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ERASING RACE, DISMISSING CLASS:

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ

Camille Walsh*

This article examines the culmination of strategic tendencies to combine demands for recognition of class-based and race-based discrimination in the early 1970s. San Antonio Independent School District v. Rodriguez was a pivotal case during this period. The Rodriguez claimants were low-income children and families of color whose school district was dramatically unequal in every respect when compared to the local, wealthy, white school district at issue in the case. The Court treated, however, the claims of race and class discrimination that the claimants put forward as entirely independent, and ignored the plaintiff’s race claim in order to focus on class alone, which the Court dismissed as a category not entitled to constitutional protection. This article argues that the outcome in Rodriguez was directly tied to legal frameworks that negated the possibility of protecting more than one constitutional category at the same time. The Court’s decision provided an economic privacy and local fiscal control rationale that solidified the separation of race and class as categories of constitutional analysis, to the detriment of future claims at the intersection of race and class remedies for segregated and unequal schools.

INTRODUCTION

Demetrio Rodriguez was six years old when his migrant worker family moved from a Rio Grande agricultural town to San Antonio in search of better schools.1 Decades later, he continued to seek out better educational opportunities in

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San Antonio, only now for his own children, and it would lead to the nation's highest court hearing his case. Less than twenty years after the Supreme Court in Brown declared the fundamental importance of education, the Court in San Antonio Independent School District v. Rodriguez decided that the poor, almost entirely Mexican American children receiving substandard education in San Antonio's impoverished Edgewood school district were not protected by the 14th Amendment. 2

This article argues that Rodriguez, which upheld disparities in a property tax-based public school financing system, was the outcome of legal discourse that did not engage with complex identities, and that by subsuming race under class by artificially separating the two identities, the Supreme Court negated both claims. The plaintiff children, in the eyes of the Court, could not be discriminated against both because they were poor and because they were members of a racial minority. In ignoring their claim of race discrimination, the Court also doomed their claim of poverty discrimination by refusing to see the intersection of the two. The Court's decision ultimately protected racial inequalities in education by erasing race from the conversation and dismissing class as a constitutionally protected category.

The Court's decision, far from aberrant, was rooted in the fallacious premise of equal protection jurisprudence that only one category of protection could exist at a time. 4 Though race and class discrimination were both advanced as claims in the lawsuit, parties on both sides rarely discussed race, if at all. When race did enter the discussion, it was often used to analogize the experiences of race and class, which implicitly separated them as identities. 5 Race was also deployed to argue that protecting the poor would hurt racial minorities. 6 Only rarely was the disproportionate representation of racial minorities in low-income brackets and impoverished school districts mentioned, and then most often by racial or ethnic identity organizations filing amicus briefs. Ultimately, the case failed to protect low-income children of color who were the primary plaintiffs in the case and provided a negative counterpoint to the traditionally celebratory narrative of Brown.

Legal scholar Ian F. Haney López argues that after Brown, the law moved away from using racial categories oppressively toward using those categories in remediation of racial discrimination. 7 Thus, seemingly tangential legal processes or

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3. I call one category at issue in the case "race" in response to the legal language and stated doctrine of equal protection law, while being aware of the problematic and debated nature of any such single term. See Ian F. Haney López, Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory, 85 CALIF. L. REV. 1143 (1997).

4. For more discussion of the way in which the law demands singular categories, see Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1297-98 (1993). Part of Crenshaw's project is to "trace[e] the categories to their intersections" in order to interrupt the tendency to view them as "exclusive or separable." Id. at 1244.


7. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 112 (N.Y.
cases “may be far more central to the legal construction of race today – for instance . . . race-neutral laws.”

The school-financing law in the Rodriguez litigation was seemingly race-neutral, which allowed the Court to treat race as a singularity unrelated to economic circumstances. While Rodriguez produced a very different result from Brown, the dismissal of race in Rodriguez in fact followed from the simplistic anti-categorizing process reified in Brown and fundamental to U.S. law in general. In Rodriguez, this formalistic notion of race allowed the Court to erase the racial identity of the plaintiff children from consideration because the discrimination they claimed was more complicated than formal racial categories allowed. The result was both a legitimating of seemingly “colorblind” racialized thinking and an example of a Supreme Court case in which “poor people have lost again.”

While other scholars have focused on the important role of Rodriguez in constitutional jurisprudence on class and education financing, they have not adequately dealt with the legal process of constructing, and deconstructing, both race and class in the same period. In this respect, Rodriguez serves as a useful example of poverty, race, and the language of rights coming into conflict with each other. While poverty was ostensibly the central issue, and “rights talk” was the language by the Court, race haunted both the rhetoric and rationale. My article thus takes up Kenneth Mack’s recent suggestion to “bring the law back” to the history of the civil rights movement by taking a broader view of what cases should be understood as part of the civil rights movement’s legal history.

The intersecting claims of race and class discrimination in Rodriguez were in part built on Brown overturning formal racial segregation in public schools, a decision which has long served as a popular example of establishing civil rights. But as Derrick Bell argues, the act of articulating a certain set of “rights” or rights-accruing identities itself reaffirms that the often-exclusionary language of rights is the appropriate method of distributing resources and protections.

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8. Id.
10. See Crenshaw, supra note 4.
11. San Antonio Indep. Sch. Dist., 411 U.S. at 57 (stating that in the end there is no more “than a random chance that racial minorities are concentrated in property-poor districts.”).
16. Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform 188 (Oxford Univ. Press 2004). Mary Ann Glendon argues that current rights discourse dominant in political culture over the last decades has focused on the
According to 2006 data, explicit examinations of class – and particularly the complicated and intersecting web of class and race in America – are more important now than ever. According to data from the National Center for Education Statistics (NCES), 70 percent of black and 71 percent of Hispanic fourth-graders are eligible for the federal free or reduced lunch program (a common indicator of a family’s impoverished economic status), while only 23 percent of white students are eligible. The currency of discussions about the obstacles facing low-income individuals is also illustrated by media coverage showing that as a result of higher income inequalities, a child’s economic class is a better predictor of school achievement in the U.S. than it is in many European countries. Ideas about educational opportunity and the possibility of advancement are central to cultural myths and misconceptions about what it means to be poor in America. Belief in the ideal of the American dream has grown over the last few decades; at the same time, class mobility has progressively decreased since the 1970s while the income gap has continually increased. Class segregation – the affluent associating only with other affluent people and the poor clustered into all-poor social networks and communities – has also increased consistently since the 1970s even as the illusion of classlessness has become more pervasive. The overlap of class and race today is also illustrated by the harsher impact of the economic downturn on the African American and Latino populations.

The history of racial discrimination in both law and education is well known, but class has received much less attention from historians and legal theorists. Perhaps this is in part because the terminology of class appears fluid at first glance – the specific term used by courts is “wealth discrimination,” which is a term likely to confound anyone looking for a coherent and comprehensible category. But this is also why inequalities based on class have proven so durable: judges and lawyers are constrained by a system that recognizes and protects “pure” categories (and in many ways invents them, as seen in the legal history of race). Class is a muddy category,
full of aspiration and dreams and performance, and it is for that reason that we should take it seriously since it has proven disturbingly easy for legal authorities to divest themselves of the responsibility in remediating racial discrimination by characterizing it as class and then dismissing it. 24 I discuss the overlap between race and class in this project often as a connected set of discriminatory categories, but that does not tell the full story of class or race, particularly with respect to education litigation.

Education and class are in fact tightly linked through the meritocracy ideal, generally considered a foundational value of modern democracy. 25 It is because of the strong belief in the possibility of advancement through hard work and education that a stigma often attaches to those who do not succeed. 26 It is therefore crucial to examine class and race as intersecting issues in the “facially neutral” realm of taxation and public education. The problem in naming intersectional identities in the courts is that the law does not recognize multiple axes of identity and multiple types of inequality. For example, a black woman’s sexual harassment claim may be rooted in both her race and her gender, yet courts have struggled with comprehending these multiple identity sites and have more often insisted on recognizing only one identity at a time. 27 Within legal scholarship, there is impressive work on race and gender and their complicated intersection, but there is less work examining the interconnections between race and/or gender, and class. 28

Although race was formative in the creation of simultaneously separate and unequal schools in San Antonio, as in many other cities, only the category of economic class was explicitly in the tax funding structure; thus, racial discrimination could be treated as constitutionally irrelevant by the Court. In this article I first discuss the trajectory of equal protection from Brown to Rodriguez, including the way in which Brown’s formal interpretation of inequality contributed to the construction of single categories of constitutional protection. Next, I trace the history of Rodriguez from its origins in the Edgewood neighborhood to the deliberations in the construction of racial categories by eliding multiple locations of difference, see Ariela J. Gross, What Blood Won’t Tell: A History of Race on Trial in America (Harvard Univ. Press 2008); Peggy Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America (Oxford Univ. Press 2009).

24. See San Antonio Indep. Sch. Dist., 411 U.S. 1 (1973). For a discussion of racial liberalism as a legal strategy and ideology that makes the links between economic and racial discrimination invisible, see Lani Guinier, From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma, 91 J. Amer. Hist. 92 (2004). For a discussion of how facially neutral statutes (such as school financing) have become, since Brown, a primary location for the legal construction of race and subordination, see López, supra note 7, at 112.


28. See, e.g., Evelyn Brooks Higginbotham, African-American Women’s History and the Metalanguage of Race, 17 Signs 251. For a work that examines the complex connections between race, gender and class in an African American community in the Jim Crow era, see Leslie Brown, Upbuilding Black Durham: Gender, Class, and Black Community Development in the Jim Crow South (Univ. of N.C. Press 2008).
the Supreme Court, particularly how the case illustrates the complex and overlapping relationship between race and class and the difficulty in making these simultaneous discrimination claims in a courtroom. Finally, I look briefly at the aftermath of *Rodriguez* and some of the current directions in school finance litigation that continue the efforts of the litigants to push against the overlapping racial and economic roots of unequal school finance systems.

**FROM BROWN TO RODRIGUEZ**

The *Brown* decision has been controversial long before it was even handed down, though the lines of criticism have varied. *Brown*’s legacy of formalizing equal protection analysis with respect to race has proven to be a double-edged sword. Many contemporary affirmative action cases treat race simply as a category, outside of historical circumstances, that demands strict scrutiny but does not suggest broader equitable remedies. The demand for equal, meaningful educational opportunity in *Brown* was argued in what scholar Lani Guinier calls the language of middle-class racial liberalism by the NAACP and transformed by courts into jurisprudence that could comfortably permit enormous racialized inequalities to continue. In the “court-centered universe” Guinier describes desegregation, which

29. Derrick A. Bell, Jr. has famously claimed that *Brown* was the result of a confluence of factors pushing white liberals to momentarily identify their interests with the desegregation movement, a moment that quickly ended. The white interests that Bell points to as temporarily met by *Brown* were, first, credibility in the battle against communism, appeasement of returning African American soldiers after WWII, and a desire to efficiently industrialize the South for economic development. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARY. L. REV. 518, 521 (1980); see also Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton Univ. Press 2000).

30. See Gotanda, supra note 9.


32. See Guinier, supra note 24, at 95. For more discussion of the middle class nature of the NAACP’s litigation strategy in this period, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, in *Limits of Justice: The Courts’ Role in School Desegregation* 569, 588 (Howard I. Kalodner & James J. Fishman eds., Ballinger Pub’g 1978). For a discussion of the “preservation through transformation” of status law through surface civil rights legislation, see Reva B. Siegel, “The Rule of Love:” *Wife Beating as Prerogative and Privacy,* 105

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should have been a tactic in order to obtain more equity, became itself the end goal. Despite the formal legal framework's revolution in Brown, the fundamental methods of simultaneously segregating schools along the lines of race and wealth through educational funding systems have remained largely intact, and if anything, gained a veneer of new legitimacy and neutrality as school segregation is perceived to be a thing of the past.

Neil Gotanda has argued persuasively that the color-blind constitutionalism at play in the law since Justice Harlan's famous deployment of the phrase in his Plessy dissent, "matured" in Brown as a formal doctrine of anti-categorization with respect to race. Brown's legacy of equal protection analysis rooted in formal race categories has proven that this color-blind approach is enacted in part through the philosophy of "nonrecognition." The Brown decision's focus on the psychological stigma associated with formal race categorization also deflected attention from the practical inequalities on the ground in numerous schools. For example, one case consolidated into Brown emerged from a profoundly underfunded all-black high school in Prince Edward County, Virginia. The conditions at Moton High School were so appalling that a student strike was famously led by Barbara Rose Johns in 1951 to protest the lack of funding for black schools from the all-white school board. The difference in school property values in 1950-51 in Prince Edward County dramatically illustrates the extreme levels of inequality in facilities and resources. The valuation per pupil for Moton was $306.54, and for the nearby white town of Farmville, it was $1679.31. In providing what one historian has called "a milestone in search of something to signify," Brown solidified a formal race


33. Guimier, supra note 24, at 95.

34. Cheryl I. Harris, Symposium: Race Jurisprudence and the Supreme Court: Where Do We Go From Here?: In the Shadow of Plessy, 7 U. PA. J. CONST. L. 867, 868-69 (2005). Harris argues that, in fact, Plessy v. Ferguson is in many ways still the foundation of our legal understanding of race and constitutionally acceptable or unacceptable racial categorization frameworks. Harris relies on Cass Sunstein's influential argument regarding the long-standing reification of the principles of Lochner that characterized a particular understanding of neutrality. Sunstein argued that, despite being technically overruled, the underlying precept of Lochner remained fundamental to current jurisprudence, that government intervention was a constitution problem, whereas inaction or neutrality was appropriate and natural. Current segregation functions in much the same way, as a neutral default status assumed to simply reflect the outcomes of market exchanges and personal preferences or abilities, much as we will see later in the Rodriguez case.

35. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); see also Siegel, supra note 32, at 2184, for a discussion about how civil rights reform may alleviate some inequalities but simultaneously can deny reformers the capacity to challenge the residual inequalities that still remain.

36. Gotanda, supra note 9, at 17 ("Nonrecognition is a technique, not a principle of traditional substantive common law or constitutional interpretation. It addresses the question of race, not by examining the social realities or legal categories of race, but by setting forth an analytical methodology. This technical approach permits a court to describe, to accommodate, and then to ignore issues of subordination. This deflection from the substantive to the methodological is significant. Because the technique appears purely procedural, its normative, substantive impact is hidden. Color-blind application of the technique is important because it suggests a seemingly neutral and objective method of decisionmaking that avoids any consideration of race.") (footnotes omitted).


38. For more on Barbara Johns' strike, see Taylor Branch, Parting The Waters: America In The King Years 1954-63 (Simon & Schuster 1988).

39. Table 21, Valuations of School Property in Prince Edward County, VA. School Property Evaluation, Davis v. Prince Edward County, Box 126, United States District Court, Eastern District of Virginia, RG 21, National Archives, Mid-Atlantic Region (on file with author).
discrimination narrative that did not fully encompass the complex experience of structural inequality for many communities, schools and families.

The Brown decision, despite this "formal race" legacy, did not rest on a holding that all racial classifications were automatically invalid. Instead, Chief Justice Warren stressed primarily the significance of education in the opinion and not race. Rather than invalidate racial classifications per se, Warren stated that Plessy v. Ferguson involved "not education, but transportation" and held that the Plessy doctrine of "separate but equal" did not belong in public education specifically. While there was precedent in the political-process model of Carolene Products, which pointed to the Court's role in defending "discrete and insular minorities" from majoritarian oppression, the justices were still hesitant in 1954 to expand their ruling broadly into the realm of all racial classifications, such as striking down antimiscegenation laws. The Court did not state that all racial classifications were suspect until the mid-1960s, after Congress had largely cleared the path by outlawing racial discrimination in various public arenas.

At the same time, a handful of cases dealing with wealth discrimination came to the Court in the 1960s, attempting to build on the level of constitutional scrutiny embraced in Brown. In its decision in Harper v. Virginia State Board of Elections in 1966, striking down the Virginia state poll tax on equal protection grounds, the Court stated that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Justice Black dissented vigorously, defending his participation on the Court's 1937 decision to uphold the poll tax, and arguing that if the case was only about class, not race, the plaintiffs should lose. He pointed out "the Court's decision is to no extent based on a finding that the Virginia law as written or as applied is being used as a device or mechanism to deny Negro citizens of Virginia the right to vote on account of their color." Black assumed that this meant the majority agreed with the District Court that "this record would not support any finding" that the Virginia poll tax law had a discriminatory racial effect, because if it did, he argued, that "would of course be unconstitutional." Though the appellants had strongly urged that racial discrimination was an integral component of the economic discrimination of the poll tax, Black was correct that the majority

42. U.S. v. Carolene Prods., 304 U.S. 144 (1938). The fame of this case—a seemingly minor question of the interstate commerce constitutionality of filled-milk legislation in which the Court solidified its swing away from Lochner and stated that it would defer to Congressional authority in areas of economic regulation—rests in footnote 4. In this footnote, Justice Stone set forth what came to be known as the "political process model" of equal protection jurisprudence, arguing that it would be necessary for the Court to act as a counter majoritarian influence in cases concerning "discrete and insular minorities" who were otherwise in some way excluded from the political process by majoritarian power.
46. Id. at 672.
47. Id.
48. The appellants argued that "[t]he economic discrimination effected by the poll tax has a particularly heavy impact on Negroes as a class, since a larger proportion of Negroes than whites live at or close to the subsistence level." The appellants relied on 1960 census figures which showed that 27.9 percent of all families in Virginia had incomes below the poverty line—22.4 percent of white families and 54.1 percent of nonwhite families, illustrating what they described as the "commonly known fact that
opinion was solely rooted in discrimination based on wealth, not in the combination of intersecting wealth and race discrimination alleged by the plaintiffs.

VALTIERRA AND INTERSECTING IDENTITIES IN THE COURT

After the election of Richard Nixon and the corresponding rightward turn in the administration’s attitude toward the War on Poverty in the late 1960s, the Court began to step back from some of the Warren Court’s key tenets that protected the poor. Though a few decisions were rendered in the early 1970s in favor of welfare recipients, poverty was no longer discussed openly in opinions as a potential “suspect class” that would trigger constitutional scrutiny. By the 1970s there was a strong indication that any movement to protect the poor was beginning to swing the other way. There was also further evidence of the law’s inability to deal with multiple sites of identity. James v. Valtierra was a 1970 case alleging racial and wealth discrimination in a California law requiring local referendums prior to the construction of low-income housing. A three-judge district court panel found that the law violated the Equal Protection Clause, but the Supreme Court overturned that ruling, while refusing to connect the race and class discrimination claims.

The claims of intersecting race and poverty discrimination were mentioned or discussed at nearly every level of the proceedings in Valtierra by the litigants. The NAACP Legal Defense Fund filed an amicus brief in the case arguing that the California law established an impermissible racial classification, a “badge of slavery” under the Fifteenth Amendment, and denied rights to hold property. In his bench memo on the case, Justice Blackmun’s law clerk noted that the plaintiffs in a corollary case, Hays et al v. Housing Authority of San Mateo, were poor persons, “predominantly Negro,” on the waiting list for public housing in San Mateo County. The appellees argued that the law violated the Equal Protection Clause by denying poor persons “the use of ordinary law-making procedures” and by “authorizing and encouraging a racial veto over distribution of federal funds for


50. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that a welfare recipient is entitled to an evidentiary hearing prior to termination of welfare benefits); Harper v. Va., State Bd. of Elections, 383 U.S. 663 (1966); McDonald v. Bd. of Election Comm’rs, 394 U.S. 802, 807 (1969) (decision on absentee ballots in which the Court states that “a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny”); and Sanford Levinson’s description of the Goldberg case as reflecting “a brief shining moment in poverty jurisprudence,” in Levinson, When (Some) Republican Justices Exhibited Concern for the Plight of the Poor: An Essay in Historical Retrieval, in LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR 21 (Paul D. Carrington & Trini Jones eds., N.Y. Univ. Press 2006).


52. Id.


54. Id.
public housing.\textsuperscript{55} Though they admitted that the legislation did not explicitly mention race, they argued that it was "simply a means of creating a white middle-class veto over black and brown, lower-class immigration into the traditional havens of residential segregation."\textsuperscript{56} They went on to claim "the Constitution forbids sophisticated as well as simple-minded modes of discrimination."\textsuperscript{57} Both the U.S. and the New York Attorney General supported the appellees in this case, with the New York Attorney General arguing explicitly that the law "imposes a special burden on poor persons and Negroes and other disadvantaged minorities."\textsuperscript{58} Despite the two simultaneous claims of discrimination in the case, the Court's majority opinion dealt solely with the claim of racial discrimination, which it rejected. The extremely brief opinion, written by Justice Black, opened by stating that "[t]hese cases raise but a single issue."\textsuperscript{59} The opinion compared the California provision to a 1969 case in which the city of Akron had amended the city charter to require that any ordinance attempting to regulate racial discrimination in real estate could not take effect until it had been passed by a city voter referendum.\textsuperscript{60} The Court held that the Akron provision was an unacceptable classification based on race, but in \textit{Valtierra} the majority argued "the record here would not support any claim that a law seemingly neutral on its face is in fact, aimed at a racial minority."\textsuperscript{61} Indeed, according to Black, "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."\textsuperscript{62} The majority thus disposed of the claim, and the case, by only addressing the question of race discrimination and finding a lack of the requisite intent.

The equally brief dissent in \textit{Valtierra} written by Justice Marshall and joined by Justices Brennan and Blackmun dealt only with wealth discrimination, and proceeded without any mention of racial inequality claim. The dissent argued that "[t]he article explicitly singles out low-income persons to bear its burden."\textsuperscript{63} Contending that this constituted invidious discrimination in violation of the equal protection clause, the dissenters acknowledged that, of course, states are prohibited from "discriminating between 'rich' and 'poor' as such in the formulation and application of their laws." Marshall then pointed to the Court's own precedents in wealth discrimination in cases such as \textit{Douglas, Harper and McDonald} and argued that "[i]t is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect."\textsuperscript{64} \textit{Valtierra} shows the beginnings of the Court's refusal to deal with race and poverty as anything but mutually exclusive categories, even in instances of residential zoning segregation that had been judged

\textsuperscript{55.} Id.
\textsuperscript{56.} Id.
\textsuperscript{57.} Id.
\textsuperscript{58.} \textit{Valtierra}, 402 U.S. at 138.
\textsuperscript{60.} \textit{Valtierra}, 402 U.S. at 141.
\textsuperscript{61.} Id. For more on the racially charged history of ballot measures in California, see DANIEL MARTINEZ HOSSANG, \textit{RACIAL PROPOSITIONS: BALLOT INITIATIVES AND THE MAKING OF POSTWAR CALIFORNIA} (Univ. of Cal. Press 2010).
\textsuperscript{62.} \textit{Valtierra}, 402 U.S. at 145.
\textsuperscript{63.} Id.
invalid in earlier cases and legislation. The treatment by the Court of race and class discrimination claims as entirely separate would come to fruition in the Rodriguez decision.  

**RODRIGUEZ, RACE AND CLASS: SETTING THE STAGE FOR THE LAWSUIT**

Demetrio Rodriguez was a forty-two year old veteran who had worked for more than fifteen years at Kelly Air Force base outside San Antonio before he signed on as the lead plaintiff in the 1968 complaint against San Antonio and Texas officials. Three of his four sons attended Edgewood Elementary School in San Antonio. At the elementary school, the school “building was crumbling, classrooms lacked basic supplies, and almost half the teachers were not certified and work[ing] on emergency permits.” Over 90 percent of the students at Edgewood Elementary were Hispanic and 6 percent were African American. Compared to the neighboring white districts, students in the Edgewood district had one-third as many library books, one-fourth as many guidance counselors, and classes that were fifty percent more crowded.  

Rodriguez and a handful of other concerned parents, all Mexican American, took their complaint to Arthur Gochman, a local graduate of the University of Texas Law School. Gochman was known for defending civil rights and participating in local sit-ins for the desegregation of facilities. Rodriguez also had a record of defending civil rights as he participated in numerous advocacy organizations for Mexican American rights, such as the League of United Latin American Citizens and the Mexican American Betterment Association. Gochman told Rodriguez and the concerned parents that the central legal issue was the state financing system, which enforced local taxation caps. In the system, if property values in an area were low, as they were in Edgewood, voters are simply barred from taxing themselves at a higher rate. As a result, Edgewood residents were foreclosed from funding schools at the same level as Alamo Heights, a wealthy, overwhelmingly white school district only six miles away that frequently served as a counterpoint to Edgewood in the litigation. Consequently, despite their comparatively high tax rate, Edgewood

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65. As Marshall stated in his dissent in Rodriguez, “[t]he ‘poor’ may not be seen as politically powerless as certain discrete and insular minority groups.” San Antonio Indep. Sch. Dist., 411 U.S. at 121.

66. IRONS, supra note 12, at 283.

67. Id. at 284.


72. Id. at 285.

schools raised only $26 per child, while Alamo Heights raised $333.\textsuperscript{74}

In Senate hearings Dr. Jose A. Cardenas, Superintendent of the Edgewood Independent School District, admitted that state funding did little to equalize resources. Texas required at least twenty-six Spanish-speaking students in a school in order to receive $150,000 for a bilingual education program.\textsuperscript{75} Alamo Heights had so few minority students that, as Cardenas noted, it had to combine students with another district in order to reach the minimum of twenty-six.\textsuperscript{76} This meant that, in Alamo Heights, “less than 26 students are receiving a bilingual program of $150,000” while Edgewood had to share its $150,000 among 22,000 Spanish-speaking students.\textsuperscript{77} Though financing differences were repeatedly framed by opponents, and later justices, as matters of private choice and marketplace decision-making, even without the taxation caps, any purported educational choice by the local Edgewood community was largely illusory. As one of the co-counsels who worked with Gochman on the case later said, “[p]oor districts do not choose to spend less for education. It’s like telling a man who makes $50 a week that he has the same right as a millionaire to send his son to Exeter.”\textsuperscript{78}

THE LAWSUIT AND THE LITIGANTS’ ARGUMENTS

Gochman filed a class-action lawsuit against local and state officials on behalf of all low-income or racial minority children similarly situated in Texas, making three central legal claims: first, that poverty constituted a suspect class, which called into question the laws governing the state financing system;\textsuperscript{79} second, that education was a constitutionally protected fundamental right infringed upon by the unequal school financing;\textsuperscript{80} and third, that the plaintiffs were discriminated against on the basis of race.\textsuperscript{81} By simultaneously claiming race and class discrimination in the segregated and unequal schools of San Antonio, Rodriguez attempted to tie together seemingly neutral issues of fiscal policy with the profound economic ramifications of racial segregation and discrimination.

Gochman’s first claim, that poverty was a suspect class subject to heightened judicial scrutiny and protection against discrimination, was an issue that was before the Court after then recent cases Harper and McDonald.\textsuperscript{82} When courts

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{80} Id. at *6.
\textsuperscript{81} Id. at *7.
\textsuperscript{82} Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that Virginia’s poll tax created a constitutionally unacceptable distinction between voters based on wealth); McDonald v. Bd. of Election Comm’rs, 394 U.S. 802, 807 (1969) (stating that “a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race[,] . . . two factors which would
encountered classifications based on suspect classes like race or national origin, they approached the classifications with deep suspicion. Unless the government could provide a compelling justification for utilizing classifications based on suspect categories such as national security, legislation containing them was invariably struck down. When a classification was not based on a suspect category, the court applied the “rational basis” test, under which the government simply had to provide a “rational” reason for a court to uphold a law in question. This two-tiered framework gave way to a three-tiered framework by the mid-1970s, incorporating a middle tier of scrutiny for “semi-suspect classifications” such as gender. Unfortunately for the Rodriguez claimants, their case reached the Supreme Court at a moment when it was unclear if the construction of a binary equal protection analysis would be permanent or whether the levels of scrutiny would continue to expand.

By the early 1970s, many lower courts simply assumed that the Supreme Court had in fact made wealth a suspect class, particularly where education was involved, because of the common lower court interpretation of Justice Warren’s Brown language as a virtual declaration of education as a fundamental right alongside the growth in poverty jurisprudence. School funding schemes were the test arena for this assumption. In 1971 and 1972, several state and lower federal courts agreed with claims that local property tax-based school financing systems violated the Equal Protection Clause by discriminating on the basis of wealth. While property taxes accounted for only 14 percent of the taxes collected in the nation overall in 1968, they continued to supply, on average, more than half of all school funding. The federal government did not provide much aid either as federal aid, even after the Elementary and Secondary Education Act of 1965, amounted to only around eight cents for every dollar spent on education.

Serrano v. Priest, a California state court case challenging school financing laws, received a great deal of press coverage and comment – even more than

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84. For the first distinction between rational basis review and strict scrutiny, see U.S. v. Carolene Prods., 304 U.S. 144, 152 n. 4 (1938).
85. For the first case applying an intermediate level of scrutiny to a gender classification, see Craig v. Boren, 429 U.S. 190 (1976).
86. For more on the emerging tension in this period over the future of strict scrutiny analysis, see Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213 (1991). Klarman argues that “a failure to think historically obscures the most dramatic development in equal protection thought over the last two decades: the Burger Court’s resurrection of the traditional notion of equal protection rights as restrictions on deliberate governmental disadvantaging rather than — as the Warren Court was increasingly suggesting in a variety of contexts — as entitlements to particular substantive outcomes.” Id. at 214-15.
87. See Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stating “[t]oday, education is perhaps the most important function of state and local governments.”).
88. See Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971), cert. denied sub nom. Clowes v. Serrano, 432 U.S. 907 (1977); Robinson v. Cahill, 303 A.2d 273 (N.J., 1973), cert. denied sub nom. Dickey v. Robinson, 414 U.S. 976 (1973). In each of these cases, race was either rendered invisible or subsumed completely under a discussion of wealth discrimination. In Robinson, the only mention of race was in reference to the basis of the Brown decision, even though the NAACP also submitted amicus curiae in this case.
Rodriguez prior to the Supreme Court hearing. Serrano did not make a race discrimination claim, and only argued the other two lines of Gochman’s claim in Rodriguez: wealth status as a suspect class and education as a fundamental right. The California Supreme Court wrote a much more expansive opinion, expounding on the rationales for their favorable findings on these issues, than did the Texas District Court in Rodriguez. Given the positive response of lower courts to plaintiffs’ claims of wealth status as a suspect class and education as a fundamental right, as shown by Serrano, the Supreme Court clearly left an impression with its earlier language that at least implied that wealth disparity was an invalid basis for unequal government treatment. Rodriguez, however, was a case about much more than wealth discrimination, and as it reached the Supreme Court first, it would go on to influence the fate of Serrano and others in this line of case law.

The second claim Gochman put forth in the Edgewood plaintiffs’ suit was that education was a fundamental right implicated by the school financing system and implicitly guaranteed by the Constitution. Other fundamental rights the Court considers implicit in the Constitution include the rights to interstate travel, to vote, to privacy, which encompasses reproductive rights, to procreate, to marry, and to have Miranda warnings read before an arrest. The Court repeatedly held that laws that impose intolerable burdens on fundamental rights, such as forcing sterilization, refusing to allow citizens to travel between states, or implementing prohibitively high filing fees for marriage or divorce, are unconstitutional, even if there were no suspect class involved. Brown was seen as strong precedent to support the premise that education is a fundamental right, especially given its importance to other explicit constitutional rights such as freedom of speech or implied rights such as the right to vote.

As his third and final claim, like the plaintiffs in Valtierra, Gochman

92. Serrano, 487 P.2d at 1244.
93. See Serrano, which encompasses twenty-two pages of opinion, while Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971) rev’d, 411 U.S. 1 (1973), which was decided after Serrano, is a brief six page decision.
95. See, e.g., Edwards v. Cal., 314 U.S. 160, 173 (1941) (overturning a law prohibiting the transporting of an individual into the state on the basis that it creates an unconstitutional barrier to interstate commerce); Shapiro v. Thompson, 394 U.S. 618 (1969) (overturning state residency requirements for welfare on the grounds that they violated a fundamental constitutional right to interstate travel).
97. See, e.g., Skinner v. Okla., 316 U.S. 535 (1942) (holding that forced sterilization of habitual criminals was unconstitutional because it impinged upon the fundamental right to procreate); Boddie v. Conn., 401 U.S. 371 (1971) (holding that a filing fee for divorce impinged upon the fundamental right of marriage of indigent people).
99. See, e.g., Skinner v. Okla., 316 U.S. 535 (1942) (holding forced sterilization of habitual criminals was unconstitutional because it impinged upon the fundamental right to procreate); Edwards v. Cal., 314 U.S. 160 (1941) (holding that state statute prohibiting bringing an indigent person into the state was unconstitutional because interstate travel constituted a fundamental right); Boddie v. Conn., 401 U.S. 371 (1971) (holding that a filing fee for divorce impinged upon the fundamental right of marriage of indigent people).
argued that the Mexican American plaintiffs in *Rodriguez* constituted a suspect class discriminated against on the basis of race. Gochman, in fact, chose Demetrio Rodriguez as the named plaintiff in part because he hoped his Latino surname would emphasize the racial aspects of the case. 101 *Hernandez v. Texas*, decided the same year as *Brown*, made clear that Mexican Americans, like African Americans, were entitled to equal protection, and thus courts should apply heightened scrutiny to legislation incorporating classifications based on Mexican ancestry. 102 Litigants faced, however, difficulties in pressing their claims on the basis of *Brown*’s holding that racially segregated schools violate the Fourteenth Amendment’s Equal Protection Clause, in part because many attorneys of Mexican American clients did not utilize the precedent of *Brown* in their claims. 103

David Montejano has argued that the identification of Mexican Americans as a distinct “race” became, “like the question of political representation and civil rights, an important issue to be settled locally.” 104 The complex legal position of Mexican Americans in the Jim Crow era led advocates in many areas to embrace an identity as “other whites,” which consequently led to difficulties in constructing a unified legal argument encompassing the *de jure* segregation condemned in *Brown* and the ongoing *de facto* segregation of Mexican Americans prevalent in Texas. 105 Indeed, the “other white” argument was used by many school boards to avoid or delay the desegregation of all-white schools ordered by *Brown* and its progeny. School boards would assign African American and Mexican American students to the same schools – an action simplified by the proximity of ghettos and barrios in many urban areas – and would argue that these schools were considered desegregated under *Brown* because Mexican Americans were classified as “white.” 106

This type of segregation, or rather, desegregation avoidance was not declared unconstitutional until a Texas District Court in 1970 ruled that Mexican Americans in Corpus Christi were entitled to Fourteenth Amendment protections and the protections created from the *Brown* line of cases. 107 Judge Seals rejected any judicial construction of *Brown* or the Equal Protection Clause that implied that “any other group which is similarly or perhaps equally, disadvantaged politically and economically, and which has been substantially segregated in public schools” should receive less constitutional protection than African Americans, stating that “it is clear . . . that these cases are not limited to race and color alone.” 108

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The three-judge Texas District Court panel that convened to hear Gochman’s complaint needed to find only one of his three arguments valid in order to force the state to provide a “compelling justification” for its school financing system. The panel held, however, that the state had failed to “even establish a reasonable basis” for its financing system, without even ruling on the claims of poverty as a suspect class, education as a fundamental right, or race as an equal protection trigger.109 The district court failed Texas on a rational basis examination, the most deferential judicial standard, and the state consequently appealed. The panel mentioned “minority status” only briefly when discussing evidence that the richest school districts had 8 percent minority pupils as compared to the poorest which had 79 percent.110 The judges prefaced this reference with the words “[a]s might be expected,” an offhand indication that the judges were not particularly surprised that race and class were linked to the problems of education that were created by a huge race and wealth gap.111 This is the only mention of race in the district court’s opinion and subsequent clarifications, but, as amicus briefs later argued, it served as a finding of the apparently uncontroversial fact that race and class discrimination were intimately tied in the case—“as might be expected.”112

In 1971, the United States Senate instituted a Select Committee on Inequalities in Educational Opportunities, which held hearings specifically addressing inequalities in school financing and discussing cases such as Rodriguez.113 In one instance, Sarah Carey from the Lawyers’ Committee for Civil Rights under Law, the group that served as the central resource for the many nationwide lawsuits against school financing schemes, testified before Senator Walter Mondale’s committee on the Rodriguez case. Carey testified that the state court principle of Serrano,114 providing for the equalization of financing resources in different districts, could potentially lead to a reaffirmation of “separate but equal” policies in public schools.115 She argued that in school financing cases redistricting and reorganizing taxation models were necessary.116 The goal of Rodriguez, according to Carey, was in part to go further than Serrano and to merge wealthy white districts with poor minority districts in order to desegregate racially segregated districts.117 She pointed out that San Antonio’s school district lines were “drawn with great care so that Chicanos are in one area and the whites are in another.”118 Mondale responded that the San Antonio city founders had also put all the public housing in

109. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 126 (1973) (holding that “[n]ot only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for those classifications.”).
110. Id. at 282.
111. Id.
112. Id.
114. See Serrano, 487 P.2d at 1244.
116. Id.
117. Id. at 6870.
118. Id.
one district, Edgewood.\textsuperscript{119}

Though the Senate Committee’s witnesses tied race and class together, and the racial aspect of the \textit{Rodriguez} litigation received more attention in Congress than in the Supreme Court, the bulk of the hearings were about the specific details of funding systems.\textsuperscript{120} In the report following the hearings, race was not mentioned until the very end, almost as an afterthought, when the committee expressed the intolerability of a system “which regularly provides the most lavish educational services to those who have the highest incomes, live in the wealthiest communities, and are of majority ethnic status.”\textsuperscript{121}

The rest of \textit{Rodriguez}’s legal story is largely played out in the amicus briefs, the court filings (motions, briefs and reply briefs) by the two main parties, the conference notes, and of course, the judicial opinions. Out of dozens of documents produced in the case, race is mentioned only rarely and sometimes in surprising ways, providing an important indication of the difficulty within legal discourse in acknowledging intersectionality and offering hints of the deep roots taken by the idea that race is a formal category best analyzed under a “color-blind” approach.\textsuperscript{122} The justices’ notes on the case also indicate a preoccupation with tax policy questions of resource distribution\textsuperscript{123} and, particularly for Justice Powell, the author of the opinion, a concern about local fiscal control\textsuperscript{124} and a belief that tax-based inequalities in a capitalist country were fundamentally consistent with a “marketplace” concept of both education and citizenship.\textsuperscript{125} The acknowledgment of race and class in the various documents produced in the \textit{Rodriguez} case can be seen as a microcosm of broader social and political conversations about racial and economic inequality, and the tropes that are deployed in this dialogue. One of the most common argumentative techniques used by those seeking to overturn the lower court decision in \textit{Rodriguez} was to either appropriate language solely around race or to ignore it entirely as irrelevant and thus erasing the subject from the debate.\textsuperscript{126} The second argument repeated consistently throughout the documents was based on the principle of federalism, or local control, which required overturning the lower court decision because the notion of equality demanded that communities have local control over

\textsuperscript{119} Id.


\textsuperscript{121} \textit{STAFF OF S. SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, 92D CONG., ISSUES IN SCHOOL FINANCING} 127 (Comm. Print 1972).


their school’s funding policies. The idea of equality was the only rhetorical overlap between the plaintiffs and defendants in this case. It was interpreted by one party to support federalism and by another to illustrate the need for federal judicial action to protect those who were put at a disadvantage through local policies of taxation and distribution.

ERASING RACE FROM THE DEBATE

Attorneys for Texas and many amicus briefs supporting them made an appropriative move in regard to language around race, presumably to foreclose or preempt the Mexican American plaintiffs’ claim of racial discrimination. Many invoked the cultural authority of the desegregation movement to argue that upholding the lower court’s decision in Rodriguez would actually encourage racial division in society by promoting white flight. Another amicus brief argued that affirming the Rodriguez principle of equality would actually hurt racial minorities. Rather than the existing scenario of unequal public schools stratified by an unspoken racial and economic line, the appellants raised the specter of uniformly underfunded public schools utterly divided from wealthy white private schools. In addition to detrimentally appropriating race language, some advocates defending the state school financing system argued that the principle of local control of school funding was the best way to protect racial minority groups and give them some voice in fiscal education policy. Accordingly, amicus briefs on both sides of the case rarely identified the racial discrimination claims of the plaintiffs; instead, they completely sidestepped any discussion of race.

Perhaps the most important amicus brief in setting the form and argument of the majority opinion was from the state government representatives of thirty states seeking to overturn the decision. The majority opinion particularly cited sociologist James Coleman—a citation later repeated by Justice Powell in his notes approving of the brief. By the 1970s, Coleman, author of the foreword to Private Wealth and Public Education, which was treated as the framework for many school finance suits,

127. Id.
128. Jurisdictional Statement for Petitioner at 8-9, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (No. 71-1332) (questioned whether there was in fact a link between funding and quality of education, but also argued that it was doubtful that parents of children who already enjoyed the best-funded schools would sit by as their district’s funding was reduced to equalize educational expenditures).
was firmly opposed to both school finance reform and busing. Coleman equated the revision of school financing on the Rodriguez model with the exploitative use of schools by "Hitler's Germany[,]... Stalin's Russia[,]... Mao's China[,] and... Castro's Cuba." The brief argued that Coleman's antipathy towards school finance reform was actually rooted in concern about maintaining "diversity" in public schools. Although race was mentioned only once in its 119 pages, the appellants argued that the Rodriguez decision was "actually destructive of the interests of urban areas and the interests of minority children." The brief speculated that implementation of the lower court's decision would potentially result in higher taxes for urban areas and a decrease in per-student expenditures in many large city school districts, which they argued would harm the educational opportunities of the high percentage of racial minorities in those cities.

Gochman in his motion to affirm the District Court's decision pointed, however, to evidence from Texas that as the percentage of minority residents in a district increased, the tax rate of citizens within the district would also increase up to the statewide cap, while the revenues available for education decreased. He also pointed to the tradition of educational discrimination against Mexican Americans in Texas, citing as one example the 1950 injunction against the state school system that prevented the continuance of segregating Mexican American students. Gochman's brief further argued that Mexican Americans live in poor neighborhoods because of both racial segregation and poverty. Indeed, restrictive covenants, long before Shelley v. Kraemer and the 1968 Fair Housing Act, had barred Mexican Americans in Texas and elsewhere from all but the poorest neighborhoods.

Yet even those supporting the lower court's ruling in Rodriguez often failed to acknowledge that there were claims of both race and wealth discrimination in the case. Nevertheless, advocates analogized from harms suffered based on race and those based on class in support of the lower court's decision. Given the Supreme

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135. Id. at 38.
136. Id. at 83.
137. See id. at 83-88.
139. Id. at 16.
140. See id.
142. Brief for Serrano Plaintiffs as Amici Curiae Supporting Appellees at 9-10, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (No. 71-1332). This quite lengthy brief discussed race for only one paragraph, when arguing that the claim that minority children would be harmed by the decision was false and referencing the support of minority interest groups for the decision. See Brief for State Controller of Cal. as Amicus Curiae Supporting Appellees, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (No. 71-1332).
143. Brief for the Nat'l Educ. Ass'n et al. as Amici Curiae Supporting Appellees at 33-34, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (No. 71-1332). This brief brought up race only briefly in its sixty-five pages in order to draw an analogy between the harm suffered by poor children under property-tax school financing to the harm suffered by black law students in Texas in Sweatt v. Painter.
Court's history of discussing wealth discrimination by analogy to race,\textsuperscript{144} it was predictable for those in support of the district court's decision to employ analogies between harms suffered based on race and those based on class. In one brief in support of the district court decision, the single paragraph devoted to race was not addressed to the racial discrimination claim of the plaintiffs, but rather to the Texas brief's argument that \textit{Rodriguez} would encourage "white flight" from public schools. This brief argued that "it [is] singularly unattractive to propose that this Court trade off discrimination against the poor in exchange for eliminating racial discrimination."\textsuperscript{145}

A handful of briefs noted the partial similarities between \textit{Brown} and \textit{Rodriguez}, including a California education official that explained, "many black children are not receiving an education equal to that which would have been provided them under the separate but equal doctrine."\textsuperscript{146} Amicus briefs filed by urban interest and racial advocacy groups were the only ones that brought race and class together as a major component and complication of the discussion. The Council of Great City Schools, representing the twenty-three largest city school districts in the United States along with various city mayors and councils, the AFL-CIO, and the Urban League, filed the brief. It claimed that the amicus briefs submitted by "certain suburban interests [ ,]" which "profess great concern for the effect[s] of \textit{(Rodriguez)} on large cities, does not represent the actual interests of the large cities they purportedly defended, but in fact advanced claims adverse to the interests of those cities.\textsuperscript{147} The Great City Schools Brief explicitly linked race and poverty in citing the high proportion of African Americans and minorities in high levels of poverty in the Detroit population versus the surrounding overwhelmingly white and affluent suburbs surrounding it.\textsuperscript{148} The Great City Schools Brief also argued that the needs of low-income communities and costs of bilingual education within these communities required higher expenditures by urban schools, not lower. The brief analyzed the case of Detroit specifically, showing that 65 percent of students in Detroit public schools were black or another minority group, while in outlying suburbs like Grosse Pointe, the entire minority population comprised about 0.3 percent of its entire population.\textsuperscript{149} While Grosse Pointe students scored in the 97th percentile on seventh-grade achievement tests, Detroit seventh-graders scored in the 1st percentile.\textsuperscript{150} Finally, they pointed out that even with federal aid, Detroit spent only three-quarters as much per pupil of what suburban schools spent despite the fact that Detroit taxed itself for education at double the statewide average rate.\textsuperscript{151}

\textsuperscript{144} Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored.").


\textsuperscript{148} Id. at 16-17.

\textsuperscript{149} Id. at 9-12.

\textsuperscript{150} Id. at 16.

\textsuperscript{151} Id. at 17.

\textsuperscript{152} Id.
The NAACP's amicus brief, signed by Jack Greenberg, among others, also argued that the link between race and class was inextricable and tied to the history of racism and educational segregation. The NAACP argued that the disparities in the school financing system "made it virtually impossible for Texas school districts of [a] predominantly Mexican-American population to raise sufficient revenues to even begin to meet the educational needs of its children." The NAACP brief directly linked race and class by insisting that the Court uphold the District Court's decision.

Finally, the American Civil Liberties Union (ACLU)/La Raza's brief, like that of the NAACP and the Council of Great City Schools, did much more to identify the race and class of the plaintiffs than most of the other filings. The authors of this brief argued that, because the lowest-income school districts had the highest proportion of minorities and the highest-income school districts had the lowest proportion of minorities, these facts were sufficient to constitute a prima facie case of racial discrimination in violation of the Equal Protection Clause. They further urged the Court to uphold the opinion on both race and class grounds, arguing repeatedly that poverty and race were tightly linked, particularly in the Rodriguez case. They also referred to the Sweatt v. Painter decision, pointing out that, twenty two years after the Court invalidated racially segregated graduate education, the state of Texas was still making the same arguments in reference to primary and secondary education.

At one point, the brief stated that the Rodriguez case was "for the Mexican American community . . . what Sweatt and Brown were for our Black citizens" and argued passionately that the loss of this case would lead to a community feeling of desperation. Finally, they stated pointedly that "[t]he racial discrimination issue is not an afterthought to the litigants here [or to those nationwide supporting them], rather, it lies at the very core of this case." However, as they would learn when the Court announced its opinion, it was nowhere near the core of the legal conversation.

FEDERALISM AND LOCAL CONTROL

Professor Charles Alan Wright, a renowned constitutional scholar and veteran Supreme Court advocate, presented oral arguments for the state of Texas before the U.S. Supreme Court on October 12, 1972. He reiterated the claims from his jurisdictional brief and reply brief, emphasizing concerns of local control and questioning the linkage of educational quality and financial expenditure. Toward the end of Wright's oral argument, Justice Douglas raised the question of race for the

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154. Id. at 3.
156. Id. at 14-19.
157. Id. at 21-22.
158. Id. at 22.
159. Id.
first time and Wright admitted, "the racial issue is in this litigation" but argued that racial discrimination was not the basis for the district court's decision. He then claimed that the correlation between racial composition and poverty in San Antonio was a "happenstance." On the other hand, Gochman referenced minority status and segregation as well as arguing in his oral presentation that, "mobility is a key issue in this litigation – if it was a rich guy in a poor district he could just move." Several briefs and affidavits had shown evidence of a legacy of racially restrictive covenants linked to property that had historically segregated minorities in lower-income neighborhoods, thereby interconnecting poverty and race and limiting mobility as Gochman described.

The local control argument offered by Wright was ultimately a powerful device enabling the Court's majority to deny equal protection to the plaintiffs. In fact, Rodriguez was one of the cases that signaled the judicial redemption of federalism as legal doctrine after what was seen by many as "judicial activism" in Brown. Part of this renewed emphasis on federalism emerged in the Cold War anti-communist rhetoric that can be found in some of the Rodriguez briefs. Political scientist Paul Sracic has argued that the Rodriguez decision was part of a shift from an emphasis on the importance of education for civic society and the collective good to a postwar understanding of education as primarily important as an engine of economic advancement for the individual. In this case, the plaintiffs were seeking both a personal right to education and a community right to have their children educated equally, but the idea of local fiscal (community) control would prove more compelling than the idea of a community right to equality to the majority of the court.

Justice Lewis Powell, a former education official on both the Richmond School Board and the Virginia Board of Education, may have had more interest in the functioning of schools than any other justice. In Powell's prepared notes for conference, he indicated his sense that Rodriguez was different from Brown because the alleged discrimination was based on wealth – writing, "in a free enterprise society we could hardly hold that wealth is suspect. This is a communist doctrine but is not even accepted (except in a limited sense) in Soviet countries." As Mary Dudziak argues, the presumption of the acceptability of wealth differences reflected the then widespread perception that "class-based inequality did not threaten the nation’s core principles." In fact, during the deliberations, one of Blackmun’s clerks expressed concern that the implications of the decision might lead from taxation inequality to income inequality, questioning, “[i]s this unconstitutional? Must incomes, as well as tax bases, be equalized?”

162. Id.
164. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that racially restrictive property covenants did not necessarily violate the Fourteenth Amendment but were not enforceable by courts).
166. Id. at 217.
SUPREME COURT’S PATH TO THE DECISION

In an early internal memorandum indicating the justices’ first impressions of the case, the initial votes hewed closely to the final 5-4 split. Chief Justice Burger cast a straw vote for reversal.169 Powell’s notes on the discussion indicate that Burger agreed with the Texas brief and felt that the “holding would result in restructuring our system of state and local gov[ernmen]t.”170 Justice Stewart also cast an early vote for reversal, arguing that “money is some index, but the [Equal Protection Clause] does not require egalitarianism.”171 Stewart went on to state that “[u]nless there is a specific, identifiable class of people that is being discriminated against, [Equal Protection Clause] does not apply.”172 According to Stewart, “[r]ich’ and ‘poor’ are not discrete, specific, and identifiable classes,”173 a concern that would show up again later in Powell’s majority opinion. Justice Rehnquist also noted his agreement with Stewart’s assessment of the case in his vote for reversal.174 Justice Blackmun’s vote for reversal, according to Powell’s notes, was based simply on his assessment that the “Texas system provides adequate basic aid.”175

Justice White voted to affirm “with a narrower opinion,” agreeing with the district court that in “a district which is ‘locked-in’ and where [the] state provides no way to equalize there is a denial of [equal protection].”176 Douglas also voted to affirm, stating that the case was a “[p]roblem of equality.”177 According to Powell’s notes in the chart, Douglas felt that the problem was “not solved by money alone, but money is an element.”178 In his initial vote to affirm, Justice Marshall argued that the district “can equalize the money even if [it] can’t equalize education,”179 and Justice Powell noted that Marshall agreed with his statement. Marshall’s final point in the conference notes was that the “Texas law results in [a] geographic distinction.”180 Justice Brennan also voted to affirm the case and was quoted by Powell as saying “[f]ew cases have troubled me more.”181 Brennan argued that “money is important and if a state provides [education,] the allocation of money must be substantially equal.”182 Agreeing with the methodology of the district court decision, Brennan stated that the defendants “[d]on’t have to show a compelling interest – there is no rational interest.”183

In an early memo from Justice Powell to one of his law clerks at the time, J.

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170. Id.
171. Id.
172. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
179. Id.
180. Id.
181. Id.
182. Id.
183. Id.
Harvie Wilkinson III, Powell described the *Rodriguez* case as one in which the district court had “almost slavishly” followed *Serrano*, which Powell claimed “adopted almost literally the ‘activist scholarship’ theory of Professors Coons and Sugarman in their book *Private Wealth and Public Education*.” One of Powell’s first criticisms of the case was that the Supreme Court cases the claimants relied upon dealt with wealth classifications that operated against individuals, whereas *Serrano* and *Rodriguez* dealt with the wealth classification of school districts. Thus, the case did not fit into the individualized remedies language of constitutional equal protection from previous precedent, and by claiming a collective harm, the injury was further removed from the Court’s grasp.

Powell argued that his own experience in public education in Virginia supported the view that the taxable wealth of a school district did not necessarily reflect the wealth of its individual residents. He ventured a guess that “in terms of wealth, the city of Richmond is one of Virginia’s wealthiest school districts – largely because of industrial and commercial development within the City.” Nonetheless, Powell speculated, “the wealth per individual or family may be relatively low in view of the large black population.” This speculation is indicative of, yet again, an almost automatic assumption of a link between race and poverty that Powell would refuse to carry over into his deliberations on the subject. Discussing the Coons, Clune and Sugarman theories Powell had dismissed, Justice Blackmun’s clerk James Ziglar acknowledged that “[t]heir theory is not addressed to racial discrimination, although the end product is that minorities suffer the greatest educational disadvantage because they live in districts with the poorest tax bases.”

Powell continued to argue from his own experience on a school board that the educational problem of school funding based in local property taxes in Virginia was in the rural counties rather than the “urban centers inhabited by the blacks and the poor whites.” As an example, Powell cited the case of Giles County, in which there was few to no high-value commercial developments or real estate. In Giles County, according to Powell, “[t]he county is poor and the people are poor, but they are not ‘ghetto’ residents and there are very few blacks.” By citing a piece of evidence in which poor whites also suffered from the ill effects of poverty, Powell was able to quickly dismiss the question of whether a system that operated particularly harshly upon the poor also had a disproportionate racial impact. If whites were present in the case, even the minute percentage of white students in Edgewood schools, then race discrimination could not be examined as a legal claim – a sort of inverse of the one-drop rule.

185. *Id.*
186. *Id.*
187. *Id.*
190. *Id.* at 3.
Powell suggested to the clerk he had assigned to the case, Larry Hammond, that he should divert from the standard format of producing first a bench memo establishing the different issues and questions and instead draft his first memo “in a manner that might serve as a ‘rough outline’ of an opinion.” Hammond chose not to follow this request. After reviewing the materials in the case, he stated his opinion that “the case is clearly the most important one I have participated in since you came on the Court (indeed it is possibly the most important case in recent years).” Ultimately, Hammond said he had found the issues too complex to attempt a draft of the opinion, and instead drafted a bench memo laying out all the potential issues in the case and raising the possibility of affirmance, which Hammond said he “lean[ed] toward.” It appears—though the record is not entirely clear with regard to the other clerks—that at least early on, all three of Powell’s law clerks, as well as the majority of the other clerks at the time, leaned toward affirming given Hammond’s attempt to assure Powell at the end of the memo that the three clerks were not going to “gang up on” him. Indeed, one of them wrote a law review article three years later critiquing the decision, which caused Powell to write a somewhat affronted letter to all his clerks clarifying the question of their support at the time.

Hammond’s memo reflected Powell’s instinct to shelve the racial component of the case. Early in the bench memo, Hammond argued that “the [Court] must avoid the temptation to mislabel the case,” saying that “[i]t is not a case designed, necessarily, to provide some remedy for the educational ills of racial minorities or of the poor.” Some poor children and some minority children might certainly benefit, Hammond argued, but “so will many who cannot claim either status, and whose only injury derives from his residence within a property-poor school district.” Acknowledging severe differences between schools, Hammond pointed out that in a system in which close to half of the money in any but the poorest districts comes from local taxes, “the schools that must rely on the state aid alone are likely to be inferior institutions in a large number of demonstrable ways.” Later, when discussing the argument of Texas in his bench memo, Hammond asked, “If spending less in the wealthy schools means that they will become mediocre, how is it that spending more in the poor schools will not improve the quality of education?” He went on to ask, “whether the State can genuinely argue, as it does, both sides of the money-quality question.”

Hammond finally queried whether “a property-tax based system for

192. Id. at 2.
193. Id. at 1-2.
194. Id. at 42.
195. Id. at 44.
197. Memorandum from Larry A. Hammond to J. Powell at 6.
198. Id. at 6-7.
199. Id. at 10.
200. Id. at 39.
201. Id.
financing public education [is] discriminatory on a minority or racial basis.” He dispensed with the question abruptly, by stating, “this issue seems entirely spurious and is a product, primarily, of the case’s advocates in the press and the law reviews excessive zeal for the result.” After questioning in general terms the district court’s conclusion that minority groups were concentrated in property-poor districts, the memo stated that “[c]ertainly, Mexican-Americans in Edgewood will profit from the [district court’s] decision but their gain is incidental or even coincidental to the benefits accruing to all the children in property-poor districts where the tax effort has been high and the educational yield low.” Hammond went on to say that he “will not waste further time on this ‘herring.’” Regarding the distinction between the wealth of individuals and the wealth of a collection of individuals in a political subdivision, Hammond agreed with the state of Texas and Powell’s earlier memo — that there was such a distinction. But, he argued, “in the words of the Socratic method, it appears to be a distinction without a difference.” Hammond then argued, “if a state offers a fundamental education to some, it must not offer less than that to others simply because of their lack of wealth.” Tacitly acknowledging the high interstate disparities in educational spending, Hammond stated that only if the Court were to declare “some fundamental human right to education would differences between states become constitutionally relevant.”

Finally, Hammond argued that if appellees convinced the court to subject the case to heightened scrutiny for any reason, the taxation structure would fail. He argued that appellees would “have no trouble establishing that there is no compelling state interest to substantiate the State formula for school finance,” saying that the only possible justification would be local control. However, he said, the system under attack “simply does not provide local control in any real sense at the level of the poorer districts” and there were “any number of constitutionally-acceptable [alternatives] . . . available that could preserve local control.”

Powell sent to Hammond a week later another memo citing the Maryland amicus brief with great support and indicating that he was remaining strongly in favor of the local fiscal control argument. He stated that he remained “unconvinced” that the ultimate effect of the case would not be “national control of education.” Again citing the Maryland brief and its deployment of Coleman’s anti-communist rhetoric, Powell said “I would abhor such control for all the obvious reasons . . . the irresistible impulse of politicians to manipulate public education for their own power and ideology — e.g. Hitler, Mussolini, and all Communist dictators.” Powell then discussed a less repugnant — but still problematic, to him — alternative:

202. Id. at 16.
203. Memorandum from Larry A. Hammond to J. Powell at 16.
204. Id.
205. Id. at 20.
206. Id. at 27.
207. Id.
208. Id. at 28.
209. Memorandum from Larry A. Hammond to J. Powell at 28.
210. Id.
state control, saying that “[t]o a far lesser extent, full state control – inevitable if there is full state funding – could have unattractive consequences.” By limiting the discourse to local control and focusing critique on the quasi-communist specter of potential state or national funding, the Maryland brief held a great degree of sway in Powell’s opinion formulation – with many citations to it in his notes, memos and drafts to his clerks.

At the bottom of one of the pages of handwritten notes for conference on Rodriguez, Powell wrote in large letters that “Brown was based on racial discrimination,” thus illustrating the pervasiveness of the rhetoric of “formal race” that Brown had set up and Powell’s desire to distinguish this case from it. Powell did not find the lower court’s rational basis condemnation of Texas’s education financing acceptable, saying that he “cannot say legislatures of 49 states have been irrational for the last century.” He remained convinced by the Maryland amicus brief that any form of funding equalization would hurt minorities the worst. In his notes on the question of “racial discrimination,” he wrote that “[a]s the briefs [and] authorities cited show, if the opinion below stands, the persons who will be disadvantaged the most will be the citizens who live in the urbanized areas.” Powell treated urbanization, race, and poverty from the paradigm of northern educational segregation in the first half of the 20th century, a lens through which southern states, such as Virginia, (which he relied on repeatedly as an example) were the only places considered by courts when segregation was under discussion.

As the “education justice” and a former education official, Powell also sought to defend the power and purview of school boards, saying that “[t]he local school board is, I believe, a unique American institution” that has “played a vital role in the development of our public school system, and especially in helping to generate the community support necessary to finance it.” In a telling paragraph, Powell stated that if a layman stopped him on the street and “inquired whether I thought education is fundamental to our democracy, there could be only one answer.” But, Powell continued, “if the same layman asked whether public housing and welfare are fundamental where indigents are concerned, I would unhesitatingly give the same answer.” He then argued that the same reasoning could be applied to police and fire protection with the same result, and concluded that “[i]t is possible, of course that the legal concept of what is ‘fundamental’ may differ from the lay concept.” One of Blackmun’s clerks was even more explicit in saying that local school district authority was not the only property tax-funded entity at issue stating: “I believe that what is at stake here is not just financing schools through the local property tax, but

212. Id. at 3-4.
213. Id.
215. Id.
218. Id.
the local property tax itself as a means of financing all services provided by local
government.\textsuperscript{219}

In a memo on Rodriguez revisions, Hammond cited a reference by Powell
to Baker v. Carr, a major case on vote redistricting in 1962 that had important
implications for the "political question" doctrine in Powell's revisions. Hammond
said this was \textquotedblleft a hard question for me\textquotedblright; having \textquotedblleft purposely not cited the
reapportionment cases,\textquotedblright; though he agreed Powell was "absolutely correct in thinking
the cases are pertinent.\textsuperscript{220} Hammond acknowledged that the reapportionment cases
represented an area, along with school segregation, in which the Court had in the
past entered a realm traditionally reserved for the states. He then argued, however,
that the biggest difference between voting and education was that in voting the Court
\textquotedblleft was able to come up with an easily manageable standard – one man, one vote.\textquotedblright; There was no such easily controllable standard in education, he claimed, except for
equal expenditures, "which no one seems to want." Hammond's problem was that he
did not want to say this unless \textquotedblleft a dissent compels us to because it makes the Court
sound as if it is treating this case as nonjusticiable.\textsuperscript{221}

Powell's clerks remained uneasy with the decision until the end. In a last set
of draft revisions before publication of the opinion, Hammond wrote that he tried to
"tone down" one of Powell's footnotes, because \textquotedblleft upon rereading it I came away with
a sense of inevitability about the status quo.\textquotedblright; Hammond cited Baker v. Carr again
highlighting its similarities to Rodriguez and saying that \textquotedblleft[i]f, indeed, no alternative
other than what we have today is politically feasible, this is the best reason for the
Court to intervene." In Rodriguez, according to Hammond, as in Carr, \textquotedblleft[t]he
majority is so wedded to the status quo and/or so unwilling to respond to the present
disparities in educational expenditures that nothing other than judicial intervention
can break the log jam.\textsuperscript{222} Despite the ongoing questions that seemed to linger in his
conferences with his clerks, Powell remained set on the same view of the case he had
had from the earliest discussion.

THE DECISION

The final opinion in the case was issued on March 21, 1973, six months
after oral arguments. A 5-4 vote decided the fate of low-income school districts and
property taxation schemes nationwide. Justices Stewart, Blackmun, Rehnquist and
Burger joined Powell's majority opinion. Stewart filed a concurring opinion, and
Justices Brennan, Marshall, and White each wrote dissenting opinions, which Justice
Douglas joined. Powell claimed that the financing plan was "certainly not the
product of purposeful discrimination against any group or class" and instead was
"rooted in decades of experience in Texas and elsewhere, and in major part is the
product of responsible studies by qualified people.\textsuperscript{223}

\textsuperscript{219} Memorandum from Jack M. Weiss to J. Blackmun (Sept. 20, 1972), in No. 71-1332 San
Antonio v. Rodriguez, Box 161, Folder 5, Harry A. Blackmun Papers (on file with Library of Cong.,
Manuscript Division).

\textsuperscript{220} Memorandum from Larry A. Hammond to J. Powell (undated), in No. 71-1332 San
Antonio v. Rodriguez, Series 10.6, Box 8/153, Supreme Court Case Files, Lewis F. Powell, Jr. Papers (on
file with Library of Cong., Manuscript Division).

\textsuperscript{221} Id.

\textsuperscript{222} Id.

\textsuperscript{223} San Antonio Indep. Sch. Dist., 411 U.S. at 55.
Powell’s opinion reflected his understanding that, under constitutional jurisprudence, if education were declared a fundamental right or interest it would be virtually impossible to sustain the funding structure in Texas since the state would not be able to meet the compelling interest standard required of infringement on a fundamental right. His solution, ultimately accepted by a slim majority of the justices, was to conclude that education was not a fundamental right recognized by the Constitution. At one point the opinion indicated that if children were being excluded from schools outright, they might have a claim of violation of a fundamental right and be entitled to 14th Amendment protections (which even Wright had virtually conceded at oral arguments). This case, in fact, came before the Court a decade later, and I will re-address it in my conclusion.\footnote{224. Plyler v. Doe, 457 U.S. 202 (1982) (J. Powell joins JJ. Marshall, Blackmun, Brennan and Stevens holding that a Texas statute completely denying school enrollment to children of undocumented parents violated the Equal Protection clause).}

The majority in that case argued that a Texas law that deprived the children of undocumented workers of education risked creating a permanent underclass and stated, “the Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”\footnote{225. Id. at 213.} But in \textit{Rodriguez} the disadvantaged students were still receiving some “minimal” level of skills. Since the Edgewood schools were simply unequal, all to nothing, the disparities were acceptable to the Court. If segregation were imposed by state or government edict in explicitly racial language, the Court would find the edict unconscionable. But if segregation were a result of historically racialized property taxation laws and income disparities, then the Court would characterize the segregation as tradition.

Powell mentioned the racial identification of the plaintiffs in the opening sentence of the opinion, but buried the description between his description of the nature of the lawsuit and his description of its place of origin.\footnote{226. \textit{San Antonio Indep. Sch. Dist.}, 411 U.S. at 4.} Other than a brief passing mention of race in listing the statistical descriptions of the two school districts under comparison, the opinion went on for another fifty-three pages without bringing up race again. And in the last two pages Powell mentioned that these children were not just poor but also nonwhite. He shrugged off this issue by stating that there was no consensus whether “the poor, the racial minorities, or the children in overburdened core-city school districts would be benefited by abrogation of traditional modes of financing education.”\footnote{227. Id. at 56.} He then cited one example of a school district with a majority of Mexican American students where the per-pupil taxable wealth level was above the local average and used this to argue that it was no more than “a random chance that racial minorities are concentrated in property-poor districts.”\footnote{228. Id. at 57.} He followed with the statement that “[t]hese practical considerations, of course, play no role in the adjudication of the constitutional issues presented here.”\footnote{229. Id.}

The Court’s seeming blindness in \textit{Rodriguez} to the racial identity of the plaintiffs – an identity raised at least by the appellees and several amicus briefs – seems to refract from the formal racial underpinnings of \textit{Brown} where race as
nothing more than skin color implied no “practical considerations” outside of its own irrationality and certainly did not include a historicized context of racial discrimination. Indeed, in a page of handwritten notes on an early draft, Powell wrote “[d]on’t admit or refer to ‘discriminatory treatment of children’ – it is not ‘discriminatory’; [they] are inequalities resulting from [the] system.” 230 Inequalities or injustices resulting from a disembodied system of taxation, tradition, and local market choices were defended in a way in which inequalities resulting from discriminating, openly and specifically, against children of color was not.

In a passionate dissent joined by Justice Douglas, Justice Marshall took apart the majority’s arguments point-by-point; but note that he mentioned race only twice in his sixty-four page dissent. First, when discussing the majority’s refusal to accept the finding by the district court that poor and minority group members tended to live in property-poor districts, he asserted that such a finding suggested “discrimination on the basis of both personal wealth and race.” 231 Second, when arguing that wealth classifications should constitute a suspect class he paused to note that there were reasons the Court may consider wealth discrimination different from as compared to racial discrimination. He acknowledged that while poverty may entail a social stigma similar to that historically attached to racial and ethnic groups, “personal poverty is not a permanent disability; its shackles may be escaped.” 232 Marshall went out of his way to point out that class was malleable and “separate” from race, even though race was not a component of his argument.

Given that the actual victims of the law at issue were children, it is questionable how much they could do to escape their class status. And given that those children were still almost all racial minorities, it is unclear why it was crucial to mark the division between the two categories except for the fact that Marshall himself was bound by the strictures of a legal system that recognized only one category of identity at a time. To write a dissent arguing for equal protection against wealth discrimination as a constitutionally protected category, Marshall had to treat race as inconsequential to the case because intersections of identities and discrimination at those intersections was not part of constitutional jurisprudence.

Marshall’s reference, to race and nationality as “irrelevant” when analyzing personal wealth, is a particularly striking example of the formal race philosophy of Brown carried forward by the case’s most famous advocate. He stated that “most importantly” wealth did not share the “general irrelevance as a basis for legislative action” that race or nationality had – an example of the nonrecognition of race, even in a scenario where race had been asserted by the plaintiffs as a basis for their claim and where Marshall found that the class deserved protection. 233 Even in his Valtierra dissent, Marshall refused to discuss the racial aspect of the case in supporting the wealth discrimination claim. 234

In the end, an opinion of one-hundred-and-thirty-seven pages mentioned race exactly five times, largely in passing or to argue that poverty analysis was not

232. Id. at 94-95.
233. Id. at 95.
ERASING RACE, DISMISSING CLASS

comparable to race analysis. At oral argument, the litigants briefly mentioned race, and in the numerous briefs filed with the Court, the only parties to acknowledge the importance of race in this case were the Great City Schools, the ACLU and the NAACP in their amicus briefs. When race was mentioned by other amicus briefs, and by Powell in his memos and notes, the authors were arguing that protecting the poor would somehow hurt minorities or that the poor constituted a “different” class from racial minorities as if the two categories were mutually exclusive and on opposite sides of a barricade. Perhaps some of this was strategic. From the standpoint of procedure, it is tempting to resolve the narrative of this case by expounding upon the varying legal rationales that may or may not have convinced the Court’s dissenters. The attorneys or the amicus briefs may have purposefully tried to limit the issue to a question of wealth discrimination.

But from the standpoint of legal history and policy the repetitive discursive image is inescapable that before the Court, the Edgewood children and families could be either poor or Mexican American but not both. Nearly everywhere in the texts that form the body of this narrative, the plaintiffs were either told to choose between their race and their class or more often had the choice made for them. Rights accrued to only one of these identity categories: race. But it was only the category of wealth that had the evidence of intent and explicit classification behind it. Thus, race was, in the language of color-blind constitutionalism, irrelevant.

AFTER RODRIGUEZ

In his final, handwritten thank you letter to Powell on the day the Rodriguez opinion was announced, Hammond wrote, “this was an especially hard case because what I regard as sound constitutional doctrine occasions a result that will not be happily received by those who are presently disadvantaged by finance systems.” He continued, that if the Court stood behind the “two-level doctrine” of equal protection jurisprudence in the Rodriguez opinion “our case could be defended fairly as respect for law.” In a note of prescient warning, Hammond then wrote, “if the Court departs from this approach in the near future[,] this case will look like a result-oriented political judgment by [five] men.” Hammond ended his letter by saying that “I have great confidence in the future course of your judgment in this area, but less in the course others may pursue.” Indeed, an intermediate level of scrutiny was developed in the Court within a few years of Rodriguez, shifting to a three-tier level of analysis. This would then begin to look like the “sliding-scale” framework of equal protection jurisprudence endorsed by Marshall a decade later when the

235. For a thoughtful examination of this trend in other legal cases, see, e.g., Barbara Welke, When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855-1914 13 L. & Hist. Rev. 261 (1995); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990) (particularly her analysis on Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)).


237. Id.

238. Id.

239. Id.

Court reviewed a case dealing with a home for people who are developmentally delayed. M. L. Rudee, an associate professor of materials science at Rice University in Houston, Texas, wrote to Powell shortly after the decision stating he had visited both Edgewood and Alamo Heights in his capacity as a college recruiter. Rudee, despite his lack of legal background, went on to poignantly describe the enormous differences between the two school districts:

The comparison is so profound that any person of goodwill would disagree with your decision. Edgewood High School has offices and rooms lighted by one bare bulb hanging from the ceiling, while Alamo Heights has the most commodious of physical plants. The affluent district has a large staff of counselors, all specialists at getting their students into college. This counseling staff has more receptionists than Edgewood schools have counselors. I am glad that I will not be held accountable for the future generations of students that will remain trapped by the continuing reality of unequal opportunity that was sustained by your decision.

In the end, the property tax finance law at issue in Rodriguez was upheld, in part, by a subtle but significant disentangling of race and class. The Brown precedent provided an interpretive backdrop of formal race disconnected from the social, historical and economic context that enabled the Rodriguez court to render the plaintiffs' race invisible. After drawing parallels between race and class as formal categories while reinforcing their own process of categorization in the 1960s development of equal protection jurisprudence, the Supreme Court in Rodriguez artificially conflated the race and class of these children, subsuming their racial identity and rendering it invisible. Then the Court decided that based on class alone, the children would lose. Simultaneously, the majority artificially separated the legal statuses of race and class groups in the abstract in order to reach the same result. The inability of the law in this case to view the narrative historically is particularly ironic in a discourse that prides itself on adherence to prior precedent. The historical narrative tells of a systemic racial wealth divide entrenched by decades of racially restrictive covenants, employment discrimination, school segregation and unequal taxation and finance policies. This historicization could have made sense of the statistics showing dramatic overrepresentation of black and Latino children in low-income households and school districts. But the legal discourse saw only one or the other—either race discrimination or wealth discrimination. If wealth discrimination was claimed, race could not be a factor.

The law has sought, generally, as in this case, to stabilize categories in its pursuit of some pure, idealized embodiment of a category. This push toward the solidification of categories was not the sudden whim of any particularly conservative court, nor was it invented in the backdrop of Brown or even Plessy. It is the ongoing tragic flaw of a legal system—and an epistemological framework—that both aims

243. id.
and does not aim toward an ideal of justice. This does not entirely negate the potential for interpretive complexity and nuance in the law, but it demands the critical examination of the language and framing of presumed “victories” at least as much as those of “defeats.” While attributing this ahistorical fetishization of categories and singularities to the law alone would be a mistake, in these cases the law’s particular way of treating human identity has had a profound and far-reaching impact on access and opportunity for countless children.

The problem from a critical race perspective is that law as a mode of discourse seems incapable of comprehending both the unreality or incompleteness of a particular category (e.g. Homer Plessy arguing that race was an incoherent category because of his mixed-race status) and addressing the power of categorization and its real-life consequences (e.g. segregation). If law does the first, but not the second, it is left with a smug sense of “category-blindness” which is often simply ahistoric blindness to the lived experiences of race. If it does only the second, the complexity of multiple webs of oppression is lost, and the metaphorical results, following Kimberle Crenshaw’s argument, events such as the Clarence Thomas/Anita Hill hearings. Because two narrative categories (race equals black man’s experience, gender equals white woman’s experience) came up against each other in that case, everything came to a standstill and Hill’s “position could not be told.” Similarly, the Rodriguez children’s position could not be told due to the tendency of the law to reify a strict narrative category – in this case, formal race.

The disentangling of race and class in the law’s discourse was enormously influenced by long-standing trends rooted in U.S. racism and capitalism. In particular, the legacy of linking taxpayer citizenship rights and educational equality constructed a framework where theoretically more taxes would equal more rights. This framework clearly reflected Powell’s concern regarding the local control of property tax funds. If citizens happened to live in a poor neighborhood through the marketplace (and by their choice), they simply had to accept the limited resources of their poor neighborhood in funding education. Despite Powell’s description of this philosophy in broad terms as simply local control, it was local fiscal control – and particularly the local fiscal inequalities – maintained through property tax-based financing that were the case’s crux. As many scholars note, the notion that control over funding implies substantial control over educational content and services ignores the reality that the level of funding is in fact often quite determinative of actual decision-making ability.

LITIGATION TODAY

In 1959, the United Nations adopted the “Declaration of the Rights of the Child,” which stated that a child was entitled to receive free and compulsory education which would enable him “on the basis of equal opportunity” to develop his abilities and become a “useful member of society.” Over fifty years later, children

244. Crenshaw, supra note 4, at 1297-98.
245. Gotanda, supra note 9.
246. Crenshaw, supra note 4, at 1298.
enjoyed a constitutional right to education in Mexico, Canada, the United Kingdom, Ireland, India, Japan, Korea, Taiwan, Finland, Switzerland, Sweden, China, and Russia, among other nations.249 But the U.S. Supreme Court in Rodriguez still denied children a "fundamental right" to properly funded public education system all while requiring mandatory attendance by every school-age child.250 The more troubling comparison, however, is not between U.S. educational rights as constitutionally protected rights in relation to other countries educational rights. It is when comparing states to other states, and their respective educational rights granted and methods (and amounts) of educational funding employed, that public education begins to appear not only unequal but also almost indefensibly irrational. In virtually every state and across the thousands of school districts in the U.S., there are different educational financing formulas, different levels of local taxation and funding, different definitions of what constitutes equality, and different conceptions of whether, in the end, a schoolchild has a right to an education at all. And, since the 1980s racial segregation has been rapidly increasing in many of the largest school systems, putting many areas back to a level of racial separation comparable to the year Brown was decided.251

One of the most prominent U.S. education historians, in 1947, concluded his magisterial treatise on the history of public schooling with a call to make education the next great “nationalizing event,” akin to the railroad, the telephone, and the highway.252 Describing the dramatic inequalities between the states in their ability to fund adequate public schools, he argued that the need to overhaul education funding and resources on a national basis was “one of the great tasks of the next quarter century.”253 Rodriguez attempted to achieve that goal, but the Supreme Court was unwilling to allow such a broad construction of educational rights and national responsibilities. Since Rodriguez, cases have been filed in almost every state challenging education financing on state constitutional grounds. In the late 1970s and 1980s, the plaintiffs lost the majority of these cases, with courts often claiming that they had no way of remedying the inequalities. But since 1989, plaintiffs have won the majority of the cases brought before state courts. The main reason for this shift is the change in litigation strategy – earlier cases were brought on the basis of equal protection demanding the right to equal education. But as of 1973, the year Rodriguez was handed down, only seventeen states explicitly required that education be “open to all” in their state constitutions, and only five mentioned ‘equality’ or ‘equal opportunity.’254 Since the late 1980s, plaintiffs largely switched to a strategy

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249. For a complete breakdown of educational rights by country and constitution, see RIGHT TO EDUCATION PROJECT, http://www.right-to-education.org/country-node/413/country-constitutional (last visited Mar. 3, 2010).
251. On deepening segregation for Black and Latino students since the 1980s, see GARY ORFIELD, CHUNGMEI LEE & CIVIL RIGHTS PROJECT, BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE? (Harv. Univ. Press 2004).
253. Id. at 746.
254. U.S. DEP’T. OF HEALTH, EDUC. & WELFARE, STATE CONSTITUTIONAL PROVISIONS AND SELECTED LEGAL MATERIALS RELATING TO PUBLIC SCHOOL FINANCE 6 (U.S. Gov’t Printing Off.) (1973). The states requiring education be “open to all” were Arizona, Arkansas, California, Colorado, Indiana, Iowa, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Dakota,
of challenging only the \emph{adequacy} of the education provided; these are the cases, by and large, which plaintiffs have won.\footnote{255}{For information on the current status of school finance litigation and state-by-state details, see Nat'l Access Network, Teachers Coll., Columbia Univ., http://www.schoolfunding.info/states/state_by_state.php3 (last visited May 30, 2010).}

Ultimately, these cases do not – and cannot, because they are limited by Rodriguez to state constitutional claims – address the most significant component of educational inequality across the nation today, which is not inequality \textit{within} states but inequality \textit{between} states. Indeed, economists have found that two-thirds of the nationwide inequality in district spending is between states and only one-third is within states.\footnote{256}{William N. Evans, Sheila E. Murray & Robert M. Schwab, Schoolhouses, Courthouses and Statehouses After Serrano, 16 J. Pol'y Analysis & Mgmt. 10, 10-31 (1997).} This is a lucky outcome for those who live in largely rural states with prominent natural resources, but a profound inequality for students in poorer states. Thus, the only way to address the deepest educational funding inequalities is through federal remedies and substantial judicial oversight. For these inequalities to be seen, however, class and race would need to be understood by courts as complicated, connected and frequently overlapping categorical identities, especially with respect to educational inequality and segregation.

Education researchers Gary Orfield and Chungmei Lee have found that today the majority of middle-class whites and even low-income whites are able to send their children to schools with a low-percentage of impoverished students. In contrast, middle-class black and Latino families frequently still end up in overwhelmingly segregated schools with high poverty concentrations due to entrenched residential segregation patterns.\footnote{257}{Gary Orfield, Chungmei Lee, & the Civil Rights Project, Why Segregation Matters: Poverty and Educational Inequality 15 (Harv. Univ. Press 2005).} A majority of black students in the ten largest U.S. cities now attend what are described as “apartheid” schools, with a 99 percent student of color population.\footnote{258}{Gary Orfield, Susan E. Eaton & The Harvard Project on School Desegregation, Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education (New Press 1996).} These are invariably also the schools with the lowest funding levels, and the poor resources of these schools along with other forms of discrimination have contributed to a dropout rate for black and Latino students that is nearly 50 percent nationwide.\footnote{259}{National Center for Education Statistics data also shows that black and Hispanic fourth-graders are more than eight times as likely, as compared to white students, to attend “high-poverty schools,” schools with the highest proportion of low-income students.} 70 percent of black and 71 percent of Hispanic fourth-graders are eligible for the federal free or reduced lunch program (a common indicator of a family’s impoverished economic status), while only twenty-three percent of white students are eligible.\footnote{260}{National Center for Education Statistics, supra note 17.} NCES data also shows that black and Hispanic students are more than eight times as likely, as compared to white students, to attend “high-poverty schools,” schools with the highest proportion of low-income students.\footnote{261}{National Center for Education Statistics, supra note 17.} Latino students, while one of the largest racial groups in the U.S., “are clearly the worst off as measured by educational attainment,” with twice the high school dropout rate of black students and more than four times that of white Tennessee, Utah, Virginia, Washington and Wyoming. Only Colorado, Indiana, North Carolina, South Dakota and Tennessee mention ‘equality’ or ‘equal opportunity.’

Tennessee, Utah, Virginia, Washington and Wyoming. Only Colorado, Indiana, North Carolina, South Dakota and Tennessee mention 'equality' or 'equal opportunity.'
Racialized economic disparities continue to seriously affect educational funding. In Pennsylvania during the 2002-2003 school year, for example, Lower Merion County with a 91% white school population and a 4% low-income population spent $17,261 per pupil. But in Philadelphia — just a few miles away from Lower Merion County, across a literal and fictional dividing line — school spending was $9,299 despite its higher property tax rate. Philadelphia has a 79% black and Latino student population and a 71% low-income population. In 2008, Lower Merion County even began a program to distribute free Mac laptops to its high school students. Some lawsuits have begun to push back against this structure of racialized taxation inequality, protesting school financing systems in state courts on the grounds that they are racially discriminatory. Sheff v. O'Neill, an important 1996 Connecticut state court decision, held that the state’s children were entitled to a substantially equal education that was not limited by racial isolation. Yet implementation of the remedies has moved at a “glacial speed” reminiscent of the early efforts to desegregate schools after Brown.

Education researcher Jonathan Kozol, in his discussion of economically and racially segregated school districts, points out that most citizens never have to acknowledge the denial of equal opportunities to other people’s children because “[i]nequality is mediated for us by a taxing system that most people do not fully understand and seldom scrutinize.” Kozol finds that attorneys for low-income school district residents in resegregated areas are now in the position of arguing that their clients should receive a “separate, but equal” education package. As a result of the legal and wider social discourse around them, plaintiffs' lawyers in these cases “rarely choose to speak at all of racial isolation.”

The desegregation that was ostensibly supposed to occur after Brown didn’t

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267. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICAN’S SCHOOLS 207 (Harper Perennial 1992). The taxing inequalities are reflective of a broad trend toward privatization and acceptance of educational inequalities. Schools in Washington, Colorado, Arizona, Indiana, Oregon and elsewhere have now introduced the practice of canceling full-day kindergarten — within public school systems -- except for those whose parents can supply private funds to pay for it. KOZOL, supra note 263, at 308.
268. KOZOL, supra note 263, at 260. Kozol goes on to argue that: Yet separate but equal obviously has to have a place within these equity or adequacy cases. Given realities of politics and precedent, there is no other argument attorneys plausibly can make. Whether they ask for equal, adequate, high adequate, or basic minimal provision, they are asking for post-modern versions of the promise Plessy made and the next 60 years of history betrayed. Id. at 260. For more on resegregation of public schools after Brown, see ORFIELD ET AL., supra note 258.
actually begin until 1969, and desegregation outside of the South never happened in a meaningful way once *Milliken* prohibited busing and metropolitan desegregation as remedies. The high point for desegregated schools is usually placed around 1988, with increasing educational resegregation ever since. And urban school financing was already "in desperate shape" by the mid-1970s, according to one of Justice Powell's former Supreme Court clerks, who acknowledged, "the Court had not helped much." Constance Baker Motley of the NAACP Legal Defense and Education Fund (NAACP LDEF) by 1974 acknowledged that the *Brown* decision had minimal impact on African Americans in the inner city. Many advocates hoped that the *Milliken v. Bradley* case in 1974 would offer a way for the Court to "soften the fiscal blow dealt [by] the dispossessed in *Rodriguez*" by creating school districts through district-wide busing (and, implicitly, district-wide taxation) that included wealthy white suburbs. But the Court in *Milliken*, with the same 5-4 split as *Rodriguez*, overturned the inter-district busing remedy that would have linked the fates of Detroit schools (majority black and majority poor) to suburban schools (majority white and majority not poor).

Education is the *sine qua non* of the democratic experiment. Without education, freedom of speech loses its function; the franchise loses its effectiveness, and the law loses its meaning. The fight for integrated and equal education has continued, but it has also continued to be deflected by a legal system unwilling to see the connections between economic and racial inequality, taxation, and segregation. Popular U.S. history and legal mythology understandably focus on the importance of *Brown v. Board of Education* when discussing 20th century education. Backlashes, court battles, and Cold War cynicism aside, *Brown* represents what many Americans see as one of the nation's best moments in the last fifty-plus years. *Brown*, however, cannot make sense of the ongoing racial and economic segregation that continues in U.S. schools across the country. The problem of racially segregated, economically unequal school expenditures predates, and has long outlasted, formal Jim Crow segregation laws and their rejection in *Brown*.


271. See ORFIELD ET AL., supra note 258.


273. PATTERSON, supra note 31 (Constance Baker Motley quoted in N.Y. TIMES (May 13, 1974)).

274. WILKINSON III, supra note 272, at 221.


277. For a discussion of education as a fundamental social right of citizenship in modern democracies, see T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS (Cambridge Univ. Press 1950).
In *Rodriguez*, the Court ruled that there was no constitutional right to education and that property tax-based school financing did not discriminate on the basis of wealth, despite the 96 percent minority student population and the fraction of funding they received compared to overwhelmingly white, wealthy school districts.\(^{278}\) The case pushed a long standing framework separating race and class to its logical end to argue that those who were too poor to pay high enough taxes or live in a wealthy enough area to fund their schools adequately were simply enjoying the "equality" of the school finance marketplace.

Texas continued to serve as a front line in battles over educational equality and access in school financing systems. Litigation based in Edgewood was repeatedly brought and ultimately found victories in state courts years after *Rodriguez* on minimal adequacy grounds based on an educational provision in the state constitution.\(^{279}\) Texas passed a law two years after *Rodriguez* that withheld state funds for the education of the children of undocumented immigrants and permitted local districts to exclude them from enrollment.\(^{280}\) When the case reached the Court, Powell remained committed to his decision in *Rodriguez*; yet by *Plyer* he also seemed concerned about where such a ruling had led the country. He pushed for a heightened level of equal protection scrutiny because the class at issue was "innocent children." He did not acknowledge that the *Rodriguez* complainants were in fact in the same category of "innocent children," and yet he had refused to apply heightened scrutiny.\(^{281}\) In the end, Justice Brennan wrote the majority opinion tracing the historical importance of education but again stopping short of declaring it as a right. The Court found that the Texas rule would promote the "creation and perpetuation of a subclass" and that children could not be completely excluded from education under equal protection.\(^{282}\) By this decision, they solidified the simultaneously important and precarious position of education within the constitutional jurisprudence framework, without affirmatively recognizing education as falling within the rubric of equal protection.

Ultimately, the *Rodriguez* Court could both see and not see the race of the plaintiff children. In seeing race as a narrow irrelevance rooted in skin color, the justices chose not to see the context and complexity of the community harmed in this case. The consolidation of "formal race" rights rhetoric in 20th century equal protection cases, solidified in *Brown*, found its complement in *Rodriguez* by the law's inherent fascination with categories and its inability to process contingency...

\(^{278}\) *San Antonio Indep. Sch. Dist.*, 411 U.S. 1.

\(^{279}\) Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) ("Edgewood I"); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991) ("Edgewood II"); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) ("Edgewood III"); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1995) ("Edgewood IV"). In *Edgewood IV*, the court stated, "sadly, the existence of more than 1000 independent school districts in Texas, each with duplicative administrative bureaucracies, combined with widely varying tax bases and an excessive reliance on local property taxes, has resulted in a state of affairs that can only charitably be called a 'system.' For too long, the Legislature's response to its constitutional duty to provide for an efficient system has been little more than crisis management. The rationality behind such a complex and unwieldy system is not obvious. We conclude that the system becomes minimally acceptable only when viewed through the prism of history. Surely Texas can and must do better." *Edgewood IV*, S.W.2d at 726.

\(^{280}\) *Plyer*, 457 U.S. at 206.

\(^{281}\) Memorandum from J. Powell to J. Brennan, et al. (Jan. 30, 1982), Box 154, Folder 6 (Plyer v. Doc), Harry Blackmun Papers (on file with Library of Cong., Manuscript Division).

\(^{282}\) *Plyer*, 457 U.S. at 230.
and slippage.\textsuperscript{283} Schoolchildren have since paid a price in a way "unlikely ever to be undone."\textsuperscript{284} The Court in this case thus protected the inequality inherent in the property tax-based financing scheme by characterizing it as a private, local question and dismissing the children’s claim to either race or class protection by making the overlap between the categories invisible and irrelevant.

As much as the legal system has demanded categorical definitions as preconditions for rights claims, individuals such as Demetrio Rodriguez have attempted to push back against such disciplinary frameworks by repeatedly asserting the nature of identity, oppression and community as multiple, complex and incapable of being simplistically separated. Rodriguez and his fellow plaintiffs demanded equality, and they received categories. The plaintiffs refused to subsume one identity into another in making their case, but the legal system mapped its own categorizing process of their claims. As Mario Obledo, Director of the Mexican American Legal Defense and Educational Fund for San Antonio, testified before the Senate, "[t]o a school child, segregation is segregation, irrespective of how it is labeled by the courts."\textsuperscript{285}

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\item[283.] \textit{Brown}, 347 U.S. at 494.
\item[284.] \textit{Id}.
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