The Burger Court Opinion Writing Database

San Antonio Independent School District v. Rodriguez

411 U.S. 1 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 12, 1973

Re: No. 71-1332 - San Antonio Independent School District v. Rodriguez

Dear Lewis:

Please join me.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

October 25, 1972

Dear Thurgood:

It is fine with me if you undertake the dissent in No. 61-1332 - Rodriguez, and No. 71-732 - Bustamonte.

W. O. D. wd

Mr. Justice Marshall

cc: Conference

wd

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 6, 1973

MEMORANDUM TO: Mr. Justice Brennan
Mr. Justice White

According to my records you two, Thurgood and I voted to affirm in No. 71-1332 - the Texas school case - in which Lewis has just circulated an opinion for the Court.

I was talking to Thurgood this morning, and he is happy to try his hand at a dissent.

WOD

W. O. D.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 4, 1973

Dear Byron:

Please join me in your dissent in 71-1332, San Antonio Independent School Dist. v. Rodriguez.

William O. Douglas

Mr. Justice White

cc: Conference
Law Clerks

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 15, 1973

Dear Thurgood:

Please join me in your dissent in 71-1332, San Antonio v. Rodriguez.

William O. Douglas

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 25, 1972

Dear Bill:

I've talked with Thurgood about the dissents on the October List. If you agree, Thurgood would like to try his hand in Rodriguez, No. 71-1332 and Bustamonte, No. 71-732, and I'll attempt dissents in Columbia Broadcasting, No. 71-863 and Biggers, No. 71-586.

The three of us are also in dissent with Lewis Powell in Fuller, No. 71-559 and with Potter in Kras, No. 71-749. Both of us think that Lewis would be the best choice in Fuller and Potter the best choice in Kras.

In Ricci, No. 71-858, I am with the majority but you and Thurgood are with Lewis and Potter in dissent. Thurgood waives in this one.

Sincerely,

Bill

Mr. Justice Douglas

cc: Mr. Justice Marshall

WJ

S

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 13, 1973

RE: No. 71-1332 San Antonio Independent School District v. Rodriguez, et al.

Dear Byron:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

WJD

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: 3/14/73

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1332

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al. | On Appeal from the United States District Court for the Western District of Texas.

[March —, 1973]

MR. JUSTICE BRENNAN, dissenting.

Although I agree with my Brother WHITE that the Texas statutory scheme is devoid of any rational basis, and for that reason is violative of the Equal Protection Clause, I also record my disagreement with the Court's rather distressing assertion that a right may be deemed "fundamental" for the purposes of equal protection analysis only if it is "explicitly or implicitly guaranteed by the Constitution." *Ante,* at —. As my Brother MARSHALL convincingly demonstrates, our prior cases stand for the proposition that "fundamentality" is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, "[a]s 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." *Ante,* at —.

Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. See *ante,* at —. This being so, any classification affecting education must

B
JM
You plan a dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 8, 1973

Re: No. 71-1332 - San Antonio School Dist. v. Rodriguez

Dear Lewis,

Please forgive my delay in responding to your circulation in this case. The delay was occasioned by my intention to write a rather thorough memorandum, but that intention has been frustrated by a variety of time-consuming factors, ranging from reading abortion fan mail to preparing to leave for California today. I shall, therefore, necessarily be brief.

First of all, I think you have done a magnificent job with this extremely important and factually complex case. I agree with the result you reach.

After much consideration, however, I have decided I cannot subscribe to an opinion that accepts the "doctrine" that there are two separate alternative tests under the Equal Protection Clause, and that the necessary first step in any equal protection case is to decide which test to apply, and therefore first to decide whether a "fundamental interest" is affected.

I do not for a moment criticize you for embracing this analysis. It is the analysis adopted by the district court in this case, the analysis briefed and argued before us, and the analysis that finds support in several of our recent cases. I have become convinced, however, that the theory that there is a "compelling state interest" test and a quite different "rational basis" test under the Equal Protection Clause is wholly spurious and unsound, in the absence of a "suspect" classification.

The Equal Protection Clause is typically invoked to attack classifications made by state statutes. I fully agree that some few classifications are suspect, notably and primarily race, but also others, including alienage, perhaps sex, perhaps illegitimacy, and indigency. (I understand indigency to mean actual or functional indigency, not comparative poverty vis-a-vis comparative wealth.) A state law that makes such suspect classifications is, I think, presumptively invalid.

A state law that impinges upon an individual liberty or freedom explicitly or implicitly guaranteed by the Constitution is also, I think, presumptively invalid. That, however, is not because of a "compelling state interest" test peculiar to the Equal Protection Clause, but because of the constitutional freedom that is impinged upon. In other words, a state law that impinges upon free speech or freedom of interstate travel is presumptively invalid for that reason alone, regardless of whether the state law makes any classifications.

The so-called "compelling state interest" doctrine stems, I think, from a passage in the Court's opinion in the Kramer case less than four years ago. 395 U.S. 621, 625-630. I understood that passage then, and I understand it now, to mean little or no more than what is said in the two paragraphs above. It is, incidentally, interesting to compare that passage with what the same author had to say about the Equal Protection Clause a few years earlier in McGowan v. Maryland, 366 U.S. 420, 425-426, a case in which very bona fide First Amendment claims were rejected.

Application of the so-called "compelling state interest" test automatically results, of course, in striking down the state statute under attack. That is illustrated by the concession of the petitioner in the present case. There is hardly a statute on the books that does not result in treating some people differently from others. There is hardly a statute on the books, therefore, that an ingenious lawyer cannot attack under the Equal Protection Clause. If he can persuade a court that a "fundamental interest" is involved, then the state cannot possibly meet its resulting burden

of proving that there was a compelling state interest in enacting the statute exactly as it was written. The end result, of course, is to return this Court, and all federal courts, to the heyday of the Nine Old Men, who felt that the Constitution enabled them to invalidate almost any state laws they thought unwise.

I have dictated this letter hurriedly, and I hope it is at least minimally intelligible. The upshot is that I cannot subscribe to an opinion in this highly important case that will perpetuate a very recent "doctrine" that I think is basically unsound.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

P. S. -- It occurs to me that some of the above thoughts were better expressed in my concurring opinion in the Shapiro case, 394 U. S. at 642.

S

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 26, 1973

Re: No. 71-1332, San Antonio Independent School District v. Rodriguez

Dear Lewis,

I sincerely appreciate your patient and generous effort to accommodate my views in this case, expressed to you orally and in writing. While you have not found it possible to accept all of my suggestions, the modifications in the draft recirculated on February 23 are such that I am able to join your opinion, and I gladly do so.

It is more than likely that I shall write a brief separate concurrence, but I shall await Thurgood's forthcoming recirculation before finally deciding whether or not to do so.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

(WJV)

5

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

No. 71-1332

Circulated: MAR 15 1973

Recirculated: _____

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al. | On Appeal from the United States District Court for the Western District of Texas.

[March —, 1973]

MR. JUSTICE STEWART, concurring.

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.[1] It does not follow, however, and I cannot find, that this system violates the Constitution of the United States. I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment. The uncharted directions of such a departure are suggested, I think, by the imaginative dissenting opinion my Brother MARSHALL has filed today.

Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties.[2] The function of the Equal

[1] See New York Times, March 11, 1973, p. 1, col. 1.

[2] There is one notable exception to the above statement: It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, *e. g., Reynolds* v. *Sims*, 377 U. S. 533; *Kramer* v. *Union School District*, 395 U. S. 621; *Dunn* v. *Blumstein*, 405 U. S.

(WD)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 2, 1973

71-1332

Dear Lewis,

Many thanks for sharing with me Charlie Wright's comments about the Rodriguez opinion. It was a good opinion, and the credit for it belongs entirely to you.

Sincerely yours,

P.S.

Mr. Justice Powell

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1332

San Antonio Independent School District et al., Appellants *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[February —, 1973]

MR. JUSTICE WHITE, dissenting.

The Texas public schools are financed through a combination of state funding, local property tax revenue, and some federal funds.[1] Concededly, the system yields wide disparity in per pupil revenue among the various districts. In a typical year, for example, the Alamo Heights district had total revenues of $594 per pupil, while the Edgewood district had only $356 per student.[2] The majority and the State concede, as they must, the existence of major disparities in spendable funds. But the State contends that the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed "to provide an adequate education for all, with local autonomy to go beyond that as individual school districts desire and are able. . . . It leaves to the people of each district the choice whether to go beyond the

[1] The heart of the Texas system is embodied in an intricate series of statutory provisions which make up Chapter 16 of the Texas Education Code, V. T. C. A., Education Code § 16.01 *et seq.* See also V. T. C. A., Education Code § 15.01 *et seq.*, and § 20.10 *et seq.*

[2] The figures discussed are from Plaintiffs' Exhibits 7, 8, and 12. The figures are from the 1967-1968 school year. Because the various exhibits relied upon different attendance totals, the per pupil results do not precisely correspond to the gross figures quoted. The disparity between districts, rather than the actual figures, is the important factor.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: White, J.

Circulated: _____

Recirculated: 2-12-73

SUPREME COURT OF THE UNITED STATES

No. 71-1332

San Antonio Independent School District et al., Appellants
v.
Demetrio P. Rodriguez et al.

On Appeal from the United States District Court for the Western District of Texas.

[February —, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Texas public schools are financed through a combination of state funding, local property tax revenue, and some federal funds.[1] Concededly, the system yields wide disparity in per-pupil revenue among the various districts. In a typical year, for example, the Alamo Heights district had total revenues of $594 per pupil, while the Edgewood district had only $356 per student.[2] The majority and the State concede, as they must, the existence of major disparities in spendable funds. But the State contends that the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed "to provide an adequate education for all, with local autonomy to go beyond that as individual school dis-

[1] The heart of the Texas system is embodied in an intricate series of statutory provisions which make up Chapter 16 of the Texas Education Code, V. T. C. A., Education Code § 16.01 *et seq.* See also V. T. C. A., Education Code § 15.01 *et seq.*, and § 20.10 *et seq.*

[2] The figures discussed are from Plaintiffs' Exhibits 7, 8, and 12. The figures are from the 1967–1968 school year. Because the various exhibits relied upon different attendance totals, the per pupil results do not precisely correspond to the gross figures quoted. The disparity between districts, rather than the actual figures, is the important factor.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 2-13-73

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–1332

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[February —, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The Texas public schools are financed through a combination of state funding, local property tax revenue, and some federal funds.[1] Concededly, the system yields wide disparity in per-pupil revenue among the various districts. In a typical year, for example, the Alamo Heights district had total revenues of $594 per pupil, while the Edgewood district had only $356 per student.[2] The majority and the State concede, as they must, the existence of major disparities in spendable funds. But the State contends that the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed "to provide an adequate education for all, with local autonomy to go beyond that as individual school dis-

[1] The heart of the Texas system is embodied in an intricate series of statutory provisions which make up Chapter 16 of the Texas Education Code, V. T. C. A., Education Code § 16.01 *et seq.* See also V. T. C. A., Education Code § 15.01 *et seq.*, and § 20.10 *et seq.*

[2] The figures discussed are from Plaintiffs' Exhibits 7, 8, and 12. The figures are from the 1967–1968 school year. Because the various exhibits relied upon different attendance totals, the per pupil results do not precisely correspond to the gross figures quoted. The disparity between districts, rather than the actual figures, is the important factor.

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1332

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[February —, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The Texas public schools are financed through a combination of state funding, local property tax revenue, and some federal funds.[1] Concededly, the system yields wide disparity in per-pupil revenue among the various districts. In a typical year, for example, the Alamo Heights district had total revenues of $594 per pupil, while the Edgewood district had only $356 per student.[2] The majority and the State concede, as they must, the existence of major disparities in spendable funds. But the State contends that the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed "to provide an adequate education for all, with local autonomy to go beyond that as individual school dis-

[1] The heart of the Texas system is embodied in an intricate series of statutory provisions which make up Chapter 16 of the Texas Education Code, V. T. C. A., Education Code § 16.01 *et seq.* See also V. T. C. A., Education Code § 15.01 *et seq.*, and § 20.10 *et seq.*

[2] The figures discussed are from Plaintiffs' Exhibits 7, 8, and 12. The figures are from the 1967–1968 school year. Because the various exhibits relied upon different attendance totals, the per pupil results do not precisely correspond to the gross figures quoted. The disparity between districts, rather than the actual figures, is the important factor.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 9, 1973

Re: No. 71-1332 - San Antonio School v. Rodriguez

Dear Lewis:

In due time I will circulate a dissent in this case.

Sincerely,

T.M.

Mr. Justice Powell

cc: Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: FEB 14 1973

No. 71-1332

Recirculated: _____

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[February —, 1973]

MR. JUSTICE MARSHALL, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the district within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth.[1] More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels edu-

[1] See *Van Dusartz* v. *Hatfield,* 334 F. Supp. 870 (Minn. 1971); *Milliken* v. *Green,* — Mich. —, — N. W. 2d — (1972); *Serrano* v. *Priest,* 5 Cal. 3d 584, 487 P. 2d 1241, 96 Cal. Rptr. 601 (1971); *Robinson* v. *Cahill,* 118 N. Y. Super. 223, 287 A. 2d 187 (1972); *Hollins* v. *Sofstall,* Civil No. C-253652 (Super. Ct. Maricopa Cy., Ariz., Jan. 13, 1972). See also *Sweetwater County Planning Comm. for the Organization of School Districts* v. *Hinkle,* 491 P. 2d 1234 (Wyo. 1971), 493 P. 2d 1050 (Wyo. 1972).

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

Circulated: _____

Recirculated: MAR 9 - 1973

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1332

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al. | On Appeal from the United States District Court for the Western District of Texas.

[February —, 1973]

MR. JUSTICE MARSHALL, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth.[1] More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels edu-

[1] See *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (Minn. 1971); *Milliken* v. *Green*, — Mich. —, — N. W. 2d — (1972); *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P. 2d 1241, 96 Cal. Rptr. 601 (1971); *Robinson* v. *Cahill*, 118 N. J. Super. 223, 287 A. 2d 187, 119 N. J. Super. 40, 289 A. 2d 569 (1972); *Hollins* v. *Shofstall*, Civil No. C-253652 (Super. Ct. Maricopa Cty., Ariz., July 7, 1972). See also *Sweetwater County Planning Comm. for the Organization of School Districts* v. *Hinkle*, 491 P. 2d 1234 (Wyo. 1971), juris. relinquished, 493 P. 2d 1050 (Wyo. 1972).

B

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Marshall, J.

Circulated: _____

Recirculated: MAR 16 1973

SUPREME COURT OF THE UNITED STATES

No. 71–1332

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al. | On Appeal from the United States District Court for the Western District of Texas.

[February —, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth.[1] More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels edu-

[1] See *Van Dusartz* v. *Hatfield,* 334 F. Supp. 870 (Minn. 1971); *Milliken* v. *Green,* — Mich. —, — N. W. 2d — (1972); *Serrano* v. *Priest,* 5 Cal. 3d 584, 487 P. 2d 1241, 96 Cal. Rptr. 601 (1971); *Robinson* v. *Cahill,* 118 N. J. Super. 223, 287 A. 2d 187, 119 N. J. Super. 40, 289 A. 2d 569 (1972); *Hollins* v. *Shofstall,* Civil No. C–253652 (Super. Ct. Maricopa Cty., Ariz., July 7, 1972). See also *Sweetwater County Planning Comm. for the Organization of School Districts* v. *Hinkle,* 491 P. 2d 1234 (Wyo. 1971), juris. relinquished, 493 P. 2d 1050 (Wyo. 1972).

WV)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 12, 1973

Re: No. 71-1332 - San Antonio Independent School District v. Rodriguez

Dear Lewis:

Your preparation of the proposed opinion for this very difficult case is a monumental and worthwhile effort.

I suspect that you and Potter will be able to resolve your differences, as expressed by his letter of February 8. If you are able to do this, I am, of course, with you. If you are unable to do this, I find myself about where Bill Rehnquist is, as described in his note of February 8.

Sincerely,

H. A. B.

Mr. Justice Powell

cc: The Conference

Harry did not send
this letter to Conference
after talking with me

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 12, 1973

Re: No. 71-1332 - San Antonio Independent School District v. Rodriguez

Dear Lewis:

This note is intended as an addendum to my circulated letter of this date.

I have two very minor suggestions, neither of which is very important, but I pass them on to you for what they may be worth:

1. I personally would much prefer to omit the last paragraph of footnote 101 as it appears on page 41. Teachers' strikes are in current vogue across the country. Emotions run deep. I fear that paragraph may add fuel to the controversy, and I would dislike to see the Court's footnote quoted by one side or the other. Teachers undoubtedly have been underpaid in the past. But so have nurses. Each profession has made great strides recently. Thus I would be inclined to let their economic problems be resolved apart from any comment by this Court in an opinion.

2. I found the next to the last sentence of the first paragraph of footnote 101, also on page 41, to be somewhat confusing. It would be a little clearer for my benumbed mind if the sentence read, "The result is that relatively few school systems have merit plans of any kind, with the result that teachers' salaries are increased across the board. . . ."

Sincerely,

Harry

Mr. Justice Powell

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 13, 1973

Re: No. 71-1332 - San Antonio Independent School District v. Rodriguez

Dear Lewis:

Your careful and detailed opinion reveals that you have devoted a vast amount of work and thought to this case.

I am pleased to join your opinion, for I feel that it reaches a sound result and is consistent with past decisions of the Court. I am interested in the suggestions Potter has advanced in his letter to you of February 8, and I shall also be interested in any writing along this line he chooses to develop. As he pointed out in his letter, he, of course, reaches the same result.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

S

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 27, 1973

Re: No. 71-1332 - San Antonio Independent School District v. Rodriguez

Dear Lewis:

Please join me in your circulation of February 23.

Sincerely,

H.A.B.

Mr. Justice Powell

Copies to the Conference

WD

December 21, 1972

Re: No. 71-1332 San Antonio Independent School District v. Rodriguez

Dear Potter:

Here is the first draft of Rodriguez, delivered to me this morning by the printer.

I am grateful for your willingness to take a took at this before it is circulated to the Conference.

We have not yet proofread this draft, nor - indeed - reviewed it at all. I am certain that I will have some changes, although I believe the basic analysis set forth in the opinion reflects the views of a majority of the Court as expressed at our Conference.

Your suggestions will be welcome. My thought is that we will not print a second draft for circulation until next week after everyone has returned from Christmas.

Sincerely,

Mr. Justice Stewart

lfp/ss

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1332

San Antonio Independent School District et al., Appellants *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[January —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This suit, attacking the Texas system of financing public education, was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas.[1] They brought a class action on behalf of school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants[2] were the State Board of Education, the Commissioner

[1] Not all of the children of these complainants attend public school. One family's children are enrolled in private school "because of the condition of the schools in the Edgewood Independent School District." Third Amended Complaint, App., at 14.

[2] The San Antonio Independent School District, whose name this case still bears, was one of seven school districts in the San Antonio metropolitan area which were originally named as party defendants. After a pretrial conference, the District Court issued an order dismissing the school districts from the case. Subsequently, the San Antonio Independent School District has joined in the plaintiffs' challenge to the State's school finance system and has filed an *amicus curiae* brief in support of that position in this Court.

B

In due Time I will circulate a dissent in this case

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

2nd DRAFT

Circulated: JAN 4 1973

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 71-1332

San Antonio Independent School District et al., Appellants *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[January —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This suit, attacking the Texas system of financing public education, was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas.[1] They brought a class action on behalf of school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants[2] were the State Board of Education, the Commissioner

[1] Not all of the children of these complainants attend public school. One family's children are enrolled in private school "because of the condition of the schools in the Edgewood Independent School District." Third Amended Complaint, App., at 14.

[2] The San Antonio Independent School District, whose name this case still bears, was one of seven school districts in the San Antonio metropolitan area which were originally named as party defendants. After a pretrial conference, the District Court issued an order dismissing the school districts from the case. Subsequently, the San Antonio Independent School District has joined in the plaintiffs' challenge to the State's school finance system and has filed an *amicus curiae* brief in support of that position in this Court.

February 13, 1973

71-1332

Dear Harry:

First, my warm thanks for your "join" note in Rodriguez. It is a great comfort to me to have you aboard.

I thought you might be interested in the enclosed memorandum which lists the cases - perhaps not all of them - which establish the two-tier approach to equal protection. Whatever I may have thought of this approach as a de novo proposition, I thought it was too firmly rooted in our past decisions for me to attempt a new basis of analysis.

I will, nevertheless, talk to Potter and will, of course, consider any changes he may suggest short of starting fresh.

I am sending a copy of this letter and the memorandum to the Chief, with whom I talked this afternoon. He is with us in Rodriguez, and has suggested a few language changes which I am trying to work into the next circulation.

Sincerely,

Mr. Justice Blackmun

lfp/ss
Enc.
cc: The Chief Justice

February 14, 1973

Re: No. 71-1332 San Antonio Ind. School Dist.
v. Rodriguez

Dear Potter:

Thank you for your thoughtful memorandum of February 8, in which you have outlined your reservations with respect to my first circulated draft in this important case. Unless I misread the essence of your views, I see little of substance that separates us.

I am in complete accord with your views as to "suspect" classifications. I do not believe there is anything in the opinion as presently written that is inconsistent with our shared view.

The differences between us are in the area of Equal Protection analysis which has come to be known as the "fundamental" rights doctrine. You question whether "strict scrutiny" is called for where State classifications interfere with what the cases have been calling "fundamental rights". You would prefer, where State laws touch on rights explicitly or implicitly guaranteed by the Constitution, to say they are presumptively invalid, not under the Equal Protection Clause but under the particular provision of the Constitution affected.

Your dissatisfaction with application of the Equal Protection guarantee in such cases appears to be threefold: (1) its historical origins are questionable; (2) the "fundamental" rights category is open-ended and is reminiscent of the standardless dangers of substantive due process; and (3) the "compelling state interest" standard sometimes used interchangeably with other phrases to identify the test of strict scrutiny, is itself of doubtful parentage and leads too inexorably to the rejection of state laws. I will address each of these briefly.

I agree that the historic origins of the two-level approach to equal protection problems are at least dubious. But whatever a close examination of history might disclose, I concluded that the considerable volume of precedent in this area leaves little room for a de novo review unless the Court is willing to start fresh. Numerous cases, dating at least as far back as Skinner v. Oklahoma in 1942, have accepted or articulated the idea of closer scrutiny of laws infringing upon fundamental rights. Most of those decisions, as you have suggested, are of quite recent vintage. Yet the sheer number of such cases (nearly two dozen by my count), * and the firmness with which they express and apply the two-tier approach, stand as a rather formidably impressive barrier to reconsideration of the doctrine.

Instead, in Rodriguez I have endeavored to rationalize the cases and explore their limits. I am in entire agreement that a "fundamental" rights test which allows judges to pick and choose rights which they desire to accord special protection because of their mere importance and to treat them as fundamental would be unacceptable. But (contrary to Thurgood Marshall's dissenting views) I do not read the cases as leaving open that possibility. To the contrary, the cases seem to establish that to be regarded as "fundamental" a right must have its roots in the Constitution or, as my draft opinion states, they must be fundamental "in a constitutional sense." So restricted, I do not regard it as a standardless or unmanageable approach to equal protection. And, since I do not regard as "fundamental" any rights that are not "explicitly or implicitly guaranteed by the Constitution," I doubt that you and I would arrive at different results in very many cases.

Finally, you suggest that the term "compelling state interest" has undesirable connotations and is of questionable origins, a view shared by Justice Blackmun as I read his separate concurrence in Dunn v. Blumstein. To the extent that we have used this language in our prior drafts of Rodriguez, it was employed simply as a shorthand for strict scrutiny. To avoid any possible confusion, I have taken it out in my most recent draft, which has not yet been circulated. Our case involves the question only whether a stricter or more rigorous review is required. Since I find that education is not fundamental in a constitutional sense, I have no occasion to discuss what tests are used once such a right is found. If I were to write on the meaning of

*See attached memo.

the test, however, I would conclude that there is nothing talismanic about the word "compelling." As Chief Justice Warren suggested in United States v. O'Brien, 391 U. S. 367, 376-77 (1968) it simply is a shorthand way of saying that a State's laws must be found to be necessary to the furtherance of an important or substantial governmental interest if they are to withstand scrutiny. Properly understood, strict scrutiny focuses more on the means utilized to achieve legitimate state ends than it does on the importance of those ends.

In sum, I think we are not far apart. I would greatly appreciate any changes you might suggest.

Sincerely,

Mr. Justice Stewart

lfp/ss

Changes: pp. 12, 13-21, 23, 24, 25, 29-33, 35-37, 39, 40, 42, 44, 46-49, 51, 52.

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–1332

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[February —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This suit, attacking the Texas system of financing public education, was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas.[1] They brought a class action on behalf of school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants[2] were the State Board of Education, the Commissioner

[1] Not all of the children of these complainants attend public school. One family's children are enrolled in private school "because of the condition of the schools in the Edgewood Independent School District." Third Amended Complaint, App., at 14.

[2] The San Antonio Independent School District, whose name this case still bears, was one of seven school districts in the San Antonio metropolitan area which were originally named as party defendants. After a pretrial conference, the District Court issued an order dismissing the school districts from the case. Subsequently, the San Antonio Independent School District has joined in the plaintiffs' challenge to the State's school finance system and has filed an *amicus curiae* brief in support of that position in this Court.

February 27, 1973

Re: No. 71-1332 Rodriguez v. San Antonio Independent School District

Dear Potter:

Thank you for your note of February 26, joining my opinion in Rodriguez.

Although I have not yet received a formal note from the Chief Justice, he told me informally that he was with us. This gives us a Court.

I appreciate a great deal your suggestions and comments - as you say both "orally and in writing". They contributed materially to the improvement of the draft opinion.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 6, 1973

No. 71-1332 - San Antonio Independent School District v. Rodriguez

Dear Chief:

This refers to the discussion at Friday's Conference as to when Rodriguez (the Texas school property tax case) will be ready to come down. Although I have a "court", including your verbal concurrence, I stated on Friday that I was not quite ready.

In addition to some further verification and checking of authorities cited in the notes, I wanted to see the next circulation of Thurgood's dissent - which I believe he said was about ready for the printer. Potter also may add a "snapper."

Since the Conference, I have reviewed the situation and from my viewpoint - unless Thurgood's recirculation requires substantial revision - I will be ready by our March 16 Conference.

I certainly imply no need for expedited action by Potter and Thurgood. The case is important and difficult, and we should - as always - not rush the decisional process. I write merely to report my personal situation, as it now appears to me.

Sincerely,

L. Lewis

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 13, 1973

MEMORANDUM TO THE CONFERENCE:

No. 71-1332 Rodriguez v. San Antonio Independent School District

Here is the 5th Draft of my proposed opinion for the Court in this case.

Although there have been a number of changes of verbiage and the addition of footnotes (as indicated in the usual way) the basic structure and rationale of the opinion remain unchanged.

Sincerely,

Lewis

lfp/ss

Pp. 7, 11, 12, 16, 19, 21, 22, 24, 28, 30, 31, 33, 37, 42, 43, 47-54 and minor technical changes throughout

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

5th DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-1332

Recirculated: 3/13/73

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al. | On Appeal from the United States District Court for the Western District of Texas.

[March —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas.[1] They brought a class action on behalf of school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants[2] were the State Board of Education, the Commissioner

[1] Not all of the children of these complainants attend public school. One family's children are enrolled in private school "because of the condition of the schools in the Edgewood Independent School District." Third Amended Complaint, App., at 14.

[2] The San Antonio Independent School District, whose name this case still bears, was one of seven school districts in the San Antonio metropolitan area that were originally named as party defendants. After a pretrial conference, the District Court issued an order dismissing the school districts from the case. Subsequently, the San Antonio Independent School District has joined in the plaintiffs' challenge to the State's school finance system and has filed an *amicus curiae* brief in support of that position in this Court.

(AO1)

71-1332

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 12, 1973

No. 72-264 Parker v. Levy

MEMORANDUM TO THE CONFERENCE:

This case was held pending disposition of San Antonio Independent School District v. Rodriguez, No. 71-1332.

In Parker, a three-judge District Court for the Middle District of Louisiana (Wisdom, Rubin; West - dissenting) held unconstitutional, as violative of the Equal Protection Clause, several Louisiana constitutional, statutory, and regulatory provisions governing the distribution of state funds to political subdivisions. Those funds are distributed to the parishes in reimbursement for local revenues lost as a result of a state-created property tax exemption for homesteads.

Without going into any detailed explanation of the manner in which the complicated system operated, its consequence is to allow local governments to increase their entitlement under the reimbursement program without increasing local tax burdens by artifically manipulating their assessment ratios on residential property, by increasing their mileage rates, and by creating new special purpose districts with power to impose additional taxes. The majority of the court below found this system, which occasions substantial disparities among political subdivisions in receipts from the state, to be "wholly arbitrary" and unsupported by any reasonable or rational basis. (App. at 15a). The court noted that "(n)o reason has been advanced, nor any governmental policy argued, that would support the reimbursement of each Louisiana parish on the basis now in effect." (Id. at 14a).

I do not consider that Rodriguez articulated any new principles that control this case. There are substantial differences, which need

not be set forth in detail. In Rodriguez, we sustained a statewide system for financing education which a majority of the Court found to meet the traditional rational basis test despite wide differences, due to the local property tax impact upon the total state plan, in per pupil expenditures among school districts. But there was a statewide plan, uniformly applied, and the variations resulted from disparity in ad valorem property tax valuations which, in themselves, came about through the "happenstance" of variable taxable values (commercial, industrial and residential) within school districts long established.

In this case, the state of Louisiana - as I read its jurisdictional statement - does not contest the District Court's conclusion as to the arbitrariness of its system of distributing state revenues, nor does Louisiana suggest any justification for its juggling of state funds among parishes pursuant to a combination of constitutional, statutory and regulatory provisions. The State relies solely on the position that the Equal Protection Clause is not applicable to "the manner in which it (the state) distributes tax funds to political subdivisons."

Although our cases indicate that a state may make distinctions between local subdivisions of government in the distribution of statewide revenues, I have supposed that there must be some legitimate, identifiable reasonable basis for a distinction which results in the end in significant discrimination against the citizens of the particular city, county or district. The state is entitled, as our authorities explicitly hold, to a very broad discretion in this area. But I have not thought, and did not think in Rodriguez, that a state is entirely free to be wholly arbitrary and discriminatory in the distribution of state funds so that the consequences of state action in this respect fall discriminatorily on certain citizens.

Accordingly, and although I am not entirely content with the rationale of the majority opinion below, I would affirm. I have no doubt that the Louisiana system, a product of the Huey Long regime, is sui generis and of no precedential value on its facts. If a further clarification of the law in this area is required, I think we should await a more appropriate test case.

It may be that commentators and others will speculate as to whether affirmance here is consistent with our opinion in Rodriguez. I have considered the possibility of a short per curiam, but I doubt that even this is desirable in this most peculiar case.

L. F. P, Jr.

L. F. P.

May 1, 1973

71-1332

Dear Potter:

The enclosed is a copy of a paragraph on Rodriguez, contained in a letter on another subject from Prof. Charles Alan Wright.

As you contributed significantly to the opinion, and especially to the subtleties of its equal protection analysis, I thought you would be interested in Prof. Wright's comments.

As he concedes, he is hardly without bias. Yet, I suppose a scholar is more likely to be detached about the quality of a favorable decision than the average rough and tumble practitioner.

Again, my warm thanks.

Sincerely,

Mr. Justice Stewart

lfp/ss

THE UNIVERSITY OF TEXAS AT AUSTIN
SCHOOL OF LAW
2500 Red River
AUSTIN, TEXAS 78705

APR 30 1973

April 25, 1973

The Honorable Lewis F. Powell, Jr.
United States Supreme Court
Washington, D. C. 20543

Dear Justice Powell:

Thank you very much for your warm letter of April 20th. I am very pleased to have a copy of your remarks to the Fifth Circuit for my file on the Freund Committee.

I agree with you about the way the press has treated the report of that Committee but I am afraid the reasons for that treatment do not seem opaque to me. It seems to me wholly consistent with the attempts of the Washington press corp to smear the Chief Justice at every opportunity. The reasons for their hostility to him are a mystery to me but the existance of that hostility I regard as absolutely clear.

When the Chief announced his designees to the Commission on the structure of the appellate courts even the wire services somehow thought it relevant to point out that Bernie Segal and I had also been members of the Freund Committee and the headline in the Washington Star was "Mini-Court Advocates Appointed." Clearly the press has prepared to prejudge the work of that Commission before it is formally organized because of the taint that Bernie and I bear. No member of the press thought it relevant to note that Bernie and I are also both members of the Standing Committee on Rules of Practice and Procedure and were initially appointed to that by Chief Justice Warren. Nor does anyone think it relevant that we are both members of the Council of the American Law Institute by election of the Institute. Nor has it occurred to anyone that both of us have devoted a major part of our careers to improvements in judicial administration with particular reference to federal courts. It is all very disappointing but I have had too much experience with the press to be surprised by it.

I am delighted to hear that you will be at the Fourth Circuit Conference and I certainly hope that your Court finishes its term in time for you to do that. When I consider, however, the difficulty and importance of some of the cases that were argued last week and this week I am concerned about when the Court will be able to rise.

Since rehearing was denied on Monday in Rodriguez it is no longer inappropriate for me to say what a splendid opinion I thought you wrote in that case. Clearly I am not without bias in the matter, but I thought that the opinion was an exceptionally clear and forceful statement for precisely the right reasons for the decision the Court reached. I am glad to say that the prospect for reform of the Texas system by the Legislature seems very good.

Sincerely,

Charlie

Charles Alan Wright

January 8, 1973

Re: No. 71-1332 - San Antonio Independent School District v. Rodriguez

Dear Lewis:

Please join me.

Sincerely,

/s/ W.H.R.

Mr. Justice Powell

Copies to the Conference

January 8, 1973

Re: No. 71-1332 - San Antonio Independent School District v. Rodriguez

Dear Lewis:

Please join me.

Sincerely,

/s/ W.H.R.

Mr. Justice Powell

Copies to the Conference

Dear Lewis:

I think your opinion is excellent both with respect to its comprehensiveness and with respect to the care with which it treats the legal issues involved.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 8, 1973

Re: No. 71-1332 - San Antonio School District v. Rodriguez

Dear Lewis:

I share much of the concern expressed by Potter in his note to you of February 8th about the elaboration of the two separate alternatives test under the Equal Protection Clause in your opinion in this case. However, I joined your opinion not only because I thought it was well done and comprehensive, but because I felt that its holding was to apply the rational basis test to the facts before the Court. My lack of complete subscription to some of what I regard as dicta will not change my earlier view, and I am "still with you" as the saying goes. If Potter does write something that I feel one can consistently join while likewise joining your opinion, I will give some thought to it at that time.

Sincerely,

Bill

Mr. Justice Powell

cc: Mr. Justice Stewart