

IN THE SUPREME COURT OF THE UNITED STATES

----- X
SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, et al.,

Appellants,

v.

No. 71-1332

DEMETRIO P. RODRIGUEZ, et al.,

Appellees.
----- X

Washington, D. C.
Thursday, October 12, 1972

The above entitled matter came on for argument
at 11:42 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

CHARLES ALAN WRIGHT, ESQ., 2500 Red River Street,
Austin, Texas 78705, for the Appellants.

ARTHUR GOCHMAN, 331 Travis Park West, San Antonio,
Texas 78205, for the Appellees.

C O N T E N T SORAL ARGUMENT BY:

	<u>PAGE</u>
Charles Alan Wright, Esq., On behalf of the Appellants.	3
In Rebuttal	39
Arthur Gochman, Esq., On behalf of the Appellees.	19

* * *

Afternoon Session begins on page 15.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-1332, San Antonio School District against Rodriguez.

Mr. Wright, I think you can proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES ALAN WRIGHT, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. WRIGHT: Mr. Chief Justice, and may it please the Court:

I would like to take as the text for my argument this morning a sentence from an article that Professor Coons and his collaborators, Sugarman and Clune, wrote last year. It is cited at page 44 of my initial brief. They said: "Of all public functions, education in its goals and methods is least understood and most in need of local variety, experimentation, and independence."

That, I think, is wise counsel. I believe that is the argument for reversal in this case. In our view, the Texas system of school finance, imperfect as it is--we conceded its imperfections in our brief--the Texas system does allow for local variety, experimentation and independence; not as much as I would like it to, but that is its goal, that is its rationale, and for that reason there is a rational basis to it, and I will undertake to develop

of course in a moment our view that the rational basis test is the appropriate test.

The view adopted by the district court that there is a rigid constitutional mandate that the quality of education may not be a function of wealth, except the wealth of the state as a whole, in my submission, is based on educational assumptions about matters that are today not understood and which educators are not ready to form firm judgments, and it would seriously inhibit, if it would not destroy altogether, the possibilities for local variety, experimentation and independence, of which Messrs. Coons, et al., quite properly speak so warmly.

Proposition One, the proposition adopted by the district court in this case, would impose a constitutional strait jacket on the public schools of 50 states. It would mean that hereafter and permanently, or at least until a new book is written and the Constitution changes again, that all measurements in terms of education, the public schools, must be in terms of per capita or per pupil student expenditures, even though there may be many other things that we ought to be worrying about in an effort to cure the problems of public education.

It would not necessarily destroy all local control. There is the variation presented by Professor Coons and his associates described as district power equalizing. If

district power equalizing is consistent with the mandate of the court below, and the court did not undertake to speak to that question at all--it left it completely open--then it would still be possible for an individual school district to decide that we want to spend more money here than that other school district to spend it, and there would be an elaborate system so that this could be done; and its ability to do so would simply depend on the tax rate the district was willing to impose on itself. It would not depend on the taxable property in the district. That would leave local control still in the schools. To that extent, it is far better than any notion of centralized state funding on a single statewide formula.

But, as we pointed out both in our brief and particularly in our reply brief, it seems to us if district power equalizing is a viable alternative, that this case has ceased to be a case about education at all, that we are no longer concerned with whether the children in the Edgewood School District have an education inferior to those in Alamo Heights, because this would still be possible if the voters of Alamo Heights decided that they would assume a larger tax burden, tax rate, than the voters in Edgewood.

On the district power equalizing solution, this becomes a case for the relief of taxpayers rather than a case to help out school children. Many of the writers who

support drastic reform and who support reform as a matter of constitutional judgment have said that the district power equalizing solution would itself be unconstitutional, because it would make the number of dollars spent on a child dependent on what friends and neighbors think. I must say that in view of what this--

Q So, there would still be an equal import, there could be into that?

MR. WRIGHT: There certainly could be. In fact, a whole reason for having district power equalizing would be to make unequal input possible.

Q But under the Texas system it is impossible for some districts to have a sufficient input, even if they are willing to tax themselves more.

MR. WRIGHT: To have a sufficient input; was that your word, Justice White?

Q Yes.

MR. WRIGHT: I would not agree with that, sir, no.

Q Why is that?

MR. WRIGHT: Because we believe that our state foundation program has assured to every district a sufficient input for an adequate education, and that it has left every district to decide for itself what if anything more--

Q So, you think this is really power equalization that you have now?

MR. WRIGHT: No, I don't think that ours is power equalization. I think that ours is a matter of local choice.

Q You get the same result in the sense that anything over a minimum--a minimum is guaranteed and districts may make up their own mind.

MR. WRIGHT: That's right, yes. I, of course, do not think that Proposition One appears in the small print of the 14th Amendment; so that if the Texas system in this respect resembles power equalizing, it does not bother me, but I would think that it should bother my friend Mr. Gochman and it should bother Professor Coons. Because I do not see how the unequal input of power equalizing can be defended if the Constitution says you cannot have an equal input.

Q Would you say it would violate the equal protection clause if in some way a court did decide what was a minimum level of education, it was found that many districts in Texas did not come up to that level and could not really under the formula because the property in this particular district is just too limited and the state foundation program just does not bring it up to a minimum level?

MR. WRIGHT: I think that would be a much harder constitutional case for me to defend, yes. I do not want to concede that I would necessarily lose it because it is not my case.

Q Apparently then we must decide then whether it would be--to sustain you we must agree with you that the foundation program brings it up to a minimum level?

MR. WRIGHT: No, I think that is simply not an issue here. There is hardly so much as an allegation--

Q If there is a violation if it did not, do we not have to decide that it does?

MR. WRIGHT: I do not think you have to decide that. I am prepared for purposes of the present argument, Justice White, without foreclosing what I may say the next time I am up before you on a different case, to concede that there is a constitutional minimum that could be required. I think that there were certainly overtones of that in Yoder last term when the Court talked about a basic education and quoted what Thomas Jefferson had to say about it and things of that sort, so that I can understand what to me is a viable constitutional argument, that a minimum education is required. But I do not think there is any issue between the parties in this case on whether or not Texas is providing a minimum education.

Q You mean, in effect, if it is not conceded, at least it is not denied, that the present foundation contribution to the local schools is sufficient to provide an adequate education?

MR. WRIGHT: That is my understanding, that it is not denied. I certainly would not want to put words into the

mouths of my friends. But their pleading is not drawn on the theory that the Foundation program does not give Edgewood enough. Their theory is that it does not give Edgewood as much as Alamo Heights and that there is the constitutional violation. And that is certainly the constitutional violation found by the district court. The district court made no finding that we fall below whatever the constitutional minimum may be.

Q One difference, though, between the power equalization and your system is that under power equalization if a district chose to tax itself at a higher rate, it could get more money even if it was poor in property?

MR. WRIGHT: That is right.

Q Not so under the Texas system now?

MR. WRIGHT: That is right.

Q Each district would have the same row to hoe, so to speak, in raising that additional money under power equalization, which it does not have now?

MR. WRIGHT: I would not want to accept that entirely, Justice Rehnquist, because power equalizing is always put in terms of the taxable property per pupil. And it seems to me that in terms of what row you have to hoe in order to put a tax rate on yourself, it is really your income, your ability to pay, that is important. In a wealthy district, the same rate would be a much smaller proportion of

income. So that in that sense, in terms of the marginal utility of the dollar, it would still be easier for wealthy people to vote to spend more money than it would for poor people to do so. But, as Professor Coons says in his book, this is a point on which pragmatism must triumph over principle.

Q Do you know of any case in this Court which has ever held that it would be unconstitutional for a state simply to get out of the business of public education bag and baggage?

MR. WRIGHT: I know of no such case, and I would say there were certainly strong implications in the Prince Edward County case that a state could do exactly that if it--

Q Then why do you say that a minimum education may be a constitutional requirement if a state could get out of it entirely?

MR. WRIGHT: I, of course, you recall, sir, made my concession entirely in terms of this case. I think I can safely concede it here, but I do not have to take on that argument in order to win this case; even if a minimum is constitutionally required, Texas wins here. I must say I am attracted, Justice Rehnquist, as a scholar to the argument that it might be, despite the intimations of your previous cases, that today the failure of a state to provide an education altogether would inhibit the First Amendment rights,

that a state has an obligation to teach children to read and to write. I do not know that I would accept that argument, but I can see the possibilities of sketching out an argument of that kind.

Q In the past two or three years, did not Mr. Justice Black in one opinion, whether part of the holding or not, did he not say pretty flatly a state could close all its schools if it wanted to?

MR. WRIGHT: I think he said something of the sort in Palmer v. Thompson, the swimming pool case--

Q Is there a question, however, that once the state undertakes to furnish education, then it must furnish a certain minimal adequate education for everybody? Once they start to go down that row, they must follow through.

MR. WRIGHT: We certainly must do it for everybody, yes. If we are going to do it for any, then we must do it for every young person in the state.

Q Would that mean that if a county in a state decided to provide public education, then as a constitutional matter every county in that state had to do it?

MR. WRIGHT: I would not think so. No. Unless we can implicate the state in some way and find that this is state action that is doing it in county A and denying it in county--

Q Constitutionally, as you know, there are many,

many decisions that say that county action is state action from the point of view of the 14th Amendment.

MR. WRIGHT: Yes, for some purposes they are. But whether they are for purposes of the equal protection clause in this kind of sense, there I would say your decisions are to the contrary. They say that to have things different in one county than it is in another county is not a violation of the equal protection clause. Those were not education cases in which that was being said. In one of them Maryland had different penalties in one county for a crime than it had in another county, and you upheld that and there is a consistent line of those cases, Justice Stewart.

Q There are all sorts of local options in the Sunday closing cases involved.

MR. WRIGHT: Sure.

Q McGowan against Maryland.

MR. WRIGHT: Yes.

Q I am just curious. On district power equalizations, what about the percentage of ratings? Do they not differ in Texas? They seem to everywhere else. Some places assess at 30 percent and some at eighty and some at a hundred.

MR. WRIGHT: They differ very widely in Texas as they do in most states, Justice Brennan, and I think that if a state were to adopt district power equalizing, it as a

practical matter would have to adopt statewide assessing. I do not see any other way in which the scheme would be feasible. Otherwise you simply use a favorable rate, and you get more than you are entitled to. And I think that demonstrates the further incursion on local government that the ideas presented here by the Appellees represent, that very little is to be left of local government if the decision below is to be affirmed.

We contend, of course, that if we are subject only to the rational basis test, that this is not one of those cases in which we must demonstrate a compelling state interest in order to justify the results for which we argue and justify the state plan. And we think that there are quite a number of very recent cases in this Court, some of them ignored by the lower court and some of them still more recent, that show exactly that and show that this Court is not going to impose a constitutional strait jacket on the states in difficult, intractable questions of social reform, welfare, economics, Dandridge, Lindsey, Jefferson v. Hackney, cases of that kind, and we think this is clearly in the area with which we are concerned. The appellees undertake to distinguish these and to suggest that in some way the educational needs of the poor are fundamental, while their needs for food, for housing, are not. And, with respect, this is a distinction that I think simply is not a tenable one, that it is hard to

say that a higher salaried school teacher is more fundamental to a poor child than food or a sound roof over his head. I see, Mr. Chief Justice, that the lunch hour is here.

MR. CHIEF JUSTICE BURGER: We will resume.

[Whereupon, at 12:00 o'clock noon, a luncheon recess was taken.]

AFTERNOON SESSION - 1:00 o'clock

[Same appearances as heretofore noted.]

MR. CHIEF JUSTICE BURGER: Mr. Wright, you may continue. You have 13 minutes remaining altogether.

MR. WRIGHT: Thank you, Mr. Chief Justice.

In the time that remains to me, I would like to turn for a moment to the factual assumptions that underlie the judgment below and the arguments of the appellees. And I would like to make perfectly clear what our position is with regard to those, because there is some suggestion, particularly in some of the amicus briefs in support of the appellees, that Texas is asking this Court to resolve the very vexing questions on the relation of money to quality and education and on whether or not persons who are individually poor are likely to be found in school districts that are, in terms of taxable property, collectively poor.

We, of course, are not asking you to settle those questions. Our submission is that these are intensely difficult questions on which no answers, in the present state of knowledge, are possible and that this Court should not undertake to resolve matters on which educators and social scientists cannot come up with any answers. We have felt it necessary to discuss the questions because, as we understand it, the position of our friends would require to resolve these issues.

The decision below, though it never discusses the issue, makes the implicit assumption that in education money is quality. The assumption is explicit in the writings of Professor Coons and his associates and others who have written on that. The district court never spoke to it. But the district court looked at figures about numbers of dollars spent and then announced a constitutional requirement that the quality of education cannot be allowed to vary except as a function of the wealth of the state as a whole and thus implicitly assumed what we think no court can safely assume, because in fact we are very skeptical that it is even true that beyond some minimum quality is money.

The district court did explicitly find that there is a correlation between poor people and poor school districts. The finding of the district court in that regard is based on the reading of the extremes of the chart that was offered in evidence. Its determination in that regard has been criticized not only in our briefs and in our testimony at the trial but in the literature. In our brief we set out the discussion of the finding on that point by Professor Goldstein in his article in the Pennsylvania Law Review, and in the issue of the Yale Law Journal that was published on Tuesday of this week there is a lengthy student note that is again very critical of the finding in Rodriguez on that point that appears at page 1312, notes 40 and 41, of the Yale

note, and the subject is referred to again at page 1317 of the Yale note, on why you cannot undertake to conclude a correlation between individual poverty and district poverty on the basis of the kinds of figures that the district judge relied on.

We presented also in our briefs disinterested studies elsewhere in Kansas and in California that have said no, this relation does not exist. The central finding of the Yale note, based on virtually complete data of the entire State of Connecticut and on a far more sophisticated statistical analysis than any I have seen anywhere in the literature, is that there is no such relation in the State of Connecticut, that indeed the relation tends to be an inverse one, that it is the poor people who live in the area where the most is being spent on education and the rich people live in the areas where the least is being spent on education.

Q As I read this record, Mr. Wright, it seemed to me that the testimony--I am not sure about the findings--pretty clearly demonstrated there is unequal treatment of these respondents who are Americans of Spanish ancestry at educational levels. Is that any part of this litigation?

MR. WRIGHT: The racial issue is in this litigation, yes, Justice Douglas. It is a major portion of the plaintiffs' complaint. The trial court did not rely on it in its opinion. It put its holding squarely on the dollar

inequality without regard to whether the particular plaintiffs were of Spanish ancestry or Anglo or what. But the issue is certainly there.

We think that the issue is one that is fairly readily answered, that although it is of course quite true that in the Edgewood School District in Bexar County, Texas, the great majority of the students are of Spanish origin and not as much money is spent there as in other school districts. But we doubt that this would be found to be true as a general matter. But the poor school districts are not that congruent with racial distributions, that it is, in other words, a happenstance. We have a case in which we have particular plaintiffs who are Mexican-American and who live in a district with low taxable resources.

Again, on these factual statistical problems, we think that the state of the literature simply does not permit the conclusions that are essential to the position of my friend; and that even if their conclusions were sound, we still think that our legal argument would have great merit. But if their conclusions are not demonstrable at the present time because they are the essential premises of the results for which they argue, we think that the inability to demonstrate the accuracy of these assumptions is fatal to their case.

Q I assume you use the term "state of the

literature" in the broader sense of state of the human knowledge on this?

MR. WRIGHT: Yes, yes. That is exactly the sense in which I use it, Mr. Chief Justice.

I think, with the Court's permission, I will reserve my remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Gochman.

ORAL ARGUMENT OF ARTHUR GOCHMAN, ESQ.,

ON BEHALF OF THE APPELLEES

Mr. Gochman. Mr. Chief Justice, and may it please the Court:

The court below held the Texas system unconstitutional because it distributes educational benefits on the basis of district wealth. The court said, as might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poorer districts are poorer in income and predominantly minority in composition. And the court cites one of the exhibits. Another one is on page 98 of the Appendix, Plaintiffs' Exhibit 3, which shows that the correlation is not only on a district basis of minority discrimination but on statewide, on a statewide basis.

The court further found that there was no rational or compelling reason that could be offered for this

invidious discrimination. This Court is to decide whether or not to reverse the lower court and approve District 12 as a proper basis for distributing public school education.

The defendants admit that there is a perfect correlation between the property tax base per student and the amount of dollars each child gets for his education. Yes, Mr. Justice Brennan, tax rates do vary in Texas. But the district taxing at the highest rates in Texas get the lowest dollars per pupil, and the districts taxing at the lowest rate get the highest dollars per pupil; and we showed it in exhibits in Bexar County where my clients live, a metropolitan area, and we showed it statewide.

Q Mr. Gochman, let me be sure I understand you. Do you say that there is an inevitable correlation between district wealth and income of families?

MR. GOCHMAN: That is not what I just said a moment ago, but there is. The record shows it to this extent, that as to the poorest districts--as to the poorest districts and the richest districts, the poorest people live in the poorest districts and the richest people live in the richest districts, and in Bexar County it perfectly correlates.

Q My question is whether this is a necessary correlation.

MR. GOCHMAN: No, Your Honor, it is not. But we probably would not have a lawsuit if it was not that way.

because this kind of discrimination falls most heavily on the poor. The poor have nowhere to go.

Q I ask my question--and it is an unfair one-- I ask it from personal experience. I come from a state of varied economic areas. The Minnesota iron range was the most comparatively poor range as far as family income was concerned. And yet in my day it was the iron range that had the best schools. They were the ones with the swimming pools and the tennis courts and the extra facilities and the highest paid teachers. The reason was that the tax rates up there hit the--

MR. GOCHMAN: There are probably some accidents like that in Texas. But in the West Orange case, which we cite in our motion to affirm, we show how they do away with that happening in Texas by poor people being in a district that gets all the oil refineries. What happened in Orange, the big majority district dissolved itself and then got itself attached to the poor district, the poor people, with the great wealth, and attached itself to the district with poor families and great wealth. There is some of that in Texas, but as a whole, and especially at the top and the bottom, the richest districts have the least poor people and the least minorities, and the poorest districts have the most poor people and the most minorities.

Q It does not hold true in the middle, does it,

at least by one of your exhibits?

MR. GOCHMAN: It does not hold true in the middle. But in Bexar County, where my clients live, Your Honor, it holds true perfectly up and down the line.

Q Is there an exhibit in the record?

MR. GOCHMAN: Yes, Your Honor. In our brief on page 12. If you go with property tax and then median per capita income, they correlate perfectly up and down the line. These seven school districts have 93 percent of the students in Bexar County.

Q Would you carry your general theory across the state line?

MR. GOCHMAN: No, Your Honor. I carry the equal protection clause to be no state shall, and it is the state's obligation. The state has set up this school system.

Q The logic of it, laying aside the 14th Amendment emphasis on state, the logic of it, however, would apply across state lines, would it not?

MR. GOCHMAN: No, Your Honor, I think--

Q The logic would be military in concept that you are arguing.

MR. GOCHMAN: No, I think we are talking about--

Q Why should people in Texas, for example, have better schools than the people in Rhode Island, if they are better? I don't know whether they are or not.

MR. GOCHMAN: As a moral proposition, maybe so.

But this is a state--it is now a state function, not a federal function.

Q I said laying aside that limitation, the logic of your argument would apply with equal force, whether you call it moral grounds or totalitarian philosophy or whatever.

May I ask you one other thing: How would you rate such items as the need for police protection, fire protection, public health facilities? Where would you grade them with respect to public education, higher, lower, or on the same level as the functions of state government?

MR. GOCHMAN: I think what is important is the constitutional importance of education. And that is, education affects matters guaranteed by the Bill of Rights. It is preservative of other rights, unlike some of these other services. It is related to every important right we have. It is related to the right to vote, speech, jury service. On a federal jury you cannot serve if you cannot read, write, understand, and speak the English language. It is education this Court has used as the high water mark for measuring the importance of other rights.

For example, in measuring the importance of travel, in restricting the poor on travel, the Court said you could not close the schools to the poor, raising the importance of travel to that level. And Mr. Justice Blackmun concurring

and Palmer says--pools are nice to have, but you cannot compare them to education.

Q How about public health facilities to education?

MR. GOCHMAN: Public health, food, lodging, those things are of great economic importance. But they are not matters that are related to those things guaranteed by the Bill of Rights. And in importance, education lies at the apex up and down the ladder. It is important to the free enterprise system, to the individual not to be poor. It is important to fulfill individual potential. It is universally relevant. And it is the only thing the state provides that it compels you to utilize for this period of time. In fact, I don't know of anything it compels you to utilize for any length of time. But a child has to go to school for ten years. That is the importance that the state puts on it. It molds the character and the personality of the individual. And it is vital for the United States to compete in the world.

But they seek to rationalize this and say it is all right on the basis of local control, on the basis of diversity, variety, independence. The one thing the Texas system does not have, because those that tax at the highest rates, as I said a moment ago, have the lowest expenditures per pupil. And those that tax at the lowest rate have the

highest expenditures per pupil. There is just the reverse of local control.

In San Antonio, Edgewood taxes at a rate 20 percent higher than Alamo Heights. But they raise thirty some-odd dollars a pupil. Alamo Heights raises over \$400 a pupil. It is the property tax base that determines how much you have for a child's education. And who set that base and who set that standard? The state. And they agree that this is a state system of public school education. And these school districts were set up by the state for the convenience of the state in affording public school education.

They also agree that these district boundaries serve no educational function, and they have no rational basis.

Q What is your answer to Mr. White's suggestion that the state foundation contribution is sufficient to provide an adequate education?

MR. GOCHMAN: We show that it really does not provide any minimum. The minimum is what the school at the bottom gets. For example, he says it guarantees you instructional media. But if you look at Section K of the statute, it says if you put up the matching funds it guarantees it. And that is why Edgewood gets less funds from the state program than Alamo Heights.

But, in addition to that, what is a minimum?

What kind of a morass is Mr. Wright asking you to get into? What is a minimum? Is a minimum giving him the second grade or giving him 12 years when he comes out at the end equal to an Alamo Heights second grade? Are we going to have two classes of citizens, minimum opportunity citizens and first-class citizens? I think in Sweatt we took care of that, and I think in McLaurin we took care of that. If we are going to apply equal protection of the law to get into minimums, it is going to get us into a thicket that we have to work our way out--

Q Your answer is, the state contribution does not provide an adequate education?

MR. GOCHMAN: Yes. And I say that and I pled that and we proved that. But, additionally, it does not make any difference/once the state provides the service, it has to provide it all on equal terms.

Q Your position then is just straight out that the state must provide equal input every school district in the state. Whatever system they have, whether it is property tax or any other system, or whatever scheme you have, it has got to have equal input dollarwise per student.

MR. GOCHMAN: No, Your Honor. In fact, for example, take--

Q You can have an overall unequal input into two districts?

MR. GOCHMAN: Yes, Your Honor. But it is not just fiat based on wealth. The perfect correlation here is that the input that you get in is based on what your tax base is and nothing else.

Q Let us assume the state just had an income tax, no property tax at all. And it just gave one school district \$500 a child and another school district \$600 a child.

MR. GOCHMAN: For no reason? I would say that would violate the equal protection clause.

Q When could it give one district more than another?

MR. GOCHMAN: I would think power equalizing could be sustained because it does give effective local control, and it does--

Q That ends up with wide disparities between school districts as to what they get.

MR. GOCHMAN: Yes. We are not preaching against disparities in education.

Q As long as the local people make up their mind to have it unequal?

MR. GOCHMAN: As long as there is an equal opportunity for education. Or, if there is going to be a disparity, let it be on a program basis. If a school says-- if a state says, "We want to subsidize people more that go into the sciences," and one school is heavy in sciences and

they get more from the state because science is more expensive to teach, there would be some reason for that diversity.

Q In power equalization, if after providing a minimum education, if a district decided that they wanted to spend more money on education, they could decide to spend it; is that right?

MR. GOCHMAN: Yes. By taxing at a higher rate.

Q Yes. And let us assume a district decided that and they wanted to spend \$800 a student, and another district said, "Well, we just don't believe in education. We are just going to go to five hundred." That would be all right, as long as the five hundred provided some what you would say would be minimum?

MR. GOCHMAN: The compelling basis for that, if it is to be sustained--and I am not preaching for power equalizing, because that is not what Texas is looking at. Texas is working on putting in a new program. But you would have to compare it to James v. Valtierra, Your Honor and say that this gives the opportunity, a real genuine opportunity, for the people in the area to determine their own destiny.

Q So, you would say that the state may provide unequal inputs?

MR. GOCHMAN: On some basis, yes, when there is a compelling interest.

Q But that is only if the state guarantees a minimum?

MR. GOCHMAN: No. I cannot say that there is any such thing as a minimum. I would say if it is an educational--

Q I do not understand your position. But you go ahead with your argument.

Q A student in Mr. Justice White's \$500 district is going to be worse off than a student in Mr. Justice White's \$800 district for reasons quite beyond his control.

MR. GOCHMAN: Yes, Your Honor. But this system, Edgewood as a body, for example, 95 percent Mexican-American, average per capita income under \$1,000. In the other system you would not have a lawsuit. A person could move from one district to the other. But here the poor are stuck in the poor district and they have no mobility. The Edgewood people would like to live in Alamo Heights, but they have no way to do it. And the only way they can get a fair education is to get out of Edgewood.

Q There has got to be some consistent principle that governs the decision rather than just saying this is really bad and the other would not be quite so bad.

MR. GOCHMAN: No. What I am saying is--and we are getting into the constitutionality or lack of constitutionality of this power equalizing system--

Q Yes, but in deciding a case I suppose it is important to know, is there any ~~system~~ you can think of that would satisfy your objections to the present Texas system?

MR. GOCHMAN: Yes, Your Honor.

Q Other than just simply state control. You say you do not need to go to state control.

MR. GOCHMAN: Yes, Your Honor. One thing they are looking at in Texas for example is, you take all the non-residential wealth and you tax it statewide and you tax the residential wealth on a county-wide basis. In taxing this residential wealth on a county-wide basis each district, by improving its own tax rate, will get itself more money. But there is a basis, because pretty well, on a county-wide basis ~~throughout the state~~, the residential tax basis will be equal or the variance will relate to the higher cost of living.

Q As I get your position, it is not that just unequal inputs per se violata the equal protection clause. So far it sounds like you are saying that the fact that there are some districts that are locked in is what violates the equal protection clause. There is nothing they can do about having a better education either from the state foundation program or from taxing at higher rates.

MR. GOCHMAN: Exactly.

Q That seems to be your major point.

MR. GOCHMAN: Discrimination is based on wealth.

Q And yet your answer to Justice White a few minutes ago leaves me with the impression that district power equalization could produce precisely the picture of what you complain today.

MR. GOCHMAN: No, because the discrimination would not be based on wealth. And if you are going to justify power equalization--

Q Could power equalizing ultimately produce precisely the picture of what you complain in Texas now?

MR. GOCHMAN: The variances, Your Honor, under the present system are so vast that I cannot imagine any system, as Dr. Berke testified--no one can imagine any system having vaster disparities. Over half the teachers in Edgewood are unqualified, according to state standards, to teach school. There are 28 teachers per student in Edgewood.

Q Did Dr. Berke testify or did he submit an affidavit?

MR. GOCHMAN: He testified, Your Honor. What happened is, we filled out his direct testimony in narrative form and attached it to a question on interrogatory. All the evidence was taken by depositions and interrogatories, and he actually testified by interrogatories.

Q But it was not a question of being present in court to testify?

MR. GOCHMAN: That is right. There was no courtroom testimony. The court asked us to take all our testimony by deposition.

There are three times the number of counselors per student in Northeast as there is in Edgewood two miles away. The curriculum is much broader and Dr. Cardenas, the Superintendent of the Edgewood School District says he cannot afford to come near the curriculum they have in this neighboring school district.

The turnover of teachers in Edgewood is 50 percent a year. The turnover statewide, from the Governor's report, is 20 percent a year. The schools have to be poorly maintained because they do not have the money to maintain it. They have leaky roofs; they have one and a half times as much space per student in a school district two miles away--

Q I gather your answer to me is Edgewood, at least under power equalization, would be able to get out of this situation if it chose to.

MR. GOCHMAN: That is right, Your Honor.

Q Whereas, now it cannot get out of it.

MR. GOCHMAN: What is right. It is taxing at the highest rate in the county. And, in order to get out of it, it would have to tax 10 to 12 times that present rate, which is prohibitive. They are poor anyway.

Q Apparently it would satisfy your position if

Edgewood under some other system had the opportunity to get out and chose not to and stayed precisely at the present level of education.

MR. GOCHMAN: If it was not locked in on the basis of wealth and there was some rational or compelling state reason involved--

Q No, but it it chose not to. If it had the opportunity and it decided not to.

MR. GOCHMAN: Yes, sir.

Q You would leave that to Edgewood?

MR. GOCHMAN: That is right. Well, it would be unconstitutional if Edgewood chose to go that way and had the opportunity to do something else.

Q You would say that the majority of the people in Edgewood could lock in a minority in Edgewood who wanted to get out?

MR. GOCHMAN: Yes. But that is not likely the system. The system is--

Q Your use is Valtierra with a vengeance, is it not?

MR. GOCHMAN: Pardon?

Q This is Valtierra with a vengeance?

MR. GOCHMAN: Yes. Yes. We are facing Valtierra. And we think that if local control is that important, that if they decided to do it that way--

Q You must think it is or you would not say that would be constitutional.

MR. GOCHMAN: I think that has to be determined at a later time. I can tell the Court it will not be determined on the Texas financing system, because Texas, which has been working on a new system since the trial court decision, is now considering this.

Q Let me see if I correctly understand you now. You say even if you went to power equalization, Edgewood would have the opportunity to get itself out of the situation. If it chose not to get out of it, the state, it would not be free to make that choice, did you not just say to me, that would still, if it chose not to, the choice not to would itself be a violation of equal protection; did you say that?

MR. GOCHMAN: No. If the compelling interest of local control is that strong, then you could have that kind of discrimination, that the people in an area can decide for themselves whether they want to lock themselves into a poor school system.

Q What is your position on that question about the compelling interest? I mean, that is really the question. Would it be constitutional or would it not for Edgewood to have the opportunity but choose not to exercise it?

MR. GOCHMAN: I would think it would be constitutional.

Q In effect, your theory makes the districts equal but it may leave the students utterly unequal.

MR. GOCHMAN: Yes, but it would have a different basis at least. It would not lock onto the poor as it does now. And mobility is a serious factor in this case. If this is a rich guy in a poor district, we would not be in court. He would just move. But the poor had no way out of the present system.

Q In your case does not a lot depend on the factual--

MR. GOCHMAN: Yes, I think the factual situation supporting it--there would not be any lawsuit if the facts were not there. We say the discrimination is based upon the wealth of the districts. But we say that that discrimination falls most heavily upon the poor and the minorities. And in that regard and with regard to the racial discrimination, this is not segregation where you have to prove that the segregation discriminates. The discrimination is there on its face, that the minorities get less both in Bexar County and statewide.

Q You do not contend, do you, that Texas set up this system of district school financing with the purpose of discriminating against minorities, do you?

MR. GOCHMAN: I contend that objectively Texas did what it did, and it could have done something else. And what it did discriminates against minorities.

Q Is that not a great deal like the findings we had in Jefferson against Hackney where you could say statistically minorities were discriminated against, but there was no finding of intent to discriminate? And as to welfare, we upheld that.

MR. GOCHMAN: Exactly. We have to face Jefferson v. Hackney, and we say it is distinguished because the importance of education, because it falls on helpless children, and because the state created the discrimination.

Q Does not welfare fall on helpless children too?

MR. GOCHMAN: Yes, Your Honor. But on the other two grounds, the importance of education as it relates to the Constitution of the United States, and the fact that--I lost my train of thought on that one. The importance of education to the Constitution of the United States and the fact that the state did it, the state made these districts poor, are two distinctions of Jefferson v. Hackney.

Q The school districts are created solely by the state legislature, are they? That is, their meets and bounds?

MR. GOCHMAN: No. The state set up the system for the convenience of the state. But the boundaries are

adjusted by a majority of votes of adjoining districts and by the county board of trustees if it is a county district.

But the problem is nobody is going to join up Edgewood.

The San Antonio central city district, the evidence will show, continually took in neighboring districts, but it is not going to go to the bad, the majority of the people in San Antonio who vote, to take it in. And, thereby, the San Antonio Independent School District--the central city district--has four times the wealth per student of Edgewood. It would injure its ability to teach its present students by having an election to decide to take in Edgewood and in that way the state has locked in Edgewood.

Q The state legislature, or does any statewide agency, the board of education or whatever, have any power to create or to change or adjust the boundaries of the school districts in the state?

MR. GOCHMAN: No. Basically this is the job of majorities in the adjoining school districts, if they are independent school districts. And if they are county school districts, the county board of school trustees, Your Honor.

Q This county is B-e-x-a-r that you pronounce--

MR. GOCHMAN: It is Bexar, yes.

Q Bexar. How many school districts in Bexar County?

go into other county lines. The seven that we name in the suit--

Q They do cross county lines?

MR. GOCHMAN: Yes, sir. The seven that we name in the suit that have 93 percent of the students.

One thing they are asking you to do in this case is to declare constitutional a system that is based on money making a difference and giving incentive matching grants to those schools that have the most money and put up the most money for education, and ask you to declare that system to be unconstitutional on the ground that money makes no difference. Actually at the trial of this case they all agreed that money made some difference and money made the difference. Now they say that a minimum program is enough, which is admission that money must make a difference, that there must be a maximum program.

But again I want to go into the fact that Sweatt, I think, did away with minimums. And I want to point the Court to McLaurin, because this is what the state did. And it is not what will happen as a result that counts. In McLaurin the State of Oklahoma said this child shall sit in the back of the room, this law student shall sit in the back of the room. And they wanted to justify it in court by saying, "Well, nobody else would have sat with him anyway; so, the statute ought to be upheld because it wouldn't be any

different if we didn't have it." And the court said, "What the state did is what is important."

I want to say, in concluding, that the San Antonio Independent School District, the central city district, is a main defendant in this case. And they fought us hard at the trial level, got out on a motion to dismiss; but on appeal of this case, after seeing the decision of the trial court, and the equity involved and the vast discrimination, filed a brief in support of the decision of the trial court.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you,

Mr. Gochman.

Mr. Wright, you have six minutes remaining.

REBUTTAL ARGUMENT OF CHARLES ALAN WRIGHT, ESQ.,

ON BEHALF OF THE APPELLANTS

Mr. Wright. Thank you, Mr. Chief Justice.

I would like to begin with a further word on the racial aspects that were posed by Justice Douglas in a question to me and also in Mr. Gochman's argument. In response to that simply quote from the book by Messrs. Coons, Sugarman, and Clune. They say--the quotation appears at page 24 of our initial brief--"It is not surprising that even the present litigation is understood by many of its close supporters as a racial struggle. The fact is otherwise. There is no reason to suppose that the system of district-

based school finance embodies racial bias..... No doubt there are poor districts which are basically Negro, but it is clear almost by definition that the vast preponderance of such districts is white."

Q Is Mr. Gochman bound by that comment?

MR. WRIGHT: No, but I think that you are bound to take into account the findings of serious students, such as Professor Coons, in determining what the 14th Amendment means on a nationwide basis. Professor Coons and his associates have supported that statement, Justice Rehnquist, by figures showing that in California, for example, 59 percent of minority students live in districts in which the assessed values are above the median and therefore, if we would have strict equalization, they would get less than even now.

Q If I had a case here from Texas and was claiming that Texas had denied the equal protection, I think that I would feel rather strongly that whatever the figures might show about California, I was entitled to stand on the record made in the Texas case.

MR. WRIGHT: But I think with respect, sir, that in determining the rule of law that the particular facts about the Edgewood School District or about California or any other particular place are all merely parts of the overall mosaic that you must appraise in deciding. Does the

Constitution or does it not require this?

Q Was it any part of the district court's rationale in this constitutional decision that this was racially discriminatory?

MR. WRIGHT: No.

Q I did not think so.

MR. WRIGHT: No. There were allegations to that effect in the complaint.

I am not here to apologize for the Texas school finance system, and I have said repeatedly that it seems to me far from perfect. I think that the Texas system does assure, as evidence in the record shows, more than merely a minimum; it insures a basic education to every school child in the state, and it then lets districts, if they have money and want to spend money, go beyond that. As I understand the argument of my friend Mr. Gochman, it would not matter if Texas were giving each school district in the state \$2,000 per student. If Alamo Heights were still free to tax, with its heavy resources, and spend more than Edgewood was, he would still find this to be impermissible, although, for reasons that are not persuasive to me, he regards the same result as quite different if it stems from district power equalizing than if it comes out of the mere facts as they are.

I have said several times in my brief--and I want

to say here and say with the utmost sincerity--how much I admire the creative scholarship of Professor Coons and his associates, my colleague Professor Udall, and others who have written in the field, and I admire also the devotion and the ability with which Mr. Gochman has persevered in this case. These people have opened the eyes of the whole country to a very serious problem. I think that every one in this courtroom would agree that what we want is better education for all children and especially for poor children, that the real differences between us are whether a new system should be adopted because this Court finds that the Constitution requires it or whether we look to legislatures to provide remedies and the difference about whether the proposals they make would indeed lead to better education or only more expensive education, whether they would relieve poor children or only children who happen to live in poor school districts, and indeed if district power equalizing is to be taken seriously, whether the remedy that has been offered here is not one that is of no benefit to children but only of benefit to taxpayers.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wright.

Thank you, Mr. Gochman.

The case is submitted.

[Whereupon, at 2:10 o'clock p.m., the case was submitted.]