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## A Law & Macroeconomics Critique of San Antonio Independent School District v. Rodriguez

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## A Law & Macroeconomics Critique of *San Antonio Independent School District v. Rodriguez*

Steven A. Ramirez\*

*Fifty years ago, the Supreme Court decided, in San Antonio Independent School District v. Rodriguez, to permit states to provide dramatically disparate funding for childhood education from district to district, thereby concretizing and propagating racial and economic inequality indefinitely. This Article shows that this decision entails staggering macroeconomic costs, undermines human development in the United States, and has hindered the government from promoting general welfare, domestic tranquility, and common defense. The opinion pursued the political objectives of the Southern Strategy and does not rest upon a legitimate exercise of judicial power. Rodriguez furthers the replication of our nation's racial hierarchy rather than mitigates it. As such, the decision cannot warrant precedential weight under the Equal Protection Clause of the Fourteenth Amendment. This abuse of judicial power also invites more political accountability of the judicial branch.*

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#### INTRODUCTION

Fifty years ago, the Supreme Court decided, in *San Antonio Independent School District v. Rodriguez*,<sup>1</sup> to permit states to provide dramatically disparate funding for childhood education from district to district and thereby concretized racial and economic inequality for decades (or more).<sup>2</sup> The Court narrowly reversed a unanimous lower court, three-judge panel decision, to the contrary.<sup>3</sup> This opinion set the nation on a catastrophic course of compromised macroeconomic growth and self-replicating economic inequality, with all its accompanying economic

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1. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973) (holding that grossly disparate educational funding in Texas based upon wealth did not result in equal protection violation and that no fundamental right to education exists).

2. *See Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1971) (per curiam) (“Because of the grave significance of education both to the individual and to our society, the defendants must demonstrate a compelling state interest that is promoted by the current classifications created under the financing scheme.”), *rev’d*, 411 U.S. 1, 54–55 (1973) (5-4 decision) (“In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.”).

3. *Id.* A three-judge panel rendered the lower court’s opinion, which also featured a direct appeal to the Supreme Court, before Congress severely limited the jurisdiction of such three-judge district court panels. *See Michael E. Solimine & James L. Walker, The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954-1976*, 72 CASE W. RES. L. REV. 909, 912 (2022).

crises, deepening political corruption and division, and crippling ignorance of basic science.<sup>4</sup> The Court chose petty partisan advantage and elite entrenchment over meritocratic competition and national well-being as well as the welfare of the nation's children.<sup>5</sup> More specifically, the Court permitted inequities to fester into a full-blown educational crisis, with the United States lagging other developed nations in academic performance.<sup>6</sup> *Rodriguez* also directly impaired human capital formation, constraining macroeconomic growth, and diminished inequality-adjusted human development.<sup>7</sup> Ultimately, national security suffers.<sup>8</sup> This Article argues that the Court's political preference in *Rodriguez* constitutes a judicially imposed macroeconomic suicide pact on our constitutional republic.<sup>9</sup>

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4. Economists link high economic inequality to subverted law and regulation, impaired human capital funding, financial instability, constrained economic growth, and compromised human development. See, e.g., Joseph E. Stiglitz, *Inequality and Economic Growth*, in RETHINKING CAPITALISM 134, 134–55 (Michael Jacobs & Mariana Mazzucato eds., 2016) (stating that excessive inequality tends to harm macroeconomic performance).

5. See, e.g., STEVEN A. RAMIREZ, LAWLESS CAPITALISM 17–46 (2013) [hereinafter RAMIREZ, LAWLESS CAPITALISM] (examining the role of free market capitalism in promoting growth while criticizing the laissez-faire ideology of the mainstream Law and Economics approach). The Nixon administration infamously pursued the Southern Strategy in 1969 through 1972, whereby the Republican Party used racial resentments of disaffected white voters to its political advantage, as admitted by three former GOP chairs. *Id.* at 152. Overturning the unanimous opinion of the three-judge panel in *Rodriguez* certainly dovetailed with the Southern Strategy.

6. See, e.g., *Closing America's Education Funding Gaps*, CENTURY FOUND. (July 22, 2020), <https://tcf.org/content/report/closing-americas-education-funding/> [<https://perma.cc/3TGT-N2JG>] (“The United States is underfunding our public schools by nearly \$150 billion annually, robbing millions of children—predominantly minority and low-income children—of the opportunity to succeed.”).

7. I previously argued that inequality-adjusted human development should form the primary objective of law. Steven A. Ramirez, *The Emergence of Law and Macroeconomics: From Stability to Growth to Human Development*, 83 L. & CONTEMP. PROBS. 219, 230–32 (2020) [hereinafter Ramirez, *Emergence of Law and Macroeconomics*]. Advancing broad-based human development dovetails with the stated goal of our Constitution to provide for the general welfare, as well as securing domestic tranquility. See John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1137 (2018) (“[T]he Preamble was carefully composed to include each of its fifty-two words. It served as the unifying legal banner raised confidently and decisively in 1787. Its principles reverberate through the preambles of states and nations around the world. It should not be forgotten or ignored.”). This Article will further argue that *Rodriguez* compromised the “common defense.” For further discussion on the concept of human capital, see *infra* notes 73–79 and accompanying text.

8. For example, the military now needs to expend resources addressing the academic deficiencies of its recruits, as less than twenty-five percent of America's youth otherwise qualifies for service. Doug G. Ware, *Army Prep Course Has Seen 95% Grad Rate, \$15M in Bonuses in 1st year*, STARS & STRIPES (Aug. 7, 2023), <https://www.stripes.com/branches/army/2023-08-07/army-recruiting-prep-course-enlistment-10975470.html> [<https://perma.cc/N4YM-8CBF>].

9. Justice Powell staked out numerous conservative positions with respect to civil rights (and beyond) prior to becoming a Supreme Court Justice. Lewis F. Powell, Jr., *A Lawyer Looks at Civil*

Even a basic understanding of the nation's economic history—particularly the corrosive effects of high economic inequality and the power of broadly distributed educational opportunity—would have convinced the Court in 1973 that its course suffered deep policy infirmities.<sup>10</sup> Today, overwhelming evidence from macroeconomic learning teaches that the majority in *Rodriguez* failed to account for manifest losses presaged in the dissents.<sup>11</sup> *Rodriguez* thus ranks near (or at) the top of the list of wrongheaded and reactionary decisions,<sup>12</sup> from a Court that invariably opts to entrench elites at the expense of disadvantaged minorities and the advancement of the nation as a whole.<sup>13</sup> Too often the Court since the

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*Disobedience*, 23 WASH. & LEE L. REV. 205, 216 (1966) (“If valid breach of peace and trespass laws may be violated at will to protest these age old infirmities of mankind, rather than seeking to ameliorate them by lawful and democratic processes, there would soon be little left of law and order.”). The same political preference for less education equity and more incarceration animates other cases. *See e.g.*, *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (holding it improper to impose a multidistrict remedy for single-district de jure segregation); *McCleskey v. Kemp*, 481 U.S. 279, 317–20 (1987) (holding that evidence of racial discrimination in administration of the death penalty did not invalidate the death penalty).

10. For example, in 1973, the nation benefitted from one of the greatest and broadest human capital development programs in history—the GI Bill. *See* Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 557–59 (2003). Similarly, John Kenneth Galbraith linked high economic inequality to the Great Depression as early as 1954. JOHN KENNETH GALBRAITH, *THE GREAT CRASH 1929 177–78* (4th ed. 1997).

11. In *Rodriguez*, Mexican American parents brought a class action on behalf of their children claiming that Texas system public education violated the Equal Protection Clause of the U.S. Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4–5 (1973) (majority opinion); *see, e.g., Id.* at 70–71 (Marshall, J., dissenting) (“[T]he majority’s holding can only be seen . . . as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.”).

12. Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015), <https://time.com/4056051/worst-supreme-court-decisions/> [<https://perma.cc/MQL7-3PSJ>]. Specifically, Erwin Chemerinsky stated that *Rodriguez* “held that inequities in school funding do not violate the Constitution. The court thus said that discrimination against the poor does not violate the Constitution and that education is not a fundamental right. It played a major role in creating the separate and unequal schools that exist today.” *Id.* Steven Shiffrin concluded that *Rodriguez* allowed “funds for children in schools to be distributed on the basis of neighborhood wealth instead of educational needs, it has permitted millions of children to be imprisoned in a system of educational inequality.” *Id.* The macroeconomic critique offered herein focuses on harm that transcends the victimized children suffering from deprivation of a basic human right.

13. *See, e.g.*, ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT’S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA*, at xv (2020) (arguing that, for fifty years, the Supreme Court protected the rich and powerful at the expense of the poor and marginalized); ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT 293–94* (2014) (concluding that institutionally, the Court operates to protect the interests of dominant political and economic elites, and that these outcomes reflect the background of the justices); *see also* *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (“Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent. invoked it in protection of [African Americans], and more than 50 per cent. asked that its benefits be extended to corporations.” (citing CHARLES WALLACE COLLINS, *THE*

Nixon administration faces little or no accountability and operates in a partisan bubble of deep ignorance, at best.<sup>14</sup> This Article posits that *Rodriguez* raises profound questions about judicial review and common law rulemaking in the context of a deep-seated and long-standing history of racism and adds further proof of the need for a reawakening of accountability from other branches to avert the corruption of the Constitution into a suicide pact on our constitutional republic.<sup>15</sup>

Much scholarly debate followed the *Rodriguez* decision.<sup>16</sup> Overall, the decision received an unflattering reception, as Professor Caitlan Millat summarizes:

*Rodriguez* was immediately—and roundly—attacked. Commentators criticized the decision for trading in the same logic that had underlain the doctrine of separate but equal purportedly overturned by *Brown*. They also questioned the majority’s conclusion that Texas furnished sufficient education to provide each child with an opportunity to enjoy participation in the political process. As Mark Yudof argued soon after

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FOURTEENTH AMENDMENT AND THE STATES 138 (1912)). One commentator calls the Supreme Court “one of the most powerful and most malign institutions in American history.” IAN MILLHISER, *INJUSTICES*, at x (2016). Lewis R. Katz writes, “Nor has it been unusual in our history for the Supreme Court to stand at the forefront of racial injustice. In fact, except for a short period in our nation’s history, 1954 to 1965, . . . the United States Supreme Court has promoted or facilitated injustice against African Americans.” Lewis R. Katz, *Whren at Twenty: Systemic Racial Bias and the Criminal Justice System*, 66 CASE W. RES. L. REV. 923, 924–25 (2016). In sum, the injustices perpetrated by the Court include the use of the Fourteenth Amendment to protect the powerful instead of the most vulnerable, empowering billionaires to “corrupt American democracy,” and neutering voting rights protections for minorities. MILLHISER, *supra*, at xiii (citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010)). Millhiser argues that the Supreme Court embraces “extra-constitutional limits on the government’s ability to protect the most vulnerable Americans, while simultaneously refusing to enforce rights that are explicitly enshrined in the Constitution’s text.” MILLHISER, *supra*, at xiii.

14. Recently, efforts to reform the Supreme Court assumed a central role in public debate. See PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES: FINAL REPORT 1 (Dec. 2021) (“The Executive Order [forming the Commission] does not call for the Commission to issue recommendations, but the Report does provide a critical appraisal of arguments in the reform debate.” (citing Exec. Order No. 14023 (Apr. 9, 2021))).

15. See *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.” (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963))). Recent surveys suggest high economic inequality and poor education threatens the nation with civil war—as a divided and ignorant population falls prey to outrageous conspiracy theories. Rodrigo Pérez Ortega, *Half of Americans Anticipate a Civil War Soon, Survey Finds*, SCIENCE (July 19, 2022), <https://www.science.org/doi/10.1126/science.ade0173> [<https://perma.cc/T9AC-UZGY>].

16. See, e.g., Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 502–03 (1973) (“The *Rodriguez* decision is troubling in many ways” as it: (i) failed to recognize that values unexpressed in the Constitution still warrant judicial protection (such as privacy or interstate travel), (ii) distorted the Court’s prior holdings regarding wealth classifications, and (iii) relied on local control as a valid state interest fails to address that local control diminishes with less equal funding for poorer districts).

*Rodriguez*'s passing, the Court had abdicated its role in doctrinal analysis, instead parrying the question to "focus on the appropriate judicial role, the limits on judicial manageability, and the dictates of public policy." In the nearly fifty years since *Rodriguez*, scholars have continued to revile the decision.<sup>17</sup>

This Article adds a new dimension to these preexisting critiques: the *Rodriguez* decision proves macroeconomically backward and very costly in terms of advancing inequality-adjusted human development, which, in turn, implies huge losses to the entire nation.<sup>18</sup> Indeed, *Rodriguez* weaponizes the Constitution into a national suicide pact that threatens domestic tranquility, the general welfare, and the common defense.<sup>19</sup>

In fact, a new thread of scholarship reinforces this key point. Scholars such as Professor Caitlan Millat suggest that the Court intentionally seeks to turn the education system into an instrument of subordination.<sup>20</sup> "Rather than promote public education as an agent of equal access, it has, over time, chipped away at the franchise, both explicitly endorsing and implicitly contributing to its devolution into a tool of structural subordination."<sup>21</sup> Professor LaToya Baldwin Clark echoes this point, arguing that *Rodriguez* and other cases herald a Supreme Court devoted to the preservation of Whiteness in the wake of the dissolution of the Cold War interest convergence that Professor Derrick Bell identified as the key underlying dynamic to *Brown v. Board of Education*.<sup>22</sup> These commentators

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17. Caitlan Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529, 552 (2023) (footnotes omitted) (quoting Yudof, *supra* note 16, at 503); *id.* at 529 ("[T]he Court has over the past century worked to hobble the common school enterprise. And even at its high-water marks of protecting education's theoretical democratizing, antisubordinating, and equalizing functions, the Court's education jurisprudence often has had a subordinating impact—or explicitly been motivated by a subordinating agenda.").

18. Economists document a plunge in labor productivity in the wake of *Rodriguez*. See John W. Diamond & George R. Zodrow, *Introduction* to PROSPECTS FOR ECONOMIC GROWTH IN THE UNITED STATES, at 5–7 (2021) ("[L]abor productivity in the United States has declined in recent years, from an average rate of growth of 2.75 percent from 1948 to 1981 to slightly less than 2 percent from 1982 to 2016 . . ."). This data also demonstrated "the United States ranks next to last" among developed nations in the growth rate of the share of the population attaining tertiary education. *Id.*

19. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518–19 (1980) (arguing that *Brown* reflected the national security needs of the nation); Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 123–24, 138 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (2011)) (suggesting that national security goals and racial justice may overlap).

20. Millat, *supra* note 17, at 532.

21. *Id.*

22. Latoya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139, 2157–58 (2023) ("[E]nding segregation allowed elite White policymakers to 'provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of

impugn the Court by pursuing a pro-subordination agenda that ensnares a growing number of young Americans as the nation becomes increasingly diverse.<sup>23</sup>

This Article argues that as the diversity of the American public grows, the suicide pact that underpins *Rodriguez* becomes more lethal to key national interests.<sup>24</sup> Part I demonstrates that the Court failed to appreciate the obvious macroeconomic stakes and associated impact on human development and shows that investments in expanded and broadly distributed educational opportunities fuel macroeconomic growth and inequality-adjusted human development. These further key social goals for any constitutional republic.<sup>25</sup> Part II will show that the racial politics of Richard Nixon's racist Southern Strategy blinded the *Rodriguez* majority and drove its failure to secure equitable educational rights for the nation and its children of all colors and classes, effectively betraying the promise of *Brown*.<sup>26</sup> Inequality formed the core of the Southern Strategy regardless

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emerging third world peoples' and reassure Black people that equality was on its way—but . . . developments such as *Brown II* allowed southern school districts to resist desegregating. [And] other decisions [ ] retrenched racial subordination in public schooling," including "*San Antonio Independent School District v. Rodriguez*, which foreclosed finding a constitutional right to education." (footnotes omitted)); see generally *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

23. Angelica Menchaca et al., *Examining the Racial and Ethnic Diversity of Adults and Children*, U.S. CENSUS BUREAU (May 22, 2023), <https://www.census.gov/newsroom/blogs/random-samplings/2023/05/racial-ethnic-diversity-adults-children.html> [<https://perma.cc/ECM2-G6E4>] ("[I]n 2010, there was a 54.9% chance that two people chosen at random would be from different racial and ethnic groups, while in 2020 there was a 61.1% chance" and "the population age 18 and over had a 58.3% [chance], while the population under age 18 had a . . . score of 68.5%.")

24. The United States Constitution illuminated the goals of the new federal government as well as the intent of the Founders in its Preamble: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution . . ." U.S. CONST. pmbl. See also Welch & Heilpern, *supra* note 7, at 1137 ("[T]he Preamble was carefully composed to include each of its fifty-two words. It served as the unifying legal banner raised confidently and decisively in 1787. Its principles reverberate through the preambles of states and nations around the world. It should not be forgotten or ignored.")

25. *Infra* Part I. Textbook macroeconomics identifies physical capital, human capital and technology as the proximate causes of macroeconomic growth. DARON ACEMOGLU ET AL., *MACROECONOMICS* 211 (3rd ed. 2022) [hereinafter ACEMOGLU]. Technology and physical capital also embody the skills and knowledge of users as well as creators of technology of yesteryear. Growth stands on the shoulders of enhanced human knowledge and skills. *Id.* at 161–67. *Rodriguez* therefore constrains each proximate cause of growth.

26. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."). In *Bolling v. Sharpe*, decided the same day as *Brown*, the Court held that segregated schools in the District of Columbia violated the plaintiffs' Fifth Amendment rights. 347 U.S. 497, 499–500 (1954) ("[T]he concepts of equal protection and due process, both



of the long-term domestic unrest and other harmful macroeconomic effects of high economic inequality. Part III will illustrate the pivotal role of the *Rodriguez* decision in this Southern Strategy and will highlight the deep logical flaws and infirm arguments it rests upon—particularly in its absurd assumptions regarding the deeply rooted nature of education in American history, the text of the Constitution, and that inequality in educational opportunity could prove costless.<sup>27</sup> Part IV will argue that the misbegotten *Rodriguez* cannot hold any precedential weight, and that the opinion directly reflects the problems with an out of touch, politicized, backward, and unaccountable judiciary.<sup>28</sup> This reality cries out for the other branches to exercise full accountability for a judiciary run amok.

While this Article will focus on the macroeconomic costs of constipated educational funding and runaway economic inequality, it also focuses on a more direct measure of human well-being. Education operates as a rights multiplier in that it leads to more informed choices in health, voting, citizenship, and family, as well as more economic growth for all.<sup>29</sup> This Article is premised upon the idea that law should help citizens achieve broadly higher levels of broadly distributed and sustainable human development (as defined by the United Nations), which measures material well-being, educational attainment, and longevity and other health outcomes.<sup>30</sup> Educating our children deeply and equitably directly

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stemming from our American ideal of fairness, are not mutually exclusive. . . . [D]iscrimination may be so unjustifiable as to be violative of due process.”)

27. Inequality in education assures continued racial inequality across all indicia of social well-being. See Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 307–24 (2018) (reviewing proof of the U.S. racial hierarchy).

28. I previously argued that the Supreme Court warranted enhanced accountability and restructuring for its consistent role in propagating and entrenching the American racial hierarchy through its backwards views on mass incarceration and hate speech. Steven A. Ramirez, *Race in America 2021: A Time to Embrace Beauharnais v. Illinois?*, 52 LOY. U. CHI. L.J. 1001, 1007 (2021); andré douglas pond cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs and the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 490 (2022).

29. KATARINA TOMAŠEVSKI, HUMAN RIGHTS OBLIGATIONS: MAKING EDUCATION AVAILABLE, ACCESSIBLE, ACCEPTABLE AND ADAPTABLE 10 (2011).

30. *What is Human Development?*, UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), <https://hdr.undp.org/about/human-development> [<https://perma.cc/3VSG-D9KF>] (“Three foundations for human development are to live a long, healthy and creative life, to be knowledgeable, and to have access to resources needed for a decent standard of living.”); *Inequality-Adjusted Human Development Index (IHDI)*, UNDP, <https://hdr.undp.org/inequality-adjusted-human-development-index#/indicies/IHDI> [<https://perma.cc/6EST-QTQR>] (“The IHDI accounts for inequalities in HDI dimensions by ‘discounting’ each dimension’s average value according to its level of inequality. The IHDI value equals the HDI value when there is no inequality across people but falls below the HDI value as inequality rises. In this sense, the IHDI measures the level of human development when inequality is accounted for.”).

paves the way for these goals.<sup>31</sup> The nation needs far more educated people and voters to address climate change, environmental sustainability, rising fascism, and economic innovation.<sup>32</sup> We know that high-quality mass education fuels macroeconomic growth.<sup>33</sup> In the end, *Rodriguez* warrants condemnation because it relegates large swaths of America's children to separate and unequal educations and lifetimes of costs and foregone opportunities for all.<sup>34</sup>

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31. See Catherine E. Smith, *Brown's Children's Rights Jurisprudence and How It Was Lost*, 102 B.U. L. REV. 2297, 2329 (2022) (highlighting the focus on child well-being in *Brown* and its affirmative intervention "to prevent the states from using them to perpetuate 'an underclass of future citizens and residents' by depriving them of an equal education. The Court recognized that Black children possess their own rights to a path to adulthood unencumbered by the psychological, social, and economic barriers erected by segregated schooling."). Unfortunately, *Rodriguez* shifted focus from the plight of disadvantaged children to adults' rights betraying *Brown's* promise. *Id.* at 2302, 2329 (noting that the Court permitted burdening children with their parents' status of wealth).

32. Climate change will demand more technical innovation for humanity to learn to exist and thrive with lower levels of carbon emissions as well as adapt to new climate realities and challenges. Christina Kwauk & Joseph W. Kane, *Empowering the US Global Change Research Program to Further Climate Education and Training*, BROOKINGS INST. (Mar. 1, 2021), <https://www.brookings.edu/articles/empowering-the-us-global-change-research-program-to-further-climate-education-and-training/> [<https://perma.cc/DG6F-V8KJ>] ("Research shows that climate education can help reduce emissions as much as our best technological innovations, while also reducing people's vulnerabilities to acute and chronic environmental hazards. This is especially important for low-income communities and communities of color where structural inequities have magnified the social, health, and economic risks and effects of climate change." (citations omitted)). Given the scale of change to human lives implicit in mitigating and coping with climate change, education will facilitate informed political consensus. *Education is Key to Addressing Climate Change*, UNITED NATIONS: CLIMATE ACTION, <https://www.un.org/en/climatechange/climate-solutions/education-key-addressing-climate-change> [<https://perma.cc/H4RR-DL93>].

33. See, e.g., Łukasz Goczek et al., *How Does Education Quality Affect Economic Growth?*, 13 SUSTAINABILITY 6437, 6437 (2021) ("[T]he better the quality of education is, the higher the expected economic growth will be."); Eric A. Hanushek & Ludger Woessmann, *Do Better Schools Lead to More Growth? Cognitive Skills, Economic Outcomes, and Causation*, 17 J. ECON. GROWTH 267, 301 (2012) ("[O]ur aggregate data provide direct evidence that both providing broad basic education—education for all—and pushing significant numbers to very high achievement levels have economic payoffs.").

34. See, e.g., Erwin Chemerinsky, *The Supreme Court and Public Schools*, 117 MICH. L. REV. 1107, 1117 (2019) ("In two cases in the early 1970s, *San Antonio Independent School District v. Rodriguez* and *Milliken v. Bradley*, the Court hugely contributed to separate and unequal schools in the United States. *Rodriguez* concerned disparities in school funding."); Brad Bennett, *Weekend Read: 66 Years After Brown v. Board, Schools Across the South Still Separate and Unequal*, POVERTY L. CTR. (May 16, 2020), <https://www.splcenter.org/news/2020/05/16/weekend-read-66-years-after-brown-v-board-schools-across-south-still-separate-and-unequal> [<https://perma.cc/T8ZM-4BR6>] (showing separate and unequal schooling still plagues children of color who face lower quality curriculum, inexperienced teachers, lower funding, and disparate treatment in school of discipline); ERICA FRANKENBERG ET AL., *HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN*, C.R. PROJECT 4 (May 10, 2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf> [<https://perma.cc/9PMY-WRK4>] (reporting on the resegregation of American schools).

I. THE MACROECONOMIC SUICIDE PACT OF THE *RODRIGUEZ* COURT

The *Rodriguez* case certainly represents a political choice from a reactionary Court, and it rests on an infirm basis in logic and law.<sup>35</sup> Worse, it reflects an exceptionally backward macroeconomic policy—the imposition of separate and unequal schools for disadvantaged and minority students.<sup>36</sup> This Part impugns the Court’s political preference for failing to comprehend the benefits of widely dispersed education investments (particularly in favor of the most disadvantaged) and the costs of spiraling inequality. First, this Part will seek to synthesize the current state of law and macroeconomics, a nascent field that gained currency in the legal academy following the macroeconomic disturbances of 2008–09 and 2020.<sup>37</sup> Next, this Part will discuss the missed and obvious growth opportunity in *Rodriguez*.<sup>38</sup> Finally, it will assess the best learning on the pernicious economic influence of excessive economic inequality on human well-being.<sup>39</sup>

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35. *Infra* Parts II and III.

36. See LISA A. KEISTER & DARBY E. SOUTHGATE, *INEQUALITY* 248–49 (2022) (“Although desegregation opened opportunities for people of color, residential concentration maintains levels of inequality. In fact, some sociologists have termed this *resegregation* and show the *Brown v. Board of Education* ruling has actually been reversed through residential segregation.” (internal citations omitted)). Most Western industrialized nations pursue more equal funding for education and even pay for tertiary education. *Id.* at 343–44.

37. I define Law and Macroeconomics as the study of the impact of law upon the economy as reflected in output, growth, inflation, and stability. Law and Economics originated at the University of Chicago, which emphasized microeconomics and monetarism, each of which left little room for the relationship between law and macroeconomic indicators particularly during a period of benign macroeconomic conditions. See Yair Listokin, *Law and Macro: What Took So Long?*, 83 *LAW & CONTEMP. PROBS.* 141, 144 (2019) (“Macroeconomics is the study of how the aggregate economy behaves, examining phenomena like inflation, growth, unemployment, money, and interest rates. While microeconomics seeks to understand how one market behaves, macroeconomics focuses on the links between markets.”). Professor Listokin also suggests that libertarian ideology played a role in propagating Law and Microeconomics, including fundraising efforts. *Id.* at 143.

38. Nobel laureate Robert E. Lucas, Jr., suggests a model of growth that attributes all growth to years of schooling and interactions with other high skilled individuals throughout life. Robert E. Lucas, Jr., *Human Capital and Growth*, 105 *AM. ECON. REV.* 85, 85 (2015) (“I will describe a very simple model of an economy that conforms well to the census evidence but in which *all* growth is driven by schooling and on-the-job learning.”).

39. Nobel laureate Joseph E. Stiglitz demonstrates that high economic inequality fueled by inequality in educational opportunity impedes growth today in the United States and contributes to corruption and excessive rent-seeking. Stiglitz, *supra* note 4, at 137, 146 (“Probably the most invidious aspect of America’s inequality is that of opportunities: in the US a young person’s life prospects depend heavily on the income and education of his or her parents, even more than in other advanced countries. The ‘American dream’ is largely a myth.”). Any policy choice contributing to economic inequality must face the strictest scrutiny possible in the United States due to Professor Stiglitz’s insight that inequality harms growth and the opportunities available to young Americans. *Id.* at 148–49.

*A. A Short History of Law and Macroeconomics*

Law must reckon with the macroeconomic consequences of its policy choices and outcomes.<sup>40</sup> A legal system that ignores macroeconomic consequences will lead to financial collapse due to laissez-faire permission of speculative excess and exploitation—as vividly illustrated in both The Great Depression and The Great Financial Crisis of 2008.<sup>41</sup> The New Deal rested on explicit macroeconomic goals and substantially revised banking and financial regulation as well as monetary and human resources policy with an expressed view of creating a more powerful macroeconomy out of the depths of The Great Depression.<sup>42</sup> Much of the early efforts to create a more powerful macroeconomy through law faded into history with the pronounced success of the New Deal and the aggressive growth-seeking state that emerged after World War II.<sup>43</sup> That effort included massive educational investments to a broad swath of society (at least for white America)<sup>44</sup> and fostering breakthrough

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40. Ramirez, *Emergence of Law and Macroeconomics*, *supra* note 7, at 219 (and authorities cited therein) (“The idea of Law and Macroeconomics as a field of study has existed since lawyers began to address economic disruptions, such as the Panic of 1907 and the Great Depression, despite the lack of express recognition in the most influential sectors of the legal academy.”).

41. RICHARD A. POSNER, *THE FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION*, at xii, 189 (2009) (stating that financial regulation is needed to keep the economy from “running off the rails” and that laissez-faire policies do not work). *See also* RAMIREZ, *LAWLESS CAPITALISM*, *supra* note 5, at 1 (“Law plays a pivotal role in economic growth and stability. This book highlights the role of corrupted law and regulation in the financial crisis of 2007–9 . . . and articulates a legal framework that comprehends the links between law and macroeconomic stability and growth.”).

42. Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 571 (2003) (“After the New Deal’s massive government management, massive government regulation and massive government expenditures in support of economic growth and stability became the norm.”).

43. For example, see the Servicemen’s Readjustment Act of 1944 (GI Bill), ch. 268, 58 Stat. 284 (1944) (codified in scattered sections of 38 U.S.C.), which effectively increased college enrollment by 150 percent from pre-World War II levels. Also, see the National Defense Education Act of 1958 (NDEA), Pub. L. No. 85-864, 72 Stat. 1580 (1959), put the federal government in the business of subsidizing primary and secondary education on national defense grounds while also creating the Defense Advanced Research Projects Agency (DARPA), which pioneered the entire high-tech economy from the internet to the cell phone. For a further discussion of the high-tech economy, see *infra* note 45. Leading economists today recognize the key role government plays in high-risk innovation that the private sector will not pursue due to uncertainty. *See, e.g.*, MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* 29 (ed. rev. 2015) (“[H]istory shows that those areas of the risk landscape . . . that are defined by high capital intensity and high technological and market risk tend to be avoided by the private sector, and have required great amounts of public sector funding (of different types), as well as public sector vision and leadership, to get them off the ground.”).

44. Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court’s Affirmative Action Jurisprudence*, 75 U. PITT. L. REV.

technologies such as the internet and space-related innovations arising from the moon shot.<sup>45</sup> The legal academy, however, did not fully embrace these powerful lessons.

Instead, in 1973, Judge Richard Posner authored *The Economic Analysis of Law*,<sup>46</sup> which heralded the law and economics political movement within the legal academy.<sup>47</sup> This new academic fashion focused only on microeconomics and relegated macroeconomics and its relationship to law as an afterthought at best.<sup>48</sup> As Professor George Priest highlights, the law and economics movement rested on a political philosophy that viewed all government action with excessive skepticism.<sup>49</sup> Political philosophy masqueraded as economic science, lending law and economics only a thin veneer of legitimacy.<sup>50</sup> Ultimately, the movement lost its

583, 595 (2014) (“In the end . . . black veterans did not benefit to nearly the degree that white veterans did.”).

45. See *About DARPA*, DEF. ADVANCED RSCH. PROJECTS AGENCY, <https://www.darpa.mil/about-us/about-darpa> [<https://perma.cc/7FUX-AHWC>] (“The genesis . . . of DARPA itself dates to the launch of Sputnik in 1957, and a commitment by the United States that, from that time forward, it would be the initiator and not the victim of strategic technological surprises.”). “The ultimate results have included not only game-changing military capabilities such as precision weapons and stealth technology, but also such icons of modern civilian society such as the Internet, automated voice recognition and language translation, and Global Positioning System receivers small enough to embed in myriad consumer devices.” *Id.*

46. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1973) (applying economic analysis to theories of law).

47. See George L. Priest, *Michael Trebilcock and the Past and Future of Law and Economics*, 60 U. TORONTO L.J. 155, 156 (2010) (describing the origins of Law & Economics as a “pro-market, anti-government political philosophy”); see also Owen Fiss, *Trebilcock’s Heresy*, 60 U. TORONTO L.J. 511, 512 (2010) (stating that Law & Economics found its roots in free market ideology which “reached its apotheosis during the . . . the presidency of Ronald Reagan and the premiership of Margaret Thatcher. The market then became the model of domestic policy in the United States and the United Kingdom and, even more significantly for our purposes, guided the World Bank and the International Monetary Fund . . .”).

48. Judge Posner stated that, “macroeconomic performance, that is output, production, unemployment, and inflation, are ‘mysterious macroeconomic phenomena.’” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (6th ed. 2003) [hereinafter POSNER]. Indeed, while Judge Posner identifies numerous elements of law that he deems “efficient,” at no point does he posit that such efficiency will somehow lead to more jobs, greater GDP, more economic stability, or less inflation. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12–17 (5th ed. 1998) (defining efficiency and explaining its limitations); see also Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1005 (2001) (“[L]aw and economics’s exclusive focus on efficiency continues to lack justification even within the limited purview of modern economic reasoning.”).

49. Judge Posner changed his tact after the Great Financial Crisis of 2008. RAMIREZ, *LAWLESS CAPITALISM*, *supra* note 5, at 41 (citing RICHARD POSNER, *A FAILURE OF CAPITALISM* xii, 75, 115, 286–87 (2009)).

50. Legal scholars recognized that efficiency lacked coherency as early as 1981. See Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 388 (1981) (“[E]fficiency is incoherent. The concept of efficiency is indeterminate—it cannot yield an

shine around the same time the government bailed out big finance in 2009 and the entire economy in 2020.<sup>51</sup> Law recognized that macroeconomics mattered.<sup>52</sup>

Law and macroeconomics re-emerged as a lens for legal and regulatory policymakers after the widespread realization that microeconomic efficiency delivers only trivial contributions to growth<sup>53</sup> and barely affects other macroeconomic indicia, such as inflation, productivity, and employment.<sup>54</sup> Traditional law and economics actually focus upon only microeconomics and market efficiency instead of directly targeting human well-being.<sup>55</sup> Given the importance of growth to human well-being, more highly respected economists now suggest the field of law and macroeconomics constitutes a new frontier in law and economics.<sup>56</sup>

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answer—if we try to apply it to the whole system of private law rules. If we wish to use economic analysis to generate a determinate ideal private law regime, we have to make a series of value judgments that are more controversial, because more overtly political, than that involved in saying that we should make changes whose benefits to the gainers exceed the costs to the losers.”)

51. See Yair Listokin & Peter Bassine, *Better Rules for Worse Economies: Efficient Legal Rules over the Business Cycle*, 12 HARV. BUS. L. REV. 55, 96–97 (2022) (“Since 2008, however, periods of deficient aggregate demand have become much more pervasive. . . . Between January 2008 and June 2013, the economy was either in recession, experiencing unemployment . . . or both. Unemployment again soared well above 7.5% in 2020 because of the recession caused by COVID-19 and looks likely to stay above 7.5% through 2021.”).

52. Further discussion of how regulations designed for robust economies often perform miserably in deep recessions is provided in Listokin & Bassine, see *supra* note 51.

53. For example, Nobel laureate Robert M. Solow suggests that *Law and Economics*, as professed by Richard Posner, displays an “overemphasis on minor gains in efficiency and neglect of first-order facts.” Robert M. Solow, *How to Understand the Disaster*, N.Y. REV. BOOKS (May 14, 2009), <https://www.nybooks.com/articles/2009/05/14/how-to-understand-the-disaster/> [<https://perma.cc/359X-EXUL>].

54. POSNER, *supra* note 48, at 3 (stating that economic analysis of law is about “rational choice” and not about “mysterious macroeconomic phenomena” like inflation, growth, output, or unemployment); Bruno Meyerhof Salama, *The Art of Law & Macroeconomics*, 74 U. PITT. L. REV. 131, 135 (2012) (“[M]acroeconomics is the branch of economics dedicated to no less than the understanding of aggregates that are politically salient such as levels of investment, employment, growth, inflation, consumption, and business-cycles. Of specific importance is the fact that the outbreak of the 2007 crisis is now often portrayed in policy circles as a consequence of lack of regulation and excessive trust on market mechanisms.”).

55. Yair Listokin & Daniel Murphy, *Macroeconomics and the Law*, 15 ANN. REV. L. & SOC. SCI. 377, 378 (2019) (“In truth law and economics should be called law and microeconomics.”); Salama, *supra* note 54, at 139–40 (“[W]hile the precise intellectual legacy of the 2007 crisis remains unclear, the new political scenario will most likely cause legal scholars to turn their attention to topics where the macroeconomic dimension is particularly salient.”).

56. Indeed, Nobel laureate economist Gary Becker suggested:

[A] newer and also important research focus considers the interactions between legal systems and the macro economy. This research, pioneered by economists [Daron] Acemoglu and Andrei Shliefer, among others, analyzes the connections between legal systems and long-term rates of growth, the degree of economic inequality, aggregate investments, and other macroeconomic variables. To a lesser extent, this burgeoning literature

Macroeconomic growth, however, constitutes only one goal—environmental sustainability and broadly distributed human development hold even greater importance since survival outranks growth and growth is only a proxy for human well-being.<sup>57</sup>

Even beyond Gross Domestic Product (GDP) growth, the law should strive to create sustainable growth that raises living standards and human development as broadly as possible.<sup>58</sup> The United Nations promulgates a human development index (HDI) that measures educational attainment, material prosperity, and health outcomes as elements of human well-being.<sup>59</sup> The United Nations also adjusts HDI for inequality (IHDI), recognizing that high inequality may result in many citizens of a nation suffering in poverty.<sup>60</sup> The *Rodriguez* Court obviously squandered an opportunity to further the IHDI in the United States, and compromised environmental sustainability to boot, as educational funding impacts both prosperity and educational attainment.

These values ultimately coalesce and reinforce each other. Climate change will require a huge investment in education to ensure that human ingenuity and innovation reach the maximum level possible to mitigate

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also analyzes how macroeconomic developments affect the evolution of legal systems . . . I expect the macro interaction between law and economics to become another major frontier as the discipline of law and economics pushes its boundaries and insights into uncharted territories.

Gary S. Becker & Richard A. Posner, *The Future of Law and Economics: Essays by Ten Law School Scholars*, U. CHI. L. ALUMNI MAG. (Oct. 11, 2011), <http://www.law.uchicago.edu/alumni/magazine/fall11/lawandecon-future> [<https://perma.cc/BF8Z-4BWP>].

57. PAUL KRUGMAN & ROBIN WELLS, *MACROECONOMICS* 2271–73 (4th ed. 2015) (“Economic growth and environmental damage don’t have to go together.”); Ramirez, *Emergence of Law and Macroeconomics*, *supra* note 7, at 232 (and authorities cited therein) (positing that law “should use macroeconomic analysis to focus on broadly-based and sustainable human development in the face of contemporary problems”).

58. Stiglitz, *supra* note 4, at 162 (first citing JOSEPH E. STIGLITZ ET AL., *MISMEASURING OUR LIVES* 4 (2010); and then citing OECD, *Gross Domestic Product (GDP)*, <https://data.oecd.org/gdp/gross-domestic-product-gdp.htm> [<https://perma.cc/4XQK-SWLC>] (original URL out-of-date)) (“[T]here is a growing global consensus that GDP does not provide a good measure of overall economic performance.”). Mainstream economics now recognizes the limitations of focusing only on GDP. ACEMOGLU, *supra* note 25, at 131–36, 155.

59. *Human Development Index (HDI)*, UNDP, <https://hdr.undp.org/data-center/human-development-index#/indicies/HDI> [<https://perma.cc/3E8C-79D7>] (“The [HDI] is a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and having a decent standard of living.”).

60. *Inequality-Adjusted Human Development Index (IHDI)*, UNDP, <https://hdr.undp.org/inequality-adjusted-human-development-index#/indicies/IHDI> [<https://perma.cc/7V7U-4JKH>] (“IHDI adjusts the [HDI] for inequality in the distribution of each dimension across the population.”).

and manage climate change, which will lead to more GDP growth.<sup>61</sup> High economic inequality threatens macroeconomic growth and equity.<sup>62</sup> It also forms the root cause of climate change.<sup>63</sup> Broadly distributed investments in education simultaneously drive growth and reduce corrosive economic inequality.<sup>64</sup> They also directly contribute to higher inequality-adjusted human development.<sup>65</sup> Humanity desperately needs more highly educated brains that can push the limits of technological change—and environmental sustainability.<sup>66</sup> Law and macroeconomics teaches how law and institutions may maximize human well-being and environmental sustainability. Unfortunately, the reactionary Court in *Rodriguez* chose to entrench wealth and privilege instead.

Section I.B will explore the best learning extant on the need for broadly distributed education.

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61. Surveys suggest that climate change merits little attention in primary and secondary education, and that teachers do not understand the science behind climate change. Annika Larson, *Climate Change Education is Failing Our Youth*, STATE OF THE PLANET, COLUM. CLIMATE SCH. (Dec. 17, 2021), <https://news.climate.columbia.edu/2021/12/17/climate-change-education-is-failing-our-youth/> [<https://perma.cc/6U9H-8DWW>].

62. Stiglitz, *supra* note 4, at 148–51.

63. J. Timmons Roberts, *Global Inequality and Climate Change*, 14 SOC'Y & NAT. RES. 501, 501 (2001) (“Global warming is all about inequality, both in who will suffer most of its effects and in who created the problem in the first place.”).

64. Joseph E. Stiglitz recognizes that:

[P]ublic investment in education is fundamental to address inequality. A key determinant of workers' income is the level and quality of education. If governments ensure equal access to education, then the distribution of wages will reflect the distribution of abilities (including the ability to benefit from education) and the extent to which the education system attempts to compensate for differences in abilities and backgrounds. If, as in the United States, those with rich parents usually have access to better education, then one generation's inequality will be passed on to the next, and in each generation, wage inequality will reflect the income and related inequalities of the last.

Stiglitz, *supra* note 4, at 161.

65. The IHDI consists of educational attainment, material prosperity, and health outcomes, adjusted for inequality. *Supra* notes 58–59 (acknowledging the limitations of using GDP as the sole measuring stick of economic performance and noting that the HDI is a summary measure of a number of key dimensions in human development).

66. *Education is Key to Addressing Climate Change*, *supra* note 32 (“Education can encourage people to change their attitudes and behavior; it also helps them to make informed decisions. In the classroom, young people can be taught the impact of global warming and learn how to adapt to climate change. Education empowers all people, but especially motivates the young to take action. Knowing the facts helps eliminate the fear of an issue which is frequently colored by doom and gloom in the public arena.”); Kelly Levin & Andrew Steer, *Fighting Climate Change with Innovation*, FIN. & DEV., INT'L MONETARY FUND, Sept. 2021, at 24 (“[Innovation] doesn't only stop bad things happening, it leads to increased efficiency, drives new technology, and lowers risk. These benefits in turn stimulate investment, generating jobs, creating healthier economies, and boosting the livelihoods and well-being of citizens, even in the near term.”).



### B. Education and Sustainable Growth

The study of law and macroeconomics benefited from the work of 2018 Nobel Prize-winning economist Paul Romer because Romer sought to understand the underlying dynamics of growth.<sup>67</sup> Romer expanded the frontier of macroeconomics to include the study of the determinants of long-run economic growth, which is crucial for human well-being.<sup>68</sup> More specifically, Romer sought to unpack technological change as the driver of long-run growth and endogenize it into growth models.<sup>69</sup> In short, Romer founded Endogenous Growth Theory.<sup>70</sup> “This theory argues that ‘ideas’ are crucial for economic growth, and elaborates on the preconditions for the production of ideas.”<sup>71</sup> Developing economically powerful ideas naturally requires developing powerful human minds, and the law must create incentives and secure human capabilities to facilitate this process.<sup>72</sup> Ideas lead to exponential growth because they entail no

67. *The Prize in Economic Sciences 2018*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2018/popular-information/> [https://perma.cc/64YK-TAWX]. Romer won the Nobel Prize for his study of the dynamics of growth. *Id.* (“In the early 1980s, when he was a PhD student at the University of Chicago, Paul Romer started developing the theory of *endogenous* growth, where technological advances do not just flow in from external—*exogenous*—sources, as assumed in earlier economic models. Instead, they are created by purposeful activities in the marketplace. Romer’s findings allow us to better understand which market conditions favor the creation of new ideas for profitable technologies. His work helps us design institutions and policies that can enhance human prosperity by fostering the right conditions for technological development.”).

68. Committee for the Prize in Economic Sciences in Memory of Alfred Nobel, *Scientific Background on the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2018: Economic Growth, Technological Change, and Climate Change*, ROYAL SWEDISH ACAD. OF SCIS. (Oct. 8, 2018), at 2 (“In the midst of such ups and downs, it is easy to forget the long-run perspective: the study of economic growth . . . Even small year-to-year differences in growth rates . . . cumulate. If such differences are systematic over decades, they build up to significant changes in living standards.”). GDP growth also opens resources to support higher life expectancy and greater life satisfaction. ACEMOGLU, *supra* note 25, at 136, 155–56. Finally, expanded human capital supports exponential growth due to the fact that ideas and innovations are not subject to diminishing marginal returns. FILIPE CAMPANTE ET AL., *ADVANCED MACROECONOMICS: AN EASY GUIDE*. 7–22, 60–65 (2021).

69. Committee for the Prize in Economic Sciences in Memory of Alfred Nobel, *supra* note 68, at 3 (“Romer . . . focused precisely on the crux of how market economies might develop new technologies through . . . research-and-development (R&D) efforts. His solution laid the foundation of what is now ubiquitously referred to as *endogenous growth theory*. This theory argues that ‘ideas’ are crucial for economic growth . . .”).

70. *Id.*

71. *Id.*

72. See PHILIPPE AGHION & PETER HOWITT, *ENDOGENOUS GROWTH THEORY 1* (1998) (“[T]he intensity and direction of people’s innovative activities are conditioned by the laws, institutions, customs, and regulations that affect their incentive and their ability to appropriate rents from newly created knowledge, . . . . The purpose of endogenous growth theory is to seek some understanding of this interplay between technological knowledge and various structural characteristics of the economy . . . and how such an interplay results in economic growth.”); Douglass C. North,

additional costs to use. Stated otherwise, they are non-rivalrous, entail no additional production costs from expanded use, and therefore lead to increasing returns to scale.<sup>73</sup>

A well-educated populace proves fundamental to the propagation of new ideas and innovations and, thus, macroeconomic growth and higher living standards.<sup>74</sup> Innovation defies prediction, and the more citizens are empowered to innovate, the more innovative a society becomes, creating more economic growth.<sup>75</sup> An educated populace can absorb and expand upon innovations more quickly than a less educated populace.<sup>76</sup> Ideas arise from humans, and humans use ideas.<sup>77</sup> Thus, *Romer* holds one central policy prescription for law and policymakers seeking superior macroeconomic growth: “My number-one recommendation is to invest in people. Humans that are well trained are the inputs into this discovery

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*Institutions*, 5 J. ECON. PERSPS. 97, 97 (1991) (“Institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights).”).

73. CAMPANTE ET AL., *supra* note 68, at 80 (deducing that ideas entail two sides of the growth coin: “On the supply side, if growth depends on ideas, and ideas are produced by people, having more people means having more ideas. On the demand side, ideas are fixed cost . . . and having a larger market enables one to further dilute that fixed cost.”). This people-centered pathway to growth ultimately relies upon the fact that investment in education—or the accumulation of knowledge and skills—generates increasing returns to scale. *Id.* at 60. See also ACEMOGLU, *supra* note 25, at 211 (including human capital in a list of factors of “proximate causes of prosperity” that result in a high level of per capita GDP).

74. Robert E. Lucas Jr., *Making a Miracle*, 61 ECONOMETRICA 251, 270 (1993) (“The main engine of growth is the accumulation of human capital—[the accumulation] of knowledge—and the main source of differences in living standards among nations is differences in human capital.”).

75. See Federico Cingano, *Trends in Income Inequality and Its Impact on Economic Growth* 28 (Org. for Econ. Coop. & Dev. Soc., Emp’t & Migration, Working Paper No. 163, 2014), <http://dx.doi.org/10.1787/5jxrxjncwvx6j-en> [<https://perma.cc/BS8M-QVSS>] (“[A]nalysis based on OECD PIAAC data suggests that one key channel through which inequality negatively affects economic performance is through lowering investment opportunities (particularly in education) of the poorer segments of the population.”).

76. KRUGMAN & WELLS, *supra* note 57, at 251 (stating that long-run macroeconomic growth is a function of physical capital, human capital, and technological process and that workers must not only have access to advanced machinery but also “must know what to do with it”); RAMIREZ, LAWLESS CAPITALISM, *supra* note 5, at 23–28 (and authorities cited therein); Noam Angrist et al., *Measuring Human Capital Using Global Learning Data*, 592 NATURE 403, 403 (2021) (“Human capital—that is, resources associated with the knowledge and skills of individuals—is a critical component of economic development.” (citations omitted)).

77. Charles I. Jones, *Growth and Ideas*, in HANDBOOK OF ECONOMIC GROWTH 1063, 1107 (Phillippe Aghion & Steven N. Durlaugh eds., 2005) (“The more inventors we have, the more ideas we discover, and the richer we all are.”).

process. And there's big opportunities still, I think, to do a better job of investing in people."<sup>78</sup>

Other economists fully concur with Romer.<sup>79</sup> For example, Professor Flávio Cunha shows that, in the United States, labor productivity growth (which reflects increases in innovation) declined since 1982 by about 30 percent compared to the period of 1948–1982.<sup>80</sup> At the same time, the rate of return to investments in higher education increased dramatically, as the wage premium for college graduates increased from 23 percent in 1979 to approximately 45 percent in 2015.<sup>81</sup> The wage premium for graduate school more than doubled from 30 percent to 70 percent over the same period.<sup>82</sup> Yet, since the 1980s, the United States has lagged other developed nations in human capital formation, as shown in tertiary graduation rates.<sup>83</sup> In fact, the United States ranks next to last among developed nations in the growth of workers with tertiary education.<sup>84</sup> Professor Cunha concludes that, collectively, these facts suggest the United States suffers a severe shortage of skilled labor, which ultimately saps macroeconomic growth.<sup>85</sup> Demand for such workers continues unabated, as manifest in wage premia and the growth of skilled labor in other developed nations—but U.S. law and regulation (including, of course, the *Rodriguez* decision) do not secure the supply of skilled workers.<sup>86</sup>

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78. Tyler Cowan, *Paul Romer on the Unrivaled Joy of Scholarship*, CONVERSATIONS WITH TYLER, at 08:04 (Dec. 5, 2018), <https://conversationswithtyler.com/episodes/paul-romer/> [<https://perma.cc/9RPH-UFNW>].

79. Flávio Cunha, *Human Capital and Long-Run Economic Growth*, in PROSPECTS FOR ECONOMIC GROWTH IN THE UNITED STATES 41, 71 (John W. Diamond & George R. Zodrow eds., 2021) (“[T]he reduction in the growth rate of the supply of skilled labor . . . partially and simultaneously explains the reduction in productivity growth and the increase in inequality during the same period. Therefore, to increase productivity growth and to reduce inequality, it is important to foster the formation of skilled labor. This will require increasing the number of disadvantaged children who are college ready.”).

80. *Id.* at 41 (citing ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* (2016)).

81. *Id.* at 42 (citing Robert G. Valletta, *Recent Flattening in the Higher Education Wage Premium: Polarization, Skill Downgrading, or Both?*, in EDUCATION, SKILLS, AND TECHNICAL CHANGE: IMPLICATIONS FOR FUTURE U.S. GDP GROWTH 313, 313–56 (C. Hulton & V. Ramey, eds., 2017)). *Id.* at 43–45.

82. *Id.* at 42 (citing Valletta, *supra* note 81, at 313–56).

83. Cunha, *supra* note 79, at 43–44.

84. *Id.* at 43.

85. *Id.* at 43–45 (explaining how declines in skill labor led to decelerating productivity and accelerating inequality).

86. *Id.* (comparing the rate of the U.S. population with a tertiary education to similar countries and noting the impact of that difference on the economy).

Further, Professor Cunha localizes the crisis to a shortage of college-ready disadvantaged students.<sup>87</sup> College attainment in the United States grew far less rapidly than college enrollment.<sup>88</sup> “[I]n the [United States] economy, most of the noncollege enrollees or graduates come from low-income households.”<sup>89</sup> Eighty percent of children from high-income households enroll in college, while only 29 percent of low-income children enroll.<sup>90</sup> “Therefore, to increase college graduation rates in the United States over the next decades, it will be necessary . . . to raise the share of children growing-up in low-income households that are college ready. These findings suggest increasing investments in human capital prior to college-going years.”<sup>91</sup>

A plethora of other studies show that targeting educational funding for disadvantaged youths also enjoys huge macroeconomic benefits far beyond the costs of such investments.<sup>92</sup> For example, one study followed

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87. *Id.* at 45 (“[A] reduction in the growth rate of the supply of skilled labor drives a decrease in the growth rate of labor productivity.” (citing Paul M. Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71–102 (1990))).

88. *Id.* at 46.

89. *Id.* at 52.

90. *Id.* (citing Martha J. Bailey & Susan M. Dynarski, *Inequality in Postsecondary Education, in* WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCE 117–32 (Greg J. Duncan & Richard J. Murnane eds., 2011)).

91. *Id.* at 54.

92. According to Nobel laureate James J. Heckman:

Investment in early education for disadvantaged children from birth to age 5 helps reduce the achievement gap, reduce the need for special education, increase the likelihood of healthier lifestyles, lower the crime rate, and reduce overall social costs. In fact, every dollar invested in high-quality early childhood education produces a 7 to 10 percent per annum return on investment. Policies that provide early childhood educational resources to the most disadvantaged children produce greater social and economic equity. We can create a more level and productive playing field for all by making wise and timely investments in effective education.

James J. Heckman, *The Economics of Inequality: The Value of Early Childhood Education*, 35 AM. EDUC., 31, 32 (2011) (citing James J. Heckman et al., *The Rate of Return to the HighScope Perry Preschool Program*, 94 J. PUB. ECON. 114, 114–28 (2010)) [hereinafter Heckman, *The Economics of Inequality*]. Heckman found with respect to early education intervention program, that “[e]stimated annual social rates of return generally fall between 7 and 10%, with most estimates substantially lower than those previously reported in the literature. However, returns are generally statistically significantly different from zero for both males and females and are above the historical return on equity.” James J. Heckman et al., *The Rate of Return to the HighScope Perry Preschool Program*, 94 J. PUB. ECON. 114, 114 (2010). International studies support substantial benefits available for investments in early childhood education. See Patrice L. Engle et al., *Strategies for Reducing Inequalities and Improving Developmental Outcomes for Young Children in Low-Income and Middle-Income Countries*, 378 LANCET 1339, 1339 (2011) (“A simulation model of the potential long-term economic effects of increasing preschool enrolment to 25% or 50% in every low-income and middle-income country showed a benefit-to-cost ratio ranging from 6·4 to 17·6, depending on preschool enrolment rate and discount rate.”).

a cohort of fifty-eight young African American students in Michigan from disadvantaged backgrounds, as well as a control group, and found that investments in such students paid sixteen dollars in economic benefits for every dollar spent over a forty-year period of data collection.<sup>93</sup> In a similar study in Chicago, a cohort of 989 low-income students (all born in 1980) achieved an eleven-to-one return for targeted early education investments based upon data collected through age twenty-six.<sup>94</sup> Another study of investments in early education tracked fifty-seven disadvantaged North Carolina youths into their twenties and found a 2.5-to-1 payoff ratio.<sup>95</sup> These payoff ratios do not include enhanced innovation (and its spillovers), benefits beyond age forty, or benefits accruing to successive generations.<sup>96</sup> Today, the link between human capital development and macroeconomic growth attracts a broad consensus among high-profile economists.<sup>97</sup>

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93. LAWRENCE J. SCHWEINHART ET AL., *LIFETIME EFFECTS: THE HIGH/SCOPE PERRY PRESCHOOL STUDY THROUGH AGE 40*, 194–215 (2005) (summary available at [https://nieer.org/wp-content/uploads/2014/09/specialsummary\\_rev2011\\_02\\_2.pdf](https://nieer.org/wp-content/uploads/2014/09/specialsummary_rev2011_02_2.pdf) [<https://perma.cc/92CM-WBDL>]) (finding that participants in a preschool program boasted higher salaries, more stable jobs, a higher probability of graduating high school, and a lower probability of having been arrested, a lower probability of using drugs, and a higher probability of reporting getting along well with their families).

94. Arthur J. Reynolds et al., *Age 26 Cost-Benefit Analysis of the Child-Parent Center Early Education Program*, 82 *CHILD DEV.* 379, 379 (2011) (“Findings from a complete cohort of over 1,400 program and comparison group participants indicated that the [Child-Parent Centers] had economic benefits in 2007 dollars that exceeded costs. . . . The primary sources of benefits were increased earnings and tax revenues and averted criminal justice system costs.”).

95. W.S. Barnett & Leonard N. Masse, *Comparative Benefit-Cost Analysis of the Abecedarian Program and Its Policy Implications*, 26 *ECON. EDUC. REV.* 113, 115–16, 120 (2007) (“Family background characteristics at study entry were: maternal education of approximately 10 yr, maternal IQ of 85, 25% of households with both parents, and 55% of households receiving Aid to Families with Dependent Children.”).

96. While the above-cited studies do not include these additional benefits, economists recognize that educational funding leads to enhanced innovation through the creation of more innovators with greater cognitive capabilities. See Barbara Biasi et al., *Education and Innovation*, in *THE ROLE OF INNOVATION AND ENTREPRENEURSHIP IN ECONOMIC GROWTH* 537, 546–47 (M. Andrews, A. Chatterji, J. Lerner & S. Stern eds., 2022) (“[I]mprovements in access and in the quality of education have immense potential for encouraging entrepreneurship and innovation. Education provides the tools that creative individuals need to succeed as inventors and entrepreneurs. Some of these tools can be measured quantitatively, through improvements in IQ scores, which have been linked to innovation.”).

97. *E.g.*, ELHANAN HELPMAN, *THE MYSTERY OF ECONOMIC GROWTH*, at x–xi, 41 (2004) (identifying institutions that maximize human capital development and knowledge creation and dispersal as key elements of innovation and economic growth); Lucas, *supra* note 74, at 270 (“The main engine of growth is the accumulation of human capital—of knowledge—and the main source of differences in living standards among nations is differences in human capital.”).

In 1973, moreover, America lived this truth due to the reality of the GI Bill.<sup>98</sup> The GI Bill proved that more widely distributed educational opportunities could greatly increase macroeconomic performance.<sup>99</sup> The GI Bill dramatically increased college enrollment and yielded increased tax revenues of five-to-twelve times the expenditures of the program.<sup>100</sup> Indeed, experts suggest the GI Bill led the United States in the transition to knowledge-based economy.<sup>101</sup> It created a huge increase in college enrollment and thereby permanently expanded United States higher educational capacity.<sup>102</sup> Two Justices on the *Rodriguez* Court benefited from the GI Bill.<sup>103</sup> The link between widely dispersed educational

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98. Servicemen's Readjustment Act of 1944 (GI Bill), Pub. L. No. 346, 58 Stat. 284. High-profile scholars have demonstrated that many veterans of color faced daunting challenges in attaining benefits under the GI Bill. Perea, *supra* note 44, at 650 (“[T]he history of the G.I. Bill shows racial preferences for whites and overt race discrimination against blacks by the federal government, educational institutions, bankers, realtors, and local neighborhood homeowners’ associations. Due to this race discrimination, promoted and subsidized by the federal government, black veterans were denied opportunities for higher education and home ownership.”).

99. According to Professor Keith Olson, by 1973 the GI Bill had proved a surprising success: Once veterans boosted enrollment figures and the quality of student performance to unprecedented heights, contemporaries recognized the G.I. Bill for the success it obviously was. Franklyn B. Snyder, president of Northwestern University, called it “the greatest experiment in democratic education the world has ever seen,” while the president of innovating Reed College believed the program had “revolutionary implications for the future,” and the president of experimental Bennington College wrote about the “far-reaching” consequences embedded in the precedent of the G.I. Bill.

Keith W. Olson, *The G.I. Bill and Higher Education: Success and Surprise*, 25 AM. Q. 596, 606 (1973) (first quoting *The Brimming College Cup*, NEWSWEEK, June 3, 1946, at 86; then quoting Peter H. Odegard, Letter to the Editor, *Revolutionary Implications for the Future*, 16 AM. SCHOLAR 477–79 (1947); and then quoting Frederick Burkhardt, Letter to the Editor, *Educating the Educators*, 16 AM. SCHOLAR 479 (1947)). The superior academic performance of the veterans certainly operated to supercharge innovation for the post-World War II decades. *Id.* at 604–05 (and authorities cited therein) (“[T]he veteran generation established perhaps the most distinguished record in the history of higher education.”).

100. *A Cost-Benefit Analysis of Government Investment in Post-Secondary Education Under the World War II GI Bill: Before the Subcomm. on Educ. & Health of the J. Econ. Comm.*, 100th Cong. 1 (1988) (report by Hon. James H. Scheuer).

101. See, e.g., PETER F. DRUCKER, *POST-CAPITALIST SOCIETY* 3 (1993) (“[N]ew society[’s]” primary resource will be knowledge); see also Ramirez, *supra* note 10, at 557–59 (“In 1942, about 200,000 college degrees were awarded nationwide. By 1950, that number soared to roughly 500,000.”). See Olson, *supra* note 99, at 604 (“Contrary to the substantial, but not universal, fear that veterans would be liabilities as college students, the veteran generation established perhaps the most distinguished record in the history of higher education.”).

102. See Olson, *supra* note 99, at 608–09 (“In 1948, the peak of the postwar years, there were ten universities with over 20,000 students, in 1967 there were 55. During the same period more than 60 universities pushed their enrollments past the 10,000 mark for the first time.”).

103. Susanne Mettler, *How the GI Bill Built the Middle Class and Enhanced Democracy*, SCHOLARS STRATEGY NETWORK (Jan. 1, 2012), <https://scholars.org/contribution/how-gi-bill-built-middle-class-and-enhanced> [https://perma.cc/EM4P-BWCF] (noting that Justices Rehnquist and White benefited from the GI Bill).

opportunity and growth was as vivid in 1973 as it is today—so long as one removes their racial blinders.<sup>104</sup>

### C. High Inequality Threatens IHDI

The inadequate investment in disadvantaged children also costs the American economy beyond a shortage of college-ready high school graduates and concomitant declines in labor productivity growth as it feeds excessive economic inequality.<sup>105</sup> *Rodriguez* directly permitted educational inequality, which empirically drives high economic inequality.<sup>106</sup> Simply put, unnecessary economic inequality begins with inequality in early childhood education resources.<sup>107</sup> “The evidence is quite clear that inequality in the development of human capabilities produces negative social and economic outcomes that can and should be prevented with investments in early childhood education, particularly targeted toward disadvantaged children and their families.”<sup>108</sup> Thus, *Rodriguez* not only created macroeconomic costs, it also concretized pernicious economic and racial inequality.

Economists now recognize that too much inequality creates economic and social peril.<sup>109</sup> High inequality leads to a subverted rule of law as

104. Unconscious bias operates as a key propagator of racial inequality that powerfully influences human behavior beyond overt discrimination. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

105. Cunha, *supra* note 79, at 45 (highlighting that a decrease in the skilled labor supply can simultaneously suppress the growth rate in labor productivity and increase income inequality as wages for scarcer skilled labor increases); *See also* Heckman, *The Economics of Inequality*, *supra* note 92, at 31 (“Underdeveloped human potential burdens our economy and leaves us with a workforce that is less than it could be.”).

106. Amparo Castelló-Climent & Rafael Doménech, *Human Capital and Income Inequality Revisited*, 29 EDUC. ECON. 194, 209 (2021) (“Better education is crucial in order to increase average earnings per worker, to avoid the negative effects of skill-biased technological change and to offset other driving forces that may contribute to greater income inequality.”).

107. Heckman, *The Economics of Inequality*, *supra* note 92, at 32 (emphasizing that investment in early childhood education can prevent inequality that produces negative social and economic outcomes).

108. *Id.*

109. *See generally* Roberto Perotti, *Growth, Income Distribution, and Democracy: What the Data Say*, 1 J. ECON. GROWTH 149, 149 (1996) (finding that equality has a positive impact on growth); *see also* Torsten Persson & Guido Tabellini, *Is Inequality Harmful for Growth?*, 84 AM. ECON. REV. 600, 617 (1994) (“[Our] main theoretical result is that income inequality is harmful for growth, because it leads to policies that do not protect property rights and do not allow full private appropriation of returns from investment. . . . This implication is strongly supported by the historical evidence of a narrow [cross-section] of countries and by the postwar evidence from a broad [cross-section] of countries”); *see also* Roberto Perotti, *Political Equilibrium, Income Distribution, and Growth*, 60 REV. ECON. STUD. 755, 757 (1993) (stating that “a very unequal society will” fail to invest in human capital formation sufficiently to sustain enhanced growth and that a more egalitarian society will invest in education sufficiently to reduce inequality and spur growth).

elites use excess income and wealth to distort the legal system in their favor.<sup>110</sup> Regulators can fall prey to economic and cultural capture.<sup>111</sup> The Great Financial Crisis of 2008 coincided with historically high levels of economic inequality and elites successfully used the legal system to bend the law in their favor prior to the crisis,<sup>112</sup> as well as escape accountability after the crisis.<sup>113</sup>

High inequality undermines meritocratic competition (and therefore capitalism) as elites use their relative economic power to entrench themselves and their progeny.<sup>114</sup> Thus, high economic inequality compromises the government's ability to make rational human capital investments as elites seek to cut public investments in favor of private schools, and lower classes opt for employment over education.<sup>115</sup> In the United

110. See Edward Glaeser et al., *The Injustice of Inequality*, 50 J. MONETARY ECON. 199, 200 (2003) (“[I]f political and regulatory institutions can be moved by wealth or influence, they will favor the established, not the efficient.”). The authors found empirically that the rule of law suffered in the transition economies of eastern Europe and during the Gilded Age. *Id.* at 201. See also ERIC M. USLANER, CORRUPTION, INEQUALITY, AND THE RULE OF LAW: THE BULGING POCKET MAKES THE EASY LIFE 26–31 (2010) (finding that high inequality leads to criminal charges against greater corruption and threatens to lead to an inequality trap unless disrupted by universal social welfare programs and universal education).

111. As James Kwak highlights:

[C]ultural capture may simply be harder than traditional capture to protect against. In the traditional capture model, a regulator who sides with one interest group out of self-interest would still accept a better offer from another interest group. When groups or ideas attain prestige of their own, however, and when people identify with groups or adopt ideas in part because of the status they confer, it is considerably harder for those people to identify the sources of their choices. Those choices become sticky and are not vulnerable either to a higher offer or to rational argument about the public interest. And so, although cultural capture may be less reliable than the traditional kind, it can also provide a long-term source of advantage for regulated industries that are able to mobilize it.

James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 98 (Daniel Carpenter & David A. Moss eds., 2013).

112. RAMIREZ, LAWLESS CAPITALISM, *supra* note 5, at 1–16 (summarizing power concentration and subverted law and regulation driving all aspects of the Great Financial Crisis of 2008).

113. MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET 203–28 (2017) (summarizing manifest evidence of criminality underlying all aspects of the Great Financial Crisis of 2008 and the apparent policy of the U.S. Department of Justice to refrain from prosecution of powerful bankers and banks).

114. Textbook macroeconomics holds that the displacement of merit (meaning capability, diligence, ethics, and creativity) with privilege compromises macroeconomic productive efficiency. ACEMOGLU, *supra* note 25, at 161, 163.

115. Catalina Gutiérrez & Ryuichi Tanaka, *Inequality and Education Decisions in Developing Countries*, 7 J. ECON. INEQUAL. 55, 75 (2009) (“We find that when parents can send their children to work or to private school, high inequality leads to exit from public education at both ends of the income distribution. Thus, high inequality reduces the support for public education, leading to a low tax rate and expenditure per student.”).



States, more inequality at the county level leads elites to exploit weak governance and institutions—as *Rodriguez* broadly permits—to entrench their own children at the expense of the children of others by curtailing educational investments.<sup>116</sup> Additionally, using data from the United States from 1970 to 1990, one scholar found that the dramatic increase in inequality during that period aggravated educational attainment gaps between rich and poor children and that states with higher economic inequality featured more educational inequality than others.<sup>117</sup> The pattern is clear: elites will not fund human capital investments for the children of others unless constrained by law.

High economic inequality also undermines social cohesion.<sup>118</sup> As capital suffers diversion from productive uses to frivolous consumption, social resentments and stresses build;<sup>119</sup> crime and violence increase,<sup>120</sup> and life expectancy declines.<sup>121</sup> Political leaders neglect the people in favor of petty indulgences.<sup>122</sup> Social hostility and polarization surges as

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116. Dietrich Vollrath, *Inequality and School Funding in the Rural United States, 1890*, 50 EXPL. ECON. HIST. 267, 268 (2013) (“From a sample of 1345 rural counties, several results emerge. Inequality had a negative relationship with the tax revenues of local school districts across all counties.”).

117. Susan E. Mayer, *How Did the Increase in Economic Inequality between 1970 and 1990 Affect Children’s Educational Attainment?*, 107 AM. J. SOCIO. 1, 1–32 (2001) (“Growing income inequality raised mean educational attainment but also exacerbated disparities in educational attainment between rich and poor children. This is likely to contribute to economic inequality in the next generation.”). The essential holding of *Rodriguez* related to the attainment and ability to compete of disadvantaged children. High inequality harms disadvantaged student educational attainment even while mean educational attainment increases. *Id.* at 22 (“A 0.02 increase in the Gini coefficient is associated with reductions of 0.192 years in low-income children’s schooling and an increase of 0.372 years in high-income children’s schooling.”).

118. See Alberto Alesina & Roberto Perotti, *Income Distribution, Political Instability, and Investment*, 40 EUR. ECON. REV. 1203, 1204 (1996) (“Income inequality increases social discontent and fuels social unrest. The latter . . . has a negative effect on investment and, as a consequence, reduces growth.”).

119. *Id.* at 1226.

120. See, e.g., Benoit De Courson & Daniel Nettle, *Why Do Inequality and Deprivation Produce High Crime and Low Trust?*, 11 SCI. REP. 1937, 1937 (2021) (“Comparing across industrialised [sic] societies, higher inequality—greater dispersion in the distribution of economic resources across individuals—is associated with higher crime and lower social trust.”) (footnotes omitted).

121. See, e.g., Chao-Jie Ye et al., *Mendelian Randomization Evidence for the Causal Effects of Socio-Economic Inequality on Human Longevity among Europeans*, 7 NATURE HUM. BEHAVIOUR 1357–70 (2023) (finding that inequality diminishes life expectancy, but that education can mitigate the negative effect).

122. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 577 (2014) (“[P]olicymaking is dominated by powerful business organizations and a small number of affluent Americans . . . America’s claims to being a democratic society are seriously threatened.”).

inequality surges.<sup>123</sup> Essentially, the economy transmogrifies away from meritocratic competition to crony capitalism and worse.<sup>124</sup> At high levels of economic inequality, elites become more interested in retarding growth and maintaining their advantages than fostering growth that could threaten their incumbency and require meritocratic competition.<sup>125</sup> Such growth-retarding elites value stability, mass disempowerment, and entrenchment over dynamic capitalistic competition and innovation.<sup>126</sup> Invariably, growth-retarding elites seek to defund mass education to entrench their relative position.<sup>127</sup> As elites enjoy more concentrated economic and political power, macroeconomic costs soar.

The best evidence of the pernicious nature of high economic inequality may perhaps arise from the actual experience of the United States since

123. Christian Houle et al., *Inequality Between Identity Groups and Social Unrest*, 19 J. ROYAL SOC'Y 1, 1 (2022) (“Economic, social and political inequality between different identity groups is an important contributor to violent conflicts within societies.”).

124. ACEMOGLU, *supra* note 25, at 224 (reviewing elite efforts to sabotage macroeconomic growth to enhance their own power).

125. See Daren Acemoglu & James A. Robinson, *Economic Backwardness in Political Perspective*, 100 AM. POL. SCI. REV. 115, 115 (2006) (arguing that elites will oppose technological change and economic development when their incumbency advantages are threatened and finding historical evidence in support of this dynamic); see also Philippe Aghion et al., *Inequality and Economic Growth: The Perspective of the New Growth Theories*, 37 J. ECON. LITERATURE 1615, 1615 (1999) (“[T]he view that inequality is growth-enhancing has been further challenged by a number of empirical studies, often based on cross-country regressions of GDP growth on income inequality. They all find a negative correlation between the average rate of growth and a number of measures of inequality.”).

126. See CHRIS BRAMALL, SOURCES OF CHINESE ECONOMIC GROWTH 1978–1996, at 470 (2000) (finding that China’s experience suggests a role for “selective interventionism,” but only if the state is “hardened” against the influence of special interests which can be expected to arise and retard growth when inequality goes unchecked). See also Dani Rodrik, *Understanding Economic Policy Reform*, 34 J. ECON. LITERATURE 9, 13, 19–20 (1996) (contesting then-prevailing orthodoxy that free markets alone led to East Asian growth, and demonstrating instead that it was attributable to rapid accumulation of physical and human capital that was facilitated by a political context marked by a “hard” state with the ability to resist special interests due to relative equality).

127. Professor Philipp Ager studied behavior of growth-retarding elites in the American South after the Civil War and argued:

[T]hat the negative association between the relative wealth of the historical planter elite and the long-run economic development of counties in the US South is the likely consequence of the planter elite’s lack of support for mass schooling. My results indicate that illiteracy rates after the Civil War fell more slowly in counties with a relatively wealthier planter elite, and that these counties also saw a smaller share of the population attending high school or college in the beginning of the 20th century. I also show that counties with a richer planter elite before the Civil War were less likely to establish so-called Rosenwald schools for black children. My results suggest that more economically powerful planters may have undermined blacks and poor whites capacity to accumulate human capital by delaying the establishment of human-capital promoting institutions.

Philipp Ager, *The Persistence of de Facto Power: Elites and Economic Development in the US South, 1840–1960* 21 (Eur. Hist. Econ. Soc’y, Working Paper No. 38, 2013).

*Rodriguez*. Since 1980, the top 0.1 percent of the income distribution saw their real income increase by 281 percent; meanwhile, median household income grew by only 11 percent.<sup>128</sup> Further, hourly wages for those with only high school diplomas actually *declined* over the past thirty years.<sup>129</sup> Hourly wages overall stagnated since 1973, even as productivity increased over 70 percent.<sup>130</sup> Thus, a small fraction of Americans made economic gains—even as college graduation rates doubled since 1980—while the vast majority saw their incomes stagnate at best.<sup>131</sup> Recently, this trend has worsened: 91 percent of income gains from 2009 to 2014 went to the top 1 percent.<sup>132</sup>

Such outrageous inequality demands an explanation. According to Nobel Prize-winning economist Joseph Stiglitz:

Since the mid-1970s the rules of the economic game have been rewritten, both globally and nationally, in ways that advantage the rich and disadvantage the rest. And they have been rewritten further in this perverse direction in the U.S. than in other developed countries—even though the rules in the U.S. were already less favorable to workers.<sup>133</sup>

Professor Stiglitz maintains that when governing elites hold concentrated economic and political power, as they do today in the United States, they engage in rent-seeking behavior, which allows them to profit while producing nothing of value.<sup>134</sup> For example, they rig laws and regulations to escape accountability and achieve anti-social profits.<sup>135</sup> They undermine growth-enhancing institutions such as broadly-distributed education while expending great sums to advantage their own children.<sup>136</sup> Indeed, mainstream economics now holds that high economic inequality invariably yields growth-retarding elites more interested in rent-seeking

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128. Stiglitz, *supra* note 4, at 135 (summarizing soaring U.S. economic inequality).

129. *Id.*

130. *Id.* (“[F]rom 1948 to 1973 both [productivity and hourly wages] increased at the same pace, about doubling over the period.”).

131. *Id.*

132. *Id.* Wealth inequality followed income inequality with top one percent monopolizing over 40 percent of the nation’s wealth as of 2013, compared to less than 25 percent in 1978. *Id.* at 136.

133. Joseph E. Stiglitz, *The American Economy Is Rigged*, SCI. AM. (Nov. 1, 2018), <https://www.scientificamerican.com/article/the-american-economy-is-rigged/> [<https://perma.cc/VJ93-G6Y2>].

134. Stiglitz, *supra* note 4, at 140–41.

135. *Id.* at 146–47.

136. *Id.* at 146 (“With nearly one in four American children growing up in poverty, many of them facing not just a lack of educational opportunity but also access to adequate nutrition and health, the country’s long-term prospects are being put in jeopardy.” (footnote omitted)).

and impeding growth than exposing themselves or their children to meritocratic competition.<sup>137</sup>

The precise toll of high economic inequality on macroeconomic growth still suffers from much uncertainty. Nevertheless, the International Monetary Fund found that high inequality is associated with more financial instability and shorter growth spells.<sup>138</sup> The Organisation for Economic Co-operation and Development (OECD) found that in developed countries (including the United States), growth suffered by up to 9 percent as a result of the surge of inequality in recent decades.<sup>139</sup> This suggests that the toll is both chronic and acute.

Further, high economic inequality may lead to catastrophes such as climate change and The Great Financial Crisis that may prove impossible to quantify.<sup>140</sup> Given the manifest macroeconomic costs of inequality on growth and human capital formation, the next parts of this Article interrogate the origins and basis of *Rodriguez* to determine whether it results from a legitimate exercise of judicial power or arises from yesteryear's racist attitudes and politics warranting no precedential value.

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137. See, e.g., ACEMOGLU, *supra* note 25, at 224 (recounting the rejection of railroads and economic development in Austria-Hungary and Russia as well as rejection of free and open access to the internet in at least ten nations today); Stiglitz, *supra* note 4, at 146–47 (explaining that governing elites will resist state-sponsored growth enhancing investments—such as education—that do not benefit them personally or could threaten redistribution of income or wealth). The existence of irrational hierarchies—such as racial hierarchies—proves the presence of growth retarding elites. See Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 301 n.10 (2018) (quoting Martin Luther King, Jr.). See also *infra*, Part IV (and authorities cited therein).

138. Andrew G. Berg & Jonathan D. Ostry, *Inequality and Unsustainable Growth: Two Sides of the Same Coin?*, 65 IMF ECON. REV. 792, 808 (2017) (demonstrating that “(1) increasing the length of growth spells, rather than just getting growth going, is critical to achieving income gains over the long term and (2) countries with more equal income distributions tend to have significantly longer growth spells” and concluding that “attention to inequality may be warranted for social reasons, independently of its effects on growth, but the analyses presented here suggest that inequality has a direct economic cost—reducing the duration and sustainability of growth” (internal citations omitted)).

139. See Cingano, *supra* note 75, at 6 (“Drawing on harmonized data covering the OECD countries over the past 30 years, the econometric analysis suggests that income inequality has a negative and statistically significant impact on subsequent growth. In particular, what matters most is the gap between low-income households and the rest of the population.”).

140. RAMIREZ, *LAWLESS CAPITALISM*, *supra* note 5, at 4 (“The subprime fiasco validates these economic insights in full. Small bands of powerful corporate and financial elites subverted law in their favor on a systemic basis.”).

## II. THE BLINKING FUNDAMENTAL RIGHT TO EDUCATION AND THE BETRAYAL OF *BROWN*

*Rodriguez* certainly entails oppressive outcomes consistent with the work of growth-retarding elites regarding race.<sup>141</sup> The depths of disparities at issue in *Rodriguez* proved challenging for Texas to justify.<sup>142</sup> For instance, consider funding in two school districts: Edgewood and Alamo Heights. Although Edgewood imposed the highest property tax in the San Antonio area in 1967–1968, it spent only \$356 per pupil, which consisted of \$222 from the State of Texas, \$108 in federal funds, and \$26 of discretionary local property tax revenue.<sup>143</sup> Affluent Alamo Heights expended \$594 per pupil, which consisted of \$225 provided by the State guarantee, \$36 in federal funds, and \$333 of discretionary local property tax revenue.<sup>144</sup> Such wide disparities pervaded Texas: the ten wealthiest school districts in the State raised \$610 per student in additional discretionary funds from local property taxes, while the four poorest districts in the State raised an average of \$63 per student.<sup>145</sup> Race naturally lurked in the background—Edgewood was 90 percent Hispanic and 6 percent African American, while Alamo Heights only enrolled 19 percent minority students.<sup>146</sup> All of this meant that a fundamentally separate and unequal education system functioned openly in Texas with respect to wealthy white students versus poor minority students.<sup>147</sup> Moreover, at the time the Court issued its opinion in *Rodriguez*, it did so in clear view of the

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141. See, e.g., Gregory Smithson, *How to See Race*, AEON (Mar. 26, 2018), <https://aeon.co/es/says/race-is-not-real-what-you-see-is-a-power-relationship-made-flesh> [https://perma.cc/29XZ-A76H] (“Race is a power relationship; racial categories are not about interesting cultural or physical differences, but about putting other people into groups in order to dominate, exploit and attack them.”).

142. The lower court decided unanimously that Texas could not even clear rational basis scrutiny. See *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 284 (W.D. Tex. 1971) (“Not only are defendants unable to demonstrate compelling state interests . . . , they fail even to establish a reasonable basis for these classifications.”). Four Supreme Court Justices agreed with the lower court. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 63–70 (1973) (White, J., joined by Douglas & Brennan JJ., dissenting); *Id.* at 71–133 (Marshall, J., dissenting).

143. *Rodriguez*, 411 U.S. at 12.

144. *Id.* at 12–13.

145. *Id.* at 74–75 (Marshall, J., dissenting).

146. *Id.* at 12–13.

147. Justice Marshall highlighted the substantive differences between these two separate and unequal systems. See *id.* at 85 & nn.44–86 & n.47, 136 app. III (Marshall, J., dissenting) (noting all of Alamo Heights teachers had college degrees but only approximately 80 percent of the teachers in Edgewood were college graduates; over 37 percent of the Alamo Heights teachers had advanced degrees compared to only about 15 percent in Edgewood; Alamo Heights’ maximum teaching salary was 25 percent greater than Edgewood’s; Alamo Heights’ teacher-student ratio was 1-to-20.5, while Edgewood’s was 1-to-26.5; and, Alamo Heights boasted one counselor for every 645 students versus one for every 3,098 in Edgewood).

fact that across the nation white students enjoyed substantially more funding on a per pupil basis than minority students.<sup>148</sup>

The plaintiffs in *Rodriguez* argued that these disparities denied them equal protection regarding a fundamental right to education and that wealth amounted to a suspect classification.<sup>149</sup> As such, the Texas scheme could not withstand strict scrutiny.<sup>150</sup> The three-judge District Court panel agreed unanimously.<sup>151</sup> *Brown* seemingly settled the question of a fundamental right to education.<sup>152</sup> Specifically, the Supreme Court in 1954 declared:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>153</sup>

Unfortunately, this statement of the importance of education to any constitutional republic and capitalist system devolved from a call to action into rote rhetorical dogma with almost no practical meaning, insofar as law and education are concerned beginning with the *Rodriguez* opinion.<sup>154</sup>

148. See, e.g., CHRISTOPHER JENCKS ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 28 (1972) (estimating 15–20 percent more spending per white student than each Black pupil).

149. *Rodriguez*, 411 U.S. at 16.

150. *Id.* (“Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications.”).

151. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281 (W.D. Tex. 1971).

152. See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954).

153. *Id.*

154. As Professor Caitlan Millat puts it:

This Article argues that though the Court has rhetorically drawn connections between public education, antisubordination, democracy, and equity, an examination of the Court’s education jurisprudence shows instead that, over time, the Court has substantively rejected the concept of public education as an integrative, public-facing good and instead embraced education as a consumer commodity where private preferences and choices are to be advanced. Rather than promote public education as an agent of equal

In particular, *Brown* conflicts directly with the holding in *Rodriguez*.<sup>155</sup> In *Rodriguez*, the Court stated: “In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.”<sup>156</sup> This conclusion ignores the racial history of Texas, the racial composition of the victims of disparate funding, and the magnitude of the funding disparities.<sup>157</sup> It exalts protection of the status quo over the Constitution.<sup>158</sup> *Rodriguez* pays homage to the idea of educational importance.<sup>159</sup> Nevertheless, while rhetoric and dicta matter, holdings manifest the actual work of the Court.<sup>160</sup>

Long before *Brown*, the United States held a long-standing and fundamental value for widely distributed educational opportunities. “[T]he Northwest Ordinance, passed by Congress [in 1787], held that ‘religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever

access, it has, over time, chipped away at the franchise, both explicitly endorsing and implicitly contributing to its devolution into a tool of structural subordination.

Millat, *supra* note 17, at 532.

155. The Court in *Rodriguez* also ignored the Ninth Amendment. U.S. CONST. amend. IX. (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). In *Griswold v. Connecticut*, the Court held that the state could not interfere with the right of married couples to use birth control. 381 U.S. 479, 485–86 (1965). Justice Goldberg rested his concurring opinion on the Ninth Amendment. *See id.* at 488, 490 (Goldberg, J., concurring) (“[T]he Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”).

156. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973).

157. *Id.* at 70–133 (Marshall, J., dissenting).

158. Justice Powell admitted as much:

It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. Some commentators have concluded that, whatever the contours of the alternative financing programs that might be devised and approved, the result could not avoid being a beneficial one. But, just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers and their scholarship reflects no such unqualified confidence in the desirability of completely uprooting the existing system.

*Rodriguez*, 411 U.S. at 56.

159. *Id.* at 54–55.

160. Millat, *supra* note 17, at 532.

be encouraged.”<sup>161</sup> Under the Morrill Act of 1862, the federal government granted colleges and universities 17.4 million acres of land to be used “to teach such branches of learning as are related to agriculture and the mechanic arts . . . to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.”<sup>162</sup>

The Morrill Act of 1890 provided similar funding for schools in the South that did not discriminate on the basis of race in admissions, which greatly expanded educational opportunities for African Americans.<sup>163</sup> In *Meyer v. Nebraska*,<sup>164</sup> the Court overturned a state statute forbidding public schools from instruction in non-English languages in order to preserve English as the nation’s “mother tongue.”<sup>165</sup> The Court struck down the statute because the law “affects few citizens, except those of foreign lineage” and impeded the “natural duty of the parent to give his children education suitable to their station in life.”<sup>166</sup> In *Westminster School District v. Mendez*, the Ninth Circuit struck down school segregation of children of Mexican descent under California Law as a precursor to *Brown*.<sup>167</sup> Nevertheless, the Supreme Court rejected characterizing the right to education as a fundamental right, unlike many state courts.<sup>168</sup>

For example, the California Supreme Court, in *Serrano v. Priest*,<sup>169</sup> found that the use of property taxes to support educational funding

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161. Jill Lepore, *Is Education a Fundamental Right?*, NEW YORKER (Sept. 3, 2018), <https://www.newyorker.com/magazine/2018/09/10/is-education-a-fundamental-right> [<https://perma.cc/E28M-DE62>].

162. Morrill Act of 1862, Pub. L. No. 111-122, 12 Stat. 503, 504 (1862) (codified as amended at 7 U.S.C. § 304).

163. Morrill Act of 1890, Pub. L. No. 111-122, 26 Stat. 417, 418 (1890) (codified as amended at 7 U.S.C. § 322) (“[N]o money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students . . .”).

164. *Meyer v. Nebraska*, 262 U.S. 390, 397–98 (1923).

165. *Id.* at 401.

166. *Id.* at 398, 400 (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares: ‘Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.’ Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.”).

167. *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 784 (9th Cir. 1947) (“[I]t is pertinent that they clearly fail even to give equal facilities to the children in the two classes of schools.”).

168. See *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (finding that charging undocumented immigrants for the cost of education violated equal protection because it was not rationally related to a substantial government interest).

169. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).



violated the U.S. Constitution and the California Constitution.<sup>170</sup> Specifically, according to the California Court, such disparate funding violates the Equal Protection Clause.<sup>171</sup> The California Court cited *Brown* and added: “The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values.”<sup>172</sup> The *Serrano* court subsequently reaffirmed the right to education, notwithstanding the opinion in *Rodriguez*.<sup>173</sup> Courts across the nation followed suit.<sup>174</sup>

Federal courts continue to flirt with the possibility of a right to education.<sup>175</sup> Sometimes, courts express sympathy with the concept of more equitable funding for the disadvantaged.<sup>176</sup> In the end, *Rodriguez* left

170. *Id.* at 1244.

171. According to the California Supreme Court:

We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment. We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child’s education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.

*Serrano*, 487 P.2d 1241, 1244 (Cal. 1971).

172. *Id.* at 1256, 1258 (citing *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216, 231 (1948) (Frankfurter, J., concurring); *Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

173. *Serrano v. Priest*, 557 P.2d 929, 950–51 (Cal. 1976) (“[T]he fact that a majority of the United States Supreme Court have now chosen to contract the area of active and critical analysis under the strict scrutiny test for federal constitutional purposes can have no effect upon the existing construction and application afforded our own constitutional provisions.” (footnote omitted)).

174. See Katherine Smith Davis & Jeffrey Davis, *Restoring the Rights Multiplier: The Right to an Education in the United States*, 28 J.L. & POL’Y 395, 419 (2020) (“[N]ineteen states have recognized a fundamental right to an education under their state constitutions, and others have enforced the right through their highest courts. Furthermore, the legislative branch has repeatedly passed and amended federal legislation based upon the recognition of the importance of an equal education for all children.”).

175. *Gary B. v. Whitmer*, 957 F.3d 616, 642 (6th Cir. 2020) (finding a “fundamental right to a basic minimum education”), *reh’g en banc granted, opinion automatically vacated by circuit rule*, 958 F.3d 1216 (6th Cir. 2020).

176. *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 174–75 (D.R.I. 2020) (dismissing the complaint but stating that the complaint constituted “a cry for help from” a generation of youth who “recognize [] that American democracy is in peril. Its survival, and their ability to reap the benefits of living in a country with robust freedoms and rights, a strong economy, and a moral center protected by the rule of law is something that citizens must cherish . . .”), *aff’d sub nom. A.C. ex rel. Waithe v. McKee*, 23 F.4th 37 (1st Cir. 2022).

little space for any effective right to an education. In 1988, the Supreme Court affirmed *Rodriguez*.<sup>177</sup> Scholars try mightily to find relief for disadvantaged students.<sup>178</sup> These laudable efforts miss an essential point: *Rodriguez* represents a political choice of a well-entrenched conservative faction that exalts wealth and the status quo at the expense of a growing majority of poor children of color.<sup>179</sup> This perspective suggests *Rodriguez* operates exactly in accordance with political preferences of those then holding power to impose such preferences.<sup>180</sup> It does not reflect judicial reasoning but the triumph of the politics of racial oppression with all the wanton destruction of human capital implicit in racial oppression.<sup>181</sup> As such, it rests upon a fundamentally illegitimate, corrupt, and craven basis.

Scholars previously highlighted the politics leading to *Rodriguez*.<sup>182</sup> In 1968, Professor Phillip Kurland predicted: “[S]ooner or later the Supreme Court will affirm the proposition that a State is obligated by the Equal Protection Clause to afford equal educational opportunity to all of its public school students [by requiring the equalization of per pupil

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177. See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 456–58 (1988) (finding that education is not a fundamental right to which strict equal protection scrutiny would apply and classifications based upon wealth do not trigger strict scrutiny).

178. See, e.g., Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1182–83 (2022) (suggesting that the right to education be recast as a property interest); Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1075–76, 1089–90 (2019) (suggesting an originalist argument that state provision of public education is foundational to liberty); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 110–48 (2013) (arguing for a positive right to a minimally adequate education); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 347–48 (2006) (contending that the Fourteenth Amendment Citizenship Clause assigns Congress a duty to establish a meaningful right to education); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 113 (2004) (arguing that a federally recognized right to education “is imperative to deal with the problems in American public schools”).

179. See Millat, *supra* note 17 (“[T]he Court has substantively rejected the concept of public education as an integrative, public-facing good and instead embraced education as a consumer commodity where private preferences and choices are to be advanced.”).

180. See *Davis & Davis*, *supra* note 174, at 396 (“In *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court *incorrectly* ruled that education was not a fundamental right.” (second emphasis added)).

181. Race is a social construct that always involves mass destruction of human capital for corrupt reasons. Steven A. Ramirez, *Taking Economic Human Rights Seriously After the Debt Crisis*, 42 LOY. U. CHI. L.J. 713, 716 (2011) (and accompanying notes).

182. E.g., Earl M. Maltz, *The Road to Rodriguez: Presidential Politics, Judicial Appointments, and the Contingent Nature of Constitutional Law*, 109 VA. L. REV. ONLINE 17, 18 (2023) (arguing that *Rodriguez* “provides a particularly striking illustration” of how political developments can determine opinions).

spending].”<sup>183</sup> Nevertheless, Professor Maltz argues that the election of 1968 resulted in the reversal of the three-judge panel in *Rodriguez* due to Richard Nixon ascending to the White House.<sup>184</sup> President Johnson could not get Justice Abe Fortas confirmed to succeed Chief Justice Warren, and the winner of the 1968 election would fill the seat left vacant by Warren’s resignation.<sup>185</sup> Fortas subsequently resigned under an ethical cloud, giving Nixon another appointment.<sup>186</sup> Then, Justice Hugo Black and Justice John Harlan resigned.<sup>187</sup> “[T]he impact of four Nixon appointees on the Court’s approach to issues of educational equality would emerge clearly during the consideration of *San Antonio Independent School District v. Rodriguez*.”<sup>188</sup> The constitutional right to an education perished in an unprecedented and historic ideological shift in the Court.

Richard Nixon’s ascent to the White House also proved a political reaction to the civil rights movement.<sup>189</sup> President Nixon won the election of 1968 pursuant to an admitted Southern Strategy.<sup>190</sup> The Southern Strategy used code such as “law and order” and generally evinced hostility to “civil rights.”<sup>191</sup> He promised to appoint “strict constructionists”<sup>192</sup> to the Court who would take a tough stand against crime.<sup>193</sup> John

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183. Philip B. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 592 (1968).

184. See Maltz, *supra* note 182, at 22 (suggesting President Nixon’s election jeopardized the Supreme Court’s potential to affirm progressive educational initiatives).

185. *Id.* at 22–27.

186. See *id.* at 28 (explaining that Justice Fortas accepted a \$20,000 payment from a nonprofit organization that was under SEC investigation).

187. See *id.* at 29 (explaining that Justices Black and Harlan retired in the early 1970s).

188. *Id.*

189. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS*, at ix (2014) (“In the last 50 years, dog whistle politics has driven broad swaths of white voters to adopt a self-defeating hostility to government, and in the process has remade the very nature of race and racism. American politics today—and the crisis of the middle class—cannot be understood without recognizing racism’s evolution and the power of pernicious demagoguery.”).

190. See RAMIREZ, *LAWLESS CAPITALISM*, *supra* note 5, at 152 (stating that two GOP chairmen, Michael Steele and Ken Mehlman, admitted that the party used the so-called Southern Strategy’s racial hostility and coded language to attract working-class voters); see also HANEY LÓPEZ, *supra* note 189, at 24–27 (stating that President Nixon, as well as at least two of his senior aides, also essentially admitted to using racial anxiety and racial divisions as a political tool).

191. HANEY LÓPEZ, *supra* note 189, at 22–34 (describing Richard Nixon’s use of race-baiting in the 1968 election and the strategies employed by Democrats and Republicans in the South).

192. John Hart Ely claimed that “strict constructionism,” as used by Richard Nixon, signaled outcomes comporting with conservative politics. JOHN HART ELY, *DEMOCRACY AND DISTRUST I* (1980).

193. See *Transcript of the President’s Announcement on Two Nominees for Supreme Court*, N.Y. TIMES, Oct. 22, 1971, at 24 (“As a judicial conservative, I believe some Court decisions in the past have gone too far in weakening the peace forces as against the criminal forces in our society.”).

Ehrlichman stated that President Nixon also used the War on Drugs to intentionally suppress the political power of his perceived enemies, particularly African Americans.<sup>194</sup> According to the diary of H. R. Haldeman, Nixon's chief of staff, "[President Nixon] emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to."<sup>195</sup> Thus, Nixon stated in a national radio broadcast: "Government must never become so preoccupied with catering to the way-out wants of those who reject all respect for moral and legal values that it forgets the citizen's first civil right, the right to be free from domestic violence."<sup>196</sup> President Nixon came of age in the 1930s and 1940s; like many Americans of that era, he voiced reprehensible and discordant racial views that the public may access today from his presidential tapes.<sup>197</sup> These sentiments drove the entire Southern Strategy, which in turn drove Nixon's views on judicial appointments.<sup>198</sup>

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194. Watergate co-conspirator John Ehrlichman is quoted as stating:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER'S MAG., Apr. 2016, at 22, <https://archive.harpers.org/2016/04/pdf/HarpersMagazine-2016-04-0085915.pdf> [<https://perma.cc/G9DL-26CK>] (describing an interview with former Richard Nixon domestic-policy adviser and Watergate co-conspirator John Ehrlichman admitting to the racist underpinnings of the War on Drugs).

195. DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 12 (1996) (citing H. R. Haldeman's diary).

196. Robert B. Semple Jr., *Nixon Says He Kept Vow to Check Rise in Crime*, N.Y. TIMES, Oct. 16, 1972, at 1, <https://www.nytimes.com/1972/10/16/archives/nixon-says-he-kept-vow-to-check-rise-in-crime-nixon-says-he-kept.html> [<https://perma.cc/GE7M-ETRN>].

197. According to the Miller Center at the University of Virginia:

Richard Nixon's racism and bigotry are well-established, largely due to the approximately 3,432 hours of secret recordings he made during his presidency. The Miller Center began its Presidential Recordings Program in 1998 to make accessible these and other once-secret White House tapes, which continue to offer insights about not only Nixon but also the many individuals of the era who are featured in the recordings—including Ronald Reagan, then governor of California.

*Reagan, Nixon, and Race*, MILLER CTR., <https://millercenter.org/the-presidency/educational-resources/reagan-nixon-and-race> [<https://perma.cc/YE2L-URHV>]. The tapes available on the Miller Center website record Nixon and Reagan using deeply offensive terms to refer to Africans.

198. Nixon's appointments to the Court included two who failed to attain confirmation:

Nixon set out to produce a strict constructionist majority on the Supreme Court that would limit or eliminate busing to achieve integration. After the appointment of Chief Justice Warren Burger, Nixon attempted to appoint two southern federal judges with

President Nixon's successfully-confirmed Supreme Court Justices fully reflected this Southern Strategy, albeit without the racist tapes.<sup>199</sup> For example, prior to his ascent to the Supreme Court, Lewis Powell voiced resistance to civil disobedience and presided over the Richmond, Virginia version of massive resistance to desegregation.<sup>200</sup> As a Justice, Powell saved the death penalty—despite compelling evidence of racial infirmities in its administration—because if it should fail to pass constitutional muster, the entire criminal justice system may suffer from unconstitutional racial infirmities.<sup>201</sup> Powell stated, “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties.”<sup>202</sup> As he further clarified in a memo to his clerks: “If *McCleskey* were to prevail, not only would other minorities seek to avoid capital punishment on the basis of statistics; blacks and other minorities would attempt to extend *McCleskey* to rape, life sentences, and possibly other crimes and penalties, relying on the Eighth Amendment.”<sup>203</sup> Simply put, Justice Powell evinced easy comfort with minorities in jail not school—justice be damned.<sup>204</sup>

Justice Rehnquist, another one of President Nixon’s four Supreme Court appointees, joined Justice Powell in both *Rodriguez* and *McCleskey* without writing an opinion.<sup>205</sup> Infamously, he wrote a memorandum as

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conservative records on civil rights. Clement Haynesworth had upheld both Virginia’s effort to close schools to avoid court ordered integration and the freedom-of-choice plans that were stuck down . . . Harold Carswell, as a candidate for the state legislature, had declared his unwavering support for white supremacy.

Myron Orfield, Milliken, Meredith, and *Metropolitan Segregation*, 62 UCLA L. REV. 364, 381 (2015).

199. See Anders Walker, *A Lawyer Looks at Civil Disobedience: How Lewis F. Powell, Jr. Reframed the Civil Rights Revolution*, 86 U. COLO. L. REV. 1229, 1230–35 (2015) (explaining that Justice Powell voiced opposition to the civil rights movement and worked to minimize integration pursuant to *Brown* as the head of the Richmond, Virginia schools. In fact, under Justice Powell’s leadership only 2 of 23,000 African American students in Richmond attended white schools).

200. See *id.* (explaining that Justice Powell worked to preserve segregation in Richmond); see generally Powell, *supra* note 9, at 216.

201. See Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1383 (2018) (“For victimless crimes, one has grounds to worry about the fate of alternative sanctions, like diversion, that tend to disproportionately favor [W]hite defendants.”).

202. *McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1987). In dissent, Justice Brennan responded: “Taken on its face, such a statement seems to suggest a fear of too much justice.” *Id.* at 339.

203. Gruber, *supra* note 201, at 1361.

204. See *id.* (demonstrating Justice Powell’s aversion to allowing statistics determine the propriety of capital punishment).

205. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *McCleskey*, 481 U.S. 279 (1987).

a clerk to Justice Robert H. Jackson while *Brown* pended before the Court that urged Justice Jackson to affirm<sup>206</sup> *Plessy v. Ferguson*.<sup>207</sup> Much controversy surrounded the memo and whether Rehnquist wrote the memo in the sincere belief that *Brown* should not overturn *Plessy*.<sup>208</sup> New evidence recently emerged establishing that Chief Justice Rehnquist did indeed believe the Fourteenth Amendment permitted racial segregation and thus almost certainly opposed *Brown*.<sup>209</sup> President Nixon stated on tape that he appointed Rehnquist as part of the Southern Strategy because the future Justice would pursue “reactionary” policies in a “mean” way.<sup>210</sup> Justices Powell and Rehnquist both should bear responsibility for our separate and unequal schools and the closely related emergence of the carceral state, each of which dovetails with the other to propagate the American racial hierarchy with staggering macroeconomic costs.<sup>211</sup>

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206. See Adam Liptak, *The Memo That Rehnquist Wrote and Had to Disown*, N.Y. TIMES, (Sept. 11, 2005), <https://www.nytimes.com/2005/09/11/weekinreview/the-memo-that-rehnquist-wrote-and-had-to-disown.html> [<https://perma.cc/5KDS-3H48>] (quoting future Justice Rehnquist as writing: “I realize that this is an unpopular and unhumanitarian position for which I have been excoriated by ‘liberal’ colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed.”).

207. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

208. See Brad Snyder, *What Would Justice Holmes Do (WWJHD)?: Rehnquist’s Plessy Memo, Majoritarianism, and Parents Involved*, 69 OHIO ST. L.J. 873, 874 (2008) (“Legal scholars who have written about the credibility of his explanation tend to fall into anti- and not-so-anti Rehnquist camps.”).

209. See Richard L. Hasen & Dahlia Lithwick, *There’s Unsettling New Evidence About William Rehnquist’s Views on Segregation*, SLATE (June 1, 2023), <https://slate.com/news-and-politics/2023/06/supreme-court-term-william-rehnquist-segregation.html> [<https://perma.cc/7GZK-49SV>] (quoting Justice Rehnquist in a message to Justice O’Connor as stating: “The Fourteenth Amendment prohibits discrimination; it does not require integration, and I think it is a mistake to intimate that it does even as a ‘goal.’”).

210. Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1023–24 (2006). Professor Butler further assesses a number of other indicia that Rehnquist harbored racist impulses at various times in his career such as challenging minority voters and various instances of possible misconduct or ill-advised statement. *Id.* at 1020–23. Professor Butler also plumbs Justice Rehnquist’s judicial opinions for evidence of racism. *Id.* at 1026–29. Professor Jerome Culp previously plowed the same ground. Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597, 599–600 (1994) (finding the Justice Rehnquist drew upon notions of White Supremacy). My thesis does not depend upon any particular Justice being a racist; my thesis is highly pernicious racial policies (like *Rodriguez*) directly attributable to racial politics (the Southern strategy) cannot stand.

211. The macroeconomic costs of the War on Drugs are now well established:

[T]he disproportionate impact of the WOD operates in tandem with the pre-existing encumbrance of race. Thus, Black workers without a criminal record earn around twenty percent less than white workers with a criminal record. Such “grotesque” inequities burden not just Latinx and African American communities, but our entire economy. Indeed, the losses in wages means that communities of color often face high poverty rates that transmit the burdens of mass incarceration across generations—entire families

The Southern Strategy and its impact on the Court evince that the right to an education in the United States fell prey to ugly racial politics.<sup>212</sup> “International treaties, national constitutions and legislation, state constitutions, United States statutes, and international and state judicial decisions overwhelmingly recognize education to be a fundamental human right.”<sup>213</sup> More specifically, but for such racial politics, the right to an education, with all of its admitted importance for human development and actualization, evolves naturally under law.<sup>214</sup> All fifty states include an obligation for the state to provide free public education or more expansive rights to an education.<sup>215</sup> As of 2021, in twenty-seven reported decisions, state courts enforced these provisions at least in part.<sup>216</sup> Further, the International Covenant on Economic, Social and Cultural Rights, of which 171 countries have ratified, includes a right to education.<sup>217</sup>

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effectively face sentences of poverty. Axiomatically, as America becomes more diverse and more Americans of color suffer from the oppression implicit in our festering racial hierarchy, these costs will soar.

andré douglas pond cummings & Steven A. Ramirez, *Roadmap for Anti-Racism: First Unwind the War on Drugs Now*, 96 TUL. L. REV. 469, 488 (2022). As Nobel laureate Joseph Stiglitz states:

As a perpetual drag on the earning potential of tens of millions of Americans, these costs are not only borne by individuals, their families, and their communities. They are also system-wide drivers of inequality and are so large as to have macroeconomic consequences.

....

There is much that has to be done if our society is to fully come to terms with our long history of racial injustice. Stopping mass incarceration is an easy place to begin. This report makes a compelling case for the enormous economic benefits to be derived from doing so.

Joseph E. Stiglitz, *Foreword* to TERRY-ANN CRAIGIE ET AL., CONVICTION, IMPRISONMENT, AND LOST EARNINGS, at 4–5 (2020).

212. Davis & Davis, *supra* note 174, at 403 (“Nearly every democratic country in the world recognizes education to be a fundamental human right, a fact reinforced by the right’s expression in several human rights treaties.”).

213. *Id.* at 444 (explaining the view on education as a fundamental right).

214. *Id.* at 396 (“While many scholars have analyzed and criticized this decision, we show that the Court fundamentally misunderstood the very nature of rights. Unlike other critiques, we use a comparative approach examining international, regional, state, and federal laws and decisions to demonstrate conclusively that education is a fundamental human right.”).

215. See Scott Dallman & Anusha Nath, *Education Clauses in State Constitutions Across the United States*, FED. RES. BANK OF MINNEAPOLIS, Jan. 8, 2020, at 1 (“[E]very state constitution includes language that mandates the establishment of a public education system. Some state constitutions include clauses that only stipulate that the state provide public education, while other states have taken more significant measures to ensure the provision of a high-quality public education system.”).

216. See Spencer C. Weiler et al., *Applying Odds Ratio to the Study of School Finance Litigation*, 392 EDUC. L. REP. 1, 6 (2021) (listing the states where these decisions were rendered).

217. U.N. International Covenant on Economic, Social, and Cultural Rights (ICESCR) arts. 13 & 14, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (“The State Parties to the present Covenant recognize the right of everyone to education.”).

Four additional countries including the United States have signed but not ratified the treaty.<sup>218</sup> In fact, virtually all of the twenty-three nations that outrank the United States on the World Bank's Human Capital Index recognize the right to an education.<sup>219</sup> Only racial politics explains the isolated and backward U.S. position regarding the right to an education.

The rest of the world recognizes the macroeconomic and human development stakes implicit in the right to an education. According to the United Nations Committee on Economic, Social and Cultural Rights:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.<sup>220</sup>

Ironically, the rest of the world appreciates and acts pursuant to the very sentiments (albeit updated) regarding education from *Brown* and Justice Marshall's dissent from *Rodriguez*.

The Court's hostile view of the right to education<sup>221</sup> has not served the nation well, as the most disadvantaged students face global competition with highly restricted resources. The United States' scores on the most recent triennial Programme for International Student Assessment tests stagnate around the OECD average, far below leaders such as China and

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218. U.N. International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en) [<https://perma.cc/X5M3-ZQ45>] (listing the signing nations).

219. See *World Bank Rankings*, WALL ST. J. (2023), [https://graphics.wsj.com/table/WorldBank\\_1031](https://graphics.wsj.com/table/WorldBank_1031) [<https://perma.cc/6VBG-6VP7>] (ranking the United States twenty-fourth in Human Capital).

220. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. And Cultural Rights, 21st Sess., General Comment No. 13, art. 13, at 1, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999), <https://digitallibrary.un.org/record/407275?ln=en> [<https://perma.cc/2QGD-TR6D>].

221. In 1988 the Court decided to continue its preference of relegating poor, politically disempowered largely minority students to manifestly inferior educational facilities. See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988) (finding that education is not a fundamental right to which strict equal protection scrutiny would apply).



Singapore.<sup>222</sup> A predictable outcome of the *Rodriguez* approach: our disadvantaged students underperform the disadvantaged students from other nations, notwithstanding the Herculean efforts of the states to fill the gap left in funding from the *Rodriguez* decision.<sup>223</sup> In fact, the highest-performing countries feature educational funding equity across socioeconomic lines.<sup>224</sup> Many commentators suggest that the failures of *Rodriguez* led to a crisis in American education, particularly, among the most disadvantaged.<sup>225</sup>

### III. THE INFIRMITIES OF *RODRIGUEZ*

Some opinions stand upon a reasonable analysis of the issues at hand and convey a serious effort at exercising judicial power. *Rodriguez* rests upon facially infirm reasoning and reeks of an outcome in search of a legal basis. As noted above, the *Rodriguez* decision suffered many criticisms over the years.<sup>226</sup> The following seeks to complete those critiques.

#### A. *Ignoring the Ninth Amendment & the Long History of Unenumerated Rights*

Justice Powell denied a federal right to an education largely because it was not expressly enumerated in the Constitution—in an apparent contravention of the Ninth Amendment.<sup>227</sup> In 1973, the now fashionable

222. OECD, *Country Note, United States, Programme for International Student Assessment (PISA) Results from PISA 2018*, at 1 (explaining that American students' scores have not significantly improved over the last two decades and that countries such as China and Singapore lead the world in mathematics scores).

223. *Id.* at 3 (assessing the current state of American education).

224. See, e.g., Tim Walker, *PISA 2018: Slight U.S. Progress, But What Do The Results Really Tell Us?*, NAT'L EDUC. ASS'N (Dec. 3, 2019), <https://www.nea.org/advocating-for-change/new-from-nea/pisa-2018-slight-us-progress-what-do-results-really-tell-us> [<https://perma.cc/WE26-45LV>] (“These top performing countries followed the same blueprint: they invested heavily in their students, educators, and schools regardless of socio-economic standing.”).

225. For commentator discussion, see, for example, JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 271–304 (2010), which illustrates that students in high-poverty schools and districts with limited political power suffer disproportionately in the United States; Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 314–22 (2013), which indicates that local control and its reliance on unequal tax bases as a key progenitor of educational inequities; Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 551–52 (1992), which describes the magnitude of the education crisis as “such menacing proportions that not only is the national self-concept of a free and independent people imperiled, but the very economic and political pre-eminence of the nation has been jeopardized.”

226. For explanations of critiques of the *Rodriguez* decision, see *supra* notes 16, 17, 22 and 34.

227. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–38 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.”).

conservative effort to render the Ninth Amendment surplusage held little currency.<sup>228</sup> The plain meaning of the Ninth Amendment authorizes the judiciary to elevate additional rights to the same status as those enumerated in the Bill of Rights.<sup>229</sup> According to Justice Goldberg, “the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”<sup>230</sup> According to Justice Douglas, “[r]ights, not explicitly mentioned in the Constitution, have at times been deemed so elementary to our way of life that they have been labeled as basic rights” worthy of protection under the Ninth Amendment.<sup>231</sup> Of course, the Court always enforced certain unenumerated rights without citation or reference to the Ninth Amendment.<sup>232</sup> These cases also frequently touch upon the right to education.<sup>233</sup>

In general, the Court’s test for whether a putative unenumerated right warrants the same protection as enumerated rights revolves around two factors: whether the supposed right is (1) “objectively, deeply rooted in this Nation’s history and tradition;” and (2) “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they

228. *See* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240 (2022) (“Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one.”). Ironically, Justice Powell weighed-in favorably for the right to privacy in *Roe v. Wade*, 410 U.S. 113, 152 (1973) (“[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”).

229. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

230. *Griswold v. Connecticut*, 381 U.S. 488, 491 (1965) (Goldberg, J., concurring) (holding that marital rights enjoy unenumerated protection on par with the Bill of Rights).

231. *Palmer v. Thompson*, 403 U.S. 217, 233 (1971) (Douglas, J., dissenting) (quoting U.S. CONST. amend. IX).

232. *E.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (right to same-sex marriage); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (right to engage in private, consensual sexual acts); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992) (upholding right to abortion); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (right to abortion); *Oregon v. Mitchell*, 400 U.S. 112, 134–35 (1970) (right to vote); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to marry interracial); *United States v. Guest*, 383 U.S. 745, 759 (1966) (right to travel); *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (right to international travel); *NAACP v. State of Alabama*, 357 U.S. 449, 462 (1958) (right of privacy in association); *Edwards v. California*, 314 U.S. 160, 181 (1941) (right of free movement to enter states); *United States v. Reese*, 92 U.S. 214, 218 (1876) (right to vote regardless of race).

233. *E.g.*, *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2262 (2020) (if a state subsidizes private education, it may not disqualify some private schools solely because they are religious-based); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (separate but equal schools violate equal protection clause); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (parents have a right to choose private education for their children); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (parents have a right to teach languages other than English).

were sacrificed.”<sup>234</sup> Justice Powell did not cite or apply this time-worn test; instead, he subjectively rejected any constitutional right to an education.<sup>235</sup>

As shown above, the right to an education or the right to an equal education arises from deep roots in American history.<sup>236</sup> Moreover, a well-educated populace, all admit, would contribute to a well-functioning democracy.<sup>237</sup> Further, widely distributed education reduces poverty, a virulent form of non-freedom.<sup>238</sup> Finally, education, innovation, and economic strength form the backbone of national security.<sup>239</sup> In sum, education proves essential to a well-ordered scheme of liberty.<sup>240</sup> Certainly, the *Rodriguez* Court did not face inexorable legal compulsion to

234. *Washington v. Glucksberg*, 521 U.S. 702, 720–26 (1997) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); and *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

235. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34–35 (1973) (explaining that there is no right to education enumerated in the Constitution).

236. *See Brown*, 347 U.S. at 493 (“Today, education is perhaps the most important function of state and local governments.”).

237. *Id.* (“[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.”).

238. *See, e.g., Masood Sarwar Awan et al., Impact of Education on Poverty Reduction*, 3 INT’L J. ACAD. RES. 659, 662 (“Therefore, education is the most important factor regarding poverty reduction.”).

239. *See, e.g., Lloyd J. Dumas, Economic Power, Military Power, and National Security*, 24 J. ECON. ISSUES 653, 653 (1990) (“Economic strength has always been a component of national power and influence. Perhaps it is time to more fully integrate economic considerations into national security policy.”); *see also* President Dwight D. Eisenhower, *Statement by the President Upon Signing the National Defense Education Act*, AM. PRESIDENCY PROJECT (Sept. 2, 1958), <https://www.presidency.ucsb.edu/node/233961> [<https://perma.cc/2UGZ-KKN6>] (“This Act, which is an emergency undertaking . . . [will] do much to strengthen our American system of education so that it can meet the broad and increasing demands imposed upon it by considerations of basic national security.”).

Note as well, the United States created an entire government-sponsored technological ecosystem to achieve breakthrough innovations in support of national security:

For more than 60 years, DARPA has held to a singular and enduring mission: to create technological surprise. We do this by making pivotal investments in breakthrough technologies for national security. Working with innovators inside and outside government, DARPA has repeatedly delivered on our mission, transforming revolutionary concepts and seeming impossibilities into practical capabilities. The results have included game-changing military capabilities like precision weapons, stealth technology, and unmanned aerial vehicles, as well as icons of modern civilian society such as the internet, automated voice recognition and language translation, miniaturized GPS receivers, and, just a decade ago, mRNA-based vaccines.

*Accelerating Innovation for the Warfighter: Hearing on Emerging Threats and Capabilities Before the U.S. Senate Armed Servs. Comm., Subcomm.* (Apr. 6, 2022) (statement by Dr. Stefanie Tompkins, Director, Def. Advanced Rsch. Projects Agency), <https://www.armed-services.senate.gov/download/tompkins-04/06/2022> [<https://perma.cc/FC72-URZB>].

240. *See, e.g., Brown*, 347 U.S. at 493 (explaining the benefits that democratic society enjoys when citizens are well-educated).

reject education as an unenumerated right under the Constitution.<sup>241</sup> It held discretion over the issue and subjectively negated such a right.

### *B. The Myth of Judicial Unsuitability*

Justice Powell expressed doubt about the ability of the Court to intervene productively in educational funding decisions.<sup>242</sup> He thought that upholding the lower court's determination in favor of funding equity would lead to "unprecedented upheaval."<sup>243</sup> Yet, state courts managed these challenges successfully.

A study of action and results at the state level proved Justice Powell wrong; states successfully stepped into the vacuum of leadership left by the Court, and the most probable outcome of a decision finding the Texas funding plan violative of the Constitution would be more educational funding that would be more equitably distributed.<sup>244</sup> More specifically, in the sixteen states with courts willing to intervene in disparate funding claims, court orders achieved more educational funding that was more equitably distributed.<sup>245</sup> No massive resistance like that seen after *Brown* occurred.<sup>246</sup> This study proves that judicial intervention in educational funding works.

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241. *Supra* notes 1, 2, and 3 (showing the indeterminate nature of the legal analysis for the issue of whether education is a Constitutional right by the dissents and lower court decisions).

242. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 ("In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.").

243. *Id.* at 56 ("It cannot be questioned that the constitutional judgment reached by District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education.").

244. Subsequent state-based litigation leaves little doubt that *Rodriguez* led to more constrained educational funding as well as poorly distributed funding:

Between 1971 and 1996 opponents of local funding for public schools successfully challenged the constitutionality of school-finance systems in 16 states. Using the variation across states in the timing of these cases we investigate the impact of reform on the distribution of school resources. Our results suggest that court-ordered finance reform reduced within-state inequality in spending by 19 to 34 percent. Successful litigation reduced inequality by raising spending in the poorest districts while leaving spending in the richest districts unchanged, thereby increasing aggregate spending on education. Reform led states to fund additional spending through higher state taxes.

Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 789 (1998) (citation omitted).

245. Murray et al., *supra* note 244, at 789 ("We find that court-mandated reform of school-finance systems reduces within-state inequality in spending by 19 to 34 percent.").

246. RAMIREZ, LAWLESS CAPITALISM, *supra* note 5 (noting that Justice Powell played a key role in massive resistance to *Brown* as the Chair of the Richmond, Virginia Board of Education).

State courts cannot address interstate funding inequalities. While it is impossible to know how a federal right to education would evolve (particularly under the supervision of reactionary Supreme Courts), the possibility of courts serving the needs of the people they rule over, insofar as education is concerned, has been clearly established empirically.<sup>247</sup> Nevertheless, the federal courts could play a key role that the states could not—regulating minimal levels of funding to address interstate inequalities, which far outweigh intrastate differences in funding.<sup>248</sup>

### C. Money Matters

Justice Powell suggested that money may not influence the quality of education.<sup>249</sup> Again, Justice Powell proved wrong.<sup>250</sup> “A research consensus has emerged that money matters for education because of the influential resources that it can purchase, and the longstanding debate over whether money matters has shifted to how money should be spent most efficiently to improve student achievement.”<sup>251</sup> The premise that money

247. State litigation cannot resolve funding disparities among the states. See Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL’Y REV. 201, 202–03 (2016) (“Federal options for addressing spending disparities are particularly crucial because the greatest variation in per pupil spending occurs between states, rather than within states.”).

248. See Sean P. Corcoran & William N. Evans, *Equity, Adequacy, and the Evolving State Role in Education Finance*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 358 tbl.21.2 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015) (finding that 78 percent of inequality in educational funding arises from interstate differentials).

249. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 42–43 (“On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education.”).

250. One team of economists assessing the impact of enhanced educational funding noted:

We find . . . for low-income children, a 10% increase in per pupil spending each year for all 12 years of public school is associated with 0.46 additional years of completed education, 9.6% higher earnings, and a 6.1 percentage point reduction in the annual incidence of adult poverty. The results imply that a 25% increase in per pupil spending throughout one’s school years could eliminate the average attainment gaps between children from low-income . . . and nonpoor families.

C. Kirabo Jackson et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q. J. ECON. 157, 160 (2016).

251. Kimberly Jenkins Robinson, Fisher’s *Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 208 (2016) (first citing BRUCE D. BAKER, ALBERT SHANKER INST., REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION?, at iv–v (2012); and then citing Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, *Creating New Pathways to Equal Educational Opportunity*, in THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 263, 264, 268–70 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015)).

may not matter for educational outcomes defies credulity and defied credulity in 1973.

One scholar recently challenged the argument that funding for education does not matter to student outcomes. Reviewing 163 studies from before 1995, the scholar concluded: “To put it bluntly, any claim that there is little evidence of a statistical link between school spending and student outcomes is demonstrably false.”<sup>252</sup> Older studies, scholars now recognize, established a strong correlation between increased funding and superior student outcomes.<sup>253</sup> Newer studies now establish causation.<sup>254</sup>

For example, in a 2018 study, a team of economists found that increased school funding across a range of low-income school districts led to higher student performance as schools reduced class size and invested in better facilities.<sup>255</sup> Using an event-study design that exploited random court-ordered funding reforms, the team found that immediate and sustained increases in school spending in low-income school districts led to dramatic increases in test scores.<sup>256</sup> Specifically, a \$1,000 increase in per pupil spending sustained for ten years increased test scores by between 0.12 and 0.24 standard deviations.<sup>257</sup> Based upon estimates of additional earnings tied to higher performance, that team estimates a 1.5-dollar present value in additional earnings only for every dollar spent.<sup>258</sup> In other

252. C. Kirabo Jackson, *Does School Spending Matter?: The New Literature on an Old Question*, in *CONFRONTING INEQUALITY* 165, 166 (Laura Tach, Rachel Dunifon & Douglas L. Miller eds., Am. Psych. Ass’n 2020).

253. *Id.* at 165.

254. See, e.g., Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement*, 10 *AM. ECON. J.: APPLIED ECON.* 1, 24 (2018) (“Our results thus show that money can and does matter in education, and complement similar results for the long-run impacts of school finance reforms . . .”).

255. The researchers found evidence to suggest that:

[S]tate-level school finance reforms enacted during the adequacy era markedly increased the progressivity of school spending. They did not accomplish this by “leveling down” school funding, but rather by increasing spending across the board, with larger increases in low-income districts. Schools used these additional funds to increase instructional spending, reduce class size, and for capital outlays. Using nationally representative data on student achievement, we find that these reforms were productive: Reforms increased the absolute and relative achievement of students in low-income districts.

Lafortune et al., *supra* note 254, at 23.

256. *Id.* (“Schools used these additional funds to increase instructional spending, reduce class size, and for capital outlays. Using nationally representative data on student achievement, we find that these reforms were productive: Reforms increased the absolute and relative achievement of students in low-income districts.”).

257. *Id.* at 4 (“The implied impact is between 0.12 and 0.24 standard deviations per \$1,000 per pupil in annual spending.”).

258. *Id.* at 24 (“This implies a benefit-cost ratio of 1.5, even when only earnings impacts are counted as benefits.”). The authors note that other studies find greater payoff benefits. *Id.*

words, educational funding for low-income students does not cost; it pays, as established above.<sup>259</sup> *Rodriguez*, as decided, short-circuited opportunities to achieve the greatest pay-offs in educational funding—aid to the most disadvantaged students and districts.

Parts II and III establish that a bare-naked desire to replicate the racial and socioeconomic hierarchy provides the only plausible reasoning for the *Rodriguez* decision. The Court seized the opportunity to perpetuate inequality and project it into the indefinite future. This obvious outcome operates as the sole intelligible purpose of the opinion. The next part of this Article will explore the legacy of *Rodriguez*. *Rodriguez* ultimately had the effect its progenitors intended.

#### IV. RECKONING WITH *RODRIGUEZ* AND A PARTISAN AND BACKWARDS COURT

Consider the savage educational inequities seen today in our nation as a result of *Rodriguez*.<sup>260</sup> School funding inequalities are “staggering.”<sup>261</sup> At a time when human resources are more critical to economic success than ever before:<sup>262</sup>

[T]he U.S. education system is plagued with persistent and longstanding funding inequities—with the majority of states sending the fewest number of resources to the districts and schools that actually need the

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259. For a demonstration of the parallel relationship between investments in educational opportunities and macroeconomic growth, see *supra* Part I.

260. See Derek W. Black, *Localism, Pretext, and the Color of School Dollars*, 107 MINN. L. REV. 1415, 1493 (2023) (“[I]t is now, ironically, the local district itself—with its sacrosanct borders and funds—that creates barriers and entrenches inequality. Until courts and policymakers seriously confront this reality—and the history and constitutional principles that demand change—our schools will remain indefinitely segregated and unequal.”); Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CAL. L. REV. 1531, 1580 (2020) (“[T]he vast inequality of resources among the states constitutes a substantial barrier to the federal government’s ability to guarantee adequate levels of education, health care, and other core commitments over time.”).

261. Black, *supra* note 260, at 1424 (“School funding inequalities are staggering on multiple accounts—race, wealth, and geography—and only get worse during economic downturns.”).

262. See, e.g., *Investing in People to Build Human Capital*, WORLD BANK (Aug. 3, 2018), <https://www.worldbank.org/en/news/immersive-story/2018/08/03/investing-in-people-to-build-human-capital> [<https://perma.cc/Y9KP-V6X7>] (“‘Human capital’—the potential of individuals—is going to be the most important long-term investment any country can make for its people’s future prosperity and quality of life.”); Jim Yong Kim, *The Human Capital Gap Getting Governments to Invest in People*, FOREIGN AFFS. (June 14, 2018), <https://www.foreignaffairs.com/articles/2018-06-14/human-capital-gap> [<https://perma.cc/GF47-GXCL>] (“[N]eglecting investments in human capital can dramatically weaken a country’s competitiveness in a rapidly changing world, one in which economies need ever-increasing amounts of talent to sustain growth.”).

most resources. As a result, millions of students are not getting the proper resources that would allow them to succeed.<sup>263</sup>

School districts serving the most students of color spend almost \$2,700 less per pupil than white districts.<sup>264</sup> Across the nation, districts with the most students of color spend 16 percent less than those with the most white students.<sup>265</sup> Nebraska spends nearly 25 percent less on students of color.<sup>266</sup> Another six states—including New York, Texas, Florida, and Illinois—spend between 10 to 20 percent less on districts serving the most students of color.<sup>267</sup> Another recent analysis graded twenty-two states an “F” for school funding, based upon inequity because they spent substantially less in schools serving predominantly low-income students or overall levels of funding.<sup>268</sup> Recent data suggests these funding disparities stubbornly defy any substantial improvement, if not worse.<sup>269</sup>

These gaps, however, understate the full injustice and social harm. “Decades of research shows that low-income students require more, not fewer, resources than their peers to achieve basic education outcomes.”<sup>270</sup> As such, a recent study found that the funding shortfalls

263. Ivy Morgan, *Equal is not Good Enough: An Analysis of School Funding Equity Across the U.S. and Within Each State*, EDUC. TR. 1 (Dec. 2022), <https://edtrust.org/wp-content/uploads/2014/09/Equal-Is-Not-Good-Enough-December-2022.pdf> [<https://perma.cc/5VF7-VTHJ>].

264. *Id.* at 5 (“Across the country, districts with the most students of color on average receive substantially less (16%) state and local revenue than districts with the fewest students of color. That’s about \$2,700 less per student . . .”).

265. *Id.* at 4 (“Districts with the most students of color receive 16% less state and local revenue than district with the fewest students of color.”).

266. *Id.* at 11 (“In 22 states, districts serving the most students of color receive less state and local revenue per-student than districts serving the fewest students of color. This is a particularly pronounced problem in six states (Connecticut, Illinois, Kansas, Nebraska, North Carolina, Rhode Island), where districts serving the most students of color receive 10% to 22% less state and local funding than districts serving the fewest students of color.”).

267. *Id.* at 10–11 fig.4 (demonstrating which states spend less on the most diverse districts).

268. See Danielle Farrie & David G. Sciarra, *Making the Grade: How Fair Is School Funding in Your State?*, EDUC. L. CTR. 8 (2021), <https://edlawcenter.org/research/making-the-grade-2021.html> [<https://perma.cc/7WFU-XG8D>] (awarding Texas, Arkansas, Alabama, Oklahoma, Tennessee, Florida, Mississippi, North Carolina, Nevada, Idaho, Utah, and Arizona an “F” for their funding levels, and awarding Maine, Alabama, Florida, Pennsylvania, Rhode Island, Connecticut, Missouri, Illinois, New Hampshire, and Nevada an “F” for the funding disparities between districts).

269. Compare Ivy Morgan & Ary Amerikaner, *Funding Gaps 2018*, EDUC. TR. 4 (Feb. 2018), <https://files.eric.ed.gov/fulltext/ED587198.pdf> [<https://perma.cc/F2V9-2DW5>] (analyzing school funding equity across the United States and within each state), with Morgan, *supra* note 263, at 5 (showing the variations in funding gaps amongst poverty districts and the challenges in meeting a community school system’s unique financial needs). See also Sylvia Allegretto et al., *Public Education Funding in the U.S. needs an Overhaul*, ECON. POL’Y INST. (July 12, 2022) <https://www.epi.org/233143> [<https://perma.cc/74SX-98DD>].

270. Black, *supra* note 260, at 1425 (first citing Thomas B. Parrish, Christine S. Hikido & William J. Fowler, Jr., *Inequalities in Public School District Revenues*, NAT’L CTR. FOR EDUC. STAT.



exceed \$10,000 per student in the highest poverty districts.<sup>271</sup> In aggregate, a recent analysis found that funding gaps total \$150 billion nationwide and that children of color disproportionately suffer from inadequate educational funding.<sup>272</sup> “Inequity in public education is not a natural occurrence, but rather the result of funding choices. Decades of disinvestment in public education at the state and federal level have a cost, and it has primarily come at the expense of Latinx, Black, and low-income students.”<sup>273</sup> These funding shortfalls account for approximately half of the high school graduation gap plaguing African Americans.<sup>274</sup> Fifty years on, *Rodriguez* continues to permit these gross inequities and the consequent disability of huge numbers of children of color at the earliest and most critical stage of development.

Further, the demographic reality of the United States suggests a growing degree of oppression arising from the *Rodriguez* decision. Diversity continues to grow in America, and childhood poverty has recently experienced a sharp increase.<sup>275</sup> More children will suffer constricted educational funding under *Rodriguez*, which manifestly failed to protect poor children and children of color.<sup>276</sup> Thus, the *Rodriguez* opinion operates as the primary mechanism for the permanence of the American racial hierarchy because it oppresses the very young and encumbers their ability

62 (1998), <https://nces.ed.gov/pubs98/98210.pdf> [<https://perma.cc/97YQ-68KN>] (identifying 40 percent as the appropriate adjustment for low-income students); and then citing Ross Wiener & Eli Pristoop, *How States Shortchange the Districts That Need the Most Help*, EDUC. TR. FUNDING GAPS 5, 6 (2006) <https://edtrust.org/wp-content/uploads/2013/10/FundingGap2006.pdf> [<https://perma.cc/7384-NZX6>] (surveying scholars who estimate the additional cost as being thirty percent to sixty percent).

271. See Bruce D. Baker et al., *The Real Shame of the Nation: The Causes and Consequences of Interstate Inequity in Public School Investments*, RUTGERS UNIV. & EDUC. L. CTR. 1 (2018), [www.shankerinstitute.org/sites/default/files/The Real Shame of the Nation.pdf](http://www.shankerinstitute.org/sites/default/files/The%20Real%20Shame%20of%20the%20Nation.pdf) [<https://perma.cc/S8LV-CTCP>] (“In some states—notably Arizona, Mississippi, Alabama and California—the highest poverty school districts fall as much as \$14,000 to \$16,000 per pupil below necessary spending levels . . .”).

272. CENTURY FOUND., *supra* note 6 (explaining that the United States is underfunding public schools significantly and thus is causing children to lose opportunities to succeed).

273. *Id.*

274. *Id.* (“Districts that have more than 50 percent Black or Latinx enrollment are nearly twice (1.95 times) as likely to have a funding gap than districts with minority enrollment less than 50 percent.” (emphasis omitted)).

275. U.S. CENSUS BUREAU, *supra* note 23 (showing that the younger generation of Americans is the most racially and ethnically diverse population in decades). Additionally, childhood poverty recently spiked to 12.4 percent, or about nine million children. Belinda Luscombe, *What’s Behind the Spike in Child Poverty in the U.S.*, TIME (Sept. 12, 2023, 5:40 PM), <https://time.com/6313242/child-poverty-rate-2022-census/> [<https://perma.cc/29X4-23FK>].

276. See *supra* notes 141–47 for examples of inequality in Texas schools regarding funding that were apparent when the Court issued its opinion in *Rodriguez*.

to achieve full development, and its damage increases annually as America becomes more diverse.

Courts should not construe the Constitution in a way that threatens the viability of our constitutional republic. The Supreme Court recognized decades ago that “the Constitution . . . is not a suicide pact.”<sup>277</sup> When legal issues before the Court implicate national security concerns, it should respond in ways to vindicate such concerns.<sup>278</sup> When national security concerns coincide with other core values of the nation, such as equality under law, the general welfare and domestic tranquility, national security (or the common defense) should weigh heavily in any legal analysis of constitutional requirements.<sup>279</sup>

Today, America’s enemies use the American racial hierarchy against the United States by highlighting our hypocrisy worldwide<sup>280</sup> and seeking to stoke divisions and violence at home.<sup>281</sup> In fact, a bipartisan

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277. *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

278. During World War II, the Court permitted unnecessary oppression of Japanese Americans that it later came to regret. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. . . . The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history.” (citing *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting))).

279. *See Welch & Heilpern, supra* note 7, at 1137 (explaining the Preamble’s significance within the context of textual interpretation).

280. *See Michelle Nichols, U.S. and China Spar over Racism at United Nations*, REUTERS (Mar. 19, 2021, 2:01 PM), <https://www.reuters.com/article/us-usa-china-un-idUSKBN2BB29E> [<https://perma.cc/BH3V-87MP>] (“‘If the U.S. truly cared about human rights, they should address the deep-seated problems of racial discrimination, social injustice and police brutality, on their own soil,’ [Chinese Deputy UN Ambassador] Dai [Bing] told the 193-member General Assembly.”); *see also* Andrew Higgins, *Putin Says U.S. Is in ‘Deep Internal Crisis’*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/14/world/europe/putin-interview-united-states.html?smid=nyt-core-android-share> [<https://perma.cc/4AM5-GWZG>] (quoting Vladimir Putin as criticizing the United States over race and stating that the nation faced “deep internal crisis”).

281. *See* Richard Engel et al., *Russian Documents Reveal Desire to Sow Racial Discord—and Violence—in the U.S.*, NBC NEWS (May 20, 2019, 5:54 PM), <https://www.nbcnews.com/news/world/russian-documents-reveal-desire-sow-racial-discord-violence-u-s-n1008051> [<https://perma.cc/KP3W-Z78C>] (“The unfortunate reality is that we’re seeing an adversary that will consider virtually anything to get what it wants, and if it means violence or splitting America along racial lines or eroding our trust in institutions, they’ll do it.”); *see* Jason Sattler, *Trump and Russia used Race to Divide America: Now it’s a National Security Problem*, USA TODAY (July 19, 2018, 1:41 PM), <https://www.usatoday.com/story/opinion/2018/07/19/putin-trump-race-divide-americans-2016-election-interference-column/799765002/> [<https://perma.cc/527T-TGDR>] (“The roughly 3,500 Facebook ads created by the Russian-based Internet Research Agency ‘consistently promoted ads designed to inflame race-related tensions,’ a USA Today analysis found . . . [r]ace is our Achilles’ heel. Putin and Trump have grabbed us by it.”).

consensus recognizes our enemies' efforts to divide us based on race.<sup>282</sup> As economists predict under conditions of high inequality, social unrest and domestic violence soared recently in the US, even exploding into a failed insurrection on January 6, 2021.<sup>283</sup> A majority expects more such violence driven by an ill-educated population that proves easy prey for those propagating conspiracy theories.<sup>284</sup> Simply stated, national security should play a critical role in the exercise of government power, including judicial power, particularly when it also furthers core American values.<sup>285</sup> Simply put: *Rodriguez* threatens all core values, of our constitutional republic, and should not hold any precedential weight.

In *Dobbs v. Jackson Women's Health Organization*,<sup>286</sup> Justice Alito overturned *Roe v. Wade*.<sup>287</sup> Alito deemed *Roe* and the many courts following or affirming it “egregiously wrong”<sup>288</sup> as well as “simply

282. The entire Senate Select Committee on Intelligence already found that Russia uses social media to incite racial and other animosity within the United States. See S. SELECT COMM. ON INTEL., RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, VOL. 2: RUSSIA'S USE OF SOCIAL MEDIA, WITH ADDITIONAL VIEWS, S. REP. 116-XX, at 6 (2019), [https://www.intelligence.senate.gov/sites/default/files/documents/Report\\_Volume2.pdf](https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf) [<https://perma.cc/WHS5-FJ56>] (“[T]he Russian information warfare campaign exploited . . . divisive issues—such as race, immigration, and Second Amendment rights—in an attempt to pit Americans against one another and against their government.”); H.R. MCMASTER, BATTLEGROUND: THE FIGHT TO DEFEND THE FREE WORLD 47–48 (2020) (recognizing how Russia attempted to discredit Hillary Clinton during her presidential campaign by creating racial and political polarization that favored Donald Trump).

283. Mary Clare Jalonick, *Jan. 6 report: Trump 'lit that fire' of Capitol insurrection*, ASSOC. PRESS (Dec. 23, 2022, 9:05 AM), <https://apnews.com/article/jan-6-committee-final-report-trump-bcfea6162fe9cfa0d120e86d069af0e4> [<https://perma.cc/2WLQ-UJQZ>].

284. See Pérez Ortega, *supra* note 15 (explaining how the unregulated dissemination of misinformation coupled with the inability of some to distinguish between reliable and unreliable sources increases the success of spreading conspiracy theories).

285. See Welch & Heilpern, *supra* notes 7, at 1137 (“[T]he Preamble was carefully composed to include each of its fifty-two words. It served as the unifying legal banner. . . . Its principles reverberate through the preambles of states and nations around the world.”).

286. See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

287. In overturning the decision, Justice Alito wrote:

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”

*Dobbs*, 142 S. Ct. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

288. *Id.*; *Id.* at 2265 (“*Roe* was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*’s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.”).

wrong.”<sup>289</sup> Justice Alito noted that little reliance on *Casey* can be shown because it did not involve contract or property rights.<sup>290</sup> Finally, the *Roe* ruling caused lower court “conflicts” and entailed “distortions” in other laws.<sup>291</sup> Essentially, Justice Alito gives precedence zero deference beyond his own preferences and his contorted and subjective view that rights should be frozen in our racist and misogynistic past of 1868.<sup>292</sup> Alito’s obsession with defining rights, with reference to a bygone era of bigotry, can only reflect his own subjective preferences as he fails to cite any text or contemporaneous statements of intent that the Constitution should operate in such a constipated manner.<sup>293</sup> Alito’s majority opinion pedantically explores the ancient history of abortion regulation (citing sources from the thirteenth century) in search of some relevant legal doctrine.<sup>294</sup> Alito (and the majority) fail to comprehend that a constitution must serve people of all ages.<sup>295</sup>

Chief Justice Roberts concurred in the *Dobbs* judgment but not in overturning *Roe v. Wade*.<sup>296</sup> The Chief Justice would instead exercise judicial

289. *Id.* at 2265 (“*Roe*’s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong.”).

290. *Id.* at 2275 (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)).

291. *Id.* at 2276.

292. *Dobbs*, 142 S. Ct. at 2253, 2254, 2260, 2261 and 2267. The dissent, however, recognizes the subjective bigotry of defining rights pursuant a darker time:

Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women’s rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

*Id.* at 2325 (Breyer, J., dissenting).

293. See ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* 72–95 (2022) (showing that originalism suffers from inherent incoherency because the Founders did not support interpreting the Constitution in accordance with original intent such that following their intent means not following their original intent).

294. Justice Alito plumbed the history of the legality of abortion to as far back as the thirteenth century, where he found no constitutional right to an abortion. *Dobbs*, 142 S. Ct. at 2251 (“In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive right to procure an abortion at any stage of pregnancy.”). Justice Alito admits that most ancient sources did not deem all abortions a crime. *Id.* at 2249 (“We begin with the common law, under which abortion was a crime at least after ‘quickening’—i.e., the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.”).

295. Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1033 (1981) (“[W]e must never forget, that it is a *constitution* we are expounding. . . . [I]ntended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819))).

296. *Dobbs*, 142 S. Ct. at 2316–17 (Roberts, C.J., concurring) (“[T]he Court’s opinion . . . display[s] a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for

restraint and simply decide the issue presented and not decide whether to overturn such long-standing precedents with clear reliance interests that Justice Alioto simply ignored.<sup>297</sup> The dissent concluded that the majority simply abandoned *stare decisis* as an essential element of common law rulemaking and judicial power.<sup>298</sup> In the end, *stare decisis* and judicial precedent after *Dobbs* faces severe credibility challenges as limiting principles or defining elements of judicial power and appear illusory at best and mere lip service at worst.

All of this suggests an urgent need to reconstruct an objective basis for *stare decisis*. For example, *stare decisis* cannot project the racism of the past into contemporary America under the cover of precedent and judicial power. The Fourteenth Amendment militates powerfully against allowing decisions to so operate. *Rodriguez* arises from the racialized Southern Strategy, premiering in the election of 1968.<sup>299</sup> That Amendment aimed squarely at assuring that law did not perpetuate the American racial hierarchy.<sup>300</sup> It should operate today to ensure that Supreme Court decisions touching upon race, which tend to perpetuate the racial hierarchy, will hold zero precedential effect.<sup>301</sup> Race exacts a devastating macroeconomic toll upon the American economy.<sup>302</sup> It continues to operate to oppress a growing number of American children and rob them and their nation of their full potential.<sup>303</sup> Given this macroeconomic cost, its in-firm reasoning, its key role in replicating our racial hierarchy, its betrayal

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example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks.”).

297. *Id.*

298. *Id.* at 2333 (Breyer, J., dissenting) (“By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. . . . *Stare decisis* ‘promotes the evenhanded, predictable, and consistent development of legal principles’ . . . It maintains a stability that allows people to order their lives under the law.” (internal citations omitted) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))).

299. See *supra* Part II (describing *Rodriguez*’s roots in the racial political principles established under the Southern Strategy).

300. U.S. CONST. amend. XIV, § 1 (“No state . . . shall deprive any person of life, liberty, or property . . . nor deny to any person within its jurisdiction the equal protection of the laws.”).

301. The federal government cannot violate the Equal Protection Clause. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law’ . . .”).

302. See Steven A. Ramirez, *A Vision of the Anti-Racist Public Corporation*, 91 U. CIN. L. REV. 828, 847–48 (2023) (“The gap between our collective maximum potential and the current state of American output as constrained by the reality of the racial hierarchy certainly amounts to many trillions of dollars per year.”).

303. *Id.* at 835–48 (emphasizing the disproportionate consequences stemming from racial hierarchy, including disparate infant mortality and childhood poverty rates, limited educational opportunity, and increased rates of incarceration).

of virtually all core constitutional values, and its oppressive impact on children, *Rodriguez* should warrant no precedential value.<sup>304</sup>

Beyond the shattered doctrine of stare decisis, *Rodriguez* also counsels in favor of heightened checks and balances regarding the Supreme Court. The reasoning, impact, precedents, and politics of the *Rodriguez* decision demonstrate that the Supreme Court too often acts as growth-retarding elites, as macroeconomics would predict under conditions of concentrated and unaccountable power.<sup>305</sup> The absence of accountability encourages corruption and the appearance of corruption.<sup>306</sup> Ever since President Roosevelt (successfully) took steps to restructure an out-of-touch and backward Supreme Court in 1937, the political branches failed to monitor the Court and impose any semblance of accountability on the Supreme Court.<sup>307</sup> The Constitution grants Congress express powers of accountability over the Supreme Court, ranging from appropriations to the promulgation of ethics codes.<sup>308</sup> The Constitution also presumably

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304. Judicial review exercised in favor of the wealthy and politically powerful at the expense of the disadvantaged—such as the *Rodriguez* opinion—should warrant strict scrutiny in terms of judicial legitimacy and invite enhanced political supervision. See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

305. *Supra* Parts I, II and III. The *Rodriguez* opinion, while the focus of this article, does not stand alone in impugning the institutional structure of the Supreme Court. *Supra* notes 13, 22, 34, 192, and 193. The current institutional structure of the Court consistently delivers opinions in favor of entrenched elites and against the disadvantaged, particularly children of color.

306. Nan Aron, *Investigate the Shadow Network of Billionaires Funding Supreme Court Justices*, THE HILL (Aug. 2, 2023, 10:30 AM), <https://thehill.com/opinion/judiciary/4131512-investigate-the-shadow-network-of-billionaires-funding-supreme-court-justices/> [<https://perma.cc/FJ9N-C6B4>] (“Near daily revelations of unseemly financial relationships between the court’s conservative justices and their billionaire patrons were hallmarks of another blockbuster, precedent-busting term.”).

307. In February of 1937, President Roosevelt asked Congress to add up to six Justices to the United States Supreme Court. William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347 (1966). This plan responded to a series of Supreme Court decisions striking down important parts of Roosevelt’s New Deal. See *id.* at 369. Roosevelt’s initial plan was a smashing failure, but a second plan nearly succeeded in the summer of 1937. William E. Leuchtenburg, *FDR’s Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673 (describing a lesser-known, second attempt by Roosevelt to “pack” the Supreme Court in 1937). The Supreme Court defused Roosevelt’s initial plan somewhat when it began to take a more expansive approach to federal power. See *id.* at 673.

308. See U.S. CONST. art. I; see also e.g., JOANNA R. LAMPE, CONG. RSCH. SERV., R47382 CONGRESSIONAL CONTROL OVER THE SUPREME COURT 1–2 (2023) (assessing age limits, term limits, court-packing, jurisdictional limits and other mechanisms of reigning-in Supreme Court excesses); see also PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, *supra* note 14, at 20–21 (assessing reform proposals such as term limits, Court size and composition, transparency and ethics, and powers of review).

allows Congress the power to define “good Behaviour” as a condition to continued tenure.<sup>309</sup> Congress holds further power to regulate judicial jurisdiction and to define the number of Supreme Court Justices.<sup>310</sup>

The precise contours of reconstructing stare decisis and restructuring the Supreme Court lies beyond the scope of this Article, which focuses instead on the handiwork of a backward Court in *Rodriguez*.<sup>311</sup> The outcome of that case grows in perniciousness daily, as more innocent children see their future prospects destroyed or diminished to the tune of \$150 billion per year that stunts the number of college-ready graduates in the United States while privileging an increasingly corrupt elite.<sup>312</sup> Today, the savage inequities marring education in the United States continue unabated.<sup>313</sup> At the very least, *Rodriguez* should hold zero precedential value.<sup>314</sup> No rational legal system can ignore its immoral and self-destructive realities.<sup>315</sup> If dismantling the United States racial hierarchy really matters to the judiciary, opinions giving real effect to the social construction of race and acting to replicate its realities into the future—like *Rodriguez*—warrant no precedential weight.<sup>316</sup> Deference to such

309. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

310. *Id.*

311. Senator Elizabeth Warren proposes changing the size of the Supreme Court by adding four new seats. Elizabeth Warren, *Expand the Court*, BOS. GLOBE (Dec. 14, 2021), <https://www.bostonglobe.com/2021/12/15/opinion/expand-supreme-court/> [<https://perma.cc/F8QQ-CMNF>] (noting that Congress changed the size of the Supreme Court seven times over the course of U.S. history).

312. CENTURY FOUND., *supra* note 6 (“The United States is underfunding our public schools by nearly \$150 billion annually, robbing millions of children . . . of the opportunity to succeed.”).

313. See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* (Broadway Paperbacks 1991) (discussing disparities in educational quality between schools that predominantly serve students of color and schools in higher-income neighborhoods that predominantly serve white students). Over thirty years after these inequalities gained widespread notoriety our nation still clearly invests in the futures of White children more than children of color, despite the moral reprehensibility and macroeconomic destruction that follows. *Supra* notes 251–63.

314. Advocates and activists against racial injustice and vicious poverty cycles must attack these precedents politically and by all means necessary to bring these judicial opinions into wide disrepute. See Darren Lenard Hutchinson, *Thinly Rooted: Dobbs, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385, 420–21 (2023) (“Constitutional law changes because social movements, activists, politicians, and members of the public collectively make claims about the meaning of the Constitution and seek to legalize these perspectives through legislation, litigation, and executive action.”).

315. Ramirez, *Emergence of Law and Macroeconomics*, *supra* note 7, at 230–32 (arguing that the objective of the law should be to maximize the Inequality-Adjusted Human Development Index).

316. See Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833, 834 (2022) (cataloging cases evincing the failure of the Supreme Court to deal with race and stating: “The Supreme Court has been a dismal failure in dealing with issues of race throughout American history”).

precedents becomes a tribute to racism and racists of yesteryear at a great cost to living citizens.

#### CONCLUSION

The American legal system fails to assure equal protection under the law and broad-based human development. The Supreme Court plays a central role in this deeply suboptimal reality. *Rodriguez* plays the lead antagonist. It directly constricts tertiary educational attainment in the United States. It thereby feeds runaway economic inequality. It creates a populace ill-equipped to function in a well-ordered democratic republic. It constrains innovation and macroeconomic growth. It creates a demographic time bomb in that a greater portion of our population will necessarily face increasing educational shortfalls. *Rodriguez* thus compromises national defense and harms our standing internationally. It renders the Constitution an economic and demographic suicide pact.

The Founders certainly did not intend an unaccountable and corrupt judiciary that only tended to their own parochial and privileged interests. On the contrary, the Founders intended to cabin judicial authority by intentionally leaving “good Behaviour”<sup>317</sup> undefined as a condition for lifetime tenure. Additionally, they gave Congress the power of the purse, control over jurisdiction, and control over the number of justices. Moreover, as our history demonstrates, the Founders knew that the judiciary needed its legal opinions enforced by the executive. The judicial power, particularly at the Supreme Court level, now imposes severe—even suicidal—harm upon our constitutional republic and the American people. *Rodriguez* heralded an ideological Court that was backward on basic concepts of macroeconomic development and willing to engage in legal gymnastics to maintain their own parochial political preferences. *Rodriguez* clearly operates to entrench economic and political elites and retard growth. *Rodriguez* reflects the racial politics and policies of yesteryear and must face rebuke today, by all means necessary, under the law.

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317. U.S. CONST. art. III, § 1.





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