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Introduction

In his tenure on the United States Supreme Court, Associate Justice Lewis F. Powell, Jr., has emerged as a key figure in cases dealing with education. With the Court frequently split five to four on school cases, Powell is often the swing vote, and even when in the minority, his dissenting opinions have exerted significant influence on later decisions. His jurisprudence in this area devolves from his extensive experience as a school board president and member of the Virginia Board of Education, and reflects his recognition of the competing forces at play in American public education. Powell's opinions reflect his attempt to balance these forces, to find a proper equilibrium between individual rights and those of the community. But while one can applaud his eschewal of a rigid doctrinaire approach to educational issues, his case by case evaluation provides little guidance for lower courts to develop a consistent judicial policy. The strengths and weaknesses of Powell's decision-making can be seen in cases dealing with desegregation, equal protection, the establishment clause, and school management.

When Richard Nixon appointed Lewis F. Powell, Jr., to the United States Supreme Court in late 1971, he expressed his belief that the Virginia lawyer would help shift the Court away from the liberal activism of the Warren years and toward support of the "peace forces." Together with William R. Rehnquist, whom Nixon appointed the same day, the President expected that Powell would favor law and order, and take a conservative, strict constructionist interpretation of the Constitution.[1]

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[1] N.Y. Times, Oct. 22, 1971, at 24.

Conservatives greeted Powell's nomination with joy. The Richmond (Va.) *Times-Dispatch* called it "brilliant," and declared: "No man in the country is better qualified—temperamentally, intellectually, and professionally—to serve on the nation's highest bench."[2] Supporters pointed to Powell's distinguished career with one of the South's largest and most prestigious law firms, his professional recognition as former president of the American Bar Association, the American Bar Foundation, and the American College of Trial Lawyers, and also his public service as a member of President Johnson's Crime Commission in 1967 and later on Nixon's Blue Ribbon Defense Panel. Professor Jon R. Waltz of Northwestern called Powell "a very fine lawyer . . . who has demonstrated he can work with the law, and he can do it superbly."[3]

Of equal importance to his later work on the Court was Powell's role as president of the Richmond School Board and of the State Board of Education during the difficult days of school desegregation in Virginia. Although politically allied to the conservative Byrd political machine, Powell refused to go along with the call for "massive resistance," and successfully managed to keep Richmond's schools open during the integration process. Committed to the rule of law, he steered a course between die-hard obstructionists on the one hand and activists who espoused civil disobedience on the other. Above all, he feared the "catastrophic effect" of closing schools, especially the "warping and corrosive" effect on children. Private schools, which sprung up all over the South to avoid court-ordered integration, did not appeal to Powell; only the well-to-do would be able to afford them, and the resulting social schism between rich and poor, as well as between white and black, would be disastrous.[4]

Some blacks objected to the nomination. Jeroyd W. Greene, a leading Richmond activist, charged that Powell belonged to two segregated clubs and that his firm discriminated against minorities.[5] Henry Marsh, later to be Richmond's first black mayor, asserted that while Powell had recognized the futility of massive resistance, he had evaded the spirit of the *Brown* decision, and had failed to implement any meaningful desegregation of the city's schools.[6] Congressman John Conyers of Michigan, representing the Congressional Black Caucus, also attacked Powell for his association with the white corporate power structure. "His defense of the

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[2] Richmond Times-Dispatch, Oct. 22, 1971, at 18.

[3] *Time*, Nov. 1, 1971, at 18.

[4] Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445, 459 (1972).

[5] Richmond Times-Dispatch, Oct. 24, 1971, at 1.

[6] *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Committee on the Judiciary*, 92nd Cong., 1st Sess. 393 (1971).

status quo [is] inconsistent with the kind of jurist that . . . is desperately needed for the Court in the 1970's and the 1980's."[7]

But Jean Camper Cahn, a black woman attorney associated with the Office of Equal Opportunity, lauded Powell's "capacity to empathize, to respond to the plight of a single human being to a degree that transcends ideologies or fixed positions." Although she had been initially leery of working with a "white lawyer from the ranks of Southern aristocracy," the experience had convinced her that Powell had those qualities essential for membership on the Court "to which I and my people so frequently must turn as the sole forum" for relief from oppression.[8]

Powell himself eschewed labels. "I don't categorize myself," he told a reporter. "My views may be liberal on one issue and conservative on another."[9] In his statement before the Senate Judiciary Committee, Powell touched more on the integrity of the judicial process than on substantive jurisprudential issues; judges had to decide cases on the basis of law and on the facts presented, always aware of the constitutional constraints involved. His sense of judicial restraint, he said proudly, derived from having studied with Felix Frankfurter at the Harvard School of Law.[10] This sense of balance also reflected his admiration for the second Justice Harlan, with whom he would often be compared.[11]

Although some commentators have attempted to label Powell "a core conservative,"[12] his opinions generally embody this flexible approach. In education especially, his writings on the Court reflect his understanding of the difficulties involved in administering public schools, as well as a strong attachment to particular values which he associates with the educational system. Powell wrote in an early case:

> Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features of the surrounding neighborhood. Community support, interest and dedication to public schools may well run higher with a neighborhood attendance pattern; distance may encourage disinterest. Many citizens sense today

[7] *Id.* at 380.

[8] *Id.* at 281.

[9] *Time*, Nov. 1, 1971 at 18.

[10] Hearings, *supra* note at 219.

[11] *See* Howard, *supra* note 4 at 451; Yackle, *Thoughts on* Rodriguez: *Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICH. L. REV. 181, 196 (1975); and Freund, *Justice Powell—The Meaning of Moderation*, 68 VA. L. REV. 169, 171 (1982).

[12] Russell W. Galloway, Jr., through a series of "disagreement rate tables," found Powell most closely aligned with the two most conservative members of the Court, Burger and Rehnquist. Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891, 930-31 (1981). But although he often agreed on result with the conservative wing, his reasoning represented a much more moderate position, and in one area at least, capital punishment, he has differed strongly from Burger and Rehnquist.

> a decline in the intimacy of our institutions—home, church, and school—which has caused a concomitant decline in the unity and communal spirit of our people. I pass no judgment on this viewpoint, but I do believe that this Court should be wary of compelling in the name of constitutional law what may seem to many a dissolution in the traditional, more personal fabric of their public schools.[13]

Christina B. Whitman finds in this view the key to Justice Powell's jurisprudence, one which "emphasizes the individual, but not the individual in isolation. Rather, it emphasizes the communal aspects of individual life, the expression of human variety through communtiy."[14] Powell also recognizes that in any community, limits exist on how people behave, and how far they can be pushed to conform to different expectations. In his opinions in cases dealing with education, Powell has indicated that beyond certain minimal constitutional guarantees and protections, he is willing to trust communities and local officials, reflecting local values and communal priorities, to establish educational policy.

Racial Integration

In his first term on the Court, Powell did not write any opinions in integration cases, but his vote in two companion cases involving school boundaries foreshadowed his later views.

Prior to 1967, Emporia, Virginia, had sent its children to the Greensville County schools. In that year, Emporia changed from a "town" to a politically independent "city," and announced its plans to establish its own school system. The District Court found Emporia's withdrawal would lead to a "substantial increase in the population of white students in the schools attended by city residents, and a concomitant decrease in the county schools," a situation which would frustrate an earlier desegregation decree, and enjoined the city from implementing the plan.[15] The court of appeals reversed, holding the realignment benign and not a mask for discrimination.[16] The Supreme Court upheld the district court, with Justice Stewart noting that it had been right to look at the *effect* rather than the *purpose* of the proposal. Conceding that facially the plan involved no discriminatory intent, so long as the available data indicated that increased segregation would result, the federal courts could intervene.[17]

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[13] Keyes v. School Dist. No. 1, 413 U.S. 189, 246 (1973).

[14] Whitman, *Individual and Community: An Appreciation of Mr. Justice Powell*, 68 VA. L. REV. 303 (1982).

[15] 309 F. Supp. 671 (E.D. Va. 1970).

[16] 442 F.2d 570 (4th Cir. 1971).

[17] Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).

Chief Justice Burger, joined by Blackmun, Powell, and Rehnquist, dissented, and found nothing in the record to indicate a deliberate effort to frustrate the earlier order to dismantle a dual school system. They also attacked the majority for failing to articulate a standard by which lower courts could judge whether the effect would violate the Constitution. Here both the new school systems would be unitary, with children in the same grade attending the same school. The courts were not charged with achieving a full and complete racial balance, but had to take legitimate geographical facts into account.[18]

Burger noted that if the plan had been designed to "perpetuate racial segregation . . . or otherwise frustrate the dismantling of the dual system in that area, I would unhesitatingly join in reversing," and he showed that he meant that in the companion case of *United States v. Scotland Neck City Board of Education*.[19] In North Carolina, a state statute created a new school district for Scotland Neck out of the larger Halifax County system. The majority, using a rationale similar to *Emporia*, held the move unconstitutional, and the earlier dissenters now concurred. Burger explained that in this case the state statute would not only have the effect of continuing segregated schools, but had been purposely designed to do so. The difference, simply, revolved around the distinction between *de jure* and *de facto* segregation.[20] Although Powell joined in the concurrence, he evidently did not feel comfortable with this distinction, and he explored it at length when he concurred in part and dissented in part the next term in a case involving segregation in a city outside the South.[21]

In Denver, the overall school population consisted of sixty-six percent Anglo students, fourteen percent black, and twenty percent Hispanic, but local school authorities were charged with having used patterns of residential segregation to ensure that schools in predominantly white areas of the city remained almost exclusively white. Following the assassination of Martin Luther King, Jr., the school board voted to integrate the system through city-wide busing. This so angered white citizens that at the next election they chose a new board, which immediately rescinded the earlier plan and replaced it with a voluntary pupil transfer program.

Lower courts, and then the Supreme Court, found Denver officials guilty of racism evidenced through a deliberate pattern of gerrymandering school districts to maintain a *de facto* dual system. Black elementary schools fed black middle and high school, which were staffed primarily

[18] *Id.* at 471.
[19] 407 U.S. 484 (1972).
[20] *Id.* at 491.
[21] Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

by minority teachers, a pattern common to many northern and western cities. The Court further found that although the school board policy affected some districts more than others, "racially inspired school board actions," as Justice Brennan noted, "have an impact beyond the particular schools that are the subject of those actions."[22] The Court remanded the case to the district court, which ultimately ordered a complete desegregation of the entire system.[23]

In his separate opinion, which drew support from none of his brethren, Powell called for an end to the *de jure/de facto* distinction. "If our national concern is for those who attend such [segregated] schools," he declared, "rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta."[24] The only way to do this is to require that "once the State has assumed responsibility for education, local school boards will operate *integrated school systems* within their respective districts."[25]

Powell's difference from the majority lay in the Court's basing its decision on the deliberate actions of the school board to foster and maintain a dual system, rather than looking at the root cause of the problem, the residential segregation within the district. Neither in this case nor in others, as we shall see below, was Powell willing to expand this doctrine outside the geographic bounds of an established school district. But within these districts, he argued that any discrimination violated the equal protection holding enumerated in the first *Brown* case.[26] Specifically, he called on the Court and the nation to recognize that no difference existed, insofar as social and education effects upon children were concerned, between segregation resulting from state action in the South and from residential patterns in the North.

Nearly all previous court actions had dealt with southern school systems, and the South had taken major steps to eliminate dual public systems. But the problem, as well as the constitutional and educational goals involved were, in Powell's opinion, of national concern, and the remedies therefore had to be applied on a national basis. Where segregated schools existed anywhere, and for any reason, he would find "a prima facie case that the duly constituted public authorities . . . are sufficiently responsible to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely

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[22] *Id.* at 203.
[23] 368 F. Supp. 207 (D. Colo., 1973).
[24] 413 U.S. at 219.
[25] *Id.* at 225-26 (emphasis in original).
[26] Brown v. Board of Educ., 347 U.S. 483 (1954).

integrated school system."[27]

Powell went on to explain that an "integrated school system" presupposed affirmative measures as well as a racially neutral state policy, but he would not require a totally uniform system, in which every school in the district had exactly the same racial composition.[28] He recognized that local conditions could result in legitimate differences which were acceptable so long as the overall policy strove to create a fair and equal environment. "A school which happens to be all or predominantly white or all or predominantly black is not a 'segregated' school in an unconstitutional sense if the system itself is a genuinely integrated one."[29]

Lest it be thought that Powell was calling for massive busing or the total reorganization of the schools, he made it clear that he expected local authorities and courts to move carefully and with due regard to community feelings, so as to avoid an exodus of white pupils to private or suburban schools. Nothing in the Constitution required busing as the sole or even the main remedy, and he urged a return to the rationale of earlier cases, where courts in fashioning remedies would be "guided by equitable principles which include the adjusting and reconciling [of] public and private needs."[30]

Powell's opinion, for all its limiting language, suggested a major expansion of the original desegregation holding, imposing a unitary standard, measured by the fact and extent of racial segregation, upon the entire nation. The majority's ruling, in his view, continued a double standard. The South, with its long history of state-sponsored discrimination, would be held to strict accounting for any traces of segregation, while the North, eschewing actual state action, would be able to maintain segregation by merely taking advantage of existing residential patterns. Moreover, eliminating the effect/intent distinction of official action, and looking at action, and looking at the actual amount of integration, would give lower courts an easier standard by which to evaluate complaints of discrimination.[31]

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[27] 413 U.S. at 224.

[28] Powell has always sought a rule of reason rather than ironclad guidelines. In a biting dissent in an apportionment case he wrote: "I would not have thought that the Constitution—a vital and living charter after nearly two centuries because of the wise flexibility of its key provisions—could be read to require a rule of mathematical exactitude in legislative reapportionment." White v. Weiser, 412 U.S. 783, 798 (1973).

[29] 413 U.S. at 227.

[30] *Id.* at 251 (citing Brown v. Board of Educ. (*Brown II*), 349 U.S. 294, 300 (1955)).

[31] Note, Case Comment: Keyes v. School Dist. No. 1: *Unlocking the Northern Schoolhouse Doors*, 9 HARV. C.R.—C.L. L. REV. 124, 145 (1974).

That Powell did not mean for this doctrine to imply massive restructuring of the school systems can be seen by his vote with the majority in *Milliken v. Bradley*.[32] There by a 5-4 vote the Court held that federal judges could not order multidistrict remedies unless it could be proven that the district lines had originally been drawn in a racially discriminatory manner, or that state action had been the major cause of interdistrict segregation. The case arose out of efforts to force the integration of the nearly all-black Detroit schools with the nearly all-white schools of the surrounding suburbs. The Court had faced the same issue a year earlier. A district judge had ordered the merging of all-black schools in Richmond with the all-white schools in surrounding Henrico and Chesterfield counties, but the Fourth Circuit reversed, holding that the historic district lines had not been drawn to confine blacks to the city, nor was there any evidence of conspiracy between districts to maintain segregation.[33] When the case reached the Supreme Court, Powell had recused himself, presumably because of his earlier connection with the Richmond school, and the remaining Justices had split 4-4, thus leaving the circuit court's opinion in place.[34] Now Powell provided the necessary majority, and the Court turned back the effort to transcend the remedial limits flowing from the core city and suburb dichotomy.

For some people, *Milliken* was, purely and simply, "the sad but inevitable culmination of a national anti-black strategy."[35] The case marked the first time since *Brown* that blacks had lost a school case, and Justice Thurgood Marshall lamented that "after twenty years of small, often difficult steps toward that great end [of equal justice under law], the Court today takes a great step backwards."[36] But for others, *Milliken* was a relief, or, in J. Harvie Wilkinson's phrase, "an act of absolution. Segregated Detroit schools were not the suburb's creation and thus not their burden."[37]

To look on this case in strictly racial terms, however, is to ignore the considerations which were important to Burger, who wrote the Court's opinion, and certainly to Powell, who gave it a majority. "No single tradition in public education," said the Chief Justice, "is more deeply rooted than local control over the operation of the schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the

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[32] 418 U.S. 717 (1974).

[33] 338 F. Supp. 67 (E.D. Va. 1972); 462 F.2d 1058 (4th Cir. 1972).

[34] Richmond School Board v. Virginia Bd. of Educ., 412 U.S. 92 (1973).

[35] Jones, *An Anti-Black Strategy and the Supreme Court*, 4 J.L. & EDUC. 203 (1975).

[36] 418 U.S. at 782.

[37] J. H. WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 224 (1979).

educational process."[38] The administrative problems inherent in creating vast "super districts," and in determining where to draw the appropriate lines, also worried the majority. While critics might view such arguments as specious, the underlying values had great meaning for Powell.

The issues raised in *Keyes* and *Milliken* highlighted the shift in desegregation litigation from the South to northern and western cities, and the growing involvement of federal courts in fashioning remedies and, at times, in the actual supervision of school operations. In nearly all these cases, losing parties filed appeals to the Supreme Court which, unless it discerned a clear constitutional question, avoided reviewing the factual findings of the lower courts. Thus in two companion cases from Ohio, Justice White held that findings by a lower court of discriminatory patterns triggered an affirmative duty by the local officials to remedy the situation in the entire system.[39] These holdings, which apparently reflected Powell's earlier solitary view in *Keyes*, nonetheless elicited a strong dissent from him.

Penick emphasized the Court's refusal to tolerate any form of racial discrimination resulting from state action, even if facially the segregation actually resulted from neighborhood residential patterns. Moreover, the Court placed the burden of proof upon the school boards to show that continuing discriminatory patterns had not resulted from official policy, and that good faith efforts had been made to solve the problem. This, in effect, applied similar standards to northern school boards as had been utilized in southern cases for more than two decades, reducing the *de jure/de facto* distinction to a semantic nicety. Since the burden now lay on the school board to prove state action absent, the litigation began with a presumption of legally sanctioned discrimination.[40] Justice White in both cases relied on the lower court findings that Columbus and Dayton were operating dual school systems, and that the respective school boards had been unable to rebut these charges. This placed them under an affirmative duty to implement system-wide remedies to correct the defects.

In his dissent, Justice Powell criticized the majority for failing to take into account the many "social, economic and demographic forces for which no school board is responsible."[41] To impose a system-wide remedy on the basis that state action alone had caused segregational patterns was to fly in the face of reality. Powell charged:

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[38] 418 U.S. at 741-42.

[39] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

[40] Note, Columbus Board of Educav. Penick: *Regarding the Concept of State Sanctioned Segregation*, 32 BAYLOR L. REV. 153, 161 (1980).

[41] 443 U.S. at 480.

> Federal courts including this Court today, continue to ignore these indisputable facts. Relying upon fictions and presumptions in school cases that are irreconcilable with principles of equal protection law applied in all other cases . . . , federal courts prescribe system-wide remedies without relation to the causes of segregation found to exist, and implement their decrees by requiring extensive transportation of children of all school ages.[42]

As he made clear, Powell had no compunctions about courts redressing inequities caused by school officials, but he considered both irresponsible and constitutionally unwarranted the tendency of courts to require large scale remedies for problems over which the local boards had little if any control. A rule of reason was necessary to prevent wholesale and unnecessary dismantling of existing systems, and he called upon his brethren to understand what they were doing. If, in fact, they were seeking greater integration, massive busing demonstrably produced the exact opposite results. Citing recent studies, Powell noted that where inner-city schools were primarily black and the suburbs white, the "effect of compulsory integration is a substantial exodus of whites from the system."[43] Those who could afford it would either move or shift their children to private schools, and thus the burden would fall upon the poor. He repeated his plea from *Keyes* that if public education were not to suffer further, we must return to "a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert."[44] These interests, he argued, had been severely damaged whenever courts had imposed system-wide remedies, since courts "are the branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education."[45]

To some it might appear that Powell was warning his brethren that further pressure to force integration would only backfire, and they should leave well-enough alone. I would suggest, however, that Powell was reflecting the philosophy of judicial restraint which his teacher, Felix Frankfurter, espoused. There are certain evils in the world which are not amenable to judicial correction, and efforts to utilize the law as a remedy not only fail to solve the problem, but also weaken the stature of the judiciary. Such issues, under our system of government, Powell believes are best left to the political process which, even if imperfect, is the appropriate channel. "Democratic institutions are weakened," he warned

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[42] *Id.* at 481.
[43] *Id.* at 485.
[44] 413 U.S. at 253.
[45] 443 U.S. at 488.

in another case, "and confidence in the restraint of the court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional process."[46]

That Powell doubted the efficacy of busing as a remedy is indisputable, and as the nation's experience with busing increased, his fears often seemed confirmed. He dissented, therefore, when the Court dismissed writs of certiorari as improvidently granted in a Texas case which might have allowed it to explore the value of extensive remedies.[47]

Dallas, the eighth largest school district in the country, had witnessed a significant change in its school population since the case had begun in 1971. Total enrollment dropped from 163,000 to 133,000 while the racial composition changed from 69 percent Anglo to 33.5 percent Anglo, 49.1 percent black, and 16.3 percent Hispanic. The district court, in a suit by minority parents, had found that elements of a segregated system remained, and ordered, as part of its remedy, busing some 15,000 students, or 11.3 percent of the total school population.[48] The plaintiffs appealed, asking for more extensive busing, and the court of appeals agreed that "nothing less than the elimination of predominantly one-race schools is constitutionally required."[49] Upon remand, the district court heard extensive testimony, conferred with a number of community groups, and in what Powell called a "thorough opinion," found that the decline in Anglo students was not the result of actions taken by the school board; to the contrary, the board had acted in good faith to establish a unitary system. The district judge asserted that the duty of the court was to adopt a plan that would "realistically and effectively" achieve desegregation in the light of demographic changes in the district. The plan he proposed had the endorsement of the community, including many minority committees, involved busing some 20,000 students, but still left about one-third of the 176 schools with "one-race" student bodies, defined as 75 percent or more students of one race.[50] Again the court of appeals remanded, stating that no one-race schools would be tolerable.[51]

Powell found the circuit court as well as the Supreme Court's emphasis on the elimination of any one-race schools unrealistic and destructive of two rules which had served as sensible guidelines for previous court-fashioned remedies. First, the nature of the remedy is determined by the

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[46] Frontiero v. Richardson, 411 U.S. 677, 692 (1975).
[47] Estes et al. v. Metropolitan Branches of NAACP, 444 U.S. 437 (1980).
[48] 342 F. Supp. 945 (N.D. Texas, 1971).
[49] 517 F.2d 92, 103 (5th Cir., 1975).
[50] 412 F. Supp. 1192 (N.D. Texas, 1976).
[51] 572 F.2d 1010, 1018 (5th Cir., 1978).

nature and scope of the constitutional violation, and second, the measure of the plan is its effectiveness. "Unless courts carefully consider these issues," he warned, "judicial school desegregation will continue to be a haphazard exercise of equitable power that can, 'like a loose cannon, inflict indiscriminate damages on our schools and communities.' "[52] The pursuit of racial balance at any cost, he feared, is not only without constitutional or social justification, but would encourage other evils. "By acting against one-race schools, courts may produce one-race school systems."[53] This warning, however, failed to move his brethren; only Justices Stewart and Rehnquist joined him, one vote shy of the necessary number to reinstate the case.

Racial integration of public schools has been one of, if not the most, divisive issues in American society for the last thirty years. In some ways, desegregation of southern schools did prove, as Powell has occasionally noted, easier because the issues were so much clearer. But in the North racial segregation in the schools has more often been the result of numerous forces, only some of which may be attributed to state action. Powell has never hesitated to condemn discrimination flowing from official policy, but he has been far more cautious than a number of his brethren in finding that segregation necessarily flowed from the actions of school boards. He has also been unable to impress his view on the Court that many of the conditions leading to racially unbalanced schools are beyond the scope of judicial action. Unfortunately, his predictions of escalating white flight and resegregation have frequently been proven true.

For Powell, schools involve a host of community values, and so long as basic constitutional rights are not transgressed, he believes local interests and values should determine policy. Thus in two 1982 decisions he voted to support popular initiatives designed to restrict the extent of school busing, although in one he spoke for an 8-1 majority, and in the other for a four-person minority.

After a California court had ordered busing to remedy what it found to be *de jure* segregation in violation of both the state and federal constitutions, the California Supreme Court affirmed, but solely on the grounds that the equal protection clause of the California Constitution barred *de facto* as well as *de jure* segregation.[54] The lower court then prepared an extensive busing program, but before it could be implemented, state voters approved Proposition I, limiting powers of the state courts to order busing to the same extent that a federal court could act to remedy

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[52] 444 U.S. at 445 (quoting Justice Stewart's dissent in Stump v. Sparkman, 435 U.S. 349, 367 (1978)).

[53] *Id.* at 450.

[54] Crawford v. Board of Educ. of the City of L.A., 130 Cal. Rptr. 724, 551 P.2d 8 (1976).

fourteenth amendment violations. Since the trial court had originally found *de jure* segregation, it ruled that the revised plan should be put into effect, but the California Court of Appeals reversed, on grounds that the record did not support this finding. Moreover, in the light of the newly revised state constitution, the courts were under no obligation to order busing for *de facto* segregation, the only basis found in the earlier state supreme court decision. The appellate court also dismissed allegations that Proposition I had been adopted for discriminatory purposes, and held that states had no duty to provide greater protection for individual rights than found in the federal Constitution.[55]

The Supreme Court, with only Justice Marshall dissenting, agreed with the court of appeals. Powell noted that the newly adopted amendment employed no racial classification, and even if it repealed or modified antidiscrimination laws, this by itself did not imply a presumptive racial bias. The fact that California had previously gone beyond the requirements of the fourteenth amendment did not preclude it from retreating, providing that it did not go below federal levels of protection. The Court no doubt understood the intention of California voters, to bar extensive busing, and Powell agreed that, absent any racial classification, the local communities had the right to do so.

> [Proposition I] neither says nor implies that persons are to be treated differently on account of race. It simply forbids state courts from ordering pupil school assignments or transportation in the absence of a Fourteenth Amendment violation. The benefit it seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of the school boards.[56]

Even if the amendment had a racially discriminatory effect, Powell asserted, it would be unconstitutional only if a discriminatory purpose had been intended.

Powell's opinion certainly followed his decade-long respect for the neighborhood school and to allow the widest latitude for local values and preferences. But his reasoning that this facially-neutral amendment embodied no discriminatory intent is open to question, since the publicity surrounding the Proposition I campaign had been heavily laden with racial implications.[57] Busing by itself had not been the issue, since thousands of students took busses to school in the Los Angeles area every day; rather, voters objected to the purpose behind the pupil transfer, namely the desegregation of public schools. In a strained analysis, Powell

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[55] 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1980).

[56] Crawford v. Board of Educ. of the City of Los Angeles, 458 U.S. 527, 537 (1982).

[57] *See, e.g.*, N.Y. Times, July 4, 1979, at 6. It is not stated, although possible to infer, that Powell sought to avoid a federal "rule" which might require more of some states than of others.

distinguished the California case from an earlier decision involving the retrenchment of state equal rights protection, *Hunter v. Erickson*,[58] in which a facially-neutral ordinance had been held racially motivated.

On the same day the Court upheld the California proposal, it struck down a similar Washington initiative.[59] The statute in question prohibited school boards from requiring students to attend any school other than the one nearest or next nearest their residence, but permitted the boards to assign pupils to non-neighborhood schools for almost any reason required by educational policy except racial desegregation. Justice Blackmun, writing for five members, held Washington's Initiative 350 unconstitutional. It did far more than merely reallocate governmental power; it did so in a way to "impose direct and undeniable burdens on minority intersts."[60] Although the racial classification here was indirect, its plain purpose was to deny minorities equal protection of the laws, and thus it fell within the ambit of *Hunter*.

As one commentator noted, it is difficult to believe that these two cases were decided by the same Court during the same term and on the same day.[61] Although the wording of the two initiatives differed slightly, both were facially-neutral regarding racial classification, the basic test of equal protection evaluation. While the nature of the suits differed (the Seattle School Board had invoked the fourteenth amendment to *defend* its busing program against the state statute), the effect and purpose of the two were nearly identical, to prevent busing for racial integration beyond limits federal courts could invoke.

Justice Powell recognized this, and in his dissent, joined by Burger, Rehnquist and O'Connor, repeated the basic points of his majority opinion in *Crawford*. "The people of the State of Washington, by a two to one vote, have adopted a neighborhood school policy."[62] Nothing in the statute prevented local boards from establishing voluntary pupil transfer programs, nor did the state undercut the equal protection guarantees of the fourteenth amendment. The fact that a state had imposed this rule upon local boards had no constitutional significance; under a federal system, states had the power to require localities to conform to general policy principles. Citing a long string of precedents, he argued that the Court had never held a neighborhood policy unconstitutional, nor that local officials had to integrate schools in the absence of unconstitutional

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[58] 393 U.S. 385 (1965).

[59] Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982).

[60] *Id.* at 484.

[61] Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 155 (1983).

[62] 458 U.S. at 488.

segregation. Without such violations, the Court had no business telling the states that they had to go beyond the requirements of the fourteenth amendment. How states chose to operate their schools, whether through completely independent boards or from a single state agency, and the policies states determined most beneficial for their citizens, were and should remain matters in which, saving for constitutional violations, courts ought to refrain from meddling.[63]

Powell's dissent in *Seattle* has many of the same problems as his majority view in *Crawford*. He is obviously concerned with preserving state and local control of education, and emphasizes settled doctrine that a state may, for the most part, allocate powers within its local units as it deems appropriate. But the *Seattle* majority certainly addresses a valid concern: to single out pupil transportation for state rather than local control does impose distinct burdens upon minorities, and that, rather than the general intrastate distribution of powers, is the real issue. Powell dismissed this argument, declaring that "even could it be assumed that Initiative 350 imposed a burden on racial minorities, it simply does not place unique political obstacles in the way of racial minorities."[64] Within the universe of values involved in public education, Powell believes the state and its citizens have the right to set priorities, and in doing so some individuals and groups will be unhappy with the decision. But "this is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no Constitutional violation."[65]

Equal Protection

In areas other than school desegregation, Justice Powell's approach to the applicability of the equal protection clause to educational issues has for the most part been marked by a strict adherence to minimal constitutional standards, and a general flexibility in trying to adjust abstract legal criteria to specific factual situations. Powell has been unwilling to extend

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[63] *Id.* at 3207, 491, 501-92. In an interesting footnote appended at the end of his dissent, Powell wrote: "As a former school board member for many years, I accept the privilege of a dissenting Justice to add a personal note. In my view, the local school board—responsible to the people of the district it serves—*is* the best qualified agency of a State government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program. . . . But this case presents a question, not of educational policy or even the merits of busing for racial integration. The question is one of a State's sovereign authority to structure and regulate its own subordinate bodies." *Id.* at 501 n.17.

[64] *Id.* at 497.

[65] *Id.* at 496.

the minimal standards, however, and has also sought a less rigid means of analysis than the traditional two-tiered approach.

In one of his first equal protection opinions, *James v. Strange*,[66] Powell apparently accepted the standard two-tiered scrutiny developed by the Warren Court, a "rational basis" test for the lower level, and "strict scrutiny" for the upper level. A Kansas statute for recouping legal defense fees expended for indigent defendants deprived poor debtors from certain protections available to other judgment debtors. Powell found a total absence of "some rationality," and as Gerald Gunther pointed out, "he refused to strain his imagination to supply that missing explanation. . . . [He] was plainly unwilling to consider all the conceivable state justifications."[67] Gunther accurately perceived that the reliance on a strengthened rational basis test appealed to a Court which had become increasingly uncomfortable with the older dichotomy, and suggested that a new model, with multiple levels of scrutiny, was in the making.[68] In this new analysis, the Court would not defer automatically to alleged state interests, nor hypothesize potential grounds of rationality, but insists on articulated and factually justified grounds for state action.[69]

The second aspect of the new model would be a shift from the Warren Court's concentration on determining which rights were fundamental for equal protection to the question of which groups deserved special judicial protection.[70] Thus, in *Weber v. Aetna Casualty and Surety Company*,[71] another first-term case, Powell brushed aside an articulated state rationale because it impinged on a recognized suspect classification, in this case illegitimacy. Louisiana statutes denied equal recovery claims under workmen's compensation to dependent unacknowledged illegitimate children, on grounds of fostering normal family relationships. The Court, with only Rehnquist dissenting, held this interest not compelling enough to override the need of the protected group.

But while Powell willingly accorded specified groups stringent protection, he was not willing to expand the range of either fundamental rights or suspect classifications, and this can be seen in the controversial 5-4 decision he delivered in *San Antonio Independent School District v. Rod-*

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[66] 407 U.S. 128 (1972).

[67] Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33 (1972).

[68] *Id.* at 26.

[69] Note, *Balanced Justice: Mr. Justice Powell and the Constitution*, 11 U. RICH. L. REV. 335, 379-80 (1977).

[70] Maltz, *Portrait of a Man in the Middle—Mr. Justice Powell, Equal Protection, and the Pure Classification, Problem*, 40 OHIO ST. L. J. 941 (1979).

[71] 406 U.S. 164 (1972).

riguez.[72] A class action suit had been brought on behalf of school children in a district with a low property tax base, claiming that the Texas system of relying primarily on local property taxes to finance schools favored more affluent areas. The Edgewood District, the poorest in San Antonio, annually spent $356 per student ($26 from local taxes, $222 from the state fund, and $108 from the federal government,) compared to the $594 per student expended by the richest district in the city, Alamo Heights ($333 from local taxes, $225 from the state fund, and $36 from the federal government). The state formula had been designed to set a minimal level for all districts, but under the scheme, the more a locality put up, the more it received. The three-judge district court, following the two-tier analysis, found "wealth" a suspect classification, and education to be a "fundamental right." Invoking strict scrutiny, it then found no compelling state interest to justify the resulting inequity, and held the entire finance system unconstitutional.[73]

If the Supreme Court affirmed, the formulae for nearly every state school financing plan in the country would have had to be radically altered. Thirty-one states filed *amici* briefs urging the Court to reverse, while only one state, Minnesota, argued for affirmation. Among the *amici* in favor of the lower court ruling were the NAACP, the National Education Association, and the American Civil Liberties Union. For Justice Powell, the arguments for reversal directly reflected his own values concerning the nature of public education, especially the importance of local control, and in his lengthy opinion, he methodically negated the lower court's ruling.

The threshold questions were clear: Did the Texas system operate to the disadvantage of some suspect class or impinge upon a fundamental right? If so, then strict scrutiny would be required and the district court decision would be upheld. If not, Texas still had the burden of proving a legitimate, articulated state purpose which did not discriminate in violation of the equal protection clause of the fourteenth amendment.

He first dismissed, as inappropriate, previous Supreme Court decisions in which wealth had been the determinant factor. In those cases, poor people had been absolutely deprived of some procedural or civil right because they had been unable to pay for—and as a result sustained a total loss of—the benefit.[74] In those cases, the disadvantaged class had been

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[72] 407 U.S. 1 (1973).

[73] 337 F. Supp. 280 (W.D. Texas 1971).

[74] Griffin v. Illinois, 351 U.S. 12 (1956) (trial transcript); Douglas v. California, 372 U.S. 353 (1963) (counsel in appeals); Williams v. Illinois, 399 U.S. 235 (1970) and Tate v. Short, 401 U.S. 395 (1971) (jail as a result of inability to pay fines); and Bullock v. Carter, 405 U.S. 134 (1972) (filing fees for election).

composed only of persons totally precluded from the right. In the present case, Powell found no distinguishing class; not all people in the poorer districts were poor, nor were all poor people in one district. Moreover, poorer students had not been deprived of an education; rather they claimed the admitted disparity in funding gave them a poorer quality education.

Here again Powell, in the Harlan tradition, attempted to balance the variables. He denied that the equal protection clause required complete equality. "Nor indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense."[75] He dismissed various academic studies purporting to show discrepancies in educational quality stemming from differences in levels of financing as beside the point. Even conceding that these differences existed, it would be impossible to establish a minimal standard. Carried to its logical conclusion, every child except those in the richest school districts would be considered disadvantaged, a proposition Powell found unacceptable as well as unfounded, again because other factors beside wealth affected the quality of education.

Thus, disposing of the suspect classification argument, Powell turned to the issue of education as a fundamental right. The Court had always held education to be very important, and it remained dedicated to that belief. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[76] The only criterion for determining if education constituted a fundamental right was whether the Constitution explicitly or implicitly guaranteed it, and under this test, Powell could find no justification for the lower court finding.[77]

Absent the preconditions for strict scrutiny, Texas still had to pass the test of a rational basis, and here Powell had no difficulty with the State's argument. The legislature had not denied anyone a privilege, but rather had adopted a reasonable goal of assuring a "minimum foundation," and then had extended public education and improved its quality. Moreover, it had then allowed the local districts the choice of going beyond the minimum if they had the resources and the desire. Powell not only approved of this, but condemned the attack:

> This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state

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[75] 407 U.S. at 24.

[76] *Id.* at 30.

[77] *Id.* at 33. Powell also rejected the lower court's analysis of the connection between education and the acknowledged fundamental rights to vote and of free speech. By itself, education could not assume the Constitutional protection afforded to other, explicitly designated rights. *Id.* at 35.

> and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenue for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. . . . [W]e continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.[78]

Few of Powell's decisions elicited such a widespread attack by commentators as did this one. Shaffee Bacchus charged the Court with turning its back on the fundamental holding of *Brown*, that the right to an equal education in the face of any sort of discrimination runs flat against constitutional guarantees.[79] John E. Coon attacked Powell's failure to understand what poverty in education meant, and for being insensitive to the needs of the deprived.[80] Peter D. Roos hoped that Justice Marshall's eloquent dissent would ultimately enunciate the real meaning of equal protection in education in the future, but lamented that for now, absent a total deprivation of educational opportunity, the right to a decent education could not be considered fundamental.[81] Powell's opinion was "strangely mechanical," charged David Kirp, and in asking who was hurt by the *status quo*, blinked "at the obvious consequences for children unlucky enough to live in poor areas." The Court thus "nipped in the bud what it may well have perceived as an emerging egalitarian revolution."[82]

In reading this litany, one is struck by the fact that Powell is not charged with overturning a long established doctrine, but for failing to inflate the questionable classification of wealth, and for refusing to define education as a constitutionally protected "fundamental" right. The fact is that prior to *Rodriguez*, wealth, or to be more precise, poverty, had never been held an inherently suspect classification *per se*, as race or illegitimacy had been. Rather, only when important previously established rights had been denied solely because of poverty had the Court intervened. Similarly, while education had certainly been

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[78] *Id.* at 40-41.

[79] Note, *Constitutional Law—Public Education Financed Partially Through Local Property Taxes is Not Proper Subject for Strict Judicial Scrutiny*—San Antonio Independent School District *et al.* v. Demetrio P. Rodriguez *et al.* 18 How. L. J. 435, 443 (1974).

[80] Roons, *Introduction: 'Fiscal Neutrality' after* Rodriguez, 38 Law & Contemp. Probs. 299, 301 (1974).

[81] Roos, *The Potential Impact of* Rodriguez *on Other School Reform Litigation*, *id.* at 566, 568 (1974); *but see* the discussion *infra* on Plyler v. Doe.

[82] Commentary, San Antonio Independent School District v. Rodriguez: *Chaotic, Unjust—and Constitutional*, 2 J. L. & Educ. 461-62 (1973).

acknowledged in numerous cases as being vitally important in contemporary society, the Court had never elevated it to the status of a "fundamental" right.[83]

The opinion is, of course, of a piece with Powell's other writings, with its emphasis on educational policy as primarily a matter of local control, and his belief that the Constitution, beyond minimal guarantees, did not mandate egalitarian treatment for all students in all school districts in all states. But Powell was also deviating from the enshrined two-tiered analysis by insisting that all variables be taken into account. If it could have been shown, for example, that district expenditures *by themselves* constituted the sole factor affecting educational quality, then the argument for the judicial relief might have been stronger. But Powell, from his own experience, knew this not to be so, and at one point referred to the fundamental conundrum of whether any direct correlation existed between dollars expended and educational quality.[84] But because the whole issue of quality is complex, Powell insisted on recognizing it as such, and as Harlan did, adopted a flexible, balancing approach. As one commentator noted, equal protection analysis in Powell's hands "is not equal protection at all but a Harlanesque notion of fundamental fairness, derived from the due process clause." This required not a rigid formula, but in phrases common to Powell's opinions, "balancing," "case by case analysis," and "an accommodation of competing values."[85] While this may provide for better evaluation of particular situations, it fails to yield a rule of law which can be clearly understood and consistently applied.

Even in areas where there has long been a suspect classification, Powell has been willing to weigh the asserted interests of the state more heavily than have some of his brethren. When the Court struck down a New York statute barring certain resident aliens from receiving state financial assistance for higher education, he dissented.[86] The majority opinion of Justice Blackmun began with the standard analysis of alienage as a suspect classification, and therefore subject to strict scrutiny. The State's rationale, that the restrictions were designed to encourage aliens to become naturalized, was held not to be a proper state concern.

Powell's short dissent is instructive. He noted that the line New York had drawn was not the suspect one between all aliens and citizens, but

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[83] Note, San Antonio Independent School District v. Rodriguez: *The Court Places Limits on the New Equal Protection*, 6 COLUM. RTS. L. R. 195 (1974). Some lower courts had suggested that it be treated this way, but such holdings were rare; *see* Hobson v. Hansen, 269 F. Supp. 401. (D.D.C. 1967).

[84] 407 U.S. at 24.

[85] Yackle, *supra* note 11 at 182.

[86] Nyquist v. Mauclet, 432 U.S. 1 (1977).

rather a justifiable one between aliens who preferred to retain their foreign citizenship, and all other persons, alien or citizen. As for the State's rationale, he could not understand why states should not have "a substantial interest in encouraging allegiance to the United States on the part of all persons, including resident aliens, who have come to live within their borders."[87] So long as New York's policy did not conflict with federal immigration and naturalization law, he saw no reason it could not reserve its scholarship assistance for citizens and those intending to become citizens. The mechanical application of the majority—suspect classification, strict scrutiny—disturbed him because it ignored all of the variables concerned.[88]

Powell evidently won over Justice White to his view in the next alien case dealing with education in New York, *Ambach v. Norwich*.[89] A state statute forbade certification as a public school teacher of any person not a citizen of the United States, unless that person had manifested an intention to apply for citizenship. Powell began by pointing out that the Court's decisions on state regulation of aliens, dating back to *Yick Wo v. Hopkins*,[90] had not formed an "unwavering line over the years." But although the trend had been to void state laws denying specific employment opportunity to aliens, certain residual areas remained where such discrimination made sense, and could be exercised. One was governmental functions, since it is obvious that here the distinction between citizen and alien could be justified not only by law but by reason.

Within this exception Powell placed teaching in public schools, since such persons perform a task crucial to representative government, namely, preparing individuals for participating in the society as citizens.

> [A teacher, moreover,] serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.[91]

Since all of this lay within the legitimate purview of state government, New York only had to show that its citizenship requirement bore a rational relationship to the educational goal. The State had carefully phrased its rule to exclude only those aliens who had demonstrated their

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[87] *Id.* at 16.

[88] For an extensive critique of the majority opinion pointing out the irrelevance of prior alienage cases to this situtaion, see Note, *Constitutional Law—Equal Protection—Aliens Rights—Participation in Assistance Funds for Higher Education—Standard of Review*, 16 DUQ. L. REV. 829, 835 (1978).

[89] 441 U.S. 68 (1979).

[90] 118 U.S. 356 (1886).

[91] 441 U.S. at 78-79.

unwillingness to become American citizens. "They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty. They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country."[92] The people of New York were therefore entitled to exclude such persons from training up their children.

Powell's opinion, relying as it did on the government role exclusion developed in earlier cases,[93] did not convince four members of the Court. Justice Blackmun believed the prior cases related only the important policy-making positions in government. But Powell had not attempted to fit *Ambach* within the constraints of the earlier decisions; rather, he extended their purview to include public officials at secondary levels who nonetheless perform important tasks. Given his oft-stated beliefs about the value of education and the role of teachers in shaping civic responsibility, he clearly believed that the State's interest in this area outweighed the burden it placed on resident aliens who, as he noted, could easily shed that burden.

One might see Powell's concurrence in *Plyler v. Doe*[94] as the obverse side of this coin. If aliens not wishing to become citizens should not be allowed to teach, aliens who wanted to be "Americans," even if illegally, should be taught. In a case whose ramifications are yet to be explored, the Court by a narrow margin held that denial of a free public school education to undocumented alien children is a violation of the equal protection clause of the fourteenth amendment. Although the majority opinion by Justice Brennan applied the traditional analysis treating the restriction as burdening the suspect class of aliens, he also noted that it was a group whose members, although not citizens, had always been viewed as coming within the ambit of constitutional protection. Texas had not been able to justify its statute denying undocumented aliens access to the public schools, and therefore it had to be voided.[95]

Although Powell joined in the result, he was uncomfortable with Brennan's conclusion that this was a suspect alienage classification and the resultant implication that education might be viewed as a fundamental right *Rodriguez* notwithstanding. For him the primary considerations were practical. Illegal immigration had been and would continue to be a national problem, and something had to be done so that the children

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[92] *Id.* at 80-81.

[93] Foley v. Connelie, 435 U.S. 291 (1978) (dealing with police), and Sugarman v. Dougall, 413 U.S. 634 (1973) (concerning the civil service).

[94] 457 U.S. 202 (1982).

[95] For a strenuous critique of the majority opinion, see Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167 (1983).

"should not be left on the streets uneducated." The sins of the parents, as the Court had held in illegitimacy cases, ought not to be visited upon their sons and daughters, who under Texas law, were being penalized for having been brought illegally into the country by their parents. "The State's denial of education to these children bears no substantial relation to any substantial state interest."[96] Moreover, it might be counterproductive, since some unknown percentage of these children would ultimately be allowed to remain in the country legally and thus become citizens; it was thus to the State's advantage to have potential future citizens educated properly to their responsibilities. While he acknowledged that the decision would not satisfy many people, and that the problem would continue so long as no solution could be found to control illegal immigration, the best thing that could be done, at the least, was to educate the children.

Powell's opinion is curiously diffident. The main issues, which he had discussed at length in *Rodriguez*, whether education is a fundamental right and therefore subject to searching equal protection analysis, are buried in a footnote where he emphasized that the Court's conclusion did not apply strict scrutiny in this case, and attempted to rebut Burger's argument that the majority opinon was inconsistent with *Rodriguez*:

> The CHIEF JUSTICE argues in his dissenting opinion that this heightened standard of review is inconsistent with the Court's decision in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). But in *Rodriguez* no group of children was singled out by the State and then penalized because of their parents' status. Rather, funding for education varied across the State because of the tradition of local control. Nor, in that case, was any group of children totally deprived of all education as in this case. If the resident children of illegal aliens were denied welfare assistance, made available to all other children who qualify, this also—in my opinion—would be an impermissible penalizing of children because of their parents' status.[97]

The rebuttal is not convincing, nor is the argument about visiting sins of parents upon children. The children are also illegally in the country, aside from their parents' status. Since the Court had already indicated that alienage *per se* is not always a suspect classification, then what are its limits? *Plyler* provides no answer. If the key to Powell's distinction between *Rodriguez* and *Plyler* is that in the latter the entire class was deprived of all education, does this now move basic education into the category of a fundamental right, since that appears to be the razor which Powell had used to distinguish *Rodriguez* from *Griffin* and its progeny?

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[96] 457 U.S. at 239. Powell did not address the issue of whether the state had a substantial interest in keeping its budget as low as possible.

[97] *Id.* at 239 n.3.

Would Powell have voted differently in *Rodriguez* if there had been a showing that the funding levels provided, from whatever source, were inadequate to provide a minimally acceptable public education? Is "heightened scrutiny" the proper standard for such cases, or is this "middle tier analysis" merely a means of avoiding the strict scrutiny test and its implications? Whether the Court distinguishes *Plyler* away in the future or not, the case remains instructive for us primarily as another example of Powell's failure to develop a rule of law to guide future lower court decisions in an effort to balance all issues involved in complex situations.

It also demonstrates Powell's view of public education as an important socializing institution, which should be open to all. But when the door to school is open, Powell's scales tip most naturally in favor of the local officials, professional educators and community values, as in upholding a state's right to control access to particular schools. A Texas statute allowed school districts to deny tuition-free admission to its public schools to children who lived apart from parents or other persons responsible for them, if their presence in the district was primarily for the purpose of attending the public schools. The Court, speaking through Powell, held the statute a legitimate residence requirement satisfying constitutional standards.[98]

Although in the past the Court had struck down several residency laws denying benefits to persons failing to meet statutory standards,[99] it had never held that a state did not have the right to impose residence requirements "appropriately defined and uniformly applied, [which] further the substantial state interest in assuring that services provided for its citizens are enjoyed only by residents."[100] Here the State provided a very important service, and citing *Milliken* and *Rodriguez*, the Court perceived a substantial interest in preserving local control over who benefitted from the schools. The Texas statute, moreover, was fairly generous in defining residency; it could have been far stricter and still come within the constitutional standards previously enunciated by the Court. A requirement that children live either with their parents or other persons responsible for them in order to attend schools in the district affronted neither the Constitution nor common sense.

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[98] Martinez, as next friend of Morales v. Bynum, ___ U.S. ___, 103 S. Ct. 1838 (1938). Only Justice Marshall dissented.

[99] Shapiro v. Thompson, 394 U.S. 618 (1969) (public financial assistance); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Vandis v. Kline, 412 U.S. 441 (1973) (instate tuition rates at state university); and Memorial Hospital v. Maricopa Univ., 415 U.S. 250 (1974) (public medical assistance).

[100] 103 S.Ct. at 1842.

Even when he has extended constitutional rights, as he did to some extent in *Youngberg v. Romeo*,[101] Powell has attempted to avoid more than minimal intrusion by the courts into local control. In this case the Court held that a state must provide institutionalized mental patients (in this instance a severely retarded man) minimum training adequate to ensure their safety and freedom of movement. Powell noted that if "it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."[102] But aside from a right to a safe environment and undue physical restraint, Powell found a constitutional right to "minimally adequate and reasonable training," the first time the Court had gone so far as to uphold rights of the retarded or handicapped to some form of education even if, as in this case, it was merely to train the patients so as to "ensure safety and freedom from undue restraint."[103]

The Court had previously avoided ruling on whether a right to training and treatment existed,[104] but even having now acknowledged its existence, Powell immediately noted that due process required a "balancing [of the] liberty interest against the relevant state interests."[105] The problems of dealing with retarded and handicapped persons were extremely complex, and federal courts should interfere as little as possible in the internal affairs of state institutions. Instead, Powell went on, courts should defer to the "professional judgments" of local officials "to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function."[106]

Although the Court had taken a major step in *Youngberg*, its decision left many questions unanswered. While Powell warned courts to defer to local professional judgment, in this case it had been local professional

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[101] 457 U.S. 307 (1982).

[102] *Id.* at 315-16.

[103] *Id.* at 319. While it may be stretching the definition to include this as an "education" case, the function of training for the mentally retarded or physically handicapped is certainly analogous to schooling for "normal" persons. At the time of the suit Nicholas Romeo was thirty-three years old, but had the mental capacities of an eighteenth-month child. After the death of his father, his mother, no longer able to care for him by herself, had him committed to Pennhurst State School and Hospital, where, in order to restrain him, the staff routinely tied him to his bed or chair for long periods of time. In part this was protective, but nonetheless Romeo suffered injuries on 77 separate occasions, and the hospital had made no effort to train him to take care of himself even within the admittedly narrow limits of his ability.

[104] *See* O'Connor v. Donaldson, 442 U.S. 563 (1975); Vitek v. Jones, 445 U.S. 480 (1980); and Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).

[105] 457 U.S. at 320.

[106] *Id.* at 324.

judgment which constituted the violations of Romeo's rights. Unfortunately, understaffed personnel in many institutions resort to large-scale physical or chemical restraints in order to keep patients placid. Powell is no doubt right that a balance has to be struck between the individual's rights and the state's obligations and abilities to care for retarded and handicapped persons, but it is hard to see how courts will be able to determine that balance either on a case by case adjudication or on a more general level without becoming enmeshed in internal operations of state hospitals and training schools.[107] Although Powell attempted to give some guidance as to what constituted minimal rights, some commentators see a potential right to full habilitative treatment within Powell's rationale.[108] Subsequent cases have so far shed little light on the subject. In *Hendrick Hudson Central School District v. Rowley*,[109] the Court read a fairly limited meaning into the Education for All Handicapped Children Act of 1975, with Powell in the 6-3 majority.

Certainly no case better represents Powell's willingness to balance issues, seek a flexible, pragmatic solution to a difficult case, and defer to professional judgment exercised within its proper sphere, than *Regents of the University of California v. Bakke*,[110] perhaps the most controversial case of the Burger Court with the exception of the abortion decisions. In a highly convoluted ruling, in which the Court twice split 5-4, the view of Justice Powell became the ruling constitutional interpretation of the land.[111] The case dealt with the issue of "reverse discrimination," that is, whether so-called "affirmative action" programs could provide opportunities to minority group members not available to non-minority individuals. The Court had managed to sidestep the issue four years earlier in *DeFunis v. Odegaard*,[112] ruling that the issue had become moot before reaching the Supreme Court. As Monrad Paulsen predicted at the time, the issue would not go away; in *DeFunis* "the bomb failed to go off."[113]

By now the facts of *Bakke* are well known and need only little reiteration here. Allan Bakke, a thirty-seven year old white male, was denied admission to the University of California medical school at Davis. He

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[107] For an examination of this problem, see Note, Youngberg v. Romeo: *The Right to Treatment Dilemma and the Mentally Retarded*, 47 ALB. L. REV. 179 (1982).

[108] For some of this discussion, see Note, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 83 n. 47 (1982).

[109] 458 U.S. 176 (1982).

[110] 438 U.S. 265 (1978).

[111] In the following term, Powell continued to play this role. In the area of equal protection litigation, twenty-one decisions were reached by a divided court, eighteen of them by a 5-4 vote. Powell ws in the majority twenty times. Maltz, *supra* note 70 at 941.

[112] 416 U.S. 312 (1974).

[113] Paulsen, *Introduction*: DeFunis: *The Road Not Taken*, 60 VA. L. REV. 917 (1974).

contended that the medical faculty's special admissions program, which reserved sixteens slots in a class of one hundred for disadvantaged minority students, operated to deprive him of his rights under the equal protection clause, as well as under the California constitution and Title VI of the 1964 Civil Rights Act. The issues facing the Court were essentially two-fold: could race be a legitimate factor in admissions decisions (and thus, i.e., in other public and private programs); and if so, did this particular program operate in such a way as to violate the equal protection clause. The nine Justices filed six separate opinions, with no more than four of them concurring in the reasoning on any point. Five did agree that race could be taken into account, but a different five concluded that Bakke's rights had been violated and he should, therefore, be ordered admitted to the medical school. The Court upheld affirmative action in principle while striking down the particular minority admissions program at Davis.

Bakke received enormous attention as the most important civil rights case since *Brown*, and indeed Justice Powell remarked when announcing the judgment that "perhaps no case in recent memory has received so much media coverage and scholarly commentary."[114] The deep split on the Court accurately reflected similar division in the country over the need for and legitimacy of affirmative action programs. Justices Stevens, Burger, Rehnquist and Stewart adopted a straightforward statutory interpretation, and concluded that the Davis program violated the Civil Rights Act by excluding Bakke because of his race; the more permissive foursome of Brennan, White, Marshall and Blackmun held that neither Title VI or the fourteenth amendment invalidated affirmative action programs designed to aid minorities in overcoming past societal discrimination.

It was left to Powell to break the deadlock, and his decision received full endorsement by none of his brethren. The statutory group concurred in ordering Bakke admitted, but dissented from his conclusion that Davis could not consider race in its admissions decisions. The other four dissented from requiring Bakke admitted, but concurred in endorsing race conscious admissions. Here was the balancing of a tightrope walker! Powell evidently struck his balance early in the deliberations, but could not win over any of his colleagues.[115] Whatever its legal merits, Anthony Lewis noted, Powell's opinion was an astute political compromise.[116] As one of his former clerks wrote:

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[114] A. P. SINDLER, *BAKKE, DEFUNIS*, AND MINORITY ADMISSIONS: THE QUEST FOR EQUAL OPPORTUNITY 292 (1978).

[115] Wilkinson, *supra* note 37, 301.

[116] N.Y. Times, July 2, 1978, at IV, 1.

> [*Bakke*] was a rebellious case, menacing to social peace, the most volatile case of Powell's time on the Court. A compromise would have to be struck. Affirmative action plans were now the status quo; Powell did not wish to upend them. But he distrusted quotas, "those direct and provocative approaches which stir so much envy and distemper in the society.' The solution was typically Powellian: a sober opinion with words precise but pale; a narrow result that allowed the employment and sex discrimination cases to continue their own separate channels; and, above all, a compromise that majorities of both races might abide.[117]

It was not just a Quixotic, Solomonic compromise, but a well considered elaboration and balancing of the various circumstances and interests involved. It was true, as Powell noted, that race conscious remedies had been imposed in school desegregation cases and that there had been other instances in which racial quotas had been upheld. But those were the exceptions rather than the rule and unless based upon determinations by judicial, legislative or responsible executive authority that there had been some antecedent racial discrimination against blacks at Davis, there was no particularized remedial need. Indeed, Powell believed any such determination would be beyond the competence of the medical faculty.

> Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims or illegality. . . . [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. . . . Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. . . .
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> [T]he purpose of helping certain groups whom the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes. . . . To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.[118]

But, the medical faculty was within its competence as an educational body to seek to diversify the student body along as many lines as possible—including racial ones. To use race flexibly, within the context of a comprehensive admissions policy with an educational rather than societal objective would be permissible. He averred that "it is not too much to say that 'the nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many people."[119] Diversity was a concept all groups could accept, and

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[118] 438 U.S. at 310.

[119] *Id.* at 313 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

had traditionally been part of the very idea of a university. Powell's argument implied that diversity had to be more than tokenism on the one hand, and less than rigid quotas on the other; it also assumed that minority students had something important and unique to contribute to the educational environment.

The concern here, of course, is to show how Powell's *Bakke* opinion utilized so many of the techniques he applied in other education cases, but one must also recognize that the fragile balance he struck displeased many people, as he predicted it would. The reliance on local admissions officers including race as one factor could easily lead to hidden quotas on one hand or extensive discrimination against minorities on the other. "Diversity," while certainly an ideal in a democratic society, is impossible to define insofar as a constitutional standard goes. The presumption of what is "diverse" will vary enormously from school to school, a condition Powell might find acceptable or even desirable, but which could also, as minority members feared, be manipulated to their disadvantage. Evidence of past discrimination or of continuing practices could lead to a different equation, as Powell noted, in which cases the courts would be drawn in, since "the legal rights of the victim must be vindicated."[120] Moreover, his desire to avoid stringent doctrinal mandates in favor of individualized, case-by-case review, led many to fear an avalanche of litigation. Finally, Powell's inability to win over any of his brethren left *Bakke* as a slim precedential reed. Yet the fact that *Bakke* was "somewhat fuzzy," declared Paul Freund, "leaves room for development, and on the whole that's a good thing."[121] But it should be remembered that the bomb has not yet gone away—at most Powell's approach only dampens the fuse. Meanwhile, the people and the courts have no certain guidance on the question.

One final case dealing with equal protection involved gender discrimination,[122] and found Powell in the minority. In *Mississippi University for Women v. Hogan*,[123] the Court held that a state nursing school's refusal

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[120] *Id.* at 307.

[121] *Time*, July 10, 1978, at 9.

[122] Another gender discrimination case, Cannon v. University of Chicago, 441 U.S. 677 (1977), did not involve equal protection but rather whether Title IX of the Education Amendments of 1972 provided a private cause of action against universities receiving federal financial assistance and who discriminated on the basis of sex. The Court held that it did by a splintered 6-3 vote (Stevens delivered the opinion, in which five other Justices, filing three separate concurrences, joined in the result), and Powell dissented vigorously. His analysis of the legislative history of Title IX concluded that Congress had not intended to create a private right of action. This view is strongly supported in Note, *A Private Right of Action under Title IX*: Cannon v. University of Chicago, 57 DEN. L.J. 437 (1980).

[123] 458 U.S. 718 (1982).

to admit qualified males violated the equal protection clause. Once again Powell argued for diversity and the right of local communities and states to determine educational policy.

Mississippi University for Women (MUW) had limited its enrollment to women since its founding in 1884. Its nursing school also took only women, but like other departments at MUW, permitted men to audit courses. Joe Hogan, a registered nurse, attempted to enroll for further training so he could qualify for a nursing speciality, and although otherwise qualified, was refused admission on the basis of sex. He filed suit, claiming he had been denied equal protection. The district court dismissed the suit, holding that the state had a legitimate interest in providing a large range of educational opportunities for its women students, but the Fifth Circuit reversed, ruling that gender discrimination required a heightened level of scrutiny. By this standard, Mississippi had failed to show a substantial relationship between its policies and goals. The state did not provide an all-male school, and if the ostensible object was to provide students with the option of single-sex education, it could not limit this option to women.[124]

Justice O'Connor, speaking for a slim majority of the Court, agreed. Because nursing had historically been dominated by women, no case existed for remedial discrimination on their part. In fact, rather than redress past grievances, the state policy served "to perpetuate the stereotyped view of nursing as an exclusively woman's job."[125] By allowing men to audit, the state gave up any claim that a single-sex school was necessary because women were adversely affected by the presence of men in the classroom. Finally, she rejected the state's argument that Title IX of the 1972 Education Amendments exempted historically one-sex schools from the ban on gender discrimination. Even assuming Congress intended such an exemption, O'Connor argued, section five of the fourteenth amendment only gives Congress the power to enforce the guarantees; "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[126]

Burger, Blackmun, Powell and Rehnquist dissented. Burger wanted only to note that the majority decision applied to nursing schools, and did not have any broader application. Blackmun rather acerbically noted that "one only states the obvious when he observes that the University long ago should have replaced its original statement of purpose and brought its corporate papers into the twentieth century."[127] But this did

[124] 646 F.2d 1116 (5th Cir. 1981).

[125] 458 U.S. at 729.

[126] *Id.* at 732-33.

[127] *Id.* at 733. Blackmun apparently believes that, except for racial and religious classifications, separate but equal remains a viable option for public education.

not mean that a state could not offer single-sex schools provided, as it did so in this situation, that equal educational opportunities existed for those excluded.

Powell, in a dissent joined by Rehnquist, contended that the majority had completely misinterpreted the issues in its deep bow to conformity.

> Left without honor—indeed held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life. . . . The Court decides today that the Equal Protection Clause makes it unlawful for the State to provide women with a traditionally popular and respected choice of educational environment. It does so in a case instituted by a single man, who represents no class, and whose primary concern is personal convenience.[128]

Mississippi offered Joe Hogan opportunities for nursing education at other state-supported institutions, opportunities he chose to ignore because it would be more convenient for him to attend MUW. Powell found absolutely nothing in the Constitution giving anyone a "right" to attend a state-supported university in one's hometown. In cases of genuine sexual discrimination, the Court should apply a measure of heightened scrutiny, but this was not a situation in which all members of a class had been forced to attend separate schools. MUW was, in fact, the only all-women's college in the state, and women who went there did so by choice; those who preferred a coeducational environment went to one of the other twenty-three state universities or junior colleges. For a state to provide an additional choice for women, Powell believed, did not deprive anyone of equal protection. He then undertook to show that even using the majority's "inappropriate" standard of heightened scrutiny, the Mississippi system did not violate the fourteenth amendment.

Powell's analysis began with an historical overview to show that coeducation was a relatively new educational theory, and that traditionally single-sex schools had been the norm until late in the nineteenth century. Moreover, some of the nation's leading colleges and universities had remained sex-segregated until fairly recently, and even today, one could find a number of prestigious schools which still catered only to men or women. Such a policy not only provided diversity in education, a value which Powell held dear, but also reflected "the preference of those subject to the policy."[129] Recent studies, including one by the Carnegie Commission on Higher Education, favored the continuation of single-sex

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[128] *Id.* at 735.
[129] *Id.* at 737.

collleges as an important option, providing definite benefits for those choosing to attend them.

So long as the state did not impose a sexually segregated system on its citizens, nor denied one group benefits available to others, it transgressed no constitutional prohibition. That had been the situation in previous cases where the Court had struck down gender-based classifications,[130] and properly so, but by "applying heightened equal protection analysis to this case, the Court frustrates the liberating spirit of the Equal Protection Clause. It forbids the State from providing women with an opportunity to choose the type of university they prefer."[131] And then, to Powell's amazement, the Court regards these women as "*victims* of an illegal, stereotyped perception of the role of women in our society."[132] While noting that Mississippi's plan could be sustained on a rational basis standard, Powell also claimed that it met the heightened scrutiny test. The state wished to offer an additional option to women, aware of the benefits available to them in an all-women environment, without either depriving them of coeducational options or depriving men of a chance to study in that particular field. The means adopted, one single-sex school out of twenty-four, with its curricula available elsewhere, more than met the test of substantial relationship to a legitimate goal.

In the *Hogan* case, as in others involving the equal protection clause, we see Powell, sometimes alone on the Court, attempting to explain the need to balance the different and sometimes competing forces which interact in education. So long as no class was deprived of equal opportunity, the fact that a diverse system worked hardships on some individuals did not raise that hardship to a constitutional violation. Diversity and not conformity should be the hallmark of higher education; free choice and local values helped to provide that diversity. To impose conformity in the name of a false equal protection, to Powell, subverted the real meaning of the fourteenth amendment.

The Establishment Clause

Because of his high regard for public education, it is not suprising that Justice Powell has taken a fairly firm stand in adjudication of issues involving the first amendment's establishment clause. Yet he has been willing to allow a breach in the "inseparable wall" between church and state provided that on balance, the benefits accrue almost entirely to the secular needs of school children and not to the religious institutions

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[130] Citing Craig v. Boren, 429 U.S. 190 (1976), and Orr v. Orr, 440 U.S. 268 (1979).

[131] 458 U.S. at 741.

[132] *Id.*

sponsoring the schools. As usual, the issue for him is "balance," and the method one of "flexibility."

In his first full term on the bench, the Court heard four educational cases dealing with potential entanglement between church and state. In *Levitt v. Committee for Public Education and Religious Liberty*,[133] Powell joined in an opinion by the Chief Justice striking down a New York law designed to reimburse nonpublic schools for services mandated by the state, including $28,000,000 which would be distributed on a per capita basis, with no requirement that the schools account for the monies received nor show any relationship between the allotment and actual costs. The Court had no difficulty here, since no safeguards had been established to ensure that the services were totally secular in nature and fully divorced from religious instruction.

Powell delivered the opinion of the Court in three other cases, all of which, including *Levitt*, came down the same day. In *Hunt v. McNair*,[134] the Court upheld the South Carolina Educational Facilities Authority Act against charges of establishment clause violations. The state had created the Authority to assist colleges and universities in financing building construction. Under the scheme, the Authority would issue bonds for the project; and the building would then be conveyed to the Authority; it would in turn lease the building back to the college, with full title turned over after the school had paid off the indebtedness. The Authority could not issue any bonds for facilities used for any form of sectarian instruction or religious worship, and its power to intervene in school management was strictly limited to ensuring that fees and financial arrangements would be sufficient to pay the bonds. As construed by the South Carolina Supreme Court,[135] the Act included sufficient safeguards to meet the prevailing requirements of *Lemon v. Kurtzman* (*Lemon* I),[136] namely, that it have a secular legislative purpose, that its primary effect neither advance nor inhibit religion, and that it not foster an excessive governmental entanglement with religion. Powell's examination of the record satisfied him that these requirements had been met, even though one of the applicants for bond support had been the Baptist College of Charleston. For the dissenters, Brennan, Douglas, and Marshall, this by itself constituted sufficient evidence of entanglement, but for Powell the *Lemon* test rested on the facts. Only sixty percent of the school's students were Baptist, and the college wanted the money to complete a dining hall and refinance certain capital improvements, none of

[133] 413 U.S. 472 (1973).
[134] 413 U.S. 734 (1973).
[135] 258 S.C. 97, 187 S.E.2d 645 (1972).
[136] 403 U.S. 602 (1971).

which had sectarian use. Moreover, in its contract with the state, the college had promised to keep sectarian activities out of these buildings, and gave state officials the right to inspect in order to ensure compliance.[137]

Powell's opinion, while relying on established precedents, also attempted to refine the tripartite test of *Lemon* by dividing the primary effect category into two branches. The first prong now holds that the program will be considered to have a primary effect of advancing religion if the school is so sectarian in nature that it would be impossible to isolate its secular functions. The other prong will find a constitutional violation if state aid is used to fund a specifically sectarian activity in an otherwise secular setting.[138] Powell then used this analysis in *Committee for Public Education and Religious Liberty v. Nyquist*, which struck down three sections of a 1972 New York law providing various types of grants to non-public schools.[139]

One provision provided $30-$40 per student per year to maintain and repair facilities if the school was in a low income area. Relying on *Tilton v. Richardson*,[140] Powell ruled that if "the State may not erect buildings in which religious activities are to take place, it may not maintain or renovate them when they fall into disrepair."[141] The second section provided tuition grants of $50-$100 per pupil for families with annual incomes of less than $5,000. Since tuition grants cannot be given to schools directly, Powell held, the state cannot achieve the prohibited purpose by rerouting the funds through parents. The final provision allowed tax credits on a graduated scale to families with incomes greater than $5,000 but less than $25,000. Again, Powell looked past the form to the substance, and found that for all practical purposes, no difference existed in benefit between tax credits and tuition grants. The institutions eligible to receive these benefits, either directly or indirectly, were so pervasively sectarian in nature that whatever form the aid took, it would have a primary effect of advancing religion.[142]

Powell, it should be noted, recognized that previous cases had allowed some forms of public aid to sectarian institutions, and agreed that a regime of total separation was neither possible nor desirable:

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[137] 413 U.S. at 744.

[138] *Id.* at 743.

[139] 413 U.S. 756 (1973).

[140] 403 U.S. 672 (1971).

[141] 413 U.S. at 777.

[142] In the fourth case that day, Sloan v. Lemon (*Lemon* II), 413 U.S. 825 (1973), the Court, through Powell, struck down a Pennsylvania statute providing tuition grants. The state had redesigned the law which *Lemon* I had held invalid, but the Court found no significant differences between it and the New York plan.

> As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of "entangling" precedents. Neither, however, may it be said that Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed at the University of Virginia.[143]

But the basic premises remained intact, and the burden always rested upon the state to prove that excessive entanglement did not result from its aid.

To meet this burden, Powell required that the legislation be exactly neutral, neither advancing nor retarding religion. But neutrality need not be "hostile indifference; incidental benefits do not immediately destroy otherwise permissible legislation."[144] Thus Powell could vote with the majority in *Meek v. Pittenger*,[145] which, while striking down still another effort by Pennsylvania to circumvent the *Lemon* decisions, upheld a provision loaning non-religious textbooks to private schools. Relying on *Board of Education v. Allen*, the Court found that the primary benefit accrued to the children and their parents, with no funds or books furnished to parochial schools.[146]

With these cases as a background, the Court in 1976 examined a Maryland program providing aid in the form of non-categorical grants to eligible colleges and universities.[147] Blackmun, joined by Burger and Powell, held the aid did not have a primary effect of advancing religion, nor were the schools so permeated by religion that the secular activities could not be separated from the religious; moreover, the statute included provisions limiting use of funds to strictly secular purposes. Justices White and Rehnquist concurred, with the remaining four members in dissent. Blackmun's plurality opinion followed the general analysis of Powell's in *Hunt v. McNair*, a step by step examination of the various parts of the *Lemon* test, measuring the effects, primary purpose, and level of entanglement. The main shift in analysis is away from an emphasis on the *form* of aid to the *character* of the recipient institutions, which some commentators feel is wise,[148] and may account for Powell's agreement. His effort to balance issues has always placed greater weight on effect than on form. By looking at the schools receiving aid and how

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[143] 413 U.S. at 761.

[144] *Balanced Justice*, *supra* note 69 at 423.

[145] 421 U.S. 349 (1975).

[146] 392 U.S. 236 (1968). Justice Brennan, in a biting dissent, called it "pure fantasy" to assert schools did not benefit from the textbook loan. 421 U.S. at 379.

[147] Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

[148] See, e.g., Note, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 139 (1976). A student note, Note, *Recent Developments*, 45 FORDHAM L. REV. 979, 989-90 (1977), is less sure.

they will use it, one can get a more accurate reading of the level of entanglement between church and state. Then one can apply the traditional constitutional standards more intelligently.[149]

Educational Management

Among Justice Powell's concerns have not only been a reluctance to see courts involved in matters of overall educational policy, but also concern with the judiciary meddling in the internal affairs of school management. As one would expect, Powell has proved resistant to efforts to involve the legal system in matters he believes beyond its competence. Where individual rights have apparently come into conflict with the administrative needs of school officials, he has attempted to weigh and balance these competing interests, but normally with a deference to local prerogatives.

It has long been established that students do not lose their constitutional rights when entering a school,[150] but the Court has also recognized that given the need to maintain order and discipline, the state could, if proper justification existed, curtail some activities which, if carried on outside school property, would be constitutionally protected. In his first term on the bench, Powell noted the need for a careful balancing of these interests:

> [W]e approach our task with special caution, recognizing the mutual interests of students, faculty members, and administrators in an environment free from disruptive interference with the educational process. We are also mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order. Where these interests appear to compete, the First Amendment, made binding upon the States by the Fourteenth Amendment, strikes the required balance.[151]

The case arose in the troubled sixties when Central Connecticut State College denied official recognition to a group of students wishing to

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[149] A similar analysis of a Minnesota statute allowing parents to deduct expenses for tuition, books, and transportation from state income taxes was utilized by Justice Rehnquist to find the law valid. Mueller v. Allen, 103 S.Ct. 3062 (1983). Powell joined the five-person majority, which distinguished the fact situation from *Nyquist*, although what its effects will be on the general rule is difficult to predict. One final case which touched on the establishment clause is Bob Jones Univ. v. United States, 103 S.Ct. 2017 (1983), in which Powell concurred in the decision that the Internal Revenue Service (I.R.S.) had the power to deny tax-exempt status to non-profit schools which practiced racial discrimination. We need not discuss Powell's opinion here, since it dealt primarily with the powers of the I.R.S. rather than with establishment clause issues.

[150] Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Grayned v. Rockford, 408 U.S. 104 (1972). In both these cases, the Court held that school officials had not met the burden of proof in showing that their restrictions on students' freedom of expression were necessary for maintaining proper discipline in the schools.

[151] Healy v. James, 408 U.S. 169, 171 (1972).

form a local chapter of the Students for a Democratic Society (SDS), an organization which had admittedly been a disruptive element in campus disorders throughout much of the decade. The students refused to promise in advance that they would never engage in activities disruptive of classroom order, but at the same time pointed out that SDS embraced a wide diversity of opinion, and it was not their intention to foment disorder. They merely wanted recognition as a legitimate student organization so they could hold meetings on campus and avail themselves of bulletin boards and newsletters. Although a joint student-faculty-administration committee recommended recognition, the president rejected the report and denied the application. He based his decision on the reputation SDS had developed in the previous years, one which he termed antithetical to the school's policy of academic freedom.

The students then turned to the courts, and sought injunctive relief on grounds that their first amendment rights had been violated, and that the president's action relied on grounds not included in the committee report, and was thus a denial of due process. The district court agreed, and ordered the college to provide a new hearing in which all evidence bearing on the issue could be introduced.[152] A second hearing under the supervision of the Dean of Student Affairs added little to the record besides reports of SDS activities at other schools, and the president reaffirmed his earlier decision. The district court on rehearing dismissed the student complaint, and the court of appeals, by a 2-1 vote, affirmed.[153]

The Supreme Court reversed, and in an opinion joined by all nine Justices, held that the students' first amendment rights had been violated. The denial of the use of college facilities and information opportunities may not have been a direct squelching of free speech and association, but indirectly had the same effect. The fact that SDS could have organized as an off-campus group "does not ameliorate significantly the disabilities imposed by the president's action. We are not free to disregard the practical realities."[154] The students had no obligation to prove the existence of their rights; they had already been confirmed by earlier decisions. But the college had failed to meet its duty to show that exercise of those rights would significantly interfere with the ability of the school to carry on its functions peacefully.

Powell did not hold that, in this case, no argument could be made to deny recognition, but rather that the college had failed to do so. In fact, a substantial basis existed, namely, the relationship of the local chapter

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[152] 311 F. Supp. 1275 (D. Conn. 1970).

[153] 310 F. Supp. 113 (D. Conn. 1970); 445 F.2d 1122 (2nd Cir. 1971).

[154] 408 U.S. at 183.

of SDS to the national organization. If it could be shown that national policies favoring disruption would be imposed upon or expressed through the local chapter, then the college could legitimately deny recognition or place other restrictions on the group. But officials had failed to do so, and the mere fear that this might be the case could not be used to abridge constitutionally protected freedoms. Moreover, even if SDS *advocated* certain unpalatable ideas or policies, advocacy by itself enjoyed full first amendment protection; a clear line existed between advocacy and action, which may be restricted. It is this balancing which Powell found determinative, and the Court, therefore, remanded for further hearing.

Healy was a fairly simple case, and Powell broke no new ground in his opinion. The Court's precedents in this area were weighty enough that although four members did not agree completely with Powell's reasoning, they concurred in the result. But a far more complex first amendment issue arose ten years later, in which a fragmented Court apparently expanded student rights far beyond any earlier protection, and this elicited a powerful dissent from Powell.

In *Board of Education, Island Trees Union Free School District No. 25 v. Pico* [155], the Court held that the first amendment could be offended by a school board's ordering the removal of certain books from the school library. The school district had argued that the decision to remove nine books targeted by a conservative parents' organization was made because the books were vulgar, in bad taste, immoral and hence educationally unsuitable for high school students. The plaintiffs alleged that even though the books had educational value, they had been removed because certain passages in the books were repugnant to the social, political and moral tastes of the board. The books contained passages regarding sexual relations, homosexuality, and drug use and contained racial and ethnic slurs, blasphemy and the common four-letter vulgar explitives.[156] On a very scant record summary judgment was entered for the school board by the district court.

The rejection of this disposition of the case produced no opinion of the Court, but the action by five Justices indicated their agreement that

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[155] 102 S.Ct. 2799 (1982). Brennan's opinion for the Court was joined in full by Marshall and Stevens, and in all but one part by Blackmun, who filed a separate opinion concurring in the result. White concurred in the judgment. Burger wrote a dissent joined by Powell, Rehnquist and O'Connor, each of whom also filed separate dissents.

[156] The books were K. VONNEGUT, SLAUGHTER HOUSE FIVE: D. MORRIS, THE NAKED APE; P. THOMAS, DOWN THESE MEAN STREETS; L. HUGHES, ED., BEST SHORT STORIES OF NEGRO WRITERS; ANON., GO ASK ALICE; P. LAFORGE, LAUGHING BOY; R. WRIGHT, BLACK BOY; A. CHILDRESS, A HERO AIN'T NOTHIN' BUT A SANDWICH; E. CLEAVER, SOUL ON ICE; J. ARCHER, ED., A READER FOR WRITERS. *Id.*, at 2803 n. 3.

there is *some* first amendment limitation upon the discretion of school authorities in this regard. The case was remanded for further development of the facts surrounding the removal to determine if the decision were motivated by appropriate educational concerns or whether the board had acted improperly toward ideas with which they disagreed.[157] Although all members of the court (save Justice White who expressed no views on the first amendment question) agreed that there was broad and presumably largely unreviewable discretion on the part of school officials to select books for the library as part of their power to set the curriculum and inculcate the values and ideals of a democratic society in students, the seemingly corollary discretion to winnow the collection so implicated first amendment concerns that it was required to withstand judicial scrutiny under the first amendment.

Powell wrote separately to express his "genuine dismay" at the results the Court's opinion appeared to invite, and the effects it would have on local school administration. "After today's decision," he warned, "any junior high school student, by initiating a suit against a school board or teacher, may invite a judge to overrule an educational decision by the official body designated by the people to operate the schools."[158] This would lead to a result he had consistently opposed in all his educational opinions, the further intrusion of courts into school management. "Judges rarely are as competent as school authorities to make this decision; nor are judges responsive to the parents and people of the school district."[159]

Referring to *Plyler v. Doe*, he noted that the Court had there proclaimed the schools to be the primary vehicle for transmitting social values, a principle which he believed that the decision in *Island Trees* undermined. He concluded:

> A school board's attempt to instill in its students the ideas and values on which a democratic system depends is viewed as an impermissible suppression of other ideas and values on which other systems of government and other societies thrive. Books may not be removed because they are indecent; extoll violence, intolerance, or racism; or degrade the dignity of the individual. Human history, not the least of the twentieth century, records the power and political life of these very ideas. But they are not our ideas or values. Although I would leave this educational decision to the duly constituted board, I certainly would not *require* a school board to promote ideas and values repugnant to a democratic society or to teach such values to *children*. In different contexts and in different times, the destruction of written materials has been the symbol of despotism and

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[157] *Id.* at 2810 (Brennan, J., plurality); *id.*, at 2812 (Blackmun, J., concurring).
[158] *Id.* at 2822.
[159] *Id.*

> intolerance. But the removal of nine vulgar or racist books from a high school library by a concerned school board does not raise this specter. For me, today's decision symbolizes a debilitating encroachment upon the institutions of a free people.[160]

In an appendix, Powell reprinted a seven-page summary of excerpts from the contested books prepared by one of the circuit court judges, which by itself appears to sustain the assertion that the books were rife with racial epithets, explicit sex and four letter words. He did this not to prove that the books were offensive *per se*, but merely to show that the local boards might have reasonably concluded that the books were not educationally suitable. Since there is no doubt that some of the books, such as Richard Wright's *Black Boy*, can be read in different ways by different people, its educational value can be perceived differently as well. For Powell, however, this judgment should be made by local officials reflecting the community values and not subject to judicial scrutiny. Wright was not denied the freedom to express his views nor were children prohibited from reading them. And whether the school should be a vehicle of their dissemination was, to Powell, solely a question of educational policy lacking in constitutional import.

Powell has been consistent in his determination to protect the flexibility and prerogatives of local boards, and this also applied to the ability of school officials to establish and enforce disciplinary measures. In *Goss v. Lopez*,[161] the Court substantially limited the power of school officials to suspend students for infractions of rules without proper notice and an opportunity to a hearing before an appropriate officer. In his opinion for a 5-4 majority, Justice White held that even though public education is not constitutionally mandated, a statutory grant of a right of schooling is protectable "property" under the due process clause. When a school suspends a student, for whatever cause, it is thus depriving him or her of property, and due process must be observed.

For Powell and his fellow dissenters, "the constitutionalizing of routine classroom decisions not only represents a significant and unwise extension of the Due Process Clause,"[162] but was also unnecessary in light of the procedural safeguards already built into the Ohio statute. Even if one could stretch the imagination to find some "arguable infringement" on student rights, "it is too speculative, transitory, and insubstantial to justify imposition of *constitutional* rule."[163] Since, as the majority admitted, the right to education relied fully on a statutory grant, then the

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[160] *Id.* at 2823.
[161] 419 U.S. 565 (1975).
[162] *Id.* at 595.
[163] *Id.* at 586.

State of Ohio could certainly condition that grant upon acceptance of reasonable disciplinary standards and appropriate punishment.

Aside from court intrusion into legitimate and non-arbitrary administration of school discipline, Powell feared that the Court was initiating potential conflict between two groups whose interests were fully congruent. Both students and administrators had an interest in seeing that the educational process moved along smoothly, with minimal disruption by those unwilling to abide by behavioral guidelines. The student who violated disciplinary rules adversely affected the education of other students; to clothe punishment of such infractions with constitutionally mandated due process, beyond that already available through statute, penalized those who behaved. No one, he warned, "can foresee the ultimate frontiers of the new 'thicket' the Court now enters," since it could, by extension, lead to similar decisions affecting grading, promotion, and other daily decisions.[164]

Powell's fears seem to have been partially realized in a case decided a month later in which the Court apparently reduced the qualified immunity of school officials against damages in a section 1983 suit.[165] Again speaking through Justice White, the five person majority recognized the need for immunity for school officials acting in good faith, but this immunity need not be absolute, since it "did not sufficiently increase the ability of the school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivation."[166]

In this particular case, the school officials had not acted arbitrarily or with malice in suspending several students for a violation of the school's policy on alcoholic beverages (they had spiked the punch at a party in the school), and the Civil Rights Act could not be interpreted to suppose federal courts should sit as review panels on school decisions, absent the deprivation of a constitutionally guaranteed right. But if such a violation existed, students did have recourse to Section 1983, and White spelled out the limits of school board immunity. The officials had to have permissible intention and knowledge of the "basic, unquestioned constitutional right of his charges." Immunity would be lost if the official "knew or reasonably should have known" that his actions violated students' rights, or if he acted maliciously.[167]

On its face, White's opinion did not alter the traditional doctrine of qualified immunity resting upon a showing of good faith action. Powell,

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[164] *Id.* at 597.

[165] Wood v. Strickland, 420 U.S. 308 (1975).

[166] *Id.* at 320.

[167] *Id.* at 322.

however, believed that in practice the decision left "little substance to the doctrine."[168] While he, Blackmun, Rehnquist, and the Chief Justice agreed in the result, Powell objected to the imposition of a new and higher standard of care upon school officials under Section 1983 than that imposed under other public officers. It was unreasonable to subject school administrators to personal liability based on their real or supposed knowledge of an area of the law which remained difficult to lawyers and judges. White had referred to "settled, indisputable law" and "unquestioned constitutional rights" as if these were crystal clear. "One need only look at the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophesy as to what are 'unquestioned constitutional rights.'"[169] Prior to this case, Powell dryly noted, he would have thought the law *contrary* to the majority opinion was settled and indisputable.

It is not surprising that Powell worried about the ability of laymen to interpret complex law, since not only as a judge, but as a former school board member he knew how difficult these matters could be. There were over 20,000 boards in the country, he reminded the Court, with five or more members each, and thousands of superintendents and principals, few of whom had either knowledge of the law nor ready access to counsel in carrying out their daily chores. For the Court to now place this higher standard upon them could well lead to many persons refusing to continue performing an important public, although voluntary, task for fear of innocently and unknowingly courting a law suit. The Court, he implied, was once again burying its head in legalistic theory rather than paying attention to the real world in which school boards and administrators functioned.

Two years later, in another case dealing with discipline, Powell spoke for the Court, as the 5-4 split shifted toward his views.[170] Students in a Florida junior high school claimed that corporal punishment, specifically paddling as permitted under state law, constituted cruel and unusual punishment in violation of the eighth amendment, and the procedures involved violated their rights to procedural due process.

Powell began by placing corporal punishment in its historic context, and asserted that it had been a commonly accepted means of school discipline in the United States since colonial days. Moreover, the common

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[168] *Id.* at 329. The decision, according to one analysis, "put sharp teeth into the section 1983 remedy." Note, *Students' Rights versus Administrators' Immunity*: Goss v. Lopez *and* Wood v. Strickland, 50 ST. JOHN'S L. REV. 102, 120 (1975).

[169] 420 U.S. at 329.

[170] Ingraham v. Wright, 430 U.S. 651 (1977).

law had always recognized the right of teachers to inflict "moderate correction" on students, the only restriction being against "excessive" or "unreasonable" force. Of twenty-three states which dealt statutorily with the subject, only two had abolished corporal punishment in schools; the rest permitted it, providing appropriate procedural safeguards. Thus, from a historical basis, reasonable corporal punishment could not be considered either cruel or unusual. Nor could it be so described from a constitutional basis, since both a textual and historical analysis of the eighth amendment "suggests an intention to limit the power of those entrusted with the criminal law function of government. . . . [T]he proscription against cruel and unusual punishment, therefore, was designed to protect those convicted of crimes."[171] The Court concluded that the prohibition did not apply to the paddling of children in schools.

After elaborating, indeed overelaborating, on this theme, Powell turned to the second issue before the Court, whether corporal punishment was subject to the due process clause, and if so what process was required? It was argued that at least a *Goss* prior hearing was necessary to the application of the paddle. Justice Powell quickly distinguished *Goss*, noting that there the child was deprived of her property interest in attending school by reason of the suspension, whereas Ingraham's continued access to education was not endangered. Nevertheless, Powell concluded that a school child does have a constitutionally protectable liberty interest in being free from bodily injury at the hands of school officials, but only if it is unreasonable or excessive. While agreeing that in the absence of the historical tradition of corporal punishment in the school context a strong case could be made for prior procedural requirements, tradition and long recognition of the teacher's "privilege" in the law stood for the proposition that the application of reasonable corrective corporal punishment did not intrude upon the recognized liberty interest of the child which was entitled to constitutional protection. That protection did not attach until the punishment could be said to be excessive. Powell further concluded that there was no need for prior administrative safeguards to forestall intrusions of the child's constitutionally protected right to be free from excessive application of corporal punishment, since there were in place statutory (and common law) requirement that the corrective measure be reasonable, and a civil tort action available both to provide a remedy for the imposition of excessive punishment and to present the specter of monetary liability sufficient to guarantee that those who were authorized to impose disciplinary measures would approach that power with such circumspection to preclude excesses.

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[171] *Id.* at 664.

All of this, of course, provides no answer to the points raised in Mr. Justice White's dissent that antecedent notice and hearing is necessary to protect the student from *mistaken* (in contradistinction to *excessive*) corporal punishment for something that he did not do, since no relief is available in tort if the teacher or principal was acting on a good faith belief and that wrongful infliction of physical pain is not truly remediable through damages.[172] To answer these criticisms, Justice Powell resorted to the special attributes of the public school to conclude that these problems were virtually nonexistent.

> Although students have testified in this case to specific instances of abuse, there is every reason to believe that mistreatment is an aberration. . . . Moreover, because paddlings are ususally inflicted in response to conduct directly observed by teachers in their presence, the risk that a child will be paddled without cause is typically insignificant.[173]

Lurking behind this conclusion is Justice Powell's belief that since school authorities can be presumed to be acting solely in the educational interest of students, they can be trusted not to abuse the authority vested in them. Justice Powell's reverence for local control of education policy matters provided a further basis for his decision.

> [A prior hearing] requirement would significantly burden the use of corporal punishment as a disciplinary measure. . . . School authorities may well choose to abandon corporal punishment rather than incur the burdens of complying with the procedural requirements.[174]
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> Assessment of the need for, and the appropriate means of maintaining school discipline is committed generally to the discretion of school authorities subject to state law. . . .
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> [T]he risk of error that may result in a violation of a schoolchild's substantive rights can only be regarded as minimal. Imposing additional administrative safeguards as a constitutional requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility.[175]

Powell's opinion raised a storm of controversy, although in terms of both historical and legal reasoning it appears quite sound. *Goss* and *Wood* both seemed to promise greater protection to students from arbitrary action by school officials, yet nothing in *Ingraham* reverses that. The state did provide safeguards as well as remedies against arbitrary or excessive punishment; Powell saw no reason to create new procedural

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[172] *Id.*, at 683, 693-95.
[173] *Id.* at 677-78.
[174] *Id.* at 680.
[175] *Id.* at 681-82.

protections and thereby intrude the federal judiciary further in daily school operations.

For some, his opinion reflected "the traditional conservative values of many white, middle-class Americans, particularly those living in the South and Midwest."[176] For another commentator,

> [Powell's opinion] denigrates the physical and psychological integrity of children; leaves in doubt the continuing vitality of the concept of parental primacy in the sensitive area of child rearing; encourages unquestioning adherence to governmental authority; and manifests a schizophrenic form of federalism which recognizes federal authority for the promotion of law enforcement but abdicates to the states responsibility for assuring vindication of federal constitutional rights.[177]

These observations miss the point. So long as prevailing community values uphold the traditional means of school discipline, and so long as the constitutional provision called into question is undeniably addressed to criminal cases, the Court should not interfere. The community, after all, consists in large measure of the parents of school children, and if they choose to do so, they may, through the political process, seek to abolish the punishment, as they have in New Jersey and Massachusetts. The fact that some, or indeed many, people believe corporal punishment to be an outmoded vestige of an earlier, more primitive time is irrelevant in terms of constitutional adjudication. The remedy, in a true federal system, is where Powell put it—in the local community, and not in the courts.

Professor Rosenberg's impassioned attack on the opinion, and her extensive effort to undermine Powell's history of the eighth amendment, prove little more than that, as with all constitutional provisions, one can find ambiguities. But her analysis would open the door to reading anything that "denigrates the physical and psychological integrity of children" as amenable to remediation through judicial supervision whenever real or imagined harm can be found. There is, indeed, much to criticize in modern schools, and a large volume of literature exists on the harmful effects they have on some children, but there is no one who claims to have a panacea to all these ills, certainly not the federal courts.

The fact that, for a variety of reasons, some children do not have as good an educational experience as others is regrettable, and Justice Powell would be among the first to agree. But by itself this sad condition

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[176] Piele, *The United States Supreme Court Decision in* Ingraham v. Wright, 7 J.L. & EDUC. 1, 7 (1978).

[177] Rosenberg, Ingraham v. Wright: *The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75, 76 (1978).

does not implicate a liberty interest nor, as Powell has repeatedly asserted, does it call for court intervention. Among the many values of public education is that of local control and the real opportunity for involvement by the community in structuring local policy. One does not have to agree with everything Justice Powell has written to at least recognize the accuracy of his observations in this area, or to admit that many Americans share them. If they are no longer applicable, and if a sufficient majority of the community wants to change them, it is within their power to do so—a power Powell knows is routinely asserted. Thus he is not willing to permit a minority to create new constitutional rights or limitations through the courts. The real complaint of the critics is not that Powell reflects middle class values, but that various local communities do. And Justice Powell has steadfastly resisted attempts to subvert their expression of these values in locally adopted educational policies through the federal courts under the aegis of constitutional liberty.

Conclusion

In the end it would be difficult to pin stereotypical labels on Lewis Powell. As he himself said at the time of his nomination, he is pragmatic and flexible, liberal on some issues, conservative on others. It would not be unfair to say he is far from the bedrock strict constructionist that some people accuse him of being, and others hoped he would be. If one does not always agree with his jurisprudence, one can at least appreciate his consistency. Throughout his years on the Supreme Court, he has brought to his opinions on education not only legal and historical analysis of high order, but an extensive knowledge of how school systems run, and what various components and pressures, not all of them harmonious or compatible, go into the educational process.[178]

If there is a key word, it must be "balance," and Justice Powell has tried, with varying degrees of success, to balance the recognized constitutionally protected interests of the individual against the equally valid claims of communal preferences, local values, and the need to maintain order and discipline within the schools. It is clear he believes that courts

[178] One case which is an exception to this conclusion, and which is not covered in this discussion is NLRB v. Yeshiva Univ., 444 US. 672 (1980), which is primarily a labor relations rather than an education case. There Powell, again speaking for a 5-4 majority, ruled that full-time faculty members, whose authority in academic matters was absolute and who had near complete control over curriculum, scheduling, teaching methods, grading policies and graduation requirements, should be considered supervisory and managerial personnel, and therefore not entitled to the benefits of collective bargaining under the National Labor Relations Act. Powell's analysis of university governance may charitably be described as far more idealistic than real, compared to his precise understanding of public schools. For an illuminating exchange on the decision and its implications, see Gerald A. Bodner's article in 7 J. COLLEGE & UNIV. L. 78 (1980), and the response by Matthew W. Finkin, *id.* at 321 (1981).

should interfere as little as possible in the schools, since they are the governmental agencies least qualified to set policy; certainly some of our experience over last decade would justify his concerns.

But while this flexible, case by case analysis in his hands may yield the results he believes desirable, primarily the noninterference by the courts in school affairs, in other hands just the opposite may occur. If, as some people believe, the lower federal courts, with the large number of appointments made during the Carter administration, are far more liberal and interventionist than is the Supreme Court, case by case analysis may allow judges, by assigning different weights to particular values, to do just what Powell fears most: intervene in directing educational policy. Flexibility and a recognition of distinct competing values are certainly admirable qualities, but in the absence of clearly delineated relationships among them, chaos in educational litigation may result. If Powell has told judges that several variables must be taken into account and balanced, he has nonetheless failed to provide them with a decisional matrix with which to align them. In the cases discussed above, very few secured unanimity from the Court, or resulted in firm decisional guidelines. When Powell complained that his brethren failed to consider competing values, it might be merely that he disagreed with the reative weight they gave to those values. The Court has not overlooked the worth of local control, but rather has often given it less importance in its overall evaluation than he would have preferred. Certainly Justice Powell has called attention to the complex, multifaceted nature of public education; but his analyses have failed to yield decisional rules in which consistent evaluation of these variables may occur.