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What Would Justice Powell Do?: The 'Alien Children' Case and the Meaning of Equal Protection

Linda Greenhouse

WHAT WOULD JUSTICE POWELL DO?

THE 'ALIEN CHILDREN' CASE AND THE MEANING OF EQUAL PROTECTION

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I

The debate over national immigration policy is at fever pitch. Harsh anti-immigrant rhetoric dominated the discourse during the early Republican presidential primaries. Congressional gridlock has led states and cities, many far from the border, to take matters into their own hands by enacting laws or adopting policies aimed at encouraging immigrants to leave the jurisdiction by penalizing those who would employ or rent to them.[1] During the 2007 legislative sessions, 46 states enacted 244 immigration-related measures, triple the previous year's number.[2] The one predictable outcome of this activity has been litigation.[3]

The immigration conflagration of today is hardly a new phenomenon in United States history. It mirrors, albeit with greater intensity and on a larger scale, the immigration brushfires of the 1980's, when Congress responded to mounting calls for action by passing the Immigration Reform and Control Act of 1986,[4] which for the first time imposed civil and criminal liabil-

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1. *E.g.* Randal C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13 and Emily Bazar, *Strict Immigration Law Rattles Okla. Businesses*, USA TODAY, Jan. 10, 2008, at A1. *See also infra* note 73.

2. Julia Preston, *States Take Up Immigration Issue*, N.Y. TIMES, Nov. 30, 2007, at A17 (citing a report by the National Conference of State Legislatures).

3. *E.g.*, Arizona Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008). *See also, infra* note 40; Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, Feb. 10, 2008, at A22.

4. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3411 (codified at 8 U.S.C. § 1101).

ity on employers who knowingly hired immigrants who lacked legal authority to work. Well before Congress acted, states had begun to take matters into their own hands. In 1975, Texas passed a law providing that alien children not legally admitted into the United States were not entitled to a free public education.[5]

The Supreme Court struck down the Texas law on June 15, 1982, ruling that a state offering a free public education to the children of citizens had to provide the same opportunity to the alien children of undocumented immigrants. Justice Brennan, writing for the 5 to 4 majority in *Plyler v. Doe*,[6] said that a statute that imposed "a lifetime hardship on a discrete class of children not accountable for their disabling status" while failing to serve any "substantial" countervailing state interest violated the 14th Amendment's guarantee of equal protection.[7]

Justice Powell concurred. "I agree with the Court that . . . children should not be left on the streets uneducated," the former chairman of the Richmond, Va. school board and former president of the Virginia State Board of Education wrote in his five-page opinion.[8] In what became the decision's best-known line, Powell added: "A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment."[9]

At the United States Department of Justice, within hours of the decision's announcement, two young special assistants in the office of the attorney general delivered a highly negative analysis to Attorney General William French Smith. They made clear not only their dismay with the ruling, but also their conclusion that Solicitor General Rex E. Lee's failure to have placed the Reagan

5. TEX. EDUC. CODE § 21.031(1975). The law authorized local school districts to bar the admission of, or charge tuition to, alien children who were not "legally admitted" into the United States. Districts declining both options were to receive no state funds for the education of these children.

6. Plyler v. Doe, 457 U.S. 202 (1982).

7. *Id.* at 223, 230. The Supreme Court ruling in Plyler v. Doe decided two consolidated cases, one from for United States Court of Appeals for the Fifth Circuit (Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980)) and the other from the United States District Court for the Southern District of Texas (In re Alien Children Education Litigation, 501 F. Supp. 544 (S.D. Tex. 1980)). The District Court case was itself a consolidation, under the jurisdiction of the Judicial Panel on Multidistrict Litigation, of lawsuits that had been filed in three Federal districts in Texas.

8. *Plyler*, 457 U.S. at 238 (Powell, J. concurring)

9. *Id.* at 239

Administration's weight behind the state's defense of its law contributed significantly to the disappointing outcome.[10]

"[T]his is a case in which our supposed litigation program to encourage judicial restraint did not get off the ground, and should have," John G. Roberts Jr. and Carolyn B. Kuhl told the attorney general.[11] The two added: "It seems likely that the dissenting Justices had particularly tried to win over Justice Powell, but were unable to do so .... It is our belief that a brief filed by the Solicitor General's Office supporting the State of Texas—and the values of judicial restraint—could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case."

The analysis was provocative, particularly in light of the subsequent career path of one of its authors. But it was almost certainly wrong.

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10. The brief the Solicitor General filed was an extremely odd, even tortured, document. Because the United States under the Carter Administration had been granted status as an intervening plaintiff in one of the cases, the brief identified the United States as a party in one case and an amicus curiae in the other. Despite the fact that both lower courts had found the Texas statute to violate equal protection, with the United States having joined the plaintiffs in making that argument, Solicitor General Lee told the Supreme Court that "the interests of the United States in these cases are limited" and that the Government "does not address" the Equal Protection question except to agree with the lower courts that the plaintiffs were "persons within the jurisdiction" within the meaning of the Fourteenth Amendment. See Brief for the United States at i, 5, 9, Plyler v. Doe, 457 U.S. 202 (1982) (Nos. 80-1538 & 80-1934). Justice Brennan was to note in the majority opinion: "Our conclusion that the illegal aliens who are plaintiffs in these cases may claim the benefit of the Fourteenth Amendment's guarantee of equal protection only begins the inquiry. The more difficult question is whether the Equal Protection Clause has been violated ...." *Plyler*, 457 U.S. at 215. Reviewing the brief for Justice Blackmun, the justice's law clerk wrote that the Government's explanation for its failure to adhere to its earlier position was "long and unconvincing." Law Clerk's Bench Memo, Harry A. Blackmun Papers, Box 349, Folder 8 (on file with The Manuscript Division, Library of Congress).

The U.S. brief was limited to a discussion of whether the Texas statute was preempted by either of two federal laws, the Immigration and Nationality Act, 8 U.S.C. (& Supp. III) 1101 *et seq.*, and the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. III) 2701 *et seq.* The brief argued that neither statute was preemptive and that the Texas law did not violate the Supremacy Clause. The Solicitor General thus took no position on the bottom-line question of whether the lower courts should be affirmed or reversed. *See* Brief for United States, *supra*.

Lawrence G. Wallace, the career Deputy Solicitor General who ordinarily handled the office's civil rights docket, conspicuously did not sign the brief, which bore only the names of Solicitor General Lee; William Bradford Reynolds, the Assistant Attorney General for civil rights; and Edwin S. Kneedler, an assistant to the Solicitor General.

11. *See* David G. Savage & Maura Reynolds, *More Early Roberts Files Are Released: A Memo Shows that an '82 High Court Ruling Was at Odds with his Views on Judicial Restraint as a Justice Dept. Lawyer*, THE LOS ANGELES TIMES, Aug. 12, 2005, at A14 (citing Memorandum from John G. Roberts Jr. and Carolyn B. Kuhl to Atty. Gen. William French (June 15, 1982) (on file with The National Archives)).

Justice Powell's papers, housed at his alma mater, Washington and Lee University Law School, show that while he found the case "extremely difficult" as a matter of legal doctrine, as he wrote to his law clerk while preparing for oral argument,[12] he sought from the very beginning of his consideration to find a way to safeguard the plaintiff children's interest in receiving an education. It is extremely unlikely that a more strongly worded brief from the Solicitor General would have led him to abandon a deep conviction, based on his lifelong involvement in public education, that the Texas law was detrimental not only to the children at whom it was aimed, but to society at large.

Still uncertain of how an opinion should be framed, Powell had concluded by the date of the argument, Dec. 1, 1981, that the statute must fall. He expressed that view at the justices' conference three days after the case was argued. According to the hand-written outline of his views, which he drafted in preparation for the conference, Powell said that children "barred from *all* primary and secondary education" were a "helpless class," a "'discrete' minority without access to political process." As for how the opinion should be written, he said, "The standard of analysis should be one of *heightened* (but not strict) scrutiny."[13]

Notes taken at the conference by both Justices Brennan and Blackmun confirm that Powell's participation followed his outline as he cast one of the five votes to affirm the judgment of the United States Court of Appeals for the Fifth Circuit that the statute was unconstitutional. The Mexican-born children on whose behalf the class-action lawsuit had been brought "have no responsibility for being there," Powell said, according to Brennan's notes. It was "hard to think of [a] category more helpless than children of illegal aliens." Powell then stated, however, what was certainly obvious to his colleagues: that he did not view education as a "fundamental right," a position he had expressed for the Court eight years earlier in his majority opinion in *San Antonio Independent School District v. Rodriguez*.[14] But, he added, as long as the state chose to provide an education to

12. Lewis F. Powell Jr., Annotation on Law Clerk's Bench Memo (Nov. 25, 1981). *in* Lewis F. Powell Jr. Papers, Box 86 (on file with Washington and Lee University School of Law) [hereinafter LFP Papers].

13. Lewis F. Powell Jr., Plyler Sketch Outline 12/3 (Dec. 3, 1981). *in* LFP papers, *supra* note 12.

14. San Antonio Indep. Sch. District v. Rodriguez, 411 U.S. 1, 37 (1983).

"some children," he did not see how it could deny the same benefit to others.[15]

Nonetheless, the two Justice Department lawyers were not completely off base in intuiting that Justice Powell had indeed been at the center of a struggle during the six and one-half months between the date the case was argued and the date it was decided. There were two senses in which this was true. There was the struggle by the Court's master tactician, William Brennan, through successive opinion drafts, to craft an opinion that Powell could sign in full, as opposed to merely concurring in the result, an outcome that would have deprived the Court of a majority voice. And there was a second struggle, within the mind and heart of Lewis Powell himself. "I have agonized over this case more than a little," he would write to Brennan two months into the effort by the two men to find common ground, at a point when it was far from clear that the effort would succeed.[16]

It did succeed, and a quarter-century later, the story of *Plyler v. Doe* is worth recapturing if only for the timeliness of its subject and the essential drama of how the opinion was produced through a polite but firm test of wills between two very different Justices who shared a common goal. The story allows us to pull back the curtain and observe the Supreme Court as we would hope it to be but fear that too often it is not, a place where Justices of decidedly different persuasions can work with mutual respect to find common ground in addressing some of the country's most intractable disputes.

And it is worth reflecting, as well, on the particular role played by Lewis F. Powell Jr. He was the "swing Justice" of his time, before that mantle passed, following his retirement in 1987, to Justice O'Connor. Lewis Powell had never been a judge before his appointment to the Court in 1971 at the age of 64. A leader of many different institutions—a large corporate law firm, a school board, Colonial Williamsburg, the American Bar Association—he brought a pragmatic problem-solving focus to his new environment, responding instinctively rather than doctri-

15. William J. Brennan Jr., Notes From Plyler v. Doe Judicial Conference (Dec. 4, 1981), *in* William J. Brennan Papers, Part I, Box 572, Folder 6 (on file with The Manuscript Division, Library of Congress); *See also,* Harry A. Blackmun, Notes From Plyler v. Doe Judicial Conference (Dec. 4, 1981), *in* Papers of Justice Harry A. Blackmun, Box 349, Folder 8 (on file with Manuscript Division, Library of Congress).

16. Letter from Justice Powell to Justice Brennan (Feb. 4, 1982), *in* Brennan Papers, *supra* note 15. See text at footnote 44.

nally to some of the hardest cases that reached the Court.[17] In *Plyler,* he struggled to reconcile a profound sense of fairness with a tightly bound view of the judicial function. Born in 1907, a gentleman of the old South, Lewis Powell may appear to us now as someone from a long-ago era, a kind of judicial Everyman whose response to *Plyler v. Doe* can be seen as a mirror of how a basically conservative, fair minded citizen of his day, who happened to be a Supreme Court Justice, might have responded to the policy concerns that animated the case.

Today's Supreme Court, of course, is very different, deeply polarized and lacking a single Justice who had not previously served as a judge on a federal court of appeals. Insistence on doctrinal purity seems to be the order of the day, as reflected in the inability of Chief Justice Roberts, for the plurality, and Justice Kennedy, concurring in the judgment, to reach common ground in the 2006 Term's school integration case, *Parents Involved in Community Schools v. Seattle School District No. 1.*[18] When a major immigration case next reaches the Court, as one will, we shall see whether the story of *Plyler v. Doe* is of more than merely historical interest. But it is surely at least that.

II

Justice Powell responded to the Texas statute not only as a Supreme Court Justice, but as one who had devoted years of his life to education, which he regarded as essential to the democratic enterprise. "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.," in the words of one scholar of education law who deemed Powell "the education Justice" in a published appraisal in 2001.[19] Powell's interest in the subject was manifest throughout his judicial career; he wrote either for the Court or separately in 51 education-related cases, including, most famously, his controlling separate opinion in *Bakke,* four years before *Plyler.*[20] A lifetime of experience told him that the Texas law was fundamentally miscon-

17. His dispositive votes in Regents of the Univ. of California v. Bakke, 438 U.S. 265, 269 (1978) and Bowers v. Hardwick, 478 U.S. 186, 197 (1986) can be seen as examples of this trait.

18. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

19. Victoria J. Dodd, *The Education Justice: The Honorable Lewis Franklin Powell, Jr.*, 29 FORDHAM URB. L.J. 683, 687 (2001).

20. Bakke, 438 U.S. at 269 (opinion of Powell, J.)

ceived: mean-spirited, hurtful to the individuals affected, and spectacularly counter-productive for society as a whole. The state's interest in educating the children, he noted in his pre-conference outline, was "strong—perhaps stronger than those advanced for not educating."[21] And indeed, his opinion in *Rodriguez* had anticipated just such a situation, absent the immigration context. *Rodriguez* rejected the notion that disparities in wealth among a state's public school districts presented a problem of constitutional dimension. But if a state were actually to charge tuition to attend public school, meaning that those who were too poor to pay were "absolutely precluded from receiving an education," Powell had observed in a footnote, "that case would present a far more compelling set of circumstances for judicial assistance than the case before us today."[22]

Suggestive as it was, the *Rodriguez* footnote had not pointed the way to a resolution of the new case. It had simply opened the door a crack. The fact remained that even as Powell recoiled from the new Texas statute as a matter of policy, he also recoiled from the constitutional doctrines that came most readily to hand to strike it down: the jurisprudence of suspect categories and fundamental rights. As a Justice, Powell had been on the conservative side of a debate then raging in legal academia and the courts about whether the Constitution could properly be harnessed as an engine for social change. The *Rodriguez* case represented that debate in concrete form, and Powell's opinion for the Court made abundantly clear which side he was on.

Another education case from Texas, *Rodriguez* presented an equal-protection challenge to the property-tax-based system for financing public education, a system that concededly created great disparities in the resources available to individual school districts, in Texas and nearly everywhere else.[23] The three-judge Federal District Court that declared this arrangement unconstitutional had accepted the plaintiffs' threshold arguments: that poverty was a suspect category—so that public policies bearing on wealth were subject to strict judicial scrutiny—and that education itself was a "fundamental" right, access to which could be

21. Powell, *supra* note 13.

22. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25 n.60 (1983).

23. For a comprehensive account of the decision and the litigation that led to it, see PAUL A. SRACIC, SAN ANTONIO V. RODRIGUEZ AND THE PURSUIT OF EQUAL EDUCATION: THE DEBATE OVER DISCRIMINATION AND SCHOOL FUNDING (2006).

neither arbitrarily denied nor made available on an unequal basis unless justified by a compelling state interest.[24]

Powell's rejection of the District Court's basic premises was blunt. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," he wrote.[25] His opinion for the Court concluded that the state's method for financing public education displayed no invidious discrimination and "abundantly satisfie[d]" rational basis review, the minimal standard of scrutiny that he found appropriate to the plaintiffs' claim.[26] The problem presented by the case was a difficult one, Powell said, "[b]ut the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[27] Fast forward eight years to the Justices' conference following the argument in *Plyler v. Doe,* and it is no wonder that Harry Blackmun, in his conference notes on what he referred to as the "alien children cases," placed an exclamation point after his notation of Powell's vote to affirm the lower courts' judgment that the Texas statute was unconstitutional.[28]

The significance of the Court's refusal to take the road open to it in *Rodriguez* was clear at the time, and became even more evident with the passing years. "*Rodriguez* was the death knell for the idea that the Constitution protects social and economic rights," Cass R. Sunstein wrote in his 2004 book on "FDR's unfinished revolution."[29] The prospect that the Court's increasingly embattled liberals could use *Plyler v. Doe* to blunt or undermine *Rodriguez* was vanishingly small, as small as the chance that Powell would repudiate in the new case anything he had said in the earlier one. In fact, Powell's *Plyler* file makes clear that *Rodriguez* was never far from his mind. "My concern when I wrote *Rodriguez* was not to create a chain reaction," he wrote in the draft of a letter to Brennan, which remained unsent.[30] Both Brennan and Powell, in their very different ways, would have to

24. Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971).
25. San Anonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. at 33.
26. *Id.* at 55.
27. *Id.* at 59.
28. Blackmun, *supra* note 15 (In notes Blackmun made on the bench as the case was being argued, he predicted, with a question mark, that Powell would vote to reverse. He also predicted that O'Connor would go along with his own vote to affirm, a prediction that also proved incorrect.)
29. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 165 (2004).
30. Draft of Letter from Justice Powell to Justice Brennan (Jan. 26, 1982), *in* LFP Papers, *supra* note 12 ("Dear Bill" document marked "Draft- not sent").

deal with both cases and, while remaining true to their own principles, reconcile them in the course of reaching a result that both sought.

Brennan, who as the senior Justice in the majority had assigned the case to himself, could not resist making an initial effort it to use the opinion to recapture lost ground from *Rodriguez*. To that extent, the decisional process in *Plyler* represented an effort to pick up the *Rodriquez* debate where it had left off in March 1973. Brennan drafted a 41-page opinion that described the children on whose behalf the class-action lawsuits had been brought as "a discrete and historically demeaned group" who, victimized by the state in an act of facial discrimination "solely on the basis of personal status," were being deprived of a "primary tool of equality," namely education. Strict scrutiny must apply, Brennan wrote, and because the state's justifications in support of the law "do not approach the showing of compelling need required," the judgments of the Court of Appeals must be affirmed.[31]

Brennan knew, of course, that he could not hope to hold Powell's vote with such an analysis unless he persuasively distinguished Powell's opinion for the Court in *Rodriguez*. The effort was rather transparently half-hearted. "This case lies far on the other end of the equal protection spectrum from *Rodriguez*," he wrote. "We are not presented here with a complex scheme of finance and funding indirectly resulting in comparative disadvantages for a fluid group, definable for purposes of equal protection analysis only by presence within a less favored geographic area." By contrast, the Texas law was a species of the "class or caste" legislation "with which the Equal Protection Clause is most directly concerned."[32]

On Jan. 25, 1982, Brennan took what he called "the unusual step" of circulating this draft not to the entire Conference (the Court's internal term of reference for the nine Justices collectively) but only to the members of his putative majority: Justices Marshall, Blackmun, Stevens, and Powell. In letters to each of the four, he introduced the draft: "My conference notes show no clear consensus with respect to the level of scrutiny to be afforded the Texas statute. But my impression was that those who voted with me to affirm shared my particular concern with a

31. William J. Brennan, Draft for Circulation 36, 41 (Jan. 25, 1982), *in* Brennan Papers, *supra* note 15.

32. *Id.* at 35–36.

statute, such as this, that sought to deprive innocent children not remotely responsible for their plight of their right to an education."[33]

There was, of course, no "right to an education" under the Court's case law. Brennan passed over this obstacle and pressed on. "The opinion is less broad than it might be," he said, "if it concerned itself only with the 'fundamentality' of education, or the 'class' of innocent children. However, since a strong case for heightened scrutiny could be made simply on the basis of the class discriminated against, I thought it appropriate, indeed necessary, where denial of basic education was at stake, to hold strict scrutiny standards applicable."[34]

No doubt recognizing that he had pushed his argument to the limit, Brennan returned to an emphasis on the qualifications that he said were inherent in his analysis. The draft had described the Framers of the Fourteenth Amendment as particularly concerned with access to education as an aspect of making concrete the promise of equal protection. Referring to this aspect of the draft, Brennan said in his letter that "[f]inally, it seems to me that the historical approach of this draft, although leading to strict scrutiny here, is for that very reason largely self-limiting and unlikely to force us down any uncharted paths in the future." He even preemptively offered to cut from the draft the 11 pages of strict-scrutiny analysis, because "[i]n my view, the Texas statute would fail under even an intermediate standard of review . . . with the same ultimate result."[35]

Powell was not ready to buy what Brennan was trying to sell. On Jan. 30, he replied to Brennan by a three-page letter that he also sent to Marshall, Blackmun, and Stevens. The draft was "an impressive piece of work, and I have enjoyed reading it," he said. But he said that it "sweeps rather broadly, and leaves me a little uneasy as to inferences that may be drawn from it in other connections not clearly foreseeable."[36]

The source of Powell's unease was, in fact, the heart of Brennan's analysis. He could not agree, he said, that either illegal aliens in general or their children in particular were a "suspect class," deserving of strict scrutiny. "We have never held that

33. Letter from Justice Brennan to Justice Blackmun (Jan. 25, 1982), *in* Blackmun Papers, *supra* note 15, at Folder 6.

34. *Id.*

35. *Id.*

36. Letter from Justice Powell to Justice Brennan (Jan. 30, 1982), *in* Blackmun Papers, *supra* note 15, at Folder 6.

persons unlawfully in this country, whatever their age, are a suspect class in the full meaning of the term," he said. And while "I fully share your view as to the importance of education, particularly in a democracy," he could not subscribe to Brennan's implication that the Framers of the Fourteenth Amendment had been concerned with "creating an expectation of public education." Powell continued: "As I am not sure where this would lead us, I need to examine your language in this respect more carefully. I have not viewed the Amendment as the source of any right to education." Citing *Rodriguez*, Powell said: "It was my view then and now that there is no constitutional right to a state provided education any more than there is such a constitutional right to welfare, housing, health services, public works and public utilities—all of which are considered by most of us to be essential."[37]

Brennan had clearly overreached. But just as clearly, all was not lost—far from it. Powell said he would subject the Texas statute to mid-level scrutiny, that is, to a requirement that the state justify its law by showing a "substantial" state interest, a considerably more stringent test than the "mere rationality" required by the lowest tier of equal protection scrutiny. "As the class is composed of innocent children, uniquely postured, I would agree that a 'heightened' level of scrutiny is required," Powell said. And, he added, "As Texas has advanced no interest that I consider sufficiently substantial to justify the discrimination, I agree that there has been a violation of the Equal Protection Clause."[38]

Any heightened judicial scrutiny, whether mid-level or strict, has the effect of shifting to the government the burden of justifying the challenged differential treatment. The distance from rational-basis review to either form of heightened scrutiny, in other words, is much further than the interval between mid-level and strict scrutiny. Powell had given Brennan a great deal to work with. But at the same time, in his gentle way, he made it clear that the *Rodriquez* debate, as far as he was concerned, was settled. He ended his letter with an obliquely worded but unmistakable challenge: "I will join your judgment, and hope that in the drafting and redrafting process the opinion can be focused so specifically on this uniquely discrete class that I can join your

37. Id.
38. Id.

opinion also."[39] The meaning was not lost on Brennan. Two days later, Blackmun's law clerk, Charles A. Rothfeld, wrote to his justice: "As I understand it, WJB is going to make substantial changes to accommodate LP's views."[40]

On Feb. 2, Brennan sent Powell and the others in the majority a three-page letter infused with hope and diplomacy. "I'm very encouraged that it will not be difficult to find common ground because I tend to perceive this case, and what would be the most appropriate opinion for the Court, in very nearly the terms that you do," Brennan wrote. Noting that his initial draft had been "purposefully 'firmed up' with as much support as possible, in order to bring to the fore all the problems at work in this somewhat *sui generis* case," he indicated that he was now ready to tone the opinion back down.[41]

He was not, however, ready to give up. He agreed with Powell that "there is just no support" in either the Congressional debates on the Fourteenth Amendment or in the Court's cases, "for the idea that a state has any affirmative obligation to establish a system of public education." Indeed, he had not meant to suggest otherwise. Nonetheless, he continued, both the debates and the cases did support the view "that education is of special importance within the framework of equality." Thus, when it came to the alien children, "[a]lthough concededly the argument for 'middle-level' scrutiny, across-the-board for such children is strong," Brennan said he believed the better course would be to avoid a blanket label and instead emphasize the nature of the "uniquely discrete class being discriminated against here." Brennan added: "I do think that the discrete nature of the class heightens for them the significance of education." He then offered to relegate the bulk of his equal protection analysis to a footnote and invited Powell's further comments and suggestions.[42]

These were major concessions. Indeed, Powell's law clerk told him "if anything, Justice Brennan may be inviting some problems from Justice Marshall and Blackmun" by downplaying so much of his original equal protection analysis.[43] But

39. Id.

40. Memorandum from Charles A. Rothfield, Clerk to Justice Blackmun, to Justice Blackmun (Feb. 1, 1982), *in* Blackmun Papers, *supra* note 15.

41. Letter from Justice Brennan to Justice Powell, (Feb. 2, 1982), *in* Blackmun Papers, *supra* note 15, at Folder 6.

42. Id.

43. Memorandum from David Levi to Justice Powell (Feb. 2, 1982) *in* LFP papers,

Powell remained wary, understanding as he did that Brennan was still trying to preserve a strict-scrutiny analysis, albeit one limited to the educational context of the case. Perhaps he suspected that Brennan was seeding the opinion with notions of equal protection that could be tended and made to flower later in places as yet unforeseen. He replied to Brennan on Feb. 4. "I have agonized over this case more than a little, as the answer seems so clear to me and yet writing it out creates various concerns," he wrote. While Brennan had offered a "substantial clarification," Powell said, "I have concluded that it is best for me to write separately. My concern as to the 'open endedness' of equal protection prompts me to be extremely cautious in this case as to the reach of the precedent we set . . . This case is quite unique, and I have thought it prudent to write less exhaustively than your opinion. I recognize, of course, that your purpose also has been to circumscribe our holding narrowly, and perhaps you have done this. Nevertheless, given my concerns, I am presently inclined to join only the judgment."[44]

Brennan made a further try, offering on Feb. 8 some slight revisions as part of a proposed opinion that, for the first time, he circulated to the Conference. His changes, he told Powell, "effectively preserve, and support, your *Rodriguez* views."[45]

Unpersuaded, Powell the next day circulated to the Conference his proposed partial concurrence and concurrence in the judgment. The seven-page document had the form of an equal protection opinion, but little of the analytical content that one would expect under that label. Instead, his focus was, at it had been from the beginning, on the unique plight of children "who are the victims of a combination of circumstances": their "innocence" of the acts of parents who remained illegally in Texas after crossing an open border, which Powell described almost as an attractive nuisance; the failure by Congress to provide "effective leadership" on "a problem of serious national proportions"; the likelihood that a substantial number of the affected children would remain in the United States for the rest of their lives as a "subclass of illiterate persons." Powell continued: "In my view,

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supra note 12.

44. Letter from Justice Powell to Justice Brennan (Feb. 4, 1982), *in* Brennan Papers, Papers, *supra* note 15.

45. Letter from Justice Brennan to Justice Powell (Feb. 8, 1982), *in* Brennan Papers, Papers, *supra* note 15.

the state's denial of education to these children bears no substantial relation to any substantial state interest." [46]

His concern for children permeated the opinion. He quoted from a 1953 concurring opinion by Justice Frankfurter: "Children have a very special place in life which law should reflect." [47] And he cited two decisions on the rights of illegitimate children that he had written for the Court.[48]

Powell saved his doctrinal disagreement with Brennan's circulating draft for a long footnote."Although I believe that our review here should be somewhat more searching than in the normal equal protection case, I do not join in the Court's conclusion that strict scrutiny is appropriately applied to this classification," he wrote. "This exacting standard of review has been reserved for instances in which a 'fundamental' constitutional right or a 'suspect' classification is present. Neither is clearly present in this case, as the Court recognizes." He added that the draft's insistence on strict scrutiny despite this ostensible recognition was not "consistent with our approach in other equal protection cases and it may tend to undermine the constructive discipline that the 'suspect classification' and 'fundamental right' concepts have imposed upon this area of the law."[49]

Two months after argument, the effort to craft an opinion for the Court appeared to have foundered. At this point, two other members of the majority weighed in with letters to Justice Brennan. Both Blackmun and Stevens urged him to move further in Powell's direction. The "class" of "illegal aliens" was a "poorly defined" one, Blackmun wrote, noting that one of the lower courts had found that a substantial number of the children were likely to remain in the United States and were not presently deportable; in any event, it was impossible to know which of the children might be found deportable or eventually be deported.[50]

Blackmun continued: "Thus, every child has a 'right' to be here until he actually is placed under a deportation order, and at

46. Lewis F. Powell Jr., Plyler v. Doe Opinion Draft (Feb. 9, 1982), *in* Blackmun Papers, *supra* note 15, at Folder 7.

47. *Id.* at 4 (citing May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J. concurring)).

48. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) and Trimble v. Gordon, 430 U.S. 762 (1977).

49. Powell, *supra* note 46, at 4 n.2.

50. Letter from Justice Blackmun to Justice Brennan (Mar. 10, 1982), *in* Blackmun Papers, *supra* note 15, at Folder 6.

every step of the immigration process a federal official still has the discretion to allow the child to remain in the United States. Many of these children, therefore, have, or will have, political and related rights, and there is no way for the State to determine which children do not have such rights." There was consequently no need to refer to the children as members of a suspect class, Blackmun said; rather, "one could say that the reason education is fundamental is that it is preservative of other rights" and "[t]he reason that it is fundamental to this group is that some of these children will be here permanently."[51]

It was, perhaps, a way out of the box, a way to get out of the suspect-category cul de sac without yielding much ground as a practical matter. In any event, Blackmun told Brennan, "I think it is desirable, if at all possible, to have a Court *opinion*, as well as a Court judgment."[52] Stevens agreed. He told Brennan that "I am reasonably sure that any draft that is acceptable to you and to Lewis will be one that I will be able to join." Stevens added that "I agree completely with Harry's suggestion that it is extremely important to obtain a Court opinion if that is at all possible." He also said he agreed with Blackmun that "the reference to illegal aliens as a suspect class could well be deleted from the opinion." Perhaps, he said, the opinion could simply declare that what Texas was doing was irrational.[53]

But Blackmun's effort to reframe the question by centering an opinion around the "fundamental" nature of education, rather than on the nature of the excluded class, did not reassure Powell. "As important as education has been in the life of my family for three generations," he wrote to Blackmun, "I would hesitate before creating another heretofore unidentified right." Maybe it would be just as well not to have an opinion for the Court in "this unique case," he continued. "This will leave the Court free to meet unforeseeable situations without being bound by a decision tailored to redress a peculiar and unprecedented type of injustice." In other words, perhaps it would be better for all concerned simply to give up the effort.[54]

But that was not Brennan's way. On April 5, he circulated a new draft, one he described to Powell as "much revised." In-

51. Id.

52. Id.

53. Letter from Justice Stevens to Justice Brennan (Mar. 10, 1982), *in* Blackmun Papers, *supra* note 15, at Folder 6.

54. Letter from Justice Powell to Justice Blackmun (Mar. 12, 1982) *in* LFP Papers, *supra* note 12.

deed, it was. "We reject the claim that 'illegal aliens' are a 'suspect class,' " the draft said in one of the footnotes to which much of the formal equal protection analysis was now relegated.[55] The body of the opinion now simply emphasized the plaintiffs' uniquely blameless and helpless situation. Brennan cited *Trimble v. Gordon*, one of Powell's earlier opinions for the Court on the rights of illegitimate children: "Their 'parents have the ability to conform their conduct to societal norms,' and presumably the wherewithal to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'"[56]

Powell grasped the implications immediately. "WJB, in this draft, has adopted the substance of my views . . . I believe I can join," he wrote on his copy of Brennan's draft.[57] To Brennan, he wrote: "This is a fine draft, and I am grateful to you for making this substantial effort to accommodate my thinking about this case—in the commendable interest of mustering a Court." He had only a few changes to offer, he said, and with those, he would join the opinion. "I may retain some portions of my brief concurring opinion that will reinforce rather than detract in any way from what you have written so well," he added.[58]

His few objections to Brennan's draft were telling. Brennan had written that the creation of a permanent underclass of undocumented residents "presents most difficult problems for a Nation that prides itself on egalitarian principles." On his copy of Brennan's draft, at page 16, Powell wrote: "Egalitarian is a code word." He asked Brennan to delete it and to substitute "principles of equality under law." [59] Brennan complied promptly, circulating a revised draft the next day. On the following day, April 8, Powell circulated his formal "join."

The following day, Powell received an angry personal letter from the Chief Justice. "Dear Lewis," Warren Burger wrote. "I am profoundly troubled by the developments in this case and of

55. Letter from Justice Brennan to Justice Powell (Apr. 5, 1982), *in* Brennan Papers, *supra* note 15; Letter from Justice Powell to Justice Brennan (Apr. 7, 1982), *in* Brennan Papers, *supra* note 15 (with Justice Brennan's Apr. 5 draft attached).

56. William J. Brennan, Jr., Plyler v. Doe Opinion Draft (Apr. 5, 1982) *in* Brennan Papers, *supra* note 15 (attached to Powell's letter of April 7) (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

57. Lewis F. Powell Jr., Notation on Brennan Draft of April 5 (April 6, 1982), *in* LFP Papers, *supra* note 12.

58. Letter from Justice Powell to Justice Brennan (Apr. 6, 1982) *in* Brennan Papers, *supra* note 15; LFP Papers, *supra* note 12.

59. Powell, Notation on Brennan Draft, *supra* note 57.

course will not join it as it stands. What limiting principle can confine this massive expansion of the Fourteenth Amendment . . ." Burger's threat to withhold his vote was a peculiarly hollow one, as he had been in dissent from the beginning. In any event, there is no evidence that Powell bothered to reply.[60]

With concurring and dissenting opinions still in circulation, it took six weeks before the decision was ready for announcement. (Blackmun and Marshall, in addition to Powell, filed concurring opinions, while Burger wrote the dissent, noting that "The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem.")[61] Brennan labored over his "hand-down," as the Justices refer among themselves to the oral announcement of an opinion; the seven-page draft in his file contains a number of emendations and hand-written additions. "As respects the standard of scrutiny appropriate for the evaluation of the Texas statute," Brennan announced to the courtroom audience on the morning of June 15, 1982, "we conclude that the discrimination contained in the statute against these children can hardly be considered rational unless it furthers some substantial goal of the state."[62]

His description of the holding went on: "Public Education is not a 'right' granted to individuals by the Constitution." (Brennan's printed script here contained a citation to *Rodriguez*.) "But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[63]

Brennan concluded: "If the state is to deny a discrete group of innocent children the free public education that it offers to

60. Letter from Justice Burger to Justice Powell (April 9, 1982) *in* LFP Papers *supra* note 12.

61. Plyler v. Doe, 457 U.S. 202, 253 (1982) (Burger, C.J., dissenting).

62. William J. Brennan, Jr., Bench Announcement 4 (June 15, 1982), *in* Brennan Papers, *supra* note 15, at Folder 7.

63. *Id.* at 4–5.

other children residing within its border, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here."[64]

The following day, William Brennan received from Lewis Powell a handwritten letter. "Dear Bill," it began.

"You are to be congratulated on *Plyler*—especially on the painstaking and generous way you wrote an opinion that accommodated our several differing views, and finally obtained a Court.

"Your final product is excellent and will be in every text and case book on Constitutional law.

"I also was proud of your verbal summary from the Bench Tuesday a.m.

"As ever, Lewis."[65]

III

The primary winners of *Plyler v. Doe* were, of course, the children on whose behalf the case was brought—and not only the children of Texas.[66] Eight years later, the voters of California, in another of the anti-immigrant spasms that periodically afflict this nation of immigrants, adopted Proposition 187. Among the burdens that measure placed on undocumented immigrants was the denial of a public education. Promptly enjoining enforcement, the Federal District Court found that the existence of clear federal law to the contrary made it obvious that the initiative's education restriction was preempted. ("[the] denial of primary and secondary education conflicts with federal law as announced by the Supreme Court in *Plyler v. Doe* and is therefore preempted.")[67]

To that extent, William Brennan was also the winner, for having produced a majority opinion with an indisputably clear holding.

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64. *Id.* at 7.

65. Letter from Justice Powell to Justice Brennan (June 16, 1982), *in* Brennan Papers, *supra* note 15, at Folder 7.

66. Mary Ann Zehr, *Amid Immigration Debate, Settled Ground*, EDUCATION WEEK, June 6, 2007, at 1 (commenting on the impact of the decision 25 years later in Tyler, Tex., where the case began).

67. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 787 (C.D. Calif. 1995) (opinion of Pfaelzer, J.).

But if *Plyler v. Doe* was one battle in a war over constitutional interpretation, it is clear after the passage of 27 years that Lewis Powell, and not William Brennan, won that war. Powell wanted the case to be about the education of children, not the equal protection rights of immigrants, and so the decision was. In stressing the unique aspects of the children's plight and of the disability that Texas sought to impose on them, Powell extracted an opinion that, if not unique, has had little generative force. Rather than opening a new constitutional conversation, *Plyler* served as a measure of how far the Burger Court had moved in the years since an idealistic group of lawyers, during the waning years of the Warren Court era, launched the litigation that had ended in failure in *Rodriquez* and into which William Brennan, for all his powers of persuasion, could breathe no new life.[68]

Plyler's significance for the new generation of anti-immigrant ordinances is cloudy at best, as illustrated by one representative recent case that attained a high profile because it was one of the first to be filed in Federal District Court. In 2006, the city of Hazelton, Pa. adopted ordinances to prohibit the employment and "harboring" of undocumented aliens, as well as to prevent them from renting apartments. On July 26, 2007, Judge James M. Munley of Federal District Court for the Middle District of Pennsylvania declared the ordinances unconstitutional. "The genius of our Constitution is that it provides rights even to those who evoke the least sympathy from the general public," Judge Munley wrote. "In that way, all in this nation can be confident of equal justice under its laws."[69] But significantly, Judge Munley rejected the plaintiffs' equal protection claim and ruled primarily on the basis of federal preemption (explicit preemption as well as field and conflict preemption) of immigration policy.[70] And while a judge in Fairfax County, Va. recently cited *Plyler*'s equal protection holding in an opinion striking down a local ordinance aimed at forbidding day laborers, nearly all of whom are undocumented immigrants, from using any "highway, sidewalk, driveway, parking area, or alley" as a place for seeking employment from passing pedestrians or motorists, the opinion relied on the First Amendment; the *Plyler* citation was dicta.[71]

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68. For a history of the *Rodriguez* case, see SRACIC, *supra* note 23.

69. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 555 (2007). *See also* Julia Preston, *Judge Voids Ordinances on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, at A14.

70. *Lozano*, 496 F. Supp. at 555.

71. The Fairfax County Circuit Court found that in the absence of adequate "alternative channels of communication," the anti-solicitation ordinance violated the job-seekers' right to free speech. Town of Herndon v. Thomas, No. MI-2007-644, slip op. at 7

The state's defense of its statute in *Plyler* offered many of the same arguments that are being raised today by those who would deny to undocumented immigrants such necessities as housing,[72] employment,[73] and—an increasingly popular way for politicians to demonstrate their disapproval of illegal immigration—in-state tuition rates at public colleges and universities.[74] (A group of Republicans in the Virginia Legislature recently announced their intention to introduce a bill to bar undocumented students from public universities entirely, regardless of the students' ability or willingness to pay.)[75]

Elected officials have learned that they show support for undocumented residents at their peril, as Gov. Eliot Spitzer of New York found out when he was forced to withdraw his proposal to give drivers' licenses to illegal immigrants.[76] Local ordinances and policies around the country are transforming police and other officials into immigration law enforcers.[77] A sting op-

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(Va. Cir. Ct. Aug. 29, 2007) (citing Plyler v. Doe, 457 U.S. 202, 211-12 (1982)).

72. Patrick McGee, *Rental Ban Faces Court Challenges*, FORT WORTH STAR-TELEGRAM, May 16, 2007, at B5 (describing litigation over a ban on renting apartments to undocumented immigrants adopted by the voters of Farmers Branch, Tex. in a May 2007 referendum).

73. *E.g.* Randal C. Archibold, *Arizona Governor Signs Tough Bill on Hiring Illegal Immigrants*, N.Y. TIMES, July 3, 2007, A10 (describing a state law under which employers who fail to verify the legal status of their employees risk suspension or, for a second offense, permanent revocation of their state business license). The Federal District Court in Arizona rejected a preemption-based challenge to the statute in *Arizona Contractors Association Inc. v. Candelaria*. *See supra* note 3.

74. *E.g.* Joseph Berger, *Debates Persist Over Subsidies for Immigrant College Students*, N.Y. TIMES, Dec. 12, 2007, at B8; Josh Keller, *State Legislatures Debate Tuition for Illegal Immigrants*, THE CHRONICLE OF HIGHER EDUCATION, April 13, 2007, at 28; Stacey Stowe, *Rell Vetoes Local Benefit for Students Here Illegally*, N.Y. TIMES, June 27, 2007, at B5 (describing Connecticut governor's veto of a bill that would have provided in-state tuition rates at state colleges and universities, regardless of a student's immigration status, as long as the student lived in the state and had graduated from a Connecticut high school. Gov. Rell said she understood the impulse behind the Legislature's passage of the measure but "[t]he fact remains, however, that these students and their parents are here illegally, and neither sympathy nor good intentions can ameliorate that fact.") Only 10 states currently permit undocumented graduates of public high schools to attend public universities at in-state tuition rates. One, ironically, is Texas, along with California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Utah and Washington. Kathy Kiely, *Children Caught in the Immigration Crossfire*, USA TODAY, Oct. 8, 2007, at A1.

75. Tim Craig, *Va. Republican Bill Would Bar Illegal Immigrants From College*, THE WASHINGTON POST, Aug. 30, 2007, at A1.

76. Nick Paumgarten, *The Humbling of Eliot Spitzer*, THE NEW YORKER, Dec. 10, 2007, at 72, 72–85; Lisa Rein, *Immigrant Driver ID Rejected by O'Malley*, THE WASHINGTON POST, Jan. 16, 2008, at B1 (reporting on decision by Gov. Martin O'Malley of Maryland).

77. Daryl Fears, *Illegal Immigrants Targeted by States*, THE WASHINGTON POST, June 25, 2007, at A1; Jill P. Capuzzo, *Connecticut City Plans to Team Its Police With Federal Immigration Agents*, N.Y. TIMES, Feb. 6, 2008, at B1; Randal C. Archibold, *Phoenix*

eration in Danbury, Connecticut, in which police posed as contractors seeking to hire day laborers and then turned the jobseekers over to immigration officials for deportation, is the subject of a pending federal lawsuit.[78]

A Federal District Judge, A. Richard Caputo, granted a preliminary injunction last year in favor of a couple who had been refused a marriage license by the Register of Wills in Luzerne County, Pa. because the groom, a Mexican national, could produce neither a visa nor a green card to show that he was in the country legally. Citing *Plyler v. Doe* for the proposition that "aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments," Judge Caputo held that the "fundamental character of the right to marry" applied to alien and citizen alike.[79]

It was a rare citation of *Plyler*, a rarity that in fact underscores the uncertainty of how the current Court would resolve any of the current disputes. A cynical appraisal of the Court's performance in *Plyler*, and specifically of Powell's role, comes from Mark Tushnet, who observed in 1995 that while the decision "on one level had almost no generative or doctrinal significance," on the other hand it had "profound doctrinal significance because one could interpret it to hold that the Supreme Court will strike down statutes that are unconstitutional when a majority of the Court thinks those statutes are unwise social policy." Tushnet continued: "Powell's jurisprudence produced an opinion that was almost nothing more than a direct reflection of his views of social policy. The Framers designed the Constitution, it appears, to allow judges to strike down statutes that are, to a person as reasonable as Powell, not sensible."[80]

Perhaps. Yet to answer the question framed by this lecture, "What would Justice Powell do?" by asserting that he would do what he thought was reasonable is to beg the question rather than answer it. Although after leaving the bench, Powell expressed regret over his vote with the majority to reject the gay rights claim in *Bowers v. Hardwick*,[81] and general doubt about the

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Police to Check Arrestees' Immigrant Status, N.Y. TIMES, Feb. 16, 2008, at A10.

78. Nina Bernstein, *Challenge in Connecticut Over Immigrants' Arrest*, N.Y. TIMES, Sept. 26, 2007, at B1.

79. Buck v. Stankovic, 485 F. Supp.2d 576, 582 (2007).

80. Mark Tushnet, *Lives in the Law: Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854 (1995).

81. Bowers v. Hardwick, 478 U.S. 186 (1986). *See* Linda Greenhouse, *When Second*

wisdom of the Court's course on capital punishment, in which he had been an active participant,[82] he never gave voice, at least publicly, to any second thoughts about either *Rodriguez* or *Plyler*. The chances are not great that he would have found a constitutional basis for disapproval of the burdens being placed on undocumented immigrants today—or even, necessarily, that he would have disapproved them as a matter of policy. Looking at Lewis Powell as our hypothetical Everyman at the center of his Court, it is therefore most unlikely that today's Court would disapprove them either.

But it is safe to assume that Justice Powell's judgment on these issues, whatever it might have been, would not have been a snap one. Perhaps he would have "agonized" over the next case as he did over *Plyler*. Perhaps not. But he would have listened respectfully to all arguments and weighed them carefully. The likelihood is remote that he would have bemoaned, as did a young Justice Department lawyer 27 years ago, the failure of any particular case to fit into a "litigation program to encourage judicial restraint."[83] He would, in other words, have confronted his own preconceptions and wrestled with them, rather than try to enshrine them into law.

After Justice Powell's death in 1998 at the age of 90, his former law clerk and protégé, Judge J. Harvie Wilkinson III, published a reminiscence in which he posed the question that he said was suggested by Lewis Powell's life: "How then does one both perfectly reflect background and powerfully transcend it?"[84] We can ask no more of a judge.

Thoughts in Case Come Too Late, N.Y. TIMES, Nov. 5, 1990, at A14.

82. E. R. Shipp, *Ex-Justice Suggests Legislators Reconsider Capital Punishment*, N.Y. TIMES, Aug. 8, 1988, at A15.

83. *See* Savage & Reynold, *supra* .note 11.

84. J. Harvie Wilkinson III, *In Memoriam: Lewis F. Powell Jr.*, 112 HARV. L. REV. 590, 593 (1999).