregnant, had tried to abort herself with a coat hanger and was hemorrhaging. Lawyer Powell and his messenger went immediately to the house the couple shared; they found the young woman dead. Powell took the messenger to the local prosecutor's office, but suffice to say, no charges were brought.

"And after that," said Justice Powell, "I just never thought that this was a subject that was the business of the Government."

To spend some time with Lewis Powell was to understand what it means to be fair, to see through the emotion of the moment. One of the opinions he wrote and was quite upset to see reversed was Booth v. Maryland,10 which ruled unconstitutional the use of victim-impact statements in capital sentencing.11 Just five years later, Booth was

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8 See id. at 507-08.
11 See id. at 502-03.
overruled in *Payne v. Tennessee.* Shortly after *Payne* was argued, I had lunch with Justice Powell, who was then retired, and told him that it sounded very much to me as though *Booth* would be overruled. One eyebrow shot up. A look of incredulity appeared.

"I can’t believe that," he muttered in that soft drawl.

"Well, I could certainly be wrong," I said. "But it sure looks to me like the reason they took *Payne* was to overrule *Booth."

Then came a deep sigh. "You can’t have these judgments made on the basis of how fine and upstanding a family is, how good they are at describing their loss, how much they cry. It’s the criminal and the crime that’s being judged."

Some time after *Payne* was announced, we had lunch again, and I couldn’t resist an "I told you so."

He just rolled his eyes.

Powell’s biographer, John Jeffries, has written a fascinating account of the Justice’s approach to decisionmaking in big cases, how he would think through where he wanted to go and rely on his clerks to prepare a lengthy memorandum on how to get there. The Justice’s system, Jeffries contends, served him well in the *Bakke* case, where he was on firm ground with his own experience as Chairman of the Richmond School Board. But in his later years, Jeffries argues, when the Justice’s energy was less, and the ground less sure, a conflict between clerks ill served him. The case was *Bowers v. Hardwick,* the constitutional test of the Georgia sodomy law, in which Powell’s vote would prove pivotal to the Court’s decision to uphold the law. Powell at first voted in Conference to strike down the law, then changed his mind, and then after the decision was published had second thoughts. Unbeknownst to Powell, Jeffries tells us, one of his clerks that Term was gay, while the one working on the case was a Mormon with conservative moral views. With Powell uncertain in his own mind, and professing to one colleague that he did not know anyone who was homosexual, the clerks, according to Jeffries, became almost paralyzed in their ability to help the Justice sort through his views.

He worked incredibly hard. "Opinions in this chamber," he once told me, "go back and forth between me and the clerks like a shuttlecock." What he meant was that there were often as many as fifteen or

14 See id. at 473–78, 498–99.
15 See id. at 514–29.
17 In his concurrence, Justice Powell did note that "a prison sentence for such conduct . . . would create a serious Eighth Amendment issue." Id. at 197 (Powell, J., concurring).
19 See id. at 522.
twenty drafts before the product was ready to be sent to other members of the Court. He was a gentle soul, but a hard-driving perfectionist. Ever deferential, he had a backbone of steel when it mattered. After all, his Bakke opinion,\(^{20}\) an opinion that bridged two wings of the Court on affirmative action, remains to this day only his, and the law of the land.

One day, after his retirement, when we were talking about the incredible shrinking Supreme Court docket, he reminded me that in his first Term on the Court he had written twenty-three opinions and, as he observed with a sly grin, he didn’t start the Term until January. That is more opinions than the average Justice writes today in a full Term.

As the Justice got older, he got frailer. Never a robust man, he suffered many serious health problems. Indeed, what was billed as a routine operation at the Mayo Clinic turned into a real heart-stopper for the surgeons, as they worked frantically for hours to staunch the flow of blood, first from one artery, then another. When I visited the Justice at home after one of these surgical bouts, I was, to put it bluntly, struck by his dearness. He and his wife Jo were holed up in the apartment they lived in during the Court Term. It was a perfectly nice apartment, but modern, pretty spare, nothing fancy — the sort of apartment a swinging-singles associate might own. They had no help. Jo rushed around to get me some cheese and crackers. The Justice was using a walker and was both pleased and tired by my visit. As I parted from him that day, I was not sure I would see him again, but as usual, I had underestimated his inner strength. He was eventually back at the Court in full swing. But we no longer walked to lunch; we rode in a Court car.

Later, as the years went by, he said rather plaintively as he got out of the car one day, "I used to worry that I wouldn’t live long enough. Now I worry that I will live too long."

For the many who loved and admired him, it was never too long. But I confess that once his beloved Jo was gone, and he spent most of his days in bed in Richmond, even I thought it was time for him to go. Still, whenever I go to the Monocle for lunch, the proprietor and I reminisce about . . . lunch with Justice Powell.

At the time of his resignation, Justice Lewis F. Powell, Jr. was justly praised as a moderate, flexible jurist — open-minded, suspicious of ideology, most often found at the center of a divided Supreme Court. Yet Justice Powell was a man of deeply conservative instincts. Suspicious of invitations to expand the scope of individual constitutional rights, he was a participant and even a leader in the Court’s re-assertion of a federalism that emphasized deference to states and in its reinvigoration of restrictions on access to federal courts. His jurisprudence was all of a piece. Justice Powell’s reluctance to expand federal court protection of constitutional rights coexisted with an unusually personal sensitivity to the situations of individual litigants. He sought, by counseling federal judicial restraint, to acknowledge with respect and encourage the vitality of state and local communities, where he thought people could most richly flourish.

Justice Powell’s non-ideological conservatism reflected his own innate courtesy and grace. It was tempered by, indeed based upon, habits of empathy and compassion that were immensely appealing. These humane and deeply personal values, rooted in the Justice’s own personal and professional experiences over the six decades before he joined the Court, both facilitated and blunted the Court’s turn to the right.

Had he never accepted appointment to the Supreme Court, it would still be fair to say that Justice Powell had a spectacularly successful personal and professional life. With the exception of a period of service during World War II, most of it was spent in Richmond, Virginia. All of it — college, law school, military service, and lawyer’s work — taught him the importance of close personal bonds, community involvement, taking responsibility, a sense of belonging to a place. He had a vivid sense of the personal rewards, as well as the costs, of public service, and he thought it absolutely critical that institutions that afforded the opportunity for service be nurtured and preserved.

For most of Justice Powell’s legal career he was a partner in a prominent Richmond law firm, but he was seldom simply in private practice. His life was filled with commitments to the governing institutions of civic and professional life. He was, for example, president of the American Bar Association, the American College of Trial Lawyers, and the American Bar Foundation; chairman of the Richmond Public School Board during a particularly tumultuous period; a member of the Virginia State Board of Education; vice-president of the National

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Legal Aid and Defender Society; and a member of both a National Advisory Committee on Legal Services to the Poor and a President’s Commission on Law Enforcement and Administration of Justice. Justice Powell was extraordinarily conscientious in these offices. He sought to leave each position having made a difference and, above all, tried to use his influence to create more inclusive and enduring institutions. He emerged from these experiences with a deep understanding of the conflicting pressures on people who hold positions of authority and a confidence that they would, as he did, struggle to do their best. He also found public service to be enormously satisfying, basic to his sense of personal as well as professional identity.

His experience of public service, his personal success, and his involvement in World War II created in Justice Powell a solid faith in American institutions. He was not oblivious to social problems, but believed that solutions lay in the involvement of individuals working together through vital public institutions. The law, and in particular the Constitution, created the structure that made self-government possible by nourishing communities in which individuals could flourish. Justice Powell had an unusually personal vision of the constitutive role of the Constitution in a way of American life that he thought worth preserving. He believed that state and local governments and the more democratic branches of government were accessible to those willing to compromise and negotiate. He was suspicious of those who sought national solutions, for he saw them as shirking this difficult, community-building work.

Justice Powell’s beliefs led him to two characteristic, and superficially inconsistent, approaches to his role on the Supreme Court: as a Justice, he continued to feel obligated by his belief that those in authority should be attentive and responsive to the people who would be personally affected by their actions, yet he was eager to give a clear message that those seeking social change should not look to the federal courts for solutions. When substantive issues of law were reached, he tried to write with particularity and sensitivity about the consequences for all the litigants, but in decisions based on issues of jurisdiction and justiciability, he often reached for broad rules that would lead to clear, door-closing results.

The felt need to consider, and articulate, the various interests affected by a judgment is responsible for the balancing approach for which Justice Powell has been both praised and criticized. Balancing appealed to him for several reasons: it allowed him to articulate the full range of views and interests implicated in a case, it expressed judicial modesty by deferring broader decisions, and it held out hope for losing litigants who might prevail in future cases. Most importantly, balancing left those most familiar with particular problems free to draw upon the full range of their local knowledge in devising solutions. It gave constitutional space to local decisionmakers while modeling the
inclusive process that the Justice hoped they would use. When Justice Powell could see the human face behind an argument, he invariably responded. If he thought that a majority opinion had failed adequately to consider a particular perspective, it was his habit to write separately — sometimes to qualify his vote, but often to give the excluded a voice. In his opinion in Keyes v. School District No. 1,\(^1\) for example, he spoke for the families of children, black and white, whose lives might be disrupted by busing. In Franks v. Bowman Transportation Co.,\(^2\) he sympathized with the white workers whose seniority expectations were displaced by the class relief approved by the majority.\(^3\) In Regents of the University of California v. Bakke,\(^4\) his respect for both sides of the affirmative action debate led him to a middle ground and a decision, joined by no other Justice but speaking for the Court, in which “individualized consideration” of applicants was held to be critical to the constitutionality of educational affirmative action programs.\(^5\)

Justice Powell preferred judgments rooted in the specific facts of a case. To give guidance primarily in terms of the various factors to be considered held out hope of future success and cautioned lower court judges to look closely. His opinions in cases involving the First and Fourteenth Amendments best illustrate this quality. An obvious, and influential, example is his opinion in Mathews v. Eldridge,\(^6\) which set forth a three-part test for evaluating procedural due process claims. In Ingraham v. Wright,\(^7\) he rejected a procedural due process challenge to corporal punishment in secondary schools but left room for claims challenging particularly severe beatings on either common law or substantive due process grounds. Gertz v. Welch, Inc.,\(^8\) a defamation case, offered some protection for media defendants who acted in good faith and some vindication for injured plaintiffs.

When Justice Powell found constitutional support for an individual right, he took care that the right was defined very narrowly. It was on these terms that he joined the majority in Roe v. Wade.\(^9\) More often, he thought the best solution was not to support individuals in pressing

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1 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part).
3 See id. at 781 (Powell, J., concurring in part and dissenting in part); see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269 (1986).
5 Id. at 318 n.52.
claims against government officials, but to encourage both sides to see their interests as ultimately congruent. Repeatedly, he spoke sympathetically of those responsible for governing community institutions. In a well-functioning school, teachers were the benevolent protectors of students.\textsuperscript{10} In prisons, he felt, wardens struggled to do the best they could, with inadequate resources, to provide a rehabilitative environment for prisoners.\textsuperscript{11} The law should be used to promote affiliation rather than conflict. The supplicant’s interest could be best protected by supporting the official in his obligation to be responsive.

Justice Powell’s opinion in \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{12} which flatly rejected the argument that school financing systems should be subject to heightened scrutiny under the Equal Protection Clause, incorporated both his balancing approach, in its articulation of the constitutional tests, and his deference to local institutions. It also illustrated the connection between Justice Powell’s sympathy for local decisionmakers and his willingness to send a clear message that federal courts will not be available to decide certain questions. He sounded that theme again in cases that interpreted Article III standing requirements very narrowly\textsuperscript{13} and those that expanded the personal immunities of local officials from constitutional litigation.\textsuperscript{14}

Justice Powell’s conservative impulses were a product of a faith in the basic institutions of American life that he not only accepted but exemplified. His own character and sense of civic obligation justified his confidence in the responsiveness of those who possessed authority and power. He made it easier for the Supreme Court to turn away from its earlier activism by reassuring individuals that their voices would still be heard and their interests respected.

\textsuperscript{12} 411 U.S. 1 (1973).
\textsuperscript{14} See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982).