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THE EDUCATION JUSTICE: THE HONORABLE LEWIS FRANKLIN POWELL, JR.

*Professor Victoria J. Dodd**

INTRODUCTION

The Honorable Lewis Franklin Powell, Jr. is "the education Justice" of the United States. During his tenure on the U.S. Supreme Court, from 1971 to 1987, Justice Powell authored at least twenty major opinions in education law, in addition to numerous significant concurrences and dissents. Just a sampling of Justice Powell's majority opinions on education could form the bulk of an education law textbook recognizable by any American law student. Among Justice Powell's most memorable education opinions are *Healy v. James*,[1] *San Antonio Independent School District v. Rodriguez*,[2] *Committee for Public Education and Religious Liberty v. Nyquist*,[3] *Ingraham v. Wright*,[4] *Abood v. Detroit Board of Education*,[5] *Regents of the University of California v. Bakke*,[6] *Ambach v. Norwick*,[7] *Southeastern Community College v. Davis*,[8] *National La-*

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1. Healy v. James, 408 U.S. 169 (1972) (upholding right of college students to organize a chapter of Students for a Democratic Society).

2. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (finding no violation of equal protection clause in local property tax funding of public schools in Texas).

3. Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding New York law subsidizing non public schools to violate Establishment Clause).

4. Ingraham v. Wright, 430 U.S. 651 (1977) (finding use of corporal punishment in public schools did not violate the Eighth Amendment or procedural due process).

5. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (holding that teachers may stop their union from spending its funds to support political views or political candidates).

6. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (allowing use of race as one factor in admission to public university).

7. Ambach v. Norwick, 441 U.S. 68 (1979) (finding no violation of equal protection in New York's refusal to grant teacher certification to non-American citizens).

8. Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979) (finding no violation of § 504 of the Rehabilitation Act in refusal of state nursing school to admit hearing impaired student).

bor Relations Board v. Yeshiva University,[9] *Widmar v. Vincent*,[10] *Martinez v. Bynum*,[11] and *Wygant v. Jackson Board of Education*.[12] A complete listing of Justice Powell's opinions relating to education appears in the appendix at the end of this Article.

Even more illustrative of Justice Powell's appellation as "the education Justice" are his deep connections, both public and private, to elementary, secondary, and higher education. These connections inevitably influenced Justice Powell's views on education, much as Justice Harry A. Blackmun's role as general counsel for the Mayo Clinic permeated his majority opinion in *Roe v. Wade*.[13]

This Article will explore some of Justice Powell's major Supreme Court rulings in education law. It will also consider how these rulings may have related to aspects of Justice Powell's life. In addition, the Article will briefly describe the Supreme Court's current views on education and will attempt to describe how Justice Powell might analyze these issues today. At least one sitting Justice on the Supreme Court, Justice Sandra Day O'Connor, appears to have been influenced by Justice Powell's views.[14] Justice O'Connor occupies a similar ideological position on the Supreme Court as did Justice Powell, who wrote more than 250 majority opinions and whose "knack for being on the winning side never dropped below eighty per cent in any term, and often exceeded ninety per cent."[15]

In the first part of the Article, a brief biography of Justice Powell will be presented, emphasizing his connection to education. The

9. NLRB v. Yeshiva Univ., 442 U.S. 672 (1980) (finding that faculty members at private university are managerial employees and therefore unable to unionize under National Labor Relations Act).

10. Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a public university must give religious groups the same access to university facilities as non-religious groups).

11. Martinez v. Bynum, 461 U.S. 321 (1983) (upholding Texas law requiring children to be bonafide residents of a school district).

12. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (overturning school board plan that laid off white teachers before African-American teachers regardless of their seniority).

13. Roe v. Wade, 410 U.S. 113 (1973) (holding that a women's fundamental right to privacy under substantive due process encompasses her decision whether or not to terminate a pregnancy). In *Roe*, Justice Blackmun discussed the history of abortion at some length and based his constitutional tests on a tripartite scheme corresponding to a medical view of gestation.

14. *See* Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395 (1987). Justice O'Connor mentions Justice Powell's concern for public education. *Id.* at 396-397. Justice O'Connor also gave a eulogy at Justice Powell's funeral. *Justice and Mrs. Lewis F. Powell, Jr.: A Son's Perspective*, 33 U. RICH. L. REV. 1, 6 (1999).

15. Burt Neuborne, *Lewis F. Powell, Jr.*, *in* THE JUSTICES OF THE UNITED STATES SUPREME COURT 1631-32 (Leon Friedman & Fred L. Israel eds., 1997).

second part of the Article will discuss Justice Powell's views in three extremely important cases: *San Antonio Independent School District v. Rodriguez*,[16] *Ingraham v. Wright*,[17] and *Committee of Public Education and Religious Liberty v. Nyquist*.[18] Woven into the case discussions will be aspects of Justice Powell's biography, as well as the present Supreme Court's thoughts on these issues. The last section of the Article will focus on the *Bakke*[19] opinion, asking if the Supreme Court can sustain Justice Powell's reasoning in *Bakke* today.

I. A Brief Look at Justice Powell's Life,[20] Particularly in the Realm of Education

Lewis Franklin Powell, Jr., was born on September 19, 1907, in Suffolk, Virginia. His father was a hardworking and prosperous businessman who never let his offspring take their comfort for granted. Powell's father required him to work during the summer at various blue-collar occupations.[21] Although a bit roughhewn, Justice Powell's father traced his roots to the Jamestown, Virginia settlers of 1607, a fact which invoked references to Justice Powell as a patrician Southern gentleman.[22]

Justice Powell considered his upbringing to have been very traditional. He stated, "I was raised in a very devout Christian family. We would have prayers every morning after breakfast, and every evening we'd kneel to pray and read a few verses from the Bible."[23] Justice Powell as a youth attended McGuire's University School, a private preparatory school.[24] Although it was assumed that Justice Powell would select the University of Virginia as his

16. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
17. Ingraham v. Wright, 430 U.S. 651 (1977).
18. Comm. of Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
19. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
20. There is a significant amount of material available concerning the life and work of Justice Powell. The most extensive single work is JUSTICE LEWIS F. POWELL, JR., by John C. Jeffries, Jr., who clerked for Justice Powell during the 1973 term. Another valuable resource is the Lewis F. Powell, Jr. Archives, which are kept at Washington and Lee University, Justice Powell's alma mater. A listing of the Archive's materials appears in THE LEWIS F. POWELL, JR. PAPERS: A GUIDE (John N. Jacob archivist, 1997) [hereinafter THE POWELL PAPERS]. Another helpful article is Melvin I. Urofsky, *Mr. Justice Powell and Education: the Balancing of Competing Values*, 13 J.L. EDUC. 581 (1984).
21. Donna Haupt, *A Justice Reflects*, 2 CONST. 16, 20 (1990).
22. *See, e.g.*, Ray McAllister, *The Southern Gentleman*, 74 A.B.A. J. 48 (1988).
23. Haupt, *supra* note 21, at 19. Justice Powell grew up in the Baptist tradition, but later belonged to a Presbyterian congregation.
24. *Id.* (quoting Justice Powell).

alma mater, he instead chose Washington and Lee because, according to some observers, he was promised a spot on the school's baseball team.[25]

Justice Powell excelled as a college student. He was elected to Phi Beta Kappa, became president of the student body, and was editor of the student newspaper.[26] These experiences no doubt later affected his views on university speech issues.[27] Justice Powell also attended law school at Washington and Lee, was elected to the Order of the Coif, and finished first in his class, even as he completed the course of study in two years.[28] At his father's suggestion, Justice Powell then studied at the Harvard Law School, finishing his L.L.M. in 1932.[29]

Although exclusively educated in private schools, Justice Powell did much in the interest of public education. He was elected by the City Council to the Richmond School Board,[30] which he chaired from 1952 to 1961.[31] He was also a president of the Virginia State Board of Education, a member of the Virginia State Library Board,[32] and a board member of the Virginia Foundation of Independent Colleges.[33]

The only controversy regarding any aspect of Justice Powell's life concerns his role on the Richmond School Board during the post-*Brown v. Board of Education* period. Although some authorities portray his integration efforts as exemplary,[34] others point to the segregatory practices of the Richmond school district revealed in the *Bradley v. School Board* case.[35] The circumstances of the *Brad-*

25. THE SUPREME COURT JUSTICES 491 (Clare Cushman ed., 2d ed. 1995).

26. Neuborne, *supra* note 15, at 1633; *see also* Norman Dorsen, *Justice Lewis F. Powell, Jr.: A Biography–A Review Essay*, 19 J. SUPREME CT. HIST. 140 (1994).

27. *See, e.g,* Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a public university must give religious groups the same access to university facilities as non-religious groups); Healy v. James, 408 U.S. 169 (1972) (upholding right of college students to organize a chapter of Students for a Democratic Society).

28. S. REP. NO. 92-17, at 1 (1971).

29. THE SUPREME COURT JUSTICES, *supra* note 25, at 492.

30. *Id.*

31. S. REP. NO. 92-17, at 2 (1971).

32. No doubt Justice Powell's service on the Virginia State Library Board influenced his dissenting view in *Board of Education v. Pico*, 457 U.S. 853 (1982).

33. THE POWELL PAPERS, *supra* note 20, at 14, 29.

34. THE OXFORD COMPANION TO THE SUPREME COURT 661 (Kermit L. Hall ed., 1992) ("[H]e presided over the successful, disturbance-free integration of the city's schools."); Oliver W. Hill, *A Tribute to Lewis F. Powell, Jr.*, *in* THE LEWIS F. POWELL, JR. PAPERS: A GUIDE 19-20 (1992) (describing Justice Powell's calm bravery in leading a stormy school board meeting concerning desegregation).

35. Bradley v. Sch. Bd., 317 F.2d 429 (4th Cir. 1963). *See* Neuborne, *supra* note 15, at 1633-34.

ley case were extensively analyzed during Justice Powell's congressional confirmation proceedings,[36] leading Senators Bayh, Hart, Kennedy, and Tunney to file a separate report in which they concluded: "We are convinced that Lewis Powell was bucking the opposition to change, pushing slowly but steadily towards the time when all the schools could be integrated."[37]

In addition to being both president of the American Bar Association and the American College of Trial Lawyers, Justice Powell served on the governing boards of Hollins College, Union Theological Seminary, and Washington and Lee University.[38] It is difficult to conceive of someone who could have had a more intimate knowledge of all facets of American education than the Honorable Lewis Franklin Powell, Jr.

II. An Analysis of Three of Justice Powell's Education Opinions

A. *San Antonio Independent School District v. Rodriguez*

Other than the *Bakke* decision, perhaps the most famous of Justice Powell's majority opinions in education law is *San Antonio Independent School District v. Rodriguez*.[39] It is also one of his earliest major opinions, written just two years after his appointment to the Supreme Court in 1973.

The facts of the *Rodriguez* case involved the public school financing system of Texas. The plaintiffs were a class of minority and low-income school children throughout Texas. They claimed that the Texas system of public school financing, which relied heavily on local property taxes, violated the Equal Protection Clause of the Fourteenth Amendment. Interestingly enough, the plaintiffs had prevailed at the district court level,[40] and the state took a direct appeal to the Supreme Court.[41] In a 5-4 decision, the Supreme Court reversed the lower federal court's decision.[42]

Justice Powell understood the profound implications of the case he was ruling upon. Early in the opinion he referred to "the far-

36. *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Comm. of the Judiciary of the United States S.*, 92d Cong. 361-397 (1971) (testimony of Senator John Conyers, Jr.).

37. S. Rep. No. 92-17, at 8 (1971).

38. The Powell Papers, *supra* note 20, at 11.

39. San Antonio Indepen. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

40. Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971).

41. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 1.

42. *Id.* at 59.

reaching constitutional questions presented."[43] At the end of the case, he cautioned "the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education."[44]

Thus from the outset, Justice Powell in *Rodriguez* was concerned with local stability, the same principles that apparently guided him in his stewardship of the Richmond school board during desegregation.[45] Justice Powell was also aware of the potential financial impact of the case and questioned whether any real improvement in education would result.[46] As a member of both local and state school boards,[47] Powell surely would have known of the difficulties in persuading a state legislature to enlarge state funding for any local activity.

The bulk of the *Rodriguez* opinion is spent on three main arguments: that wealth is not a suspect class; that education is not a fundamental right; and that federal courts should not interfere with important state policy decisions. Each of these premises seems informed by Justice Powell's experience in the education realm.

Justice Powell first analyzed the Court's precedents concerning classifications of wealth and determined that a recognized equal protection violation occurs only when poverty causes an absolute deprivation[48] of a state benefit. He concluded that the most impoverished families may or may not reside in the districts with the lowest property values.[49] A total denial of public education was something of great concern to Justice Powell. In the absence of such denial, however, Justice Powell could find no equal protection violation in *Rodriguez* under a suspect class analysis.[50]

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43. *Id.* at 6.

44. *Id.* at 56. Indeed, "the general consensus was that the United States Supreme Court would uphold the *Rodriguez* decision." W. Norton Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 LAW & CONTEMP. PROBS. 459-60 (1974). Partially because of this belief, eleven states had modified their school financing systems in the preceding few years. *Id.*

45. *See supra* notes 34-37 and accompanying text.

46. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 56-57. ("[U]nless there is to be a substantial increase in state expenditures on education across the board - an event the likelihood of which is open to considerable question.").

47. *See supra* notes 30-33 and accompanying text.

48. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 51.

49. *Id.* at 56.

50. *Id.* at 58. Justice Powell served on a state commission on constitutional revision, centering his work on granting the state board of education a larger role in setting educational standards and in mandating that counties and municipalities not shut their schools down. Public schools had been shut down in parts of Virginia after

Similar concerns led Justice Powell to hold that education is not a fundamental right, and even if it were, that the Texas funding scheme would not infringe upon it.[51] He emphasized that the state of Texas provided children with at least "basic minimal skills,"[52] and that Texas had continually sought to "extend," not contract, public education.[53]

As for federalism concerns, Justice Powell stated that "this Court's lack of specialized knowledge and experience"[54] argued against federal court action in such a state matter. Ironically, Justice Powell's own expertise in education led him to believe that states might have a variety of legitimate means to solve the problems of education financing, and that the Supreme Court should not mandate one method.

As of 2002, the Supreme Court has not yet recognized a fundamental right to an education; would Justice Powell, were he alive today, do so? It seems doubtful that he would reverse the *Rodriguez* decision and recognize such a right.

We can find evidence for this conclusion in *Plyler v. Doe,*[55] as well as in *Martinez v. Bynum.*[56] In *Plyler*, a 1982 case, the Supreme Court struck down a Texas statute denying free education to undocumented alien children by permitting public schools to refuse admission to these children.[57] Justice Powell concurred in *Plyler*, finding that the state law improperly created an "underclass" of uneducated persons.[58] His analysis, however, steered clear of a retraction of his previous federalism arguments in *Rodriguez* and he wrote separately "to emphasize the unique character of the cases before us."[59] Note also that the *Plyler* facts, where children were denied an education, did cause an "absolute deprivation" of education, which Justice Powell always opposed.[60]

Martinez v. Bynum[61] was a 1983 Powell decision upholding a Texas statute requiring minors to live with their parents or guardi-

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the decision of the U.S. Supreme Court in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). POWELL PAPERS, *supra* note 20, at 44.

51. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 79.
52. *Id.*
53. *Id.* at 81.
54. *Id.* at 85.
55. Plyler v. Doe, 457 U.S. 202 (1982).
56. Martinez v. Bynum, 461 U.S. 321 (1983).
57. *Plyler*, 457 U.S. at 205.
58. *Plyler*, 457 U.S. at 239.
59. *Plyler*, 457 U.S. at 236.
60. *See supra* notes 48-50 and accompanying text.
61. *Martinez,* 461 U.S. 321 (1983).

ans in order to attend public school. Characterizing the law as a bona fide residence requirement,[62] Justice Powell also emphasized the importance of "local control,"[63] a touchstone of *Rodriguez*. No constitutional rights were violated by the Texas law.

Although Justice Powell would probably decide the *Rodriguez* case the same way today, he might be pleased with another post-*Rodriguez* development: state supreme courts in a number of states have found a fundamental right to an education pursuant to a state constitution equal protection clause[64] or an article of the state constitution addressing education.[65] These state constitutional rulings would meet the federalism and "local control" concerns expressed by Justice Powell in *Rodriguez*, while ensuring all children the right to a quality education.[66]

B. *Ingraham v. Wright*

Ingraham v. Wright,[67] a Justice Powell opinion upholding the constitutional use of corporal punishment in American public schools, is superficially difficult to explain. However, a close analysis of the case reveals its justifications, and Justice Powell might conceivably rule differently on this issue today if he had the opportunity.

In *Ingraham*, as in *Rodriguez*, Justice Powell wrote for a bare majority. The lower federal courts were similarly divided. The district court originally dismissed the action,[68] only to be reversed by the Fifth Circuit,[69] which then reversed again sitting en banc.[70]

The plaintiffs in *Ingraham* were two boys who brought an action on behalf of themselves and other students for overly severe corporal punishment. They claimed that the school authorities had violated their Eighth Amendment right to be free of cruel and unusual punishment and their procedural due process rights.[71] One boy

62. *Id.* at 329.
63. *Id. See* Urofsky, *supra* note 20, at 598-99.
64. *See, e.g.*, Serrano v. Priest, 557 P.2d 929 (Cal. 1976); Washakie County Sch. Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980).
65. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec. of Exec. Off. of Educ., 615 N.E.2d 516 (Mass. 1993).
66. *See* THE POWELL PAPERS, *supra* note 20 at 17 (referencing a speech by Justice Powell in February, 1958, entitled "Quality in Education: A National Necessity. Address to Richmond Public School Teachers").
67. Ingraham v. Wright, 430 U.S. 651 (1977).
68. *Id.* at 654.
69. Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974).
70. Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976).
71. *Ingraham*, 430 U.S. at 654.

had received twenty "licks" from a paddle, which caused him to miss school for several days.[72] The other child had been struck on the arm with such force that he could not properly use the arm for a week.[73] Although the school board policy authorizing corporal punishment contained some limitations, it was amended while the suit was pending to ban the punishments the two boys actually received.[74] This fact may have been relevant to the Court in deciding the case, although it was not emphasized.

Justice Powell began by noting that corporal punishment was used by public schools "in most parts of the country"[75] and had been banned in only two states. Thus, at the very outset of *Ingraham* he emphasized the notion of local control, as in his other education law opinions.[76]

Justice Powell then reasoned that the Eighth Amendment cannot be applied in a non-criminal setting.[77] He proved this by reciting the history of the Amendment, which he describes as being derived from the Virginia Declaration of Rights of 1776, which in turn was based on the English Bill of Rights of 1689.[78] Knowing the Virginia-based history of the Eighth Amendment, along with Justice Powell's identification with his home state,[79] should have given pause to any advocate making such an argument.

The procedural due process discussion in *Ingraham* is classic Powell, drawing on his majority opinion in *Matthews v. Eldridge*[80] and his dissent in *Goss v. Lopez*.[81] In *Ingraham*, Justice Powell found that corporal punishment could violate a student's liberty

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72. *Id.* at 658.

73. *Id.* at 658.

74. "Licks" were limited to seven for junior and senior grades and a student could only be hit on the buttocks. *Id.* at 658 n.7. A student was also supposed to be "contemporaneously" told about the need for punishment and his or her parents notified thereafter. *Id.*

75. *Id.* at 662.

76. *See supra* notes 43-44 and accompanying text. *See* Urofsky, *supra* note 20 at 624.

77. *Ingraham*, 430 U.S. at 666 (discussing how the Eighth Amendment cruel and unusual test has historically only applied to criminal situations).

78. *Id.* at 664.

79. *See supra* notes 20-33 and accompanying text.

80. Matthews v. Eldridge, 424 U.S. 319 (1976) (holding that procedural due process was satisfied by a swift post-deprivation hearing on the termination of federal disability benefits); *see* Neuborne, *supra* note 15, at 1649-1650.

81. Goss v. Lopez, 419 U.S. 565, 584 (1975) (Powell, J., dissenting) (stating due process protections were not afforded to public school students for suspensions of ten days or less).

interest,[82] but that after-the-fact common law remedies provided adequate safeguards for any procedural due process concerns.[83]

Unlike his opinion in *Goss*, where Powell stated that the students had a "state-created property interest,"[84] in *Ingraham*, Justice Powell found no constitutional right for students to avoid corporal punishment in all instances. Recall as well that Justice Powell's overriding concern in many education cases was a student's "absolute deprivation" of education,[85] not the "inadvertent" loss of education found in *Ingraham* to be "an aberration."[86] He found that a constitutional based remedy would only marginally reduce the risk of abusive punishment resulting in a loss of educational opportunity, but would cause a "significant intrusion" into local control of schools. For Powell, this was an unacceptable result.[87]

Although the *Ingraham* opinion is deliberative and generally well analyzed, one could argue that Justice Powell might view corporal punishment differently today. Of primary relevance is the fact that in a footnote Justice Powell left open the possibility that corporal punishment could constitute a violation of substantive due process.[88] Using an alternative legal theory to procedural due process might appeal to Justice Powell, as Justice Powell himself had spoken of his overriding respect for the doctrine of *stare decisis*.[89]

A number of United States circuit and district courts have ruled that egregious examples of public school corporal punishment can violate a student's substantive due process rights,[90] although the

82. *Ingraham*, 430 U.S. at 673-74 (discussing that an individual cannot be harmed physically by the state without due process).

83. *Id.* at 674-75.

84. *Id.* at 674 n.43.

85. *See supra* note 39 and accompanying text.

86. *Ingraham*, 430 U.S. at 677 (discussing that although students had testified to specific abuse, there is no reason to believe that such abuse is customary).

87. *Id.* at 682.

88. "We have no occasion in this case . . . to decide whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause." *Id.* at 679 n.47.

89. Haupt, *supra* note 21, at 25.

90. *E.g.*, Neal v. Fulton, 229 F.3d 1069 (11th Cir. 2000); Saylor v. Bd. of Educ., 118 F. 3d 507 (6th Cir. 1997); Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988); Wise v. Pea Ridge Sch. Dist., 855 F. 2d 560 (8th Cir. 1988); Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987); Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980); Kurilla v. Callahan, 68 F. Supp. 2d 556 (M.D. Penn. 1999) (finding a substantive due process claim present only where facts "shock the conscience"); *cf.* Bisignano v. Harrison, 113 F. Supp. 2d 951 (S.D.N.Y. 2000) (Fourth Amendment claim possible under "secure in their persons" clause); Wallace v. Batavia Sch. Dist., 870 F. Supp. 222 (N.D. Ill. 1994), *aff'd*, 68 F.3d 1010 (7th Cir. 1995) (Fourth Amendment challenge possible under "secure in their

Supreme Court has yet to rule on this issue. A brief discussion of the facts of a few of these federal cases is relevant.

In *Hall v. Tawney*,[91] for example, a student was beaten so severely that she was hospitalized for ten days.[92] In *Garcia v. Miera*,[93] a nine-year-old girl was held up by her ankles and hit on her legs until they bled.[94] *Webb v. McCullough*[95] concerned a principal who knocked down a locked bathroom door, threw a student against the wall, and slapped her.[96] Contrary to Justice Powell's assertion in *Ingraham*, such egregious examples of corporal punishment in American public schools do not seem aberrational.[97] Perhaps as a result, approximately half of American states ban any use of corporal punishment in public schools whatsoever.[98]

Justice Powell may have been somewhat blind to this situation because of his own gentleness. Justice O'Connor has described Justice Powell as follows: "[I] have known no one in my lifetime who is kinder or more courteous than he."[99] Justice Powell extended substantive due process protections to related family members in *Moore v. City of East Cleveland*,[100] and to involuntarily committed persons in *Youngberg v. Romeo*.[101] It is not impossible to conceive that, upon finding that the abuse of corporal punishment was more widespread than *Ingraham* conceived, Justice Pow-

persons" clause). *But see* London v. DeWitt Pub. Sch., 194 F.3d 873 (8th Cir. 1999); Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990) (holding no violation of substantive due process exists when adequate state remedies are present); Watson v. Alvarado Indep. Sch. Dist., Civil Action No. 3:01-CV-0747-M, 2001 U.S. Dist. LEXIS 1023*1* (N.D. Tex. 2001); Harris v. Tate County Sch. Dist., 882 F. Supp. 90 (N.D. Miss. 1995).

91. Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

92. *Id.* at 614.

93. Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987).

94. *Id.* at 658.

95. Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987).

96. *Id.* at 1154.

97. *Cf.* Raymond Hernandez, *Children's Sexual Exploitation Underestimated, Study Finds*, N.Y. TIMES, Sept. 10, 2001, at A18 (noting that forty-nine percent of the 325,000 children sexually exploited annually were sexually assaulted by an acquaintance such as a teacher, coach, or neighbor).

98. *See, e.g.*, CAL. EDUC. CODE §§ 49000, 49001 (West 1993); HAW. REV. STAT. § 298-16 (1993); MASS. GEN. LAWS ANN. ch. 71, § 37G (West 1991); N.J. STAT. ANN. § 18A: G-1 (West 1999); N.Y. COMP. CODES R. & REGS. tit. 8, § 19.5 (1999).

99. The Honorable Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395 (1987).

100. Moore v. City of East Cleveland, 431 U.S. 494, 503-06 (1977) (establishing substantive due process right of related persons to live together).

101. Youngberg v. Romeo, 457 U.S. 307, 324-25 (1982) (guaranteeing involuntarily committed persons a right to minimal training).

ell might have ultimately found to encompass substantive due process as well as public school corporal punishment.[102]

C. *Committee of Public Education and Religious Liberty v. Nyquist*

Justice Lewis Powell was a prolific and exacting jurist with respect to the Establishment Clause. Although he participated in approximately thirty major decisions on the Establishment Clause, he always managed to vote on the prevailing side.[103] Justice Powell attained this extraordinary level of judicial success while acknowledging the profound complexity of the area: "[W]hile there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the 'lines of demarcation in this extraordinarily sensitive area of constitutional law.'"[104] Over the course of his long judicial career he became one of the great interpreters of the Establishment Clause, and future scholars would be wise to consider his views.

One of Justice Powell's most significant Establishment Clause opinions is *Committee for Public Education & Religious Liberty v. Nyquist.*[105] *Nyquist* involved the constitutionality of a New York statute that financially subsidized non-public schools through three programs: (1) direct aid to non-public schools for "maintenance and repair"; (2) tuition reimbursement to low-income parents; and (3) tax deductions for parents who could not qualify for tuition reimbursement.[106] Justice Powell found all three programs violated the Establishment Clause. Eight Justices found the maintenance and repair plans to be constitutionally repugnant[107] and six Justices struck down the reimbursement and tax deduction programs as

102. Justice Powell would later reconsider at least one of his decisions. He ultimately thought that he should have sided with the dissenters in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held that sexual orientation is not a fundamental right protected by the Equal Protection clause. Linda Greenhouse, *When Second Thoughts In Case Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at A14.

103. THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 360 (Melvin I. Urofsky ed., 1994).

104. Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 761 n.5 (1973) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

105. *Nyquist*, 413 U.S. at 798 (holding that New York law providing various forms of financial assistance to non-public schools violated Establishment Clause).

106. *Id.* at 761-67.

107. Justice White was the only Justice who would uphold the maintenance and repair provisions. *Id.* at 820 (White, J., dissenting).

well.[108] The *Nyquist* case is therefore a strongly established ruling.[109]

Justice Powell's majority opinion in *Nyquist* is filled with balanced yet rhapsodic writing. He begins the opinion with the following words: "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 'wall of separation' between Church and State has become 'as winding as the famous serpentine wall' he designed for the University of Virginia."[110]

Eight Justices, led by Justice Powell, readily found the "maintenance and repair" provisions to violate the Establishment Clause. As the funds were given to non-public schools directly and without a requirement that they be used solely to sustain facilities used for a secular purpose, the provisions violated the second prong of the test established in *Lemon v. Kurtzman*.[111] He wrote, "[T]his section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools."[112]

The tuition reimbursement and tax deduction programs also failed the "effects" prong of the *Lemon* standard. The reimbursement plan was particularly suspect, as the state had created no means of "guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral and nonideological purposes. . . ."[113] Justice Powell did not find controlling the fact that the reimbursement was received by parents, and not by the school directly: "[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find

108. Chief Justice Burger dissented, along with Justices Rehnquist and White. *Id.* at 805-06.

109. *But cf.* Mueller v. Allen, 463 U.S. 388 (1983) (upholding, in a five-to-four decision, a Minnesota state law allowing all parents a state income tax deduction for tuition, textbooks, and transportation expenses).

110. *Nyquist*, 413 U.S. at 761 (quoting McCollum v. Bd. of Educ., 333 U.S. 203, 238 (1948)).

111. Lemon v. Kurtzman, 403 U.S. 602 (1971). The three-prong *Lemon* test requires that the statute in question must have a secular legislative purpose; that its primary effect must neither advance nor inhibit religion; and that it must not foster "an excessive government entanglement with religion." *Id.* at 612-13 (quoting Walz v. Tax Comm'r, 397 U.S. 664, 674 (1970)).

112. *Nyquist*, 413 U.S. at 774.

113. *Id.* at 780.

their way into the sectarian institution."[114] Justice Powell also found the tax deduction plan, which in some ways actually operated as a tax credit,[115] to impermissibly advance religion in the same ways that the reimbursement program did.[116]

Given that later in his career Justice Powell supported a Minnesota law that gave parents of private and public school students a state tax deduction for educational expenses,[117] what should we consider the legal touchstones to be for Justice Powell in this area? The answer appears in *Nyquist*:

> One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program. . . . [C]ompetition among religious sects for political and religious supremacy has occasioned considerable civil strife. . . . As Mr. Justice Harlan put it, '[W]hat is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.[118]

When states give public and private schools indirect financial support that they otherwise would not receive, as in *Mueller v. Allen*, Justice Powell must have foreseen less of the political divisiveness that concerned him in *Nyquist*. Additionally, Justice Powell's dedicated career in public education would probably lead him to support state programs that truly financially assisted public schools and that gave only targeted state aid to secular components of a private school's program.[119] Particularly coming from Virginia, a colony with no particular religious designation, Justice Powell

114. *Id.* at 786. *But cf.* Mueller v. Allen, 463 U.S. 388 (1983) (allowing a tax deduction to all Minnesota parents on the basis that the tax deduction was intended to further education and ensure the financial health of schools).

115. *Nyquist*, 413 U.S. at 789-90

116. *Id.* at 794.

117. *Nyquist*, 413 U.S. at 761, 786.

118. 413 U.S. at 795-96 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 694 (Harlan, J., concurring)). *Accord* Aguilar v. Felton, 473 U.S. 402, 416-17 (1985) (Justice Powell, concurring) (stating that government entanglement in religious education brings a heavy risk of divisiveness and strife).

119. *See* Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (allowing state provided secular textbooks at both public and private schools); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (sustaining reimbursement of parents' bus fares for students at parochial schools). Both *Everson* and *Allen* were cited with approval by Justice Powell in *Nyquist*. Nyquist, 413 U.S. at 774-776. *See also* Sloan v. Lemon, 413 U.S. 825 (1973) (striking down a Pennsylvania program awarding reimbursement to parents sending child to non-public schools); *cf.* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 764 (1976) (noting that entanglement issues are greatest for children of "impressionable age").

tended towards Jefferson's Wall of Separation, an image he invoked frequently.[120] It is possible as well that Justice Powell's stormy personal experiences with the desegregation of public schools in Richmond[121] made him particularly sensitive to the destabilizing effects of controversial political and religious arguments involving public schools.

The United States Supreme Court has granted certiorari to a Sixth Circuit case, *Simmons-Harris v. Zelman*,[122] which squarely implicates the validity of Justice Powell's holding in *Nyquist*.[123] In *Simmons-Harris*, Ohio instituted a voucher program to aid education in Cleveland, Ohio. Partly aimed at low-income families, Ohio provided scholarships to almost 4000 Cleveland children to be used for private school tuition during the 1999-2000 school year.[124] About sixty percent of the families were at or below the federal poverty level,[125] and ninety-six percent of these children attended religiously-based schools.[126] Both the federal district court and the Circuit Court of Appeals found the program violated the Establishment Clause under the *Nyquist* holding.

The *Simmons-Harris* case has excited much political and legal interest; many amicus briefs from educational organizations have been filed with the Supreme Court.[127] Notably, the United States Solicitor General's Office filed an amicus brief urging the Court to accept review. This is unusual since tradition dictates that the Solicitor General only enter a case after the Court has made its certiorari ruling. In its brief, the Solicitor General's Office argues that the Sixth Circuit Court of Appeals "erred in concluding that the validity of the Ohio program in this case is controlled by *Nyquist*,"[128] and in any event, "[t]o the extent that *Nyquist* is read to cast doubt on the program at issue in this case, we urge the Court to consider whether the assumptions underlying the 'effect' analy-

120. *See id.* at 761. *See also* Edwards v. Aguillard, 482 U.S. 578, 606 (1987) (concurring opinion joined by Justice O'Connor).

121. *See supra* notes 34-37 and accompanying text.

122. Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).

123. Zelman v. Simmons-Harris, 122 S. Ct. 23 (2001).

124. *Simmons-Harris*, 234 F.3d at 949.

125. *Id.*

126. *Id.*

127. *See* Docket No. 00-1751, *at* http://www.supremecourtus.gov/docket/00-1751.htm. Among the groups filing amicus briefs are the Center for Education Reform, the National Association of Independent Schools, the Black Alliance for Educational Options, the Ohio School Boards Association, and the National Committee for Public Education and Religious Liberty. *Id.*

128. Brief of the United States Solicitor General at 11, Zelman v. Simmons-Harris (Nos. 00-1751, 00-1777, and 00-1779).

sis in *Nyquist* have been eroded by the Court's subsequent Establishment Clause decisions."[129] In other words, the Solicitor General argues that the Court should overrule *Nyquist*, much as it did *Aguilar v. Felton*,[130] another major Establishment Clause case overruled in an after-the-fact manner by *Agostini v. Felton*.[131]

The Cleveland program surely violates *Nyquist*, as well as another Powell ruling decided the same day, *Sloan v. Lemon*.[132] In *Sloan*, Justice Powell struck down a Pennsylvania program that reimbursed parents for tuition expenses at non-public schools. Scholarship checks in *Simmons-Harris* are made payable to the parents, but are mailed directly "to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition."[133] There is no requirement that the funds be used only for sectarian purposes, another key factor in *Nyquist*.[134] Finally, although adjacent public schools may technically receive scholarship monies, none has done so.[135] In a number of ways, therefore, the Cleveland program is almost akin to the very forbidden "maintenance and repair" funds of *Nyquist*, not the "neutrally provided" tax deductions of *Mueller*. The program also is more constitutionally suspect than the reimbursement provisions in *Nyquist*, where the state funds stayed with the parents. *Sloan v. Lemon* is also very apposite. If alive today Justice Powell would assuredly agree with the Sixth Circuit and rule that the holding in *Nyquist* invalidated the Ohio program. In addition, Justice Powell's concern about religious and political strife is already evident in the many newspaper, magazine, and television accounts describing the general issue of vouchers in American society.

III. Could the Supreme Court Uphold Justice Powell's *Bakke* Ruling in 2002?

Of all of Justice Powell's rulings none has been more controversial than his ruling in *Regents of the University of California v. Bakke*.[136] Indeed, it can be argued that only *Roe v. Wade*,[137] the

129. Id. at 18.
130. Aguilar v. Felton, 473 U.S. 402 (1985).
131. Agostini v. Felton, 521 U.S. 203 (1997).
132. Sloan v. Lemon, 413 U.S. 825 (1973).
133. *Simmons-Harris*, 234 F.3d at 948.
134. *Cf.* Mitchell v. Helms, 530 U.S. 793, 857 (2000) (O'Connor, J., concurring) (arguing that plaintiffs should have to prove that state aid is being used for religious purposes).
135. *Simmons-Harris*, 234 F.3d at 949.
136. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

Supreme Court opinion upholding a right to abortion, has generated more interest in the last fifty years of Supreme Court jurisprudence.

Justice Powell devoted much thought and study to the issue of affirmative action, even prior to the Court's receipt of the *Bakke* case. In a 1990 interview, Justice Powell had this to say concerning his *Bakke* opinion.

> I'm proud my name is on that opinion . . . . Some people have said I waited to see how the other Justices would vote, but that's not so. The year before *Bakke* was argued, we had a case named *Defunis* that came up from the University of Washington. It presented basically the same issue, that is, the validity of a university's setting aside a specific category, be it blacks or Chicanos or Eskimos. The *Defunis* case had been argued, but the case became moot when the University of Washington accepted a change in the system, and the case didn't have to be decided.

That summer, knowing we had granted *Bakke* certiorari in order to address the issue, I spent a fair amount of time, in addition to what I'd spent in connection with *Defunis*, thinking how I should vote in *Bakke* and, if I wrote the opinion, what I should say. *The fact that I had been interested in education, I think, helped me.* I'd been on the board of Washington and Lee University, on the board of Union Theological Seminary [and] I was very conscious of the fact that in our society diversity was critically important, so I had generally decided how I would write *Bakke* before the case was argued. Nevertheless, it was a difficult opinion to write.[138]

The Lewis F. Powell archival material concerning the *Bakke* case is almost two feet in length, more material than that of any other Powell case.[139]

In *Bakke*, Justice Powell found the admissions program at the Medical School of the University of California at Davis unconstitutional. The program in 1973 and 1974 set aside sixteen out of one hundred seats in the entering class for a "special" admissions program.[140] Though the program was ostensibly aimed toward economically disadvantaged applicants, only certain ethnic and racial groups were considered under these procedures. Four Justices

137. Roe v. Wade, 410 U.S. 113 (1973). The final member of the most groundbreaking triad of Supreme Court cases in the post World-War II era would have to be *Brown v. Board of Education*, 349 U.S. 294 (1954).

138. Haupt, *supra* note 21, at 23-24 (emphasis added).

139. THE POWELL PAPERS, *supra* note 20, at 49.

140. *Bakke*, 438 U.S. at 275.

found the special admissions program violated Title VI of the Civil Rights Act of 1964, while four other Justices, the dissenters, would have sustained the program under both Title VI and equal protection principles.[141]

Justice Powell's opinion found that the program violated equal protection, because limiting certain seats to only some racial and ethnic groups was not "necessary to promote a substantial state interest."[142] He further ruled, however, that a university might use race or ethnicity as a factor in admissions in a "properly devised" program.[143] Such a program could have as its goal the "attainment of a diverse student body,"[144] which Justice Powell linked with academic freedom, "a special concern of the First Amendment."[145] Justice Powell argued that a diverse student body would promote a "robust exchange of ideas."[146]

A series of state and lower federal court cases have called into question the continuing constitutional viability of Justice Powell's reasoning in *Bakke*. For instance, in *Grutter v. Bollinger*, a federal district court in Michigan held that Justice Powell's diversity rationale in *Bakke* was not a controlling test to determine a compelling state interest.[147] More recently, the Eleventh Circuit has ruled that Justice Powell's diversity ruling is not constitutionally "binding."[148] The Supreme Court has not granted a petition for certiorari concerning any university admissions cases.

If presented with a university admissions case, it is possible or perhaps even likely that the Supreme Court will continue to uphold Justice Powell's diversity rationale. For instance, in a very recent Supreme Court case, *Hunt v. Cromarte*,[149] Justice Breyer, writing for a bare majority, upheld a state redistricting plan where racial considerations did not "predominate."[150] In other words, some governmental use of race was allowable. The Court has also

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141. Id. at 269-72.

142. *Id.* at 320.

143. *Id.*

144. *Id.* at 311.

145. *Id.* at 312 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

146. *Bakke*, 438 U.S. at 313.

147. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 847-48 (E.D. Mich. 2001) (striking down admissions program at University of Michigan Law School). *Accord* Hopwood v. Texas, 78 F.3d 932, 944-45 (5th Cir. 1996). *But see* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1200-1201 (9th Cir. 2000); Gratz v. Bollinger, 122 F. Supp. 2d 811, 819-21 (E.D. Mich. 2000).

148. Johnson v. Bd. of Regents, 263 F.3d 1234 (11th Cir. 2001).

149. Hunt v. Cromartie, 532 U.S. 234 (2001).

150. *Id.* at 1466.

continued to emphasize in recent cases the importance of academic freedom in the mission of higher education.[151] In addition, the actual thinking of the Supreme Court concerning *Bakke* may be somewhat illuminated by their upcoming ruling in an important, pending governmental contracting case, *Adarand Constructors Inc. v. Mineta.*[152] Of particular interest is that in *Adarand*, the Solicitor General's Office has indicated that it will be supporting the government's race-conscious program. President Bush's nominee for general counsel of the U.S. Department of Education has also stated in recent Congressional hearings that racial diversity in university admissions may be a compelling state interest.[153] Viewing these indicators as a whole, the Supreme Court appears to be poised to sustain Justice Powell's *Bakke* ruling.

CONCLUSION

Justice Powell's experience and background in education served him and the American people extremely well. Justice Powell's varied life experience tempered the law's occasional rigidity. I once proposed a law school hypothetical of an affirmative action program for the Supreme Court itself. The plan was based not on the Justices' race or gender, but on requirements of "occupational" diversity: lawyer/doctors, lawyer/educators, lawyer/accountants, etc. Though the hypothetical was for a law school course, perhaps American Presidents may want to consider such notions in making Supreme Court appointments, in the mold of the Honorable Lewis Franklin Powell, Jr.

151. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 236-37 (2000) (Souter, J., concurring).

152. Adarand Constructors, Inc. v. Slater, 228 F. 3d 1147 (10th Cir. 2000), *cert. granted*, Adarand Constructors, Inc. v. Mineta 121 S. Ct. 1401 (2001).

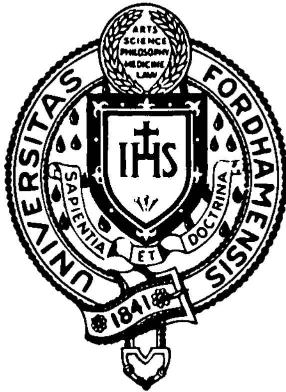
153. Ben Gose, *Education Department Nominee Moderates Views on Affirmative Action*, CHRON. OF HIGHER EDUC., Sept.14, 2001, at A29.

APPENDIX

The Honorable Lewis Franklin Powell, Jr.
Education Cases

Healy v. James, 408 U.S. 169 (1972) (OPINION)
Drummond v. Acree, 409 U.S. 1228 (1972) (OPINION)
San Antonio v. Rodriguez, 411 U.S. 1 (1973) (OPINION)
Hunt v. McNair, 413 U.S. 734 (1973) (OPINION)
Keys v. School District, 413 U.S. 189 (1973) (CONCURRENCE)
Liberty v. Nyquist, 413 U.S. 756 (1973) (OPINION)
Sloan v. Lemon, 413 U.S. 825 (1973) (OPINION)
Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) (CONCURRENCE)
Wheeler v. Barrera, 417 U.S. 402 (1974) (CONCURRENCE)
Goss v. Lopez, 419 U.S. 565 (1975) (DISSENT)
Wood v. Strickland, 420 U.S. 308 (1975) (CONCURRENCE)
Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976) (OPINION)
Runyon v. McCrary, 427 U.S. 160 (1976) (CONCURRENCE)
Ingraham v. Wright, 430 U.S. 651 (1977) (OPINION)
Abood v. Detroit Board of Education, 431 U.S. 209 (1977) (CONCURRENCE)
Nyquist v. Mauclet, 432 U.S. 1 (1977) (DISSENT)
Wolman v. Walter, 433 U.S. 229 (1977) (CONCURRENCE)
Milliken v. Bradley, 433 U.S. 267 (1977) (CONCURRENCE)
Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978) (CONCURRENCE)
Carey v. Piphus, 435 U.S. 247 (1978) (OPINION)
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (OPINION)
Ambach v. Norwick, 441 U.S. 68 (1979) (OPINION)
Cannon v. University of Chicago, 441 U.S. 677 (1979) (DISSENT)
Southeastern Community College v. Davis, 442 U.S. 397 (1979) (OPINION)
Columbus Board of Education v. Penick, 443 U.S. 449 (1979) (DISSENT)
Board of Education of City School District of City of New York v. Harris, 444 U.S. 130 (1979) (JOINED IN DISSENT)
Estes v. Metropolitan Braches of Dallas NAACP, 444 U.S. 437 (1980) (DISSENT)
NLRB v. Yeshiva University, 444 U.S. 672 (1980) (OPINION)
Andrus v. Utah, 446 U.S. 500 (1980) (DISSENT)
Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327 (1980) (OPINION)
Delaware State College v. Ricks, 449 U.S. 250 (1980) (OPINION)
Widmar v. Vincent, 454 U.S. 263 (1981) (OPINION)
North Haven Board of Education v. Bell, 456 U.S. 512 (1982) (DISSENT)
Plyer v. Doe, 457 U.S. 202 (1982) (CONCURRENCE)
Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982) (DISSENT)
Washington v. Seattle School District #1, 458 U.S. 457 (1982) (DISSENT)

Crawford v. Board of Education of the City of Los Angeles, 458 U.S. 527 (1982) (OPINION)
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (DISSENT)
Jaffree v. Board of School Commissioners of Mobile, 459 U.S. 1314 (1983) (OPINION)
Martinez v. Bynum, 461 U.S. 321 (1983) (OPINION)
Bob Jones University v. U.S, 461 U.S. 574 (1983) (CONCURRENCE)
Grove City College v. Bell, 465 U.S. 555 (1984) (CONCURRENCE)
Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) (CONCURRENCE)
New Jersey v. T.L.O., 469 U.S. 325 (1985) (CONCURRENCE)
Wallace v. Jaffree, 472 U.S. 38 (1985) (CONCURRENCE)
Aguilar v. Felton, 473 U.S. 402 (1985) (CONCURRENCE)
Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) (CONCURRENCE)
Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) (CONCURRENCE)
Bender v. Williamsport Area School District, 475 U.S. 534 (1986) (DISSENT)
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (OPINION)
Edwards v. Aguillard, 482 U.S. 578 (1987) (CONCURRENCE)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