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THOMAS REED POWELL ON THE ROOSEVELT COURT

*John Braeman**

In January 1944, historian Charles A. Beard asked Harvard law professor Thomas Reed Powell for his evaluation of the Supreme Court's recent performance. Beard had been among the most forceful critics of the old Court's response to the New Deal. Lashing out against its attempt "to confine the powers of government within the narrowest possible limits," he had warned that the Constitution could not—and would not—survive without "loose and general interpretations of its general clauses" to allow "for the use of commensurate national power" to deal with the Depression.¹ He had even publicly supported Roosevelt's Court-packing scheme as the solution to the impasse.² And he had hailed the Court's switch-in-time as a turning point in "the battle . . . to preserve the balance of powers in government as distinguished from judicial supremacy."³

In the years that followed, Roosevelt transformed the Court with his own appointees.⁴ By then, however, Beard had soured on FDR.⁵ How much that disillusionment colored his attitude toward the reconstituted Court must remain a matter of speculation. But there was no question of his disenchantment. "Maybe," he wrote Powell,

I am falling into the delusion that there were giants long ago, but it seems to me that, in the statements of facts and law, in the opinions, and in the animadversions of the Justices, the documents of the Court show increasing confusion and imprecision—in thinking and writing. There is a marked tendency to resort to fancy phrase

* Professor of History, University of Nebraska-Lincoln.

1. Beard, *The Constitution and States' Rights*, 11 VA. Q. REV. 481, 492, 494 (1935); Beard, *Little Alice Looks at the Constitution*, NEW REPUBLIC, July 22, 1936, at 317.

2. Address of Dr. Charles A. Beard over the National Broadcasting Company (March 29, 1937) (PPF 3847, Roosevelt Papers, Franklin D. Roosevelt Library).

3. Letter from Beard to Franklin D. Roosevelt (May 29, 1937) (PPF 3847, Roosevelt Papers).

4. Letter from Beard to Thomas Reed Powell (Jan. 22, 1944) (Box A, folder A19, Powell Papers, Harvard Law School Library).

5. An excellent account is Harrison, *The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography*, 2 LAW & HIST. REV. 165 (1984).

making. So my question to you is: Are the intellectual standards of the Court falling, rising, or just in statu quo?⁶

That Beard directed his question to Powell was not surprising. Their friendship dated from 1906 when Powell had begun to work toward a doctorate in political science at Columbia.

Powell had been born April 29, 1880 in Richford, Vermont. His father was a local lawyer and banker who served simultaneously as treasurer of the University of Vermont. Graduating from that institution in 1900, Powell went on to Harvard Law School. After receiving his LL.B. in 1904, he practiced law for two years in Burlington, Vermont, before deciding to pursue graduate study in political science. He was awarded the Ph.D. in 1913 and was appointed associate professor of constitutional law with a seat in the Faculty of Law. Although he continued to offer courses in the Department of Public Law, his law school work became the major focus of his energies. He was promoted to full professor in 1920, and three years later was named Ruggles Professor of Constitutional Law. In 1925, he accepted a call from Harvard Law School, where he became Langdell, and then Story, Professor. He retired from teaching in 1949, and died in Boston on August 16, 1955. Powell was a prolific writer; a bibliography compiled for his seventieth birthday listed almost four hundred articles, reviews, and comments. The James S. Carpentier Lectures that he delivered at Columbia shortly before his death were published in 1956 as *Vagaries and Varieties in Constitutional Interpretation*.⁷ But he probably had most impact through his teaching. He was, a former student recalled, "vexatious and nasty and snide and, consequently somehow, stimulating."⁸

Powell and Beard were different personalities. Beard was by temperament an activist who did not shy from public involvement in support of his favored policies. By contrast, Powell cultivated an aura of Olympian detachment. But there was a remarkable degree of consonance in their substantive positions. Just as Beard had out-

6. Beard's shift from enthusiasm to disillusionment is traced in Braeman, *The Historian as Activist: Charles A. Beard and the New Deal*, 79 S. ATLANTIC Q. 364 (1980).

7. For a brief biographical sketch by Paul A. Freund, see DICTIONARY OF AMERICAN BIOGRAPHY, SUPPLEMENT FIVE 549-50 (1977). For fuller details on the Columbia years, see R. HOXIE, A HISTORY OF THE FACULTY OF POLITICAL SCIENCE, COLUMBIA UNIVERSITY 268 (1955); J. GOEBEL, A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 241-42, 278 (1955) [hereinafter J. GOEBEL]. Surprisingly, Powell is not even listed in the index of A. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967 (1967). But recollections by four former students and colleagues—Erwin N. Griswold, Felix Frankfurter, Freund, and Henry M. Hart, Jr.—appeared after his death in 69 HARV. L. REV. 793 (1956).

8. Letter from Philip Kurland to Felix Frankfurter (Aug. 23, 1955), quoted in L. KALMAN, LEGAL REALISM AT YALE 1927-1960, at 51 (1986).

arged the politically orthodox by imputing economic motivations to the framers of the Constitution, Powell was accused by those same quarters of undermining respect for the courts by teaching that judicial decisions were influenced—even if not always consciously—by judges' social, economic, and psychological biases.⁹ Powell was fond of quoting an aphorism from William Graham Sumner that one could get out of a premise all that one had put into it.¹⁰ Like Beard, he had no sympathy with the use of "liberty of contract" to strike down protective labor legislation without regard for the real world disparity in bargaining power between employers and their workers.¹¹ Like Beard, he had scant patience with the Court's purported distinction between "direct" and "indirect" effects upon interstate commerce to tie the hands of Congress in dealing with the crisis of the Depression.¹² And though he was not a supporter of the Court-packing proposal, Powell welcomed the Court's about-face to recognize that national problems required national solutions.¹³

Powell had his quarrels with the new Court. He was probably most disturbed at the way its readiness to abandon long-established precedents threatened to undermine the law as a predictable guide for behavior. But he must be considered a friendly critic. He was sympathetic to many of the new developments. He even accepted the legitimacy of the double standard of review under the due process clause, whereby the Court applied stricter scrutiny to legislation restricting so-called civil liberties than to statutes interfering with economic liberties.¹⁴ He knew most of the individual Justices and had long-standing, personal ties with at least two: Chief Justice Harlan Fiske Stone, who had been dean of Columbia Law School

9. See the complaints made by his archconservative colleague, William D. Guthrie, to Dean Harlan Fiske Stone on Jan. 14, 1915 and Nov. 29, 1916, *quoted in* J. GOEBEL, *supra* note 7, at 477.

10. See Powell, *Constitutional Aspects of Federal Income Taxation*, in *THE FEDERAL INCOME TAX* 51, 52 (R. Haig ed. 1921).

11. Powell, *The Judiciality of Minimum-Wage Legislation*, 37 *HARV. L. REV.* 545, 569 (1924).

12. Powell, *Commerce, Pensions, and Codes II*, 49 *HARV. L. REV.* 193 (1935). Powell was privately even more biting in his opinion of the Court's right wing:

I think that Mr. Justice Butler knows just what he is up to and that he is playing God or Lucifer to keep the world from going the way he does not want it to. Sutherland seems to me a naive, doctrinaire person who really does not know the world as it is. His incompetence in economic reasoning is amazing Mr. Justice McReynolds is a tempestuous cad, and Mr. Justice Van Devanter an old dodo.

Letter from Powell to J.N. Ulman (Jan. 27, 1937) *quoted in* A. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 457 (1960).

13. Powell, *From Philadelphia to Philadelphia*, 32 *AM. POL. SCI. REV.* 1 (1938).

14. Powell, *Conscience and the Constitution*, in *DEMOCRACY AND NATIONAL UNITY* 19-23 (W. Hutchinson ed. 1941).

during most of his time there, and his former Harvard colleague, Felix Frankfurter.

His views are especially significant because his standards for appraising Supreme Court performance were a major influence in shaping the direction of law school-based commentary. "More than has been generally recognized," Harvard Law School Dean Erwin N. Griswold observed at the time of his death, "Powell laid down the intellectual foundations for the developments in constitutional law which have been seen in the past twenty years. In the twenties he was an unorthodox and somewhat irreverent teacher of fledgling students. In the thirties and forties some of his students were no longer fledglings, and his influence was widely felt."¹⁵

Not much inclined to philosophical speculation, Powell never articulated a formal theory of constitutional adjudication. Rather, his underlying premises must be extrapolated from the detailed exegeses upon Supreme Court opinions that he presented in his writings and teaching. The nearest that Powell came to an explicit statement of his credo was in an undated memorandum in response to a proposal to abolish course examinations.

[My] attitude, briefly put, is that the Supreme Court is authoritative, that their decisions must be accepted by the students to the extent that they are accepted by the court itself, that cases are not wrong because I would have decided them otherwise or because the student would have decided them otherwise, are not wrong because they can't be fitted by me or by the student into a system. This attitude is that many of the formulae announced by the court are insufficient reasons for the decisions, that we must regard what the court actually does sometimes to the neglect of what it says, that there are competing formulae that may be pulled by majority and minority, that the work of the court is predominantly that of making practical adjustments rather than of discovering doctrine, that doctrine is more often instrumental to opinion writing than to decision-reaching, that the necessity of drawing a line somewhere means that it is often drawn very narrowly between two cases so much alike that they would naturally be put on the same side of the line except that the repetition of the process in the succeeding close cases would shove the line farther to the right or to the left than the court thinks it ought to go. . . . My emphasis is on process, process, process, on particularities, particularities, particularities, on cases, cases [,] cases, on the contemporary court, on resolving competing considerations, on watching for practicalities not likely to be expressed in opinions in which the court pretends that the case is being decided by its predecessor rather than by itself.¹⁶

That approach was the antithesis of the training Powell had when he himself was a student at Harvard Law School. Holding sway at that time was the Langdellian model of law as a science, with judges simply applying established general principles to indi-

15. 69 HARV. L. REV. 793, 794 (1956).

16. Powell, Memorandum on Abolishing Course Examinations, (n.d., Box A, folder A9, Powell Papers).

vidual cases via a process of deductive logic. Powell's work with Frank J. Goodnow at Columbia marked the first step in his "getting de-Harvardized." A pioneer in the realistic school of political science, Goodnow taught that the student of American government must look behind the formal structure laid down on paper to find how things were done in fact. Nor did he shy away from applying that same mode of analysis to judicial decisionmaking. "I couldn't escape seeing from him," Powell recalled, "how courts actually behaved in public law."¹⁷ Under Goodnow's direction, Powell began his scholarly career with an investigation of what judges did in the emerging area of administrative law. He found that despite continued lip-service to a strict doctrine of separation of powers, the courts repeatedly had sanctioned departures from that principle. "The practical necessities of government," he concluded, "have compelled the courts to overcome the difficulties raised by the doctrine of the separation of powers. . . . The doctrine of the separation of governmental powers, then, as a complete denial of the capacity of one department of government to exercise a kind of power assumed to belong peculiarly to one of the others, does not obtain in our public law beyond the confines of the printed page."¹⁸

The major focus of Powell's interest became the study of the constitutional problems arising out of the federal system—intergovernmental tax immunities, state regulation and taxation impinging upon interstate commerce, and the scope of congressional power under the commerce clause. Although most of these cases involved technical and abstruse legal questions, even here Powell found a record of judicial twistings and turnings that belied the existence of controlling first principles. To the extent that the Court maintained a facade of consistency, that result was achieved by making disingenuous, even transparently meaningless, distinctions.¹⁹ The only general rule he could discern regarding state regulation of commerce, for example, was that the states could regulate commerce but not too much in a given instance.²⁰ The determinative role of judges' personal values and attitudes was even more apparent when broad questions of policy were at stake. Powell sharply attacked the *Adkins* decision striking down the District of Columbia mini-

17. Letter from Powell to Jerome Frank (Nov. 5, 1930) (Box A, folder A5, Powell Papers). For Goodnow, see H. COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880's*, at 325-28 (1950).

18. Powell, *Separation of Powers: Administrative Exercise of Legislative and Judicial Power, I. The Delegation of Power to Act*, 27 *POL. SCI. Q.* 215, 227-28, 238 (1912).

19. See Powell, *An Imaginary Judicial Opinion*, 44 *HARV. L. REV.* 899 (1931).

20. T. POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 178 (1956).

mun wage law for women, arguing that whether or not a statute constituted a deprivation of liberty in denial of due process, “depends . . . in large part upon the composition of the court of last resort at the particular time when the issue comes before it.”²¹ And he showed how accidental factors prevented the case from reaching the Court until personnel changes had transformed a probable majority in favor of the legislation into a majority for its invalidation. Not only did such cases turn upon the Justices’ “personal views of desirable governmental policy,” but all too often the opinions consisted of “patently argumentative justifications rather than inducing reasons.”²²

Powell thought it overly simplistic to assume—as Beard had appeared to do with the Founding Fathers—that human motivation was reducible to the pursuit of economic self-interest. Like the rest of humankind, judges were influenced by a complex set of values, attitudes, and emotions, of which they themselves were not always fully aware.

Judges argue from undisclosed assumptions, as you and I argue from undisclosed assumptions. Judges seek their premises from facts, as you and I strive to do. Judges have preferences for social policies, as you and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, passions. They are warmed and cooled by the same winter and summer and by the same ideas as a layman is . . . Human beings performing a human task—that is the picture thrown on the screen for me by the words “constitutional law.”²³

Even personality differences could not be ignored. Judges differed in the degree of self-confidence in the correctness of their decisions and thus in their conception of the judicial role. “This is why,” he pointed out, “in explaining the determination of constitutional issues we must take account of the temper, as well as of the outlook, of the judges before whom the issues chance to come.”²⁴ Powell’s view of judicial behavior paralleled the position of the so-called legal realist school.²⁵ But he did not feel fully comfortable with that label. The crux of his difficulties with legal realism lay in what he saw as its nihilistic implications. “Those who see law as judicial whim or fiat,” he admonished, “are partly right, but only partly.

21. *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

22. Powell, *supra* note 11, at 546, 553, 555.

23. Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. OF PHIL. PSYCHOLOGY AND SCI. METHODS 645, 648, 653 (1918).

24. Powell, *supra* note 11, at 573.

25. Karl N. Llewellyn included Powell in his list of legal realists. K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 46-47, 74-76 (1962). He was similarly classified in H. REUSCHLEIN, *JURISPRUDENCE—ITS AMERICAN PROPHETS: A SURVEY OF TAUGHT JURISPRUDENCE* 254-56 (1951).

Those who see the law as *only* this or *only* that see but narrowly.”²⁶

While individual idiosyncrasy was inevitable in judicial decisionmaking, Powell aspired to restrict—or at least to restrain—its role by persuading judges to stop taking refuge behind abstractions and instead examine the practical consequences of a decision in the real world. In his 1911 work *Social Reform and the Constitution*, Goodnow had called upon the Supreme Court to engage in conscious adaptation of the Constitution to the social changes wrought by industrialization.²⁷ Even more influential in directing Powell toward an instrumentalist conception of the law was his friendship with his fellow Vermonter John Dewey.²⁸ “[S]ince law is a rule to govern human relations,” Powell elaborated,

the wisdom of any rule of law is essentially dependent upon its effect on human relations. But this effect is necessarily forecasted and evaluated by a process of ratiocination rather than of experimentation. And the ratiocination is all too seldom controlled or guided by any special and exact knowledge of the social and economic conditions which create the need for law. . . . [M]uch more of our legal reasoning needs to be subjected to the acid test of fact.²⁹

When dealing with state regulation or taxation of commerce, the Court should “invoke practical considerations,” or apply what he called “a little bit of common sense,” to weigh the benefits to local community interests against the degree of interference with the national economy.³⁰ The crux of his indictment of the Court’s restrictive interpretation of congressional power in *Schechter*³¹ was the Court’s pronouncing “pontifical conclusions with all too little sign of mastery of the elements of the problems that the conclusions seek

26. T. POWELL, *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 269, 279-80 (1941).

27. For the significance of this work, see R. HOFSTADTER, *THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON* 202-03 (1968), and Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 *AM. J. OF LEGAL HIST.* 288, 293 (1971).

28. See Dewey, *Logical Method and Law*, 10 *CORNELL L.Q.* 17 (1924): “[G]eneral legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in concrete situations” *Id.* at 26. In an undated letter to Dewey (Box A, folder A4, Powell Papers), Powell recounted:

how much I owe to you. . . . I certainly wasn’t conscious of the ways judges think they think until we began to have talks together. I remember that one time very soon after I got to know you, I told you that legal cause was nothing but picking someone in the chain of causation upon whom for reasons of policy the law wanted to impose the responsibility. I didn’t know this a minute before I told you. It was merely finding an illustration of what you had been saying about something else. I had been taught legal cause as a branch of physics. . . . I don’t think I’d be called a philosopher by most of the devotees of philosophy, but you have given me philosophy as a tool to hew a path through my legal woods. . . .

29. Powell, *Law As a Cultural Study*, 1917 *A.B.A. REP.* 572, 581.

30. T. POWELL, *supra* note 20, at 139, 170, 176.

31. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

to solve.”³²

Powell, however, was not as thoroughgoing an instrumentalist as his accompanying rhetoric would suggest. While he acknowledged that the social sciences had much to teach the legal fraternity, he recognized that the social sciences had not—and probably never would—supply definitive answers to controversial policy issues. And even if social scientists developed the tools to do so, he doubted if judges could acquire sufficient expertise in such matters to make more than a guess-timate about the social and economic consequences of a decision.³³ More important, he himself had been only partially de-Harvardized. His own *forté* lie in the analytical parsing of judicial opinions, and he remained firmly convinced that the case-method of teaching law was the way *par excellence* of developing the ability to think.³⁴ In order to limit judicial discretion, Powell’s principal solution accordingly was to demand that judicial opinions “satisfy the mind of the trained observer”—i.e., the law school professor. At a minimum this standard required competency in the technical niceties: internal coherence, consistency with professed criteria, and fair treatment of the existing precedents whether favorable or not. The most vital ingredient, however, was “intellectual rectitude”; judges must “support their judgments with that degree of candor” that will provide “adequate disclosure of the real steps by which they have reached where they are.”³⁵

Powell was thus an intellectual father of what became known as the “Reasoned Elaboration” school of Supreme Court commentary.³⁶ Indeed, his mind was sufficiently complex and subtle that even this categorization requires qualification. He parted company with men like Herbert Wechsler who regarded adherence by the Court to so-called neutral principles, those applicable beyond the immediate case at bar, as the keystone of reasoned articulation.³⁷

32. Powell, *supra* note 12, at 238.

33. See Powell, *How Philosophers May Be Useful to Society*, 31 INT’L. J. OF ETHICS 289 (1920-1921).

34. Powell, *Law As a University Study*, 19 COLUM. U.Q. 106, 109-11, 122-25 (1916-1917). See the perceptive comments on this point in W. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 118-22, 151-53 (1982).

35. Powell, *Some Aspects of American Constitutional Law*, 53 HARV. L. REV. 529, 549-50, 552 (1940).

36. The term appears to have been coined by one of Powell’s former students, Henry M. Hart, Jr. For acknowledgment by one of the leading figures of the school of Powell’s influence, see H. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS* 27-28 (1961). The rise and underlying premises of this approach are examined in White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

37. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Powell's judicial hero was Oliver Wendell Holmes, Jr.; ergo he retained a Holmesian skepticism about general principles deciding particular cases.³⁸ The "principle of polarity," which Powell learned from his friend Morris R. Cohen, reinforced this skepticism. According to it, the world consisted of "opposites" whose "seeming contradictions" could be resolved "by finding the proper distinctions and qualifications."³⁹ Such pragmatic adjustment was inherent in Powell's own major scholarly interest, namely the problem of national-state relations in the federal system. But he thought the same mode of analysis was applicable when the question was, as in *Gobitis*,⁴⁰ deciding what was owed to Caesar and what to individual conscience. "The logical solution of a dilemma is to seize one horn and neglect the other. The logical solution is a *tour de force*. But there remains the solution by judgment, and judgment is not exercised by confining consideration to the merits of the chosen horn. . . . Reconciliation involves weighing of competing considerations. It involves choice between them as to which shall prevail in the particular conflict."⁴¹

Men of good will and sound intellect inevitably would disagree on what choice should be made. Powell himself thought the majority in *Gobitis* had struck the balance wrongly: "The public need for coerced and insincere saluting of the flag by little children seems to me to be trivial . . ." ⁴² In the final analysis, therefore, the only meaningful restraint upon judicial discretion was political in the broad sense. Powell thought it was irrelevant to debate whether the framers had intended the Supreme Court to exercise a veto over legislation. The issue had been settled by the long public acquiescence in the practice. "To one who views a constitution of government as something deeper and more vital than a written parchment, the power over legislation now exercised by the judiciary rests on as firm a foundation of grant as to any of the carefully enumerated functions of the legislature or of the executive."⁴³ The survival of individual decisions similarly depended upon popular acceptance in the long run. Here was the lesson he saw in the 1937 crisis. To paraphrase his conclusion about the power of the states over com-

38. T. POWELL, *supra* note 20, at 33-40.

39. M. COHEN, REASON AND NATURE: AN ESSAY ON THE MEANING OF SCIENTIFIC METHOD 165-67 (1931). For the importance of this concept in Cohen's thought, see D. HOLLINGER, MORRIS R. COHEN AND THE SCIENTIFIC IDEAL 79, 117-21, 232-33 (1975). On Powell's friendship with Cohen, see L. ROSENFELD, PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS at xii (1962).

40. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

41. Powell, *supra* note 14, at 26, 24.

42. *Id.* at 29.

43. Powell, *The Courts and the People*, 27 POL. SCI. Q. 682, 682 (1912).

merce, the Supreme Court had power but not too much. Judicial review could survive so long as the Justices exercised due restraint. "So long as courts have the last say we have judicial government, whether courts approve or condemn what others have done. This, however, still leaves the vast gulf between the alternatives. Judicial condonation puts responsibility onto the political agencies which remain free to respond to popular pressure for change."⁴⁴

Powell would bring those standards of judgment to bear when making his reply to Beard's query.⁴⁵

February 3, 1944

Dear Charlie:

I think you are right that the Supreme Court opinions show increasing confusion and imprecision in thinking and writing and that F.F. at least has in the past shown a marked tendency to resort to fancy phrase making. He seems to me of late, however, to have been curbing this disposition.

Accepting all this, however, I would not say that the intellectual standards of the Court are falling. I think that they have more able intellects on the Court now than at any earlier season in my memory, though no one is such a giant as Holmes or Brandeis. One trouble is that they suffer somewhat from intellectualism. Felix in dissent and in concurring opinions has devoted himself to a considerable extent to slamming inadequacies in the intellectual methods of his opponents and to that extent neglecting to deal with the issues of the case. He is still the professor correcting the intellectual processes of others, and in general the intellectual processes by which the results are supported may have little relation to the way those results are reached or to the wisdom of them.

The reason for confusion and imprecision is that the judges are making a lot of new law without confessing it. Black is still the legislator wanting each case to go the way he wants it to go, irrespective of how it fits into the established system or of what it does to that system. He is exceedingly competent intellectually and an acute debater. As such a debater, he invokes analogues that a thorough legist would know are inapposite. Doubtless he knows so too. His ideal is to write so that laymen can understand his opinions, and he puts things in that look much better to laymen than they do

44. Powell, *Our High Court Analyzed*, N.Y. Times, June 18, 1944, (Magazine), at 45.

45. Box A, folder A19, Powell Papers. I wish to thank Professor Harry S. Martin, III, Librarian at the Harvard Law School Library, for permission to publish.

to lawyers.⁴⁶

The only real intellectual flop on the Court is Murphy.

Stanley Reed is not overly keen intellectually, but he is a solid citizen and a fine human being. He votes with the Government in the fields in which he argued for the Government when Solicitor General. In other fields he wabbles, and I don't find in him any firm rudder. The boys who argue before him say that he asks blundering questions which deflect them from the real matter in issue. I don't think that he transmutes a record into clarity or succinctness. If you will compare what he did with what Bill Douglas did in some intricate railroad reorganization cases, you will see that Bill after mastering his material got outside it and presented it as his own, whereas Stanley presented it in undigested form.

Rutledge has a good, pedestrian mind and does all his work slowly and carefully. There are no flashes, and he was not called worthy of the top league in law teaching. He was appointed for reasons of geography and social slant.

Bob Jackson seems to me on the whole to be the best of the new ones. He doesn't have a Grand Rapids mind for any style of intellectual or social furniture. He has gayety and good sense. I think it was wise for the President to make Stone Chief Justice rather than Bob, but I should like to see Bob get promoted after Stone retires.

Bill Douglas is a superior workman with a determined slant to the left, being almost uniformly subservient to Black's leadership. He can take the most involved records and handle them adequately and can do more than his share of the job. Felix in private talks bitterly about both Black and Douglas, saying that the former has no sense of legal system and cares only for picking the preferred winner in a case and that the latter is running for President.

Felix regards himself as a disciple of James Bradley Thayer and Mr. Justice Holmes, with his main tenet to live up to the canon of not declaring anything unconstitutional unless its unconstitutionality is free from doubt. I don't think that he does live up to that canon when he says that state courts cannot enjoin picketing.⁴⁷ Un-

46. In a follow-up letter to Beard (June 6, 1944, Box A, folder A19, Powell Papers), Powell gave a more negative appraisal: "I am pretty much off Mr. Justice Black at present. At the beginning he was pretty frank in honest rejection of long-established canons. Now that there are new canons finding a place, he is sly and crooked in claiming for them more spread than what they merit. He also does some pretty lame things intellectually or judgmentally."

47. *Frankfurter* was more ambivalent upon this issue than Powell indicates here. In *American Federation of Labor v. Swing*, 312 U.S. 321 (1941), he did invalidate a state court injunction against stranger picketing (that is, picketing by workers not employed by the picketed firm) on first amendment grounds. Although the Illinois Supreme Court had upheld the

less one is absolute in adherence to the canon, he has to make a choice in every case and is responsible for his choice.

Felix does, however, care for legal traditions and for the judicial institution, and this explains many of the stands which he takes for which his liberal friends criticize him. Mark Childs,⁴⁸ who came back from England recently, told me that Harold Laski was quite off Felix.⁴⁹ I can't help surmising that some of Felix's posi-

injunction on the rationale that those enjoined were not employees of the firm, Frankfurter held that "a state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." *Id.* at 326. And in *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943), he spoke for a unanimous bench in overturning on the basis of *Swing* a state court injunction against picketing a cafeteria in which the owners were the only workers. But he balked against extending this protection of picketing to include those not "engaged in the same industry." *Swing*, 312 U.S. at 326. In *Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe*, 315 U.S. 722 (1942), Frankfurter spoke for a five-to-four majority in upholding a Texas court's injunction, as in violation of that state's antitrust law, against picketing by a carpenters union local or a restaurant whose owner had engaged a contractor employing nonunion labor to construct a building not connected with the restaurant. While "peaceful picketing may be a phase of the constitutional right of free utterance," he concluded, the states still had the power to forbid the parties to a labor dispute "to conscript neutrals having no relation to either the dispute or the industry in which it arose." *Id.* at 727-28. And in *Milkwagon Drivers Union of Chicago v. Meadowmoor Dairies*, 312 U.S. 287 (1941), he had upheld for a six-to-three bench the power of state courts to enjoin picketing that was itself peaceful when carried out "in a context of violence" because "the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." *Id.* at 293-94.

48. Marquis William Childs was born March 17, 1903, in Clinton, Iowa. After receiving his A.B. from the University of Wisconsin in 1923, he worked for the United Press before joining the *St. Louis Post-Dispatch* in 1926. He was a member of its Washington staff from 1934 to 1944. An admirer of the Swedish experiments with cooperatives, he held that country up as a model for the United States in his bestseller entitled *SWEDEN: THE MIDDLE WAY* (1936). From 1944 to 1954, he was a widely distributed columnist for the United Feature Syndicate. He rejoined the *Post-Dispatch* in 1954, first as a special correspondent and then, until his retirement in 1968, as its chief Washington correspondent. Childs had excellent connections that reached into the Supreme Court—including close ties with Brandeis and Stone—and even played an important behind-the-scenes role in the Court-packing fight. For biographical information, see 1943 *CURRENT BIOGRAPHY* 126-28 and *WHO'S WHO IN AMERICA* 1986-1987, at 494. His autobiography, *WITNESS TO POWER* (1975), is disappointingly thin.

49. Harold Joseph Laski was born June 30, 1893, in Manchester, England, the son of a prosperous Jewish cotton shipping merchant. He studied at New College, Oxford, winning a first class in history in 1914. Turned down for military service on medical grounds, he accepted a lectureship at McGill University in Canada. From 1916 to 1920, he taught political science at Harvard, where he forged lifelong friendships with Justices Holmes and Frankfurter. His prospects for future promotion were doomed because of his support for the 1919 Boston police strike; instead he accepted a lectureship at the London School of Economics in 1920. There he became professor of political science in 1926 and held this position until his death on March 24, 1950. His major scholarly interests were the political thought of the sixteenth and seventeenth centuries, the idea of sovereignty, and the nature of the state. His facile pen, however, ranged, if at times superficially, over a broad variety of topics, including American politics and institutions. At the same time, he was active in the British Labour Party, serving on its executive committee from 1936 to 1949. Whatever Laski's private reser-

tions are taken because Black takes the opposite one, but of course only One Who Knoweth All could be sure about it.

I think that the boys behave pretty badly in seizing upon insignificant points of difference and in slamming each other. Felix always did it to his friends, but we knew he loved us and didn't really despise our intellects or our characters as much as his debating slams might indicate. I gather, however, that some of his colleagues are not equally complacent under his shafts.

Gus Hand⁵⁰ told me a while ago that he told Stone that he had a group of able individuals, but not a court, and asked him why he couldn't keep them in line better. He answered that all that he could do was to persuade them from time to time to eliminate some of the things that they put in their draft opinions.

When Bob Jackson was here at a Law Review dinner recently, I raised the point with him, and he answered that he was glad that for a time they were differing so among themselves, since the general public had the notion that they would all be rubber stamps for the President or for the same point of view and it was good to establish that they were independent. Bob said, however, that he hoped that before long they could get more in agreement. Gus Hand thought there was nothing in favor of their present splitting off in so many directions and discounted the notion that it was important to correct public opinion that they were rubber stamps.

I am greatly interested in watching Roberts. Evidently he was converted by Hughes or by the situation to the conclusion that the position of the Court as an institution required that he should sustain the constitutionality of all federal legislation.⁵¹ However, he

uations about Frankfurter's performance on the Court, the two remained sufficiently close that Frankfurter contributed an affectionate appreciation to a Laski symposium held in 1961 by the British Broadcasting Company. See *OF LAW AND LIFE AND OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 1956-1963*, at 217-23 (P. Kurland ed. 1967). For a more critical appraisal of his political thought, see H. DEANE, *THE POLITICAL IDEAS OF HAROLD J. LASKI* (1955). See K. MARTIN, *HAROLD LASKI, 1893-1950* (1953), for a biography by a friend and admirer.

50. Augustus Noble Hand, the first cousin of Learned Hand, was born July 26, 1869, in Elizabethtown, N.Y. Graduating Harvard College *magna cum laude* in 1890, he received his LL.B. from Harvard Law School in 1894 and practiced law in New York City from 1897 to 1914. A lifelong Democrat, he was appointed by President Woodrow Wilson in 1914 to be a federal district judge for the Southern District of New York. The reputation he gained as one of the country's ablest trial judges led to his elevation in 1926 by President Calvin Coolidge—at the behest of Chief Justice William Howard Taft—to the Court of Appeals for the Second Circuit. He retired in June 1953, and died October 28, 1954. Biographical information and a detailed examination of his years on the Second Circuit bench are in M. SCHICK, *LEARNED HAND'S COURT* (1970).

51. At the time of the 1937 crisis, Powell was not so generous in his appraisal. Noting Roberts's turn-about on the constitutionality of state minimum wage laws between *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) and *West Coast Hotel Co. v. Parrish*, 300

remains independent and lawyerlike in statutory interpretation and in the interstitial common-law elements in his job.

I think it outrageous that his colleagues are so ready to reverse former statutory interpretations that Congress has left untouched. If Congress reverses them by a new statute, its action is wholly prospective. When the Court reverses, it is retrospective, and lawyers justifiably get the notion that they can no more have reliance on judicial decisions in this realm. Just last Monday, Roberts pointed out the evils of such reversals, and Felix joined with him.⁵² However, Felix has enough sins of his own to invite expiation.

Stone as Chief is no such leader or master as Hughes was. In conference he permits the fullest exploration at great expense of time. In many respects this is wise. In some, it is not. As to his own views, I feel that quite often he goes too far in new directions, though on the whole his record will be that of a high-grade statesman. It certainly is an amazing development from the Dean whom you and I knew in old days.⁵³

U.S. 379 (1937), Powell observed sarcastically: "I am not condemning Mr. Justice Roberts for changing sides or for acquiring enlightenment from all possible sources; but I should have been glad if he had thought it fitting to enlighten others with respect to what had enlightened him." Powell, *supra* note 13, at 20.

52. See *Mahnich v. Southern Steamship Co.*, 321 U.S. 96 (1944), in which a seven-to-two majority overruled the earlier unanimous decision in *Plamals v. S.S. Pinar del Rio*, 277 U.S. 151 (1928) regarding the liability of a shipowner for an injury suffered by a seaman under the Jones Act of 1920. But what appears to have most exercised Roberts (and probably Frankfurter, who concurred in his dissent) was the public announcement by Black, Douglas, and Murphy that they planned to vote to reverse *Gobitis* at the first opportunity. In response, Roberts angrily protested that the tendency of the Court to disregard precedent had "become so strong . . . as . . . to shake confidence in the consistency of decision and leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow." *Mahnich*, 321 U.S. at 113.

53. Powell probably had in mind Stone's strictures in his Hewitt Lectures against exponents of "the so-called sociological jurisprudence" for advocating that judges "should consciously endeavor to mold the rules of law to conform to their own personal notions of what is the correct theory of social organization and development, even though the result should be in many cases to disregard or overturn established rules of law." The judge's duty, he affirmed, "is primarily to ascertain whether the facts proved in the case before him are controlled by rules of law which may be found in the precedents." And he went on to praise the courts' interpretation of the due process clause of the fourteenth amendment—including explicitly the much-assailed decision by the New York Court of Appeals in *Ives v. South Buffalo Ry Co.*, 201 N.Y. 271 (1911), holding unconstitutional that state's workmen's compensation law—for the protection thus afforded against "the injustice of special and class legislation." H. STONE, *LAW AND ITS ADMINISTRATION* 41-44, 145-55 (1915). For Powell's explanation of the influences responsible for Stone's transformation, see A. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 124, 254 (1956).

This is enough for a starter. I wish we could have a long session together and reminisce over old times and fill in all the details that I have had to leave out here.

Affectionately yours,
Charles A. Beard, Esq.
Pine Crest Inn
Tryon, North Carolina