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San Antonio Independent School District v. Rodriguez: A Retreat from Equal Protection

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CASE COMMENT

San Antonio Independent School District v. Rodriguez: A Retreat From Equal Protection

> *Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*[1]

WITH THESE WORDS, the Supreme Court in *Brown v. Board of Education*,[2] unanimously declared that the long-standing, state-enforced doctrine of "separate but equal" denied equal protection of the laws to non-white pupils in state-supported schools. Recognizing the fundamental importance of an education in modern society[3] and finding that "[s]eparate education facilities are inherently unequal,"[4] the Court ruled that a state could no longer make the extent of a child's educational opportunity a function of the color of his skin.

Nineteen years later, the Supreme Court was called upon in *San Antonio Independent School District v. Rodriguez*[5] to review the constitutionality of another long-standing, state-enforced practice of affecting education. This time the challenge was to the Texas scheme of financing public elementary and secondary education. This scheme, and those in nearly every state, relied primarily upon local *ad valorem* property taxes, and resulted in great disparities between school districts in the amount of funds available for educational expenditures.[6]

Unlike *Brown*, *Rodriguez* was not unanimously decided. The Court split 5-4 in reversing the decision of the district court and in upholding the constitutionality of the Texas financing system. The paradox of the majority's decision is evidenced by this statement from the concurring opinion of Mr. Justice Stewart:

> The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust.

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[1] Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[2] 347 U.S. 483 (1954).

[3] *Id.* at 493.

[4] *Id.* at 495.

[5] ___U.S.___, 93 S.Ct. 1278 (1973).

[6] *Id.* at 1287.

> It does not follow, however, and I cannot find, that this system violates the Constitution of the United States.[7]

In so finding, the Supreme Court has now ruled that a state may make the extent of a child's educational opportunity a function of the assessed valuation of the taxable real property located within the school district in which he happens to live.

Before exploring the narrow confines of the Court's reasoning in *Rodriguez*, it will be helpful to look briefly at some of the major cases that preceded this decision. The number of these decisions over a relatively short period of time,[8] the similarities in reasoning among them, and the reactions they caused,[9] all combine to show that the school financing issue was not only very important but was also highly controversial.

The first major cases to challenge the constitutionality of a state's method of financing its public schools are noteworthy mainly for their lack of success. In the first of these, *McInnis v. Shapiro*,[10] the plaintiffs, in challenging the Illinois school financing scheme, claimed that only a financing system that apportioned public funds according to the educational needs of the students satisfies the fourteenth amendment.[11] The three-judge district court that heard the case, though recognizing the readily apparent inequalities in the system,[12] found "no Constitutional requirements that public school expenditures be made only on the basis of pupils' educational needs."[13] An attack upon the constitutionality of the Virginia school financing scheme met the same fate the following year in *Burruss v. Wilkerson*.[14] Even though the district court judge who first heard the case found merit in the plaintiffs' arguments,[15] the three-judge court subsequently impaneled found this case to be "scarcely distinguishable"[16]

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[7] *Id.* at 1310 (Stewart, J., concurring).

[8] Van Dusartz v. Hatfield, 334 F.Supp. 870 (D. Minn. 1971); Rodriguez v. San Antonio Indep. School Dist., 337 F.Supp. 280 (W.D. Tex. 1971); Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal.Rptr. 601 (1971); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972).

[9] *See, e.g.*, Flaherty, *Serrano: Its progeny and Its Prophecy*, 21 CLEVE.ST.L.REV. 104 (Sept. 1972); Vieria, *Unequal Educational Expenditures: Some Minority Views on Serrano v. Priest*, 37 MO.L.REV. 617 (1972).

[10] 293 F.Supp. 327 (N.D. Ill. 1968), *aff'd mem., sub nom.*, McInnis v. Ogilvie, 394 U.S. 322 (1969).

[11] McInnis v. Shapiro, 293 F.Supp. 327, 331 (N.D. Ill. 1968).

[12] *Id.*

[13] *Id.* at 336.

[14] 310 F.Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970).

[15] Burruss v. Wilkerson, 301 F.Supp. 1237 (W.D. Va. 1968).

[16] Burruss v. Wilkerson, 310 F.Supp. 572, 574 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970).

from *McInnis*, and dismissed the action. Since both of these cases were affirmed by the Supreme Court in *per curiam* opinions,[17] the record in the school funding cases at that time was not a good one from a plaintiff's point of view.

The outlook for success improved somewhat in March, 1971, when the Supreme Court, in *Askew v. Hargrave*,[18] vacated the decision of the three-judge district court in *Hargrave v. Kirk* which had declared unconstitutional a Florida millage rollback plan. In remanding the case to await the outcome of a state constitutional challenge to that plan, the Court expressly left open the issue of the merit of an equal protection claim.[20]

About the same time that those cases were going through the courts, three law review articles[21] and a book[22] appeared which would prove to be very influential in subsequent school financing cases. It is beyond the scope of this Comment to review those publications, but their importance cannot be underestimated. Their appearance at this time provided the final ingredients necessary for success. It was the uniting of the analysis, reasoning, and arguments contained in them, with the opportunity presented by *Askew* to avoid the holdings in *McInnis* and *Burruss*, that produced the seed of an idea that now was ready to germinate. All that was lacking was a fertile setting in which this idea could take root and flourish and from which it could propagate itself.

The fertile setting was soon found in the California Supreme Court; and it was there, in the case of *Serrano v. Priest*,[23] that the idea became law. In that celebrated case, the California court directed the trial court to overrule the defendants' general demurrer, holding that the plaintiff had stated a cause of action in alleging that the California public school financing system violated his constitutional right to equal protection of the laws.[24] In so ruling, the court wrote a detailed decision in which, *inter alia*, it found that:

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[17] Burruss v. Wilkerson, 397 U.S. 44 (1970), *aff'g mem.*, 310 F.Supp. 572 (W.D. Va. 1969); McInnis v. Ogilvie, 394 U.S. 322 (1969), *aff'g mem.*, McInnis v. Shapiro, 293 F.Supp. 327 (N.D. Ill. 1968).

[18] 401 U.S. 476 (1971).

[19] 313 F.Supp. 944 (M.D. Fla. 1970), *vacated and remanded, sub nom.*, Askew v. Hargrave, 401 U.S. 476 (1971).

[20] Askew v. Hargrave, 401 U.S. 476, 478-79 (1971).

[21] Coons, Clune, Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF.L.REV. 305 (1969); Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV.L.REV. 7 (1969); Note, *Developments — Equal Protection*, 82 HARV.L.REV. 1067 (1969).

[22] J. COONS, W. CLUNE, S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

[23] 5 Cal. 3rd 584, 487 P.2d 1241, 96 Cal.Rptr. 601 (1971).

[24] *Id.* at 618, 487 P.2d at 1266, 96 Cal.Rptr. at 626.

1) Wealth is a suspect classification.[25]

2) Discrimination on the basis of district wealth is as invalid as that based on individual wealth.[26]

3) The extent to which governmental action was the cause of the wealth classification made this more than mere de facto discrimination.[27]

4) The constitutionality of this legislative classification had to be determined by its effect, not its purpose.[28]

5) Education is a fundamental interest which may not be conditioned on wealth.[29]

6) The California school financing system was not necessary to accomplish a compelling state interest and, therefore, could not withstand the requisite "strict scrutiny" test of the Equal Protection Clause.[30]

7) The California system which relied heavily on local property taxes and resulted in substantial disparities among school districts in available educational revenues invidiously discriminated against the poor and violated the Fourteenth Amendment's Equal Protection Clause.[31]

The seeds of *Serrano* quickly spread across the nation and took root in almost every state in which they fell.[32] The consistent theme of these cases came to be that "the level of spending for the child's education may not be a function of wealth other than the wealth of the state as a whole."[33] This principle, generally referred to as "fiscal neutrality,"[34] does not require absolute uniformity of school expenditures,[35] nor does it require a state legislature to adopt a specific system of financing or taxation.[36] Under the principle of fiscal neu-

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[25] *Id.* at 597-98, 487 P.2d at 1250, 96 Cal.Rptr. at 610.

[26] *Id.* at 601, 487 P.2d at 1252, 96 Cal.Rptr. at 612.

[27] *Id.* at 603, 487 P.2d at 1254, 96 Cal.Rptr. at 614.

[28] *Id.* at 602-03, 487 P.2d at 1253-54, 96 Cal.Rptr. at 613-14.

[29] *Id.* at 608-09, 487 P.2d at 1258, 96 Cal.Rptr. at 618.

[30] *Id.* at 610, 487 P.2d at 1259-60, 96 Cal.Rptr. at 620.

[31] *Id.* at 589, 487 P.2d at 1244, 96 Cal.Rptr. at 604.

[32] *See, e.g.*, Van Dusartz v. Hatfield, 334 F.Supp. 870 (D. Minn. 1971); Rodriguez v. San Antonio Indep. School Dist., 337 F.Supp. 280 (W.D. Tex. 1971); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972).

[33] Van Dusartz v. Hatfield, 334 F.Supp. 870, 872 (D. Minn. 1971); Rodriguez v. San Antonio Indep. School Dist., 337 F.Supp. 280, 284 (W.D. Tex. 1971); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187, 214 (1972).

[34] Van Dusartz v. Hatfield, 334 F.Supp. 870, 872 (D. Minn. 1971); Rodriguez v. San Antonio Indep. School Dist., 337 F.Supp. 280, 284 (W.D. Tex. 1971).

[35] Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457, 472 (1972); Van Dusartz v. Hatfield, 334 F.Supp. 870, 876 (D. Minn. 1971).

[36] Rodriguez v. San Antonio Indep. School Dist., 337 F.Supp. 280, 284 (W.D. Tex. 1971); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187, 217 (1972).

trality, "the State remains free to pursue all imaginable interests except that of distributing education according to wealth."[37]

One of the courts in which the *Serrano* reasoning flourished was the United States District Court for the Western District of Texas. That court, in *Rodriguez v. San Antonio Independent School District*,[38] decided that the Texas system of school financing violated the fourteenth amendment's equal protection clause since Texas had been unable to show that the system was premised upon some compelling state interest.[39] The court further concluded that the defendants had failed to establish even a reasonable basis for the classifications.[40] Although the three-judge court that heard and decided this case was impaneled in January, 1969, it postponed its decision until December, 1971, in order to give the Texas legislature an opportunity to correct the inequities in its school funding scheme. Only after the legislature had adjourned without taking any action, did the court issue its decision and order.[41]

It was against this background of general state and federal court acceptance of the *Serrano* decision, that the Supreme Court decided to hear an appeal from the district court's ruling in *Rodriguez v. San Antonio Independent School District*.[42] An analysis of the Supreme Court's decision reversing that ruling will show the rigid and restrictive interpretation the Court was forced to give to the equal protection clause and its own precedents in order to justify its position.

Mr. Justice Powell's opinion of the Court begins with an account of the historical development of the Texas public school financing system[43] and a brief comparison between plaintiffs' school district, Edgewood, and Alamo Heights, "the most affluent school district in San Antonio."[44] This comparison shows that in 1967-1968 Edgewood, with the highest equalized tax rate in the San Antonio metropolitan area, received a state-local total of $248 per pupil,[45] while the same total for Alamo Heights was $558 per pupil.[46] Although noting that more recent statistics showed a marked increase in state funds made

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[37] Van Dusartz v. Hatfield, 334 F.Supp. 870, 876 (D. Minn. 1971); *see also* Rodriguez v. San Antonio Indep. School Dist., 337 F.Supp. 280, 285 (W.D. Tex. 1971).

[38] 337 F.Supp. 280 (W.D. Tex. 1971).

[39] *Id.* at 284.

[40] *Id.*

[41] *Id.* at 285 n. 11.

[42] San Antonio Indep. School Dist. v. Rodriguez, 406 U.S. 1966 (1972), *prob. juris. noted.*

[43] San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1282-85 (1973).

[44] *Id.* at 1285.

[45] *Id.*

[46] *Id.* at 1286.

available to Edgewood,[47] Powell had to admit that Alamo Heights had enjoyed an even larger gain in state aid.[48] He also recognized the existence of substantial interdistrict disparities in school expenditures throughout the state which were "largely attributable to differences in the amounts of money collected through local property taxation."[49]

In order to decide whether or not these disparities amounted to a denial of equal protection as the district court had found, the Supreme Court first had to determine the proper test to apply to the Texas system.[50] That determination was not a difficult one for the majority to make. Powell stated early in his opinion that:

> Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications.[51]

If the strict scrutiny test were found to be applicable, the effect, as noted by Powell, would be that not only the Texas system, but "its counterpart in virtually every other state will not pass muster."[52] Therefore, it was obvious almost from the start that a majority of the Court had determined that a more lenient test had to be employed.

In order to justify his refusal to apply the strict scrutiny test that had been used by the numerous courts that had previously decided cases such as this, Powell had to find that:

1) No suspect classification was involved.

2) Education is not a fundamental interest.

The strained process by which these findings were reached is detailed below.

Nature of the Classification

Powell, writing for the Court, stressed that, in contrast to the precedents, this case could not be "neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause. . ."[53]

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[47] *Id.*

[48] *Id.* at 1286 n. 35.

[49] *Id.* at 1287.

[50] *Id.* at 1288.

[51] *Id.* at 1287. The Supreme Court clearly indicated that it considered wealth classifications appropriate for strict scrutiny when it said in *McDonald v. Board of Elec.*, 394 U.S. 802, 807 (1969): "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." [citations omitted].

[52] *Id.* at 1288.

[53] *Id.*

and yet he was concerned that the class represented by the plaintiffs could not "be identified or defined in customary equal protection terms."[54] In an attempt to better delineate the class, Powell then listed three ways by which he believed the disadvantaged class might be described.[55] His first two possibilities described the class on the basis of personal wealth of either an absolute or a relative nature. His third proposed description was based on residence in a relatively poor school district without regard to an individual's personal wealth. Although acknowledging the fact that the plaintiffs and the district court had relied primarily upon the third description of the disadvantaged class,[56] Powell went to great lengths to show that the first two were not valid classifications for equal protection purposes. In the process, he was forced to resort to unreasonable interpretations of the precedents and the equal protection clause itself.

Powell found that the Supreme Court's prior wealth discrimination cases had required a class of plaintiffs who were "completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[57] Thus he found that *Griffin v. Illinois*[58] involved the absolute deprivation of a transcript to an indigent criminal defendant, and that *Douglas v. California*[59] involved the absolute deprivation of counsel to an indigent seeking appeal from a state criminal conviction. Therefore, the reasoning continued, it necessarily follows that since the plaintiffs in this case did not show that their lack of personal resources resulted in their being absolutely deprived of an education, these precedents and others cited,[60] were not controlling.[61]

There is no justification for such an extremely narrow reading of these cases and the conclusions drawn from such an interpretation of them is totally without merit. What was really at issue in both *Griffin* and *Douglas*, of course, was the constitutionality of state laws that made the meaningfulness of the opportunity to have appellate review dependent upon the wealth of the one seeking it. If the defendant seeking review could not afford a transcript or counsel, the state laws in question did not absolutely deprive him of his right

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[54] *Id.* at 1289.

[55] *Id.*

[56] *Id.* n. 51.

[57] *Id.* at 1290.

[58] 351 U.S. 12 (1956).

[59] 372 U.S. 353 (1963).

[60] Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970). Both of these cases held criminal sanctions requiring incarceration of criminal indigents unable to pay a fine, invalid. Bullock v. Carter, 405 U.S. 134 (1972) (invalidating Texas primary election filing fee requirement).

[61] San Antonio Indep. School Dist. v. Rodriguez, ...U.S...., 93 S.Ct. 1278, 1290-92 (1973).

to appellate review. There simply were no provisions in those laws to provide such services to those who could not afford them. The Supreme Court, however, recognized that in reality the right to appellate review was far less meaningful to a poor defendant than to one who could afford to get a transcript or to retain counsel. Therefore, it decided that those state laws were unconstitutional as a denial of equal protection. Admittedly, the Texas financing system has not absolutely deprived the plaintiffs of an opportunity to receive an education. It is undeniable, however, that it does make that opportunity far less meaningful to those students, such as the plaintiffs who live in property-poor school districts. Thus, in keeping with the rule established by the precedents, it should have been found that the Texas system denied plaintiffs their right to equal protection of the laws.

Therefore, it is obvious that there is no real merit in Powell's strained attempt to distinguish this case from the Court's earlier wealth discrimination cases. Furthermore, the establishment of a precedent for an absolute deprivation requirement in such cases as this will so limit the applicability of the Equal Protection Clause as to effectively reduce it to a meaningless phrase.

Having enunciated his newly-established absolute deprivation requirement, Powell went on to point out that a mere showing that pupils living in poorer districts receive a poorer quality education does not establish a violation of the equal protection clause. After all, he reminds us, "the Equal Protection Clause does not require absolute equality or precisely equal advantages."[62] There is no challenge to this latter statement, and the prior cases that decided the school funding issue did not require absolute equality in education.[63] As stated earlier,[64] they required only that a state may not make the extent of educational opportunity a function of the assessed property wealth of the school district. Powell, however, was perfectly content to overlook the admittedly wide disparities in available revenues caused by the Texas system and rely on Texas' assertion that it provides an "adequate" education for all children in the State.[65] In so doing, he not only established a precedent that will require the Court in the future to determine the adequacy of other state services, but, much worse, he has converted (or perverted) the *equal* protection clause into an *adequate* protection clause.

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[62] *Id.* at 1291.

[63] Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457, 472 (1972); Van Dusartz v. Hatfield, 334 F.Supp. 870, 876 (D. Minn. 1971).

[64] *See* text at footnotes 23-38 *supra.*

[65] San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1291-92 (1973).

No longer will a state be required to provide its services on a substantially equal basis to all of its citizens. Henceforth, when a state decides to provide a service, it will need only to assure that it makes that service available to all its citizens on some basic, minimal level that the Court would find adequate. Having assured this, it can then create arbitrary classifications of its citizens and provide substantially greater degrees of this service to some of them based on these classifications. The result of this, of course, is that the equal protection clause has been stripped of its meaning and of its effectiveness.

The worst aspect of Powell's acceptance of this "adequacy" argument is that the Supreme Court has now adopted the same position that was advocated for so many years by those in favor of maintaining the doctrine of separate but equal schools.[66] Even before the *Brown* decision, the Supreme Court rejected this position and recognized that it could not merely rely upon the state's assertion that its separate educational facilities were "adequate" when obviously great disparities existed.[67] What the fourteenth amendment demands is equal protection of the laws. To strive for anything less is to do a grave injustice to the citizens of every state and to the integrity of the Constitution.

In a further attempt to refute the validity of the first two of his possible descriptions of the disadvantaged class, Powell relied on his determination of the applicability of two surveys. The first was an analysis, taken from a law review note,[68] which claimed to show that in Connecticut poor families do not necessarily live in property-poor school districts. Even if it is assumed that what may be true in Connecticut is true in Texas, it is sufficient to repeat that neither the plaintiffs nor the district court relied on this definition of the disadvantaged class. The second survey was contained in an affidavit submitted by Professor Joele S. Berke of Syracuse University's Educational Finance Policy Institute.[69] Professor Berke's survey was a sample of Texas school districts, and showed a positive correlation between school district wealth and levels of per-pupil expenditures.[70]

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[66] *See, e.g.*, Sweatt v. Painter, 339 U.S. 629, 632-33 (1950) (reversing the state court's finding that the law school created by the state of Texas for black law students was substantially equivalent to the one provided for white students and ordering plaintiff's admission to the white law school); Wrighten v. Board of Trustees, 72 F.Supp. 948, 952 (E.D.S.C. 1947) (holding that South Carolina either had to admit plaintiff to its only existing law school or to create another facility within the state to provide him with an adequate legal education); Roberts v. Boston, 59 Mass. (5 Cush.) 198 (1849) (holding that Boston could require plaintiff to attend a separate school for black children despite the fact that the nearest school was one for white children).

[67] Sweatt v. Painter, 339 U.S. 629 (1950).

[68] Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 61 YALE L.J. 1303 (1972).

[69] San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1292 (1973).

[70] *Id.* at 1292-93.

It also showed, in the highest and lowest ranges, a similar correlation between a district's wealth and the personal wealth of its residents.[71] Powell and the majority disagreed with the conclusions that the district court had drawn from this survey;[72] but once again it should be noted that the disputed portions of this survey were not crucial to the plaintiffs' claim or to the district court's decision.

The Court finally reached the classification definition which it had earlier acknowledged[73] as the real basis for this claim and the district court's decision — *district* wealth discrimination. It took Powell only two paragraphs to dispense with this classification. He simply said:

> . . . it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.[74]

It is ironic to note that the Court has now held in effect that residence in a poor school district is a valid basis for determining the extent of a child's educational opportunity, but not a valid basis for determining that child's ability to challange the system which makes that determination.

It also should be pointed out that in a prior case in which the only common factor was residence in districts that happened to have less per-capita representation in the state legislature,[75] the Court was willing to extend its "most exacting scrutiny" to review a system that was found to discriminate against a class no less "large, diverse, and amorphous" than that represented by the plaintiffs in this case. Powell made no attempt to distinguish between these two, obviously parallel, cases. He also completely overlooked the important fact that discrimination based on district wealth is in some ways even more invidious than that based on personal wealth. It can be argued that individual wealth is much more subject to individual control than is district wealth. Therefore, even though neither is a valid basis for differential treatment, it is arguably less reasonable for the state to condition a child's educational opportunity on the wealth of his neighbors than on that of his parents. If it is contended that this problem can be solved by moving to a richer district, this not only denies

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[71] *Id.*

[72] *Id.* at 1293.

[73] *Id.* at 1289 n.51.

[74] *Id.* at 1294.

[75] Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the equal protection clause requires that both houses of the Alabama Legislature be apportioned on a population basis).

reality, but also raises other constitutional issues such as interference with the right to travel.[76] The majority, of course, chose not to face these questions. Powell simply concluded that "the Texas system does not operate to the peculiar disadvantage of any suspect class"[77] and moved on to consider the next issue.

Fundamentality of Education

The plaintiffs realized that state legislation establishing classifications based on wealth has been subjected to strict scrutiny only when it affects a fundamental right, and they contended that the right to an equal educational opportunity is a fundamental one.[78] A majority of the Supreme Court Justices did not agree, however.[79] Once again, they resorted to a very restrictive approach to the equal protection clause and an unreasonable narrow reading of the precedents.

In the opinion of Powell and the Justices concurring with him, neither the importance of the service performed by the state[80] nor a nexus between that service and some accepted constitutional interest[81] determines its fundamentality. Rather, the test of whether an interest is to be regarded as "fundamental" for purposes of examination under the equal protection clause, is whether that interest is explicitly or implicitly guaranteed by the Constitution.[82] This test, however, fails to provide an adequate explanation for those cases that have applied a strict standard of review to state legislation affecting such interests as procreation,[83] state appellate review,[84] and voting in state elections[85] — none of which can be found in the text of the Constitution. Cases such as these simply cannot be fit into the rigid framework of the majority's analysis of the equal protection precedents. Powell also failed to make any real effort to reconcile his position on the funda-

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[76] *See* San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1342 n.83 (1973) (Marshall, J., dissenting).

[77] *Id.* at 1294.

[78] *Id.*

[79] *Id.* at 1299.

[80] *Id.* at 1295.

[81] *Id.* at 1298-99.

[82] *Id.* at 1297.

[83] Skinner v. Oklahoma *ex. rel.* Williamson, 316 U.S. 535 (1942) (declaring unconstitutional the Oklahoma Habitual Criminal Sterilization Act which excluded offenses from its terms while including others of the same quality). It is interesting to note that, although this case was decided 25 years before the Supreme Court recognized the constitutional right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Powell states that:

> Implicit in the Court's opinion is the recognition that the right of procreation is among the rights of personal privacy protected under the Constitution. *San Antonio Indep. School Dist. v. Rodriguez*, ...U.S....., 93 S.Ct. 1278, 1297 n. 78 (1973).

[84] Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[85] Harper v. Virginia Bd. of Elec., 383 U.S. 663 (1966) (declaring the Virginia poll tax of $1.50 unconstitutional); Reynolds v. Sims, 377 U.S. 533 (1964).

mentality of education with the Supreme Court's opinions in several cases decided both before[86] and after[87] *Brown v. Board of Education*[88] in which it recognized the vital role of education in a free society.

A far better interpretation of the Court's prior rulings in equal protection cases, and a determination of the proper standard of review to be applied in a given case, is contained in Mr. Justice Marshall's dissenting opinion:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[89]

A test such as this not only adequately accounts for prior Supreme Court decisions; it also provides the flexibility that is necessary to meet changing circumstances in the future.

Powell's overly-restrictive definition of fundamentality, on the other hand, both fails to account for prior decisions, and goes a long way toward the emasculation of the equal protection clause. The effect of the Court's ruling in this case is that state legislation will be subjected to a strict standard of review only when it infringes on a constitutionally guaranteed right. However, it can be argued, and in fact has been argued,[90] that such a position makes the equal protection clause of the fourteenth amendment mere excess constitutional baggage. If the right infringed by the state is one that is found in the Constitution, the legislation causing the infringement can be invalidated under the fourteenth amendment's due process clause. Is the Court majority suggesting that those who drafted and ratified the fourteenth amendment intentionally included a superfluous phrase? Clearly the equal protection clause was intended to

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[86] *See, e.g.*, Illinois *ex. rel.* McCallum v. Board of Educ., 333 U.S. 203 (1948) (finding that a public school released-time program violated the establishment clause of the first amendment where the released time was granted on condition that it be spent in religious classes conducted in the public school building); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding unconstitutional the Oregon Compulsory Education Act of 1922 which required all children to attend public schools).

[87] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that a state cannot compel Amish parents to send their children to school until age 16); School Dist. v. Schempp, 374 U.S. 203 (1963) (finding Bible reading and recitation of Lord's Prayer in daily opening exercises of public school violated first amendment).

[88] 347 U.S. 483 (1954).

[89] San Antonio Indep. School Dist. v. Rodriguez, ____U.S.____, 93 S.Ct. 1278, 1332 (1973).

[90] *Id.* at 1331 n.57 (Marshall, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 661-62 1969) (Harlan, J., dissenting).

protect a citizen from state action impinging those interests that are so closely related to constitutional guarantees that it is necessary to protect them in order to ensure the integrity of the constitutional guarantee itself. Education, undeniably, is intimately related to such rights and freedoms as speech and voting; but the Court held that it is not "fundamental" because it cannot be found in the text of the Constitution. So narrow a definition of "fundamental" could, very possibly, have a serious effect on the future vitality of the equal protection clause.

Finally, relying once again on his "adequacy" argument, Powell went on to find that, even if education were a fundamental interest, Texas furnishes enough of it to "provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process."[91] The total lack of merit in the "adequacy" argument has already been discussed;[92] but it is important, in order to emphasize the inappropriateness of such an argument in deciding an equal protection question, to note, as Marshall did,[93] that it is of little benefit in our highly competitive society to be assured of receiving enough education when the state is providing others with more than enough.

Having determined that the nature of this case made it an inappropriate one in which to apply a strict standard of review,[94] all that remained was for the Court to find a rational relationship between the Texas financing system and some legitimate state purpose. The district court had found no such relationship;[95] but, the Supreme Court majority did.[96] Powell found that the purpose of the financing scheme was to assure a basic education to every child while allowing for a large degree of local control over education, and that the existing system accomplished that purpose.[97]

Even if it is conceded that the real purpose of the Texas system was to provide local control over education, it is difficult to see how it can be seriously argued that this system is reasonably related to the accomplishment of that objective. In the first place, it is doubtful that there is any meaningful local control in any of the Texas school districts. Secondly, to the extent that local school districts do control their own affairs, that control is far less meaningful, indeed almost meaningless, in the property-poor districts.

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[91] San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1299 (1973).

[92] *See* text at footnotes 62-67 *supra.*

[93] San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1338 n.72 (1973) (Marshall, J., dissenting).

[94] *Id.* at 1300.

[95] Rodriguez v. San Antonio Indep. School Dist., 337 F.Supp. 280, 284 (W.D. Tex. 1971).

[96] San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1308 (1973).

[97] *Id.* at 1305.

The mythological nature of the local control argument has been revealed by several courts,[98] and very convincingly by the dissenting Justices in this case.[99] Nonetheless, Powell argued at considerable length that Texas education is largely a local function.[100] It did not matter to him that teacher qualifications, length of the school day, and even the selection of textbooks are all matters that are determined at the state level.[101] In fact, a reading of the list of local powers that Powell did consider important,[102] shows them to be little more than routine, administrative functions. It is difficult to believe that local school authorities would lose many of those functions in even the most highly centralized educational system imaginable. More important, however, is the fact that the plaintiffs did not attack the idea of local control. They were not seeking a system that would put all power in the hands of state education officials. What they were seeking was local control for all school districts, rich and poor alike.

The majority refused to accept the obvious fact that, in reality, if any meaningful local control does exist under the Texas system, it exists only in those districts with sufficient revenues to enable them to afford educational "luxuries." For a poor district, fixed costs for such "basics" as salaries, maintenance, insurance, and retirement consume such a large portion of the budget that there is very little revenue that remains to be locally controlled. In addition, since a poor district generally cannot offer competitive salaries, even the ability to hire teachers locally loses most of its meaningfulness. The only aspect of the system over which there is significant local control is in determining the rate of the property tax; and there is a legal ceiling on that, too.[103] The amount of revenue produced by that tax rate, not the rate itself, is the crucial factor, however, and the voters have little control over that. In reality, then, many districts are practically and legally prevented from raising revenues equal to those raised in more affluent districts. Yet the Court has found that all of these inequities, inherent in school financing schemes of this type, are outweighed by Texas' asserted interest in maintaining some minimal degree of local control over education.

In response to the contention that the State of Texas could achieve its purported goal of preserving local educational control by other, less discriminatory means of school funding, Powell said:

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[98] *See* cases cited note 8 *supra*.

[99] San Antonio Indep. School Dist. v. Rodriguez, ____U.S.____, 93 S.Ct. 1278, 1312-13, 1345-46 (1973) (White & Marshall, JJ., dissenting).

[100] *Id.* at 1305-07.

[101] *Id.* at 1345 (Marshall, J., dissenting).

[102] *Id.* at 1306 n.108.

[103] *Id.* at 1314.

> Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.[104]

Having already decided that no fundamental rights was involved,[105] the Court gave the Texas financing system a strong presumption of constitutionality,[106] and refused to consider the validity of the methods it established to effectuate its purpose.

Additional attempts were made by Powell to justify his reluctance to strictly scrutinize the Texas financing scheme, even to the extent of portraying it as remedial legislation[107] as was involved in *Katzenbach v. Morgan.*[108] It was also argued that striking down this system would affect the funding of other services such as local police and fire protection.[109] On this point, Powell conveniently overlooked the fact that he had stated earlier in his opinion that this case "in significant aspects is *sui generis.*"[110] Powell even threw in a statement that the Texas system is a product of purposeful studies by qualified people, and not "the product of purposeful discrimination against any group or class."[111] Perhaps that is true, but it is the effect of the legislation, not its intent, that must ultimately determine its validity.[112]

Finally, very near the end of his opinion, Powell made a statement that really has to be read to be believed:

> One also must remember that the system here challenged is not peculiar to Texas or to any other state. In its essential characteristics the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution.[113]

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[104] *Id.* at 1306.

[105] *Id.* at 1299.

[106] *Id.* at 1308.

[107] *Id.* at 1300.

[108] 384 U.S. 641 (1966) (upholding the constitutionality of §4(e) of the Voting Rights Act of 1965 despite the fact that that section rendered unenforceable a portion of the election laws of New York requiring an ability to read and write English as a condition of voting).

[109] San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1307 (1973).

[110] *Id.* at 1288.

[111] *Id.* at 1308. However, at least one court has interpreted prior Supreme Court decisions quite differently. As Judge J. Skelly Wright has stated in *Hobson v. Hansen,* 269 F.Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom., Smuck v. Hobson,* 408 F.2d 175 (1969): "Whatever the law once was, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."

[112] *See generally* Katzenbach v. Morgan, 384 U.S. 641 (1966); Harper v. Virginia Bd. of Elec., 383 U.S. 663, 665-66 (1966); Douglas v. California, 372 U.S. 353, 356 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[113] San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1308 (1973).

It is impossible to read this statement without realizing that if "reasoning" such as this had prevailed on the Supreme Court in 1954, *Brown v. Board of Education*[114] would have upheld the right of a state to maintain separate but equal schools. Neither the plaintiffs in *Brown* nor the plaintiffs in *Rodriguez* asked the Supreme Court for a "perfect solution," only an equitable one.

Conclusion

A careful reading of Powell's opinion in this case shows that he very frequently refers to the fact that the financing system being challenged is not peculiar to the State of Texas, but is, in all important respects, substantially identical to that in existence in every state but Hawaii.[115] It is readily apparent that, despite a statement to the contrary,[116] the true basis for this decision lies in the practical consideration that an affirmance of the district court's ruling would have affected public education in virtually every state. The reluctance to take such action seems to stem from the majority's belief that to require change on such a scale would result in unpredictable consequences.[117] Not wanting to be the cause of such an upheaval, Powell resorted to an interpretation of the equal protection clause that may well have far more serious consequences than those he feared would result from affirming the district court's decision.

It would be difficult at this time to predict how great an effect this decision will have on the general area of equal protection litigation; but, unless it is restricted to its specific facts, it will undoubtedly cause a trend away from the effective use of the equal protection clause in eliminating wealth discrimination. It conceivably could have long range and far reaching effects in the entire area of state discrimination. In any event, the Court has unquestionably established a precedent that *could* be used to effectively eliminate the equal protection clause as an effective constitutional means of protecting vital individual interests from arbitrary state discrimination.

The immediate effect of this decision on the field of education will be to further delay the much-needed reforms in state educational funding. State legislatures have been slow to act in this area, and it is doubtful that that will change significantly without the motivation that could have been provided by the courts. Residents of richer school districts, generally more influential in state legislatures than their

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[114] 347 U.S. 483 (1954).

[115] San Antonio Indep. School Dist. v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1288, 1304, 1308-09 (1973).

[116] *Id.* at 1309.

[117] *Id.* at 1308.

poorer counterparts,[118] will be understandably reluctant to change a system that works so much to their advantage; and, thus will contribute to, or at least not discourage, legislative inactivity. Therefore, the great interdistrict disparities in available revenues that now exist, will continue to exist and may get much worse. The result, of course, will be equally great disparities in the educational opportunities that school districts will be able to offer their students.

The real hope for relief from the effects that this decision will have on education lies not in the state legislatures, but in the state courts. This is because, as was recently found by the New Jersey Supreme Court in *Robinson v. Cahill*,[119] the existing school funding scheme in a state may well be in violation of some provision of that state's constitution, even if it does not violate the Constitution of the United States. State constitutional challenges to these funding schemes are not as subject to political influences as are attempts at legislative reforms, and such challenges will undoubtedly be made in many states. Their successes or failures will, of course, depend upon the specific provisions of a given state constitution. Hopefully, many will be successful; but, even if they all are, it does not change the fact that in deciding as it did in *Rodriguez*, the Supreme Court has retreated from its "historic commitment to equality of educational opportunity."[120]

It took the Supreme Court more than half a century to overrule *Plessy v. Ferguson*[121] and strike down the doctrine of separate but equal; it is hoped that the error of *Rodriguez* will be corrected much more quickly.

Carl F. Noll†

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[118] *See* Hobson v. Hansen, 269 F.Supp. 401, 507-08 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[119] 62 N.J. 473, 303 A.2d 273 (1973).

[120] San Antonio Indep. School Dist., v. Rodriguez, ...U.S....., 93 S.Ct. 1278, 1316 (1973) (Marshall J., dissenting); *see also* Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972).

[121] 163 U.S. 537 (1896).

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