

Justice Thurgood Marshall Dissents from *San Antonio School District v. Rodriguez* (March 21, 1973)

In this excerpt, Justice Thurgood Marshall offered a passionate dissent to the US Supreme Court decision that the Constitution did not require equality of school funding. Before joining the court, Marshall had litigated the landmark school desegregation case, *Brown v. Board of Education*. In this dissent, Marshall argued that it is a basic right of every American to have access to an equal start in life and that the right to an equal education is necessary to make that possible. In the years before 1973, the Supreme Court had acted to enforce school segregation acts, but their decision in this case marked the beginning of a long-term retreat from challenges to local control of schools. This retreat was largely due to massive resistance in white communities, especially in Northern cities like Boston.

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. 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 educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). I must therefore respectfully dissent.

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Under Texas law, the only mechanism provided the local school district for raising new, unencumbered revenues is the power to tax property located within its boundaries. At the same time, the Texas financing scheme effectively restricts the use of monies raised by local property taxation to the support of public education within the boundaries of the district in which they are raised, since any such taxes must be approved by a majority of the property-taxpaying voters of the district.

The significance of the local property tax element of the Texas financing scheme is apparent from the fact that it provides the funds to meet some 40% of the cost of public education for Texas as a whole. Yet the amount of revenue that any particular Texas district can raise is dependent on two factors - its tax rate and its amount of taxable property. The first factor is determined by the property-taxpaying voters of the district. But, regardless of the enthusiasm of the local voters for public education, the second factor - the taxable property wealth of the district - necessarily restricts the district's ability to raise funds to support public education. Thus, even though the voters of two Texas districts may be willing to make the same tax effort, the results for the districts will be substantially different if one is property rich while the other is property poor. The necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones.

The seriously disparate consequences of the Texas local property tax, when that tax is considered alone, are amply illustrated by data presented to the District Court by appellees. These data included a detailed study of a sample of 110 Texas school districts for the 1967-1968 school year conducted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. Among other things, this study revealed that the 10 richest districts examined, each of which had more than \$100,000 in taxable property per pupil, raised through local effort an average of \$610 per pupil, whereas the four poorest districts studied, each of which had less than \$10,000 in taxable property per pupil, were able to raise only an average of \$63 per pupil. And, as the Court effectively recognizes, ante, at 27, this correlation between the amount of taxable property per pupil and the amount of local revenues per pupil holds true for the 96 districts in between the richest and poorest districts.

It is clear, moreover, that the disparity of per-pupil revenues cannot be dismissed as the result of lack of local effort - that is, lower tax rates - by property-poor districts. To the contrary, the data presented below indicate that the poorest districts tend to have the highest tax rates and the richest districts tend to have the lowest tax rates. Yet, despite the apparent extra effort being made by the poorest districts, they are unable even to begin to match the richest districts in terms of the production of local revenues. For example, the 10 richest districts studied by Professor Berke were able to produce \$585 per pupil with an equalized tax rate of 31% on \$100 of equalized valuation, but the four poorest districts studied, with an equalized rate of 70% on \$100 of equalized valuation, were able to produce only \$60 per pupil. Without more, this state-imposed system of educational funding presents a serious picture of widely varying treatment of Texas school districts, and thereby of Texas schoolchildren, in terms of the amount of funds available for public education.

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The appellants do not deny the disparities in educational funding caused by variations in taxable district property wealth. They do contend, however, that whatever the differences in per-pupil spending among Texas districts, there are no discriminatory consequences for the children of the disadvantaged districts. They recognize that what is at stake in this case is the quality of the public education provided Texas children in the districts in which they live. But appellants reject the suggestion that the quality of education in any particular district is determined by money - beyond some minimal level of funding which they believe to be assured every Texas district by the Minimum Foundation School Program. In their view, there is simply no denial of equal

educational opportunity to any Texas schoolchildren as a result of the widely varying per-pupil spending power provided districts under the current financing scheme.

In my view, though, even an unadorned restatement of this contention is sufficient to reveal its absurdity. Authorities concerned with educational quality no doubt disagree as to the significance of variations in per-pupil spending. Indeed, conflicting expert testimony was presented to the District Court in this case concerning the effect of spending variations on educational achievement. We sit, however, not to resolve disputes over educational theory but to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning than will the latter. In this regard, I believe the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds - and thus with greater choice in educational planning - may nevertheless excel is to the credit of the child, not the State, cf. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938). Indeed, who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.

Hence, even before this Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause. As a basis for striking down state-enforced segregation of a law school, the Court in *Sweatt v. Painter*, 339 U.S. 629, 633 -634 (1950), stated:

"[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [whites-only] Law School is superior. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close."

See also *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950). Likewise, it is difficult to believe that if the children of Texas had a free choice, they would choose to be educated in districts with fewer resources, and hence with more antiquated plants, less experienced teachers, and a less diversified curriculum. In fact, if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court.

The consequences, in terms of objective educational input, of the variations in district funding caused by the Texas financing scheme are apparent from the data introduced before the District Court. For example, in 1968-1969, 100% of the teachers in the property-rich Alamo Heights School District had college degrees. By contrast, during the same school year only 80.02% of the teachers had college degrees in the property poor Edgewood Independent School District. Also,

in 1968-1969, approximately 47% of the teachers in the Edgewood District were on emergency teaching permits, whereas only 11% of the teachers in Alamo Heights were on such permits. This is undoubtedly a reflection of the fact that the top of Edgewood's teacher salary scale was approximately 80% of Alamo Heights'. And, not surprisingly, the teacher-student ratio varies significantly between the two districts. In other words, as might be expected, a difference in the funds available to districts results in a difference in educational inputs available for a child's public education in Texas. For constitutional purposes, I believe this situation, which is directly attributable to the Texas financing scheme, raises a grave question of state-created discrimination in the provision of public education. Cf. *Gaston County v. United States*, 395 U.S. 285, 293 -294 (1969).

At the very least, in view of the substantial interdistrict disparities in funding and in resulting educational inputs shown by appellees to exist under the Texas financing scheme, the burden of proving that these disparities do not in fact affect the quality of children's education must fall upon the appellants. Cf. *Hobson v. Hansen*, 327 F. Supp. 844, 860-861 (DC 1971). Yet appellants made no effort in the District Court to demonstrate that educational quality is not affected by variations in funding and in resulting inputs. And, in this Court, they have argued no more than that the relationship is ambiguous. This is hardly sufficient to overcome appellees' prima facie showing of state-created discrimination between the schoolchildren of Texas with respect to objective educational opportunity.

Nor can I accept the appellants' apparent suggestion that the Texas Minimum Foundation School Program effectively eradicates any discriminatory effects otherwise resulting from the local property tax element of the Texas financing scheme. Appellants assert that, despite its imperfections, the Program "does guarantee an adequate education to every child." The majority, in considering the constitutionality of the Texas financing scheme, seems to find substantial merit in this contention, for it tells us that the Foundation Program "was designed to provide an adequate minimum educational offering in every school in the State," ante, at 45, and that the Program "assur[es] a basic education for every child," ante, at 49. But I fail to understand how the constitutional problems inherent in the financing scheme are eased by the Foundation Program. Indeed, the precise thrust of the appellants' and the Court's remarks are not altogether clear to me.

The suggestion may be that the state aid received via the Foundation Program sufficiently improves the position of property-poor districts vis-a-vis property-rich districts - in terms of educational funds - to eliminate any claim of interdistrict discrimination in available educational resources which might otherwise exist if educational funding were dependent solely upon local property taxation. Certainly the Court has recognized that to demand precise equality of treatment is normally unrealistic, and thus minor differences inherent in any practical context usually will not make out a substantial equal protection claim. See, e.g., *Mayer v. City of Chicago*, 404 U.S. 189, 194 -195 (1971); *Draper v. Washington*, 372 U.S. 487, 495 -496 (1963); *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931). But, as has already been seen, we are hardly presented here with some de minimis claim of discrimination resulting from the play necessary in any functioning system; to the contrary, it is clear that the Foundation Program utterly fails to ameliorate the seriously discriminatory effects of the local property tax.

Alternatively, the appellants and the majority may believe that the Equal Protection Clause cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education which evidently is "enough." The basis for such a novel view is far from clear. It is, of course, true that the Constitution does not require precise equality in the treatment of all persons. As Mr. Justice Frankfurter explained:

"The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. . . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

See also *Douglas v. California*, 372 U.S. 353, 357 (1963); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). But this Court has never suggested that because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Even if the Equal Protection Clause encompassed some theory of constitutional adequacy, discrimination in the provision of educational opportunity would certainly seem to be a poor candidate for its application. Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is "enough" to excuse constitutional discrimination. One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is constitutionally sufficient. Indeed, the majority's apparent reliance upon the adequacy of the educational opportunity assured by the Texas Minimum Foundation School Program seems fundamentally inconsistent with its own recognition that educational authorities are unable to agree upon what makes for educational quality, see ante, at 42-43 and n. 86 and at 47 n. 101. If, as the majority stresses, such authorities are uncertain as to the impact of various levels of funding on educational quality, I fail to see where it finds the expertise to divine that the particular levels of funding provided by the Program assure an adequate educational opportunity - much less an education substantially equivalent in quality to that which a higher level of funding might provide. Certainly appellants' mere assertion before this Court of the adequacy of the education guaranteed by the Minimum [411 U.S. 1, 90] Foundation School Program cannot obscure the constitutional implications of the discrimination in educational funding and objective educational inputs resulting from the local property tax - particularly since the appellees offered substantial uncontroverted evidence before the District Court impugning the now much-touted "adequacy" of the education guaranteed by the Foundation Program.

In my view, then, it is inequality - not some notion of gross inadequacy - of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle. Here, appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the schoolchildren of Texas. This discrimination is, in large measure,

attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient showing to raise a substantial question of discriminatory state action in violation of the Equal Protection Clause. ...