

RECALLING T.R. POWELL'S COURSE IN CONSTITUTIONAL LAW

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After accepting the preceding article by Professor Braemer for publication, we learned that a colleague of ours had been a student of Powell's. He graciously agreed to share his memories of Powell's classes.—The Editors

In my senior year at Harvard College (1934-35) I audited Professor Thomas Reed Powell's third-year course in Constitutional Law given in Austin Hall at the Law School. There were approximately 150 to 200 law students in the class which met twice a week for both semesters. I was not formally enrolled as an auditor but simply sat in on almost all the classes. No one questioned my presence. I do not recall that any other undergraduates audited the course that year.

Professor Powell, then fifty-five years old, sat at his desk in the middle of the teacher's platform, wearing horn-rimmed glasses and looking somewhat owl-like. Virtually all the talking in the class consisted of a dialogue between Professor Powell and two third-year students. One of these students became a clerk to Justice Frankfurter and ultimately a famous liberal Washington lawyer. His name was Joseph Rauh. The other student in 1950 was appointed United States Attorney for the Eastern District of New York. He had a distinguished name: it was Cornelius Wickersham, Jr. Wickersham's views as a student of constitutional law were as far to the right as Rauh's views were to the left. The fact that Rauh had a sparkling sense of humor and that Wickersham did not, contributed to the fascinating, not to say exciting quality of many of the classroom discussions. Powell seized on the preconceptions, temperaments and high intelligence of these two students and called on them to answer his questions so that each student's views played off against the other's. In this manner, Powell revealed the major premises of constitutional law that were prevalent at the time.

It was a joy even for a non-law student to attend these classes in this year-long course when Powell's flashing, cynical witticisms

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punctuated his trialogue with Rauh and Wickersham. This was the era in which some legislatures required teachers to take an oath to support the Constitution and some teachers attacked the legislation as unconstitutional. Powell cracked: "I have no objection to taking an oath to support the Constitution; after all, it has supported me all my life."

But to the contemporary law professor, the most remarkable aspect of Powell's course was that it covered only the commerce clause and some aspects of the due process clauses. I do not recall that the class overtly discussed any other part of constitutional law. Moreover, the discussion centered around only one or two cases: *Hammer v. Dagenhart*¹, and (much more briefly) *Adkins v. Children's Hospital*.² If a student in the class learned about the substantive aspects of any other part of constitutional law, he (there were no women at Harvard Law at that time) would have had to read the book assigned for the course on his own. That book was compiled by Professor James Parker Hall, Dean of the University of Chicago Law School. The book was in the American Casebook Series and covered almost 1900 pages. Students used the 1913 edition enlarged by a 1926 Supplement bound into the 1913 edition. (Constitutional law was slower to change in those days.) The two cases on which Powell dwelt were in the Supplement. It is interesting that, with regard to *Adkins v. Children's Hospital* (decided in 1923), Professor Hall suggested that it be considered immediately following the famous *Lochner* case³ (decided in 1905) while *Hammer v. Dagenhart* (decided in 1918) should be taken up right after *McCray v. United States*,⁴ decided in 1904 and long since forgotten.

I cannot explain how the sixty hours in that course slid by when only two cases were considered in depth. But the Powell method of speaking can be described. He had a rapier-like thrust of mind, exhibited sometimes in long, rolling, Macauley-like sentences and sometimes in the form of phrases meant to pierce the pontification in a Court opinion. One example from his writings conveys the essence. It is from an address given to the North Carolina Bar Association⁵ in August 1935, about three months after the end of the class, and concerns a small portion of Mr. Justice Roberts's opinion in the *Railway Pension* case.⁶

1. 247 U.S. 251 (1918).

2. 261 U.S. 525 (1923).

3. 198 U.S. 45 (1905).

4. 195 U.S. 27 (1904).

5. Powell, *Some Aspects of Constitutionalism and Federalism*, 14 N.C.L. REV. 1 (1935).

6. *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330 (1935).

"Our duty, like that of the court below, is fairly to construe the powers of Congress, and to ascertain whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation. The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality. Even should we consider the Act unwise and prejudicial to both public and private interest, if it be fairly within delegated power our obligation is to sustain it. On the other hand, though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare.⁷"

Behold these nine automatons, with minds swept free of every human frailty and every human preference, with no interest in the income of carriers or the well-being of those whose hands are on the throttle and whose eyes are on the track, with no notions of public policy, behold them reading the Constitution with some mechanical instruments of vision and of understanding and finding there between the lines or beneath the words of 1787 and 1789 the answers to the questions of 1935!⁸

You did not come away from Powell's course with any system of values for deciding constitutional questions. Indeed, Frankfurter has said that Powell often told him that he (Frankfurter) furnished the students' minds after Powell cleared them of rubbish.⁹ And so, week after week of engaging Rauh and Wickersham in debate allowed Powell to destroy the premises and lack of logic in virtually every sentence of the two opinions on which he concentrated.

Joe Rauh has since told me that he recalls Powell had predicted that the Supreme Court was going to uphold the constitutionality of the NRA in the *Schechter* case. On May 27, 1935, the Court decided that the NRA was unconstitutional.¹⁰ That was either the day before or the day after the final exam in the course but today neither of us recalls which it was.

7. *Id.* at 346.

8. Powell, *supra* note 5, at 9.

9. F. FRANKFURTER, FELIX FRANKFURTER REMINISCES 292 (1960); see also Frankfurter, *Thomas Reed Powell*, 69 HARV. L. REV. 797 (1956), reprinted in F. FRANKFURTER, OF LAW AND MEN 258 (P. Elman ed. 1956).

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