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SYMPOSIUM

THE ROAD TO *RODRIGUEZ*: PRESIDENTIAL POLITICS, JUDICIAL APPOINTMENTS, AND THE CONTINGENT NATURE OF CONSTITUTIONAL LAW

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If nothing else, the recent decision in *Dobbs v. Jackson Women's Health Organization*[1] should remind us that the evolution of constitutional doctrine will often be shaped by forces that have little or no connection to the merits of the abstract legal arguments that are made in controversial cases. After the death of Justice Scalia in February 2016, the supporters of abortion rights appeared to have good reason to hope that the constitutional rules that had been established in *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] would remain intact for the foreseeable future. However, by the time that *Dobbs* was argued in August 2021, the combination of the refusal of the Senate to consider the nomination of Merrick Garland, the surprise victory of Donald Trump in the 2016 presidential election, and the replacement of Justice Ginsburg by Justice Barrett created a Supreme Court majority that was hostile to the pro-choice position and committed to the idea that *Roe* and *Casey* should be overruled.

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[1] 142 S. Ct. 2228 (2022).

[2] 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

[3] 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

This Essay will argue that the Court's treatment of the issues raised by *San Antonio Independent School District v. Rodriguez*[4] reflected the influence of similar forces. The Essay will begin by discussing the state of constitutional doctrine and the ideological orientation of the Supreme Court in 1968, arguing that, if the orientation of the Court had remained unchanged in 1973, *Rodriguez* would have been decided differently. The Essay will then describe the sequence of events that led to the resignation of two progressive Justices and provided Republican Richard M. Nixon with the opportunity to choose two conservative replacements during the early years of his administration. After demonstrating that this change in personnel played a crucial role in denying progressives a majority in *Rodriguez*, the Essay will argue that the decision provides a particularly striking illustration of the nature of considerations that determine the course of the evolution of constitutional doctrine more generally.

I. THE WORLD AS IT APPEARED IN 1968

In mid-1968, a person with progressive views who was familiar only with the decisions of the Supreme Court would have had every reason to be optimistic about the likely course of the future development of constitutional doctrine. In the years since Justice Goldberg joined the Court in 1962, a majority of the Justices had embraced the progressive perspective in a wide variety of different contexts.[5] Among other things, the Court had begun to take actions which suggested the Justices were prepared to intervene actively to address the problem of inequality in public education.

On the issue of school desegregation, the 1968 decision in *Green v. County School Board of New Kent County*[6] had demonstrated that the Court was prepared to move aggressively to improve the racial balance of public schools in districts where such schools had previously been segregated by law. In *Green*, the Court was called upon to address the situation in New Kent County, a small rural county in Virginia.[7] In the decade following the two decisions that had been issued in *Brown v.*

[4] 411 U.S. 1 (1973).

[5] The decisions of the Court during this period are discussed in detail in Lucas A. Powe, Jr., The Warren Court and American Politics 239–462 (2000). Cf. Justin Driver, The Constitutional Conservatism of the Warren Court, 100 Calif. L. Rev. 1101, 1114 (2012) (arguing that the progressive reputation of the Warren Court is overstated).

[6] 391 U.S. 430, 441–42 (1968).

[7] Id. at 431–32.

Board of Education,[8] the county continued to operate one school that provided elementary and secondary education to all white students in the district and a different school that provided analogous services to all African-American students.[9] However, in 1965, in response to a newly-filed lawsuit, and the threat of losing federal funding, the school district adopted a freedom of choice plan which essentially allowed students in the district to choose to attend either of the two schools.[10] By 1967, fifteen percent of the county's African-American students had chosen to attend the formerly all-white school, but no white students had chosen to attend the formerly all-African-American school.[11] Despite these results, the federal Department of Health, Education and Welfare, which was responsible for administering the relevant portions of the Civil Rights Act of 1964, approved the plan.[12]

Nonetheless, in *Green,* the Supreme Court unanimously held that the freedom of choice plan did not provide an adequate remedy for past segregation.[13] Justice Brennan's opinion for the Court began with the premise that, under *Brown,* "[s]chool boards such as [that of New Kent County were] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[14] Justice Brennan also noted that the New Kent County School Board had refused to take any steps toward disestablishment of its dual school system in the years immediately following the decision in *Brown*.[15] Observing that "[t]his deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system," Justice Brennan declared that "[t]he time for mere 'deliberate speed' has run out"[16] and that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[17]

[8] 347 U.S. 483 (1954); 349 U.S. 294 (1955).
[9] *Green*, 391 U.S. at 431–32.
[10] Id. at 432–34.
[11] Id. at 441.
[12] Id. at 433–34 n.2.
[13] Id. at 441–42.
[14] Id. at 437–38.
[15] Id. at 438.
[16] Id. (quoting Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964)).
[17] Id. at 439.

Justice Brennan concluded that, measured against this standard, the New Kent County Board of Education had failed to meet its constitutional obligations. He asserted that

> [t]he New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system . . . [T]he school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which [*Brown v. Board of Education*] placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.[18]

Although by its terms *Green* dealt only with the question of racial segregation, the holdings in other cases suggested that the Court would turn its attention to class-related issues of educational inequality as well. During the late Warren era, the Court handed down a number of decisions which seemed to suggest that wealth-based classifications should be considered suspect for purposes of equal protection analysis. The first indications that the Court might be moving toward the view that the Equal Protection Clause should be interpreted to require enhanced scrutiny of classifications based on wealth came in a series of cases dealing with criminal procedure issues. In this context, the majority opinion in the 1963 case of *Douglas v. California*[19] provides one particularly striking example of language suggesting that the interests of the poor were entitled to particularly strong solicitude in equal protection analysis. There, in concluding that the state of California was constitutionally required to provide indigent criminal defendants with appointed counsel in appeals as of right, Justice Douglas declared that

> [t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already

[18] Id. at 441–42.
[19] 372 U.S. 353 (1963).

> burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[20]

In 1966, the Court focused on discrimination between the rich and the poor in a very different setting. In concluding that a state law requiring citizens to pay a poll tax to be eligible to vote violated the Equal Protection Clause, the majority opinion in *Harper v. Virginia Board of Elections* asserted that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process" and that "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."[21] Three years later, in dictum, Chief Justice Warren spoke for a unanimous Court in declaring that discrimination based on wealth was a factor "which . . . independently render[s] a classification highly suspect and thereby demand[s] a more exacting judicial scrutiny."[22]

Decisions such as these convinced some observers that the Court would soon require the reduction or elimination of economic disparities which were byproducts of the system by which public schools were financed in many states. For example, in 1968, despite observing that "I think this would be one of the problems that the Court should leave to others,"[23] Professor Philip B. Kurland predicted "with some assurance, that sooner 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 spending]."[24] Reasoning that school finance litigation raised issues at the intersection of concerns the Court had expressed in its decisions dealing with school desegregation, reapportionment, and discrimination against the poor, Kurland asserted that "[t]he logic of the case for equal educational opportunity is inexorable."[25] In making this assessment, however, Kurland could not predict the changes in the decision-making dynamic that would profoundly affect the treatment of the issue of school finance when the Court focused its attention on the question in 1973.

[20] Id. at 357–58.
[21] 383 U.S. 663, 668 (1963) (citations omitted).
[22] McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969).
[23] Philip B. Kurland, Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined, 35 Univ. Chi. L. Rev. 583, 592 (1968).
[24] Id. at 583.
[25] Id. at 588.

II. THE TRANSFORMATION OF THE SUPREME COURT, 1968–1972

Kurland's assessment of the likely outcome of school finance litigation was at least implicitly based on the assumption that the ideological and jurisprudential balance of power on the Court would not change before the Justices were called upon to resolve the relevant constitutional issues. If this assumption had been correct, his prediction would very likely have proven to be accurate. In fact, however, by the time a challenge to the constitutionality of a school financing system was actually resolved by the Court, the situation was dramatically different. In less than five years, a series of events and miscalculations led to a number of changes in personnel that deprived progressives of their majority and left control of the Court's decision-making process in the hands of a group of Justices who did not fully embrace the goals of progressive politics and jurisprudence.

The contest for the presidency in 1968 played a major role in these developments. The candidacy of Republican Richard M. Nixon was particularly significant in this regard. Nixon was a well-known figure in Republican politics, having served two terms as Vice President under Republican Dwight D. Eisenhower before losing an extremely close contest to Democrat John F. Kennedy in the 1960 presidential election. Two years later, Nixon was the Republican nominee in the race for governor of California but was once again defeated. After this setback, many believed Nixon's political career was over.[26] However, he returned with a vengeance in 1968, and by June of that year was widely viewed as the front-runner for the Republican presidential nomination.[27]

Chief Justice Warren was appalled by the possibility that Nixon might win the presidency. Chief Justice Warren despised Nixon personally and, at seventy-seven years of age, believed that he might die before Nixon finished even one term in office.[28] Moreover, during the presidential campaign, focusing particularly on decisions that had expanded the rights of criminal defendants,[29] Nixon repeatedly attacked what he described as

[26] See Gladwin Hill, Nixon Denounces Press as Biased, N.Y. Times, Nov. 8, 1962, at 1.

[27] See Robert B. Semple, Jr., The Republican Race; Nixon: The Front-Runner Looks Over His Shoulder, N.Y. Times, May 5, 1968, at E2.

[28] See Michael Bobelian, Battle for the Marble Palace: Abe Fortas, Earl Warren, Lyndon Johnson, Richard Nixon, and the Forging of the Modern Supreme Court 57, 67 (2019).

[29] See, e.g., Nixon Links Court to Rise in Crime, N.Y. Times, May 31, 1968, at 18.

the "judicial activism" of the Warren Court.[30] Thus, Chief Justice Warren had every reason to believe that, if elected, the presumptive Republican nominee would choose Supreme Court justices who were hostile to the progressive initiatives that Chief Justice Warren generally supported.

Faced with this prospect, Chief Justice Warren made a fateful decision. On June 13, 1968, he met with President Lyndon B. Johnson to discuss his plans for the future. At the meeting, Chief Justice Warren told Johnson that he wanted to give the incumbent president the opportunity to "appoint [Warren's] successor, someone who felt as Warren did . . . ."[31] The Chief Justice informed Johnson that he had decided to leave the Court.[32] In making this decision, Chief Justice Warren became the first Supreme Court Justice in the history of the United States to resign for the express purpose of ensuring that a sitting President would have the opportunity to fill the seat that would be vacated by the resignation. It was a choice that Chief Justice Warren would soon come to regret.

Rather than establishing the foundation for continued progressive dominance of the Supreme Court, Chief Justice Warren's resignation would be the first in a sequence of events that would lead to conservative victories in a variety of cases in which progressives might otherwise have prevailed. Thus, a number of years later, after some of the ramifications of his decision to resign had become clear, Chief Justice Warren observed ruefully that "[i]f I had ever known what was going to happen to this country and this Court, I *never* would have resigned. They would have had to carry me out of here on a plank."[33]

From the progressive perspective, the next misstep came when President Johnson nominated Associate Justice Fortas to be Chief Justice Warren's successor and, after considerable thought, chose Judge W. Homer Thornberry of the United States Court of Appeals for the Fifth Circuit to fill the vacancy that would be created if Justice Fortas was confirmed. From the beginning, these appointments proved to be

[30] See Kevin J. McMahon, Nixon's Court: His Challenge to Judicial Liberalism and its Political Consequences 57 (2011).

[31] See Laura Kalman, The Long Reach of the Sixties: LBJ, Nixon, and the Making of the Contemporary Supreme Court 124 (2017).

[32] Id.

[33] Dennis J. Hutchinson, Hail to the Chief: Earl Warren and the Supreme Court, 81 Mich. L. Rev. 922, 928 n.23 (1983).

extremely controversial.[34] Even before Chief Justice Warren's resignation was officially announced, Republican Senator Robert Griffin of Michigan took the Senate floor to complain that "[i]f a 'lame duck' President should seek at this stage to appoint the leadership of the Supreme Court for many years in the future, I believe he would be breaking faith with our system, and that such a move would be an affront to the American people."[35] Despite these concerns, Griffin later indicated that he would have supported the nomination of former Associate Justice Goldberg if Johnson had chosen Justice Goldberg to succeed Chief Justice Warren.[36]

However, from Griffin's perspective, the choice of the combination of Justice Fortas and Thornberry was particularly objectionable. Both Justice Fortas and Thornberry were close personal friends of President Johnson, and Justice Fortas had continued to advise the President on a variety of matters even after taking his seat on the Court. Against this background, characterizing the nominations as "cronyism at its worst," Griffin and seventeen other Republican senators with a variety of different political perspectives announced that they would vote against Justice Fortas and Thornberry.[37] In addition, Griffin declared that he would mount a filibuster to prevent the nominees from being confirmed.[38]

In sharp contrast to Griffin and his allies, Republican Senator Strom Thurmond of South Carolina and a group of Southern Democratic senators objected to the nominations for overtly ideological reasons. The opposition of the members of this group was based primarily on their displeasure with the progressive criminal procedure and civil rights decisions of the Warren Court, which Justice Fortas had generally supported.[39] In addition, during the hearings on the Justice Fortas nomination, opponents also focused their attention on a series of First Amendment decisions that limited the ability of the government to regulate the distribution of sexually-explicit books and movies.[40] The nomination was dealt another blow when, after Justice Fortas had completed his testimony before the Senate Judiciary Committee,

[34] The controversy over the Justice Fortas appointment is described in detail in Bobelian, supra note 28, at 55; Laura Kalman, Abe Fortas: A Biography 327–58 (1990); Bruce Allen Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice 269–526 (1988).

[35] 114 Cong. Rec. 18171 (1968).

[36] See Kalman, supra note 31, at 135.

[37] Marjorie Hunter, "Cronyism" Scored on Court Choices, N.Y. Times, June 28, 1968, at 1.

[38] Id.

[39] See, e.g., Kalman, supra note 31, at 151–54.

[40] Id. at 155–58.

opponents discovered that he had received a large fee to lead a seminar at American University under circumstances that some deemed inappropriate.[41]

Not surprisingly, as the controversy over the Justice Fortas nomination raged on, the presidential candidates were also drawn into the fray. Although Nixon secretly encouraged the opposition to the nomination, in public he refused to take any position on the ultimate question of whether Justice Fortas should be confirmed while at the same time announcing that on principle, he opposed the use of the filibuster to prevent a vote on the substantive merits of the nomination.[42] Democratic nominee Hubert H. Humphrey, on the other hand, repeatedly pressed Nixon to announce his views on the merits of the nomination,[43] and accused him of "making 'a deal with Strom Thurmond'" to defeat Justice Fortas.[44]

Ultimately, the weight of the attacks on the Justice Fortas nomination proved too great for his supporters to overcome. The opponents of the nomination did indeed mount a filibuster, and while a small majority of senators voted in favor of the motion to end debate on October 1, 1968, the margin was well short of the two thirds majority that would have been necessary to force a vote under the rules then in effect.[45] Faced with this reality, Justice Fortas withdrew his name from consideration the following day.[46] Justice Fortas thus became the first Supreme Court nominee to be rejected in almost forty years, and the first in American history to be denied confirmation by a filibuster. Fearing another defeat, Johnson decided not to nominate another person to succeed Chief Justice Warren.

With the Chief Justiceship now clearly at stake, the potential significance of the upcoming presidential election for the future of constitutional jurisprudence became even clearer. As one commentator observed, the winner of the election would have the opportunity to make "three and perhaps four appointments to the Supreme Court [during his

[41] Id. at 166–69.

[42] Robert C. Albright, Fortas Rejects Senate Bid to Testify Again, Wash. Post, Sept. 1, 1968, at A1.

[43] Max Frankel, Humphrey Terms Nixon 'A Wiggler' on Crucial Issues, N.Y. Times, Sept. 12, 1968, at 36.

[44] Albright, supra note 42.

[45] 90 Cong. Rec. 28933 (1968).

[46] See Fred P. Graham, Fortas Abandons Nomination Fight; Name Withdrawn, N.Y. Times, Oct. 3, 1968, at 1.

first term in office]" and "remake the [federal] [j]udiciary."[47] Against this backdrop, the head of the Southern Christian Leadership Conference asserted that Nixon was likely to appoint justices who would be hostile to the civil rights movement,[48] and Humphrey himself suggested that, if Nixon were elected, the Court might well become "a bastion of reaction."[49]

Initially, Nixon was heavily favored to prevail in the presidential election over both Humphrey and third-party candidate George Wallace. Polls taken soon after the Democratic convention showed Humphrey trailing Nixon by a double-digit margin among likely voters.[50] But as the election approached, Humphrey began to close the gap. Thus, a poll published less than one week before the election found the two leading candidates to be in a virtual dead heat.[51]

Ultimately, however, Nixon emerged victorious, receiving slightly more than forty-three percent of the popular vote, while Humphrey received slightly less than forty-three percent of those votes. More importantly, the returns entitled Nixon to receive 301 votes in the electoral college, leaving Humphrey with only 191 and Wallace with 46. A shift of less than three hundred thousand votes out of the more than seventy-three million that were cast would have been enough to provide Humphrey with a majority of the electoral votes.[52] But the narrowness of Nixon's margin of victory made little difference to the impact of his triumph on the evolution of constitutional jurisprudence.

If Humphrey, rather than Nixon, had been victorious in 1968, the Supreme Court would have very likely taken a very different approach to

[47] Marquis Childs, Eastland's Control Over the Judiciary, Wash. Post, Oct. 18, 1968, at A24.

[48] Dennis M. Higgins, Dr. Abernathy Urges Phila. Clergy to Aid Humphrey Campaign, Phila. Inquirer, Oct. 30, 1968, at 3.

[49] Robert C. Jensen, Humphrey Brands His Rival "Irresponsible" on Weapons, Wash. Post, Oct. 28, 1968, at A1.

[50] George Gallup, Nixon Leads HHH 43 to 31 Per Cent; Wallace Given 19, Wash. Post, Sept. 15, 1968, at A2.

[51] George Gallup & Louis Harris, Polls Say Election Is Tossup, Wash. Post, Nov. 4, 1968, at A1.

[52] Humphrey would have received a majority of the electoral votes if he had carried the states of California, Illinois, and Missouri. If 112,000 of those who voted for Nixon in California had instead chosen Humphrey, Humphrey would have received an additional forty electoral votes, while in Illinois Humphrey would have received an additional twenty votes if 68,000 Nixon voters had switched their allegiance. In Missouri Humphrey would have emerged victorious if fewer than 11,000 members of the electorate had voted for him rather than Nixon. Election of 1968, Am. Presidency Project, https://www.presidency.ucsb.edu/statistics/elections/1968 [https://perma.cc/7PJS-ALPS] (last visited Jan. 15, 2023).

the analysis of the constitutional issues related to school finance and a variety of other questions. Even if Justice Fortas had remained on the Court, during Humphrey's first term, the recently-elected president would have had the opportunity not only to nominate a successor to Chief Justice Warren, but also to choose replacements for Justices Black and Harlan, neither of whom was a consistent ally of the progressives on the Court in the late 1960s. Moreover, Humphrey was a committed progressive who would no doubt have made every effort to select justices who shared those values but were less vulnerable than Justice Fortas himself. Thus, progressives would almost certainly have maintained complete control over the Court for at least a generation. By contrast, Nixon's victory paved the way for the creation of a Court whose membership was much more ideologically diverse.

Nonetheless, even in the wake of Nixon's victory, in late 1968 it appeared that progressives might continue to hold the upper hand on the Court for the foreseeable future. Despite the refusal of the Senate to confirm Justice Fortas's nomination to be Chief Justice, Justice Fortas was still a member of the Court and formed part of a progressive group of jurists that also included Justices Douglas, Brennan, and Thurgood Marshall. If this bloc had remained intact, even after the departure of Chief Justice Warren, progressives would generally have been able to count on four reliable votes and would have been able to prevail in any case in which they were supported by either Justices Stewart or White, both of whom had shown a willingness to embrace progressive positions in some circumstances.[53]

However, soon after Nixon took office, Justice Fortas was once again at the center of a dispute that would permanently alter the balance of power on the Court.[54] On May 4, 1969, with the secret assistance of the Nixon White House, *Life* magazine published a story that documented the relationship between Justice Fortas and Louis Wolfson, a man who was described as "a well-known corporate stock manipulator" and was later

[53] See, e.g., Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (White, J., concurring in the judgment) (finding that the First Amendment limits government authority to regulate sexually explicit material); id. at 197 (Stewart, J., concurring) (same).

[54] The sequence of events that culminated in Justice Fortas's resignation is summarized in Don Oberdorfer, The Gathering of the Storm That Burst Upon Abe Fortas, Wash. Post, May 16, 1969, at A1. The events are discussed in greater detail and analyzed in Kalman, supra note 34, at 359–76; Kalman, supra note 31, at 180–208; Murphy, supra note 34, at 544–77.

sent to prison for illegal stock manipulation and conspiracy.[55] The story focused on the fact that, in January 1966—three months after Justice Fortas had joined the Court—a private, nonprofit organization controlled by Wolfson had paid Justice Fortas a $20,000 consulting fee while Wolfson was under investigation by the Securities and Exchange Commission.[56] Although the story also noted that Justice Fortas had returned the money[57] and had recused himself from the consideration of the appeal from Wolfson's criminal conviction,[58] this revelation created a political firestorm.

Moreover, the article that appeared in *Life* magazine had not revealed the full extent of the financial dealings between Justice Fortas and the Wolfson Foundation. In addition to the initial payment of $20,000, the nonprofit also agreed to pay Justice Fortas and his wife the same amount every year as compensation for helping the foundation plan its public service activities. This agreement was also cancelled. Nonetheless, after being informed by officials of the Nixon administration of the nature of Justice Fortas's relationship with Wolfson, Chief Justice Warren urged Justice Fortas to resign to protect the public image of the Court. After some consideration, Justice Fortas reluctantly agreed, and on May 15, 1969, President Nixon received his letter of resignation, thereby making Justice Fortas the first sitting justice in history to resign under an ethical cloud.[59]

The combination of the resignation of Chief Justice Warren, the rejection of the Justice Fortas nomination, the victory of Richard Nixon, and the subsequent resignation of Justice Fortas himself led to a dramatic change in the balance of power on the Court. On May 23, 1969, Nixon chose Judge Warren E. Burger to succeed Chief Justice Warren, and the nomination was quickly confirmed by the Senate. In addition, although the Senate refused to confirm either Clement F. Haynsworth or Harold G. Carswell, the first two people whom Nixon nominated to replace Justice

[55] William Lambert, The Justice . . . and the Stock Manipulator, Life Magazine, May 9, 1969, 32, 33. The nature of Justice Fortas's relationship with Wolfson is discussed in detail in Kalman, supra note 34, at 322–25, 359–60.

[56] Lambert, supra note 55, at 35–36.

[57] Id. at 35.

[58] Id. at 33.

[59] Justice's Resignation First Under Impeachment Threat, CQ Almanac (1969), https://webcache.googleusercontent.com/search?q=cache:JW05KQ9srnoJ:https://library.cqpress.com/cqalmanac/document.php%3Fid%3Dcqal69-1247815&cd=1&hl=en&ct=clnk&gl=us [https://perma.cc/87P2-6MHQ] (last visited Apr. 6, 2023).

Fortas, Nixon's third choice—Harry A. Blackmun—was confirmed on May 12, 1970.[60]

The replacement of Chief Justice Warren and Justice Fortas by Justices Burger and Blackmun left progressives with only three reliable votes in the cases which came before the Supreme Court in the early 1970s. The subsequent retirements of Justices Black and Harlan and confirmations of Lewis F. Powell, Jr. and William H. Rehnquist did nothing to change this reality, but instead shifted the ideological balance of power on the Court even further to the right. Within three years after the confirmation of Justices Powell and Rehnquist, the 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.*

III. THE DECISION IN *RODRIGUEZ*

San Antonio Independent School District v. Rodriguez arose from a challenge to the manner in which the state of Texas financed its public schools. While the Texas system was complicated,[61] one point was clear—the amount of money available to each school district was determined in large measure by the property taxes that were raised by that district, leading to a substantial disparity of resources between property-poor and property-rich districts. The way in which the system operated was illustrated by a comparison between two different school districts in the metropolitan area of San Antonio, Texas.

The Edgewood Independent School District, whose population was composed primarily of minority students, was located in the core city of San Antonio. The median family income in the district was $4,681 per year and, because little commercial and industrial property was located in the district, the assessed property value per pupil was $5,690. As a result, with a tax rate of $1.05 per $100 of value, the total amount of money available to the Edgewood district was $356 per pupil. By contrast, families of students in the predominantly white Alamo Heights Independent School District had a median income of $8,001 per year, and the average assessed value of the real property located in the district was

[60] The sequence of events that culminated in Justice Blackmun's ascension to the Court are described in detail in Kalman, supra note 31, at 245–48.

[61] The Texas system is described in detail in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 6–11 (1973).

$49,000 per pupil. Thus, with a property tax rate of $0.85 per $100 of assessed value, the Alamo Heights district could spend $594 per pupil.[62]

Those challenging the constitutionality of the Texas system argued that the heavy emphasis on local property taxes violated the Equal Protection Clause. Relying on language from *Brown v. Board of Education*, where the Court described education as "perhaps the most important function of state and local governments" and "the very foundation of good citizenship," the plaintiffs based their argument in part on the theory that access to public education should be considered a fundamental right for purposes of constitutional analysis.[63] In addition, they sought to analogize *Rodriguez* to the cases in which the Court had found that discrimination on the basis of wealth violated the Equal Protection Clause.[64]

Justice Stewart joined the four Nixon appointees in rejecting these arguments and concluding that the funding system adopted by the state of Texas was constitutional. Speaking for the Court, after describing the elements of the Texas system, Justice Powell addressed the contention that the application of strict scrutiny was appropriate because the system discriminated against some students on the basis of wealth. In *United States v. Kras*, which was decided after *Rodriguez* was argued but before the case was decided, a five-justice majority had rejected the contention that laws which discriminated against the poor were generally subject to strict scrutiny.[65] Nonetheless, in *Rodriguez* itself, Justice Powell took pains to distinguish the case from other decisions in which the Court had relied on wealth discrimination to raise the level of scrutiny.

Justice Powell noted that the Texas system did not single out poor people as a class for less favorable treatment, but instead discriminated against what Justice Powell described as "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts," and that this class had none of the traditional "indicia of suspectness."[66] Drawing on the framework developed in the famous *United States v. Carolene Products* footnote,[67] he observed that "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or

[62] Id. at 11–13.
[63] See id. at 29–30 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
[64] See id. at 18.
[65] 409 U.S. 434, 450–51 (1973).
[66] *Rodriguez*, 411 U.S. at 28.
[67] 304 U.S. 144, 152–53 n.4 (1938).

relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[68]

The majority opinion then turned to the contention that education should be considered a fundamental right for constitutional purposes. Referencing earlier decisions in which the Court declined to give special protection to the right to receive welfare benefits and have access to adequate housing, Justice Powell emphasized the distinction between the social importance of a right and the question of whether that right was "explicitly or implicitly guaranteed by the Constitution."[69] He found no such guarantee with respect to the right to a public education. In addition, Justice Powell rejected the contention that the right to an education should be deemed fundamental because education was necessary to both the effective use of the right to vote and the exercise of the First Amendment freedom of speech, observing that an analogous claim might be made with respect to a right to food and shelter.[70]

Justice Powell also argued that the specific nature of the issues raised by *Rodriguez* made the use of strict scrutiny particularly inappropriate. In addition to observing that the Court had consistently emphasized the need to defer to legislative judgments on issues of fiscal policy, he noted the complexity of the judgments involved in making decisions related to the financing of public education and implicitly invoked Justice Cardozo's principle of "experimental federalism,"[71] asserting that "the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."[72] Thus, while leaving open the possibility that the Court might take a different view of a case in which public education had been *completely* denied to some class of children,[73] Justice Powell concluded that the rational basis test provided the appropriate standard of review in *Rodriguez*.[74] Applying this test, he had no trouble finding that the Texas system was rationally related to the state interest in assuring a basic

[68] *Rodriguez*, 411 U.S. at 28.
[69] Id. at 33–34.
[70] Id. at 36–37.
[71] See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
[72] *Rodriguez*, 411 U.S. at 43.
[73] See id. at 37.
[74] Id. at 44.

education for each child in the state while at the same time providing for "a large measure of participation in and control of each district's schools at the local level."[75]

By contrast, four of the five holdovers from the Warren era would have held that the Texas plan was unconstitutional. Justices Douglas and Brennan joined an opinion by Justice White which argued that the distinctions drawn by the Texas system lacked a rational basis.[76] Justice White conceded that a financing system would be constitutional if it provided a meaningful opportunity for parents to improve their children's education by increasing per pupil expenditures. However, he argued that no such option was realistically available in property-poor districts such as Edgewood.[77] Justice Brennan added a separate opinion contending that education should be considered a fundamental right, asserting that "there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association . . . ."[78]

Justice Douglas also joined an opinion by Justice Marshall that differed markedly in tone from that of the other two dissents.79 Justice Marshall emphasized what he characterized as the fundamentality of education for constitutional purposes. He also criticized the majority for embracing the dominant two-tiered approach to equal protection analysis more generally, advocating instead for a sliding scale approach under which the Court would be called upon to make individualized judgments assessing the significance of the particular right at stake and the importance of the state interest served by the challenged classification.80 But in addition, Justice Marshall complained bitterly that Rodriguez was "a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."81 Justice Marshall also complained that, because of the majority's unwillingness to strike down the Texas school financing scheme, "[C]ountless children [will] unjustifiably receive inferior educations that

[75] Id. at 49.
[76] Id. at 63–70 (White, J., dissenting).
[77] Id. at 64.
[78] Id. at 63 (Brennan, J., dissenting).
[79] Id. at 70–133 (Marshall, J., dissenting).
[80] Id. at 98–99 (Marshall, J., dissenting).
[81] Id. at 71 (Marshall, J., dissenting).

'may affect their hearts and minds in a way unlikely ever to be undone.'"[82]

Progressive commentators have at times described the decision in *Rodriguez* in near-apocalyptic terms. For example, Charles J. Ogletree, Jr. and Kimberly Jenkins Robinson have analogized *Rodriguez* to the 1896 decision in *Plessy v. Ferguson*,[83] while Michelle Adams and Derek W. Black have observed that the decision has engendered "[d]ecades of [s]cholarly [o]utrage."[84] But whatever one's view of the merits of the Court's rejection of the constitutional challenge in *Rodriguez*, one point is crystal clear: The events of 1968 and 1969 played a crucial role in determining the outcome in the case.

Rodriguez was decided by the narrowest of margins, with the four Nixon appointees joining Justice Stewart to create a five-justice majority that rejected the relevant constitutional arguments of the challengers. Thus, a change in even one vote would have changed the result. Given this reality, the progressive defeat was in essence a by-product of the combination of Chief Justice Warren's decision to leave the Court, the failure of the Senate to confirm the successor nominated by Lyndon Johnson, the victory of Richard Nixon in the presidential election of 1968, and the circumstances that forced Justice Fortas to resign the subsequent year. Conversely, if either Nixon had not had the opportunity to appoint a successor to Justice Warren in 1969 or if Justice Fortas had remained on the Court, progressives would no doubt have been far more satisfied with the Court's resolution of the issues raised in *Rodriguez*.

Thus, like *Dobbs*, *Rodriguez* provides a dramatic example of what might aptly be described as the contingent nature of constitutional law. Given the place that the idea of judicial review has come to occupy in the American political culture, the Justices of the Supreme Court will inevitably be called upon to resolve a variety of ideologically-charged disputes in which either result might plausibly be characterized as being within the mainstream of constitutional thought at the time that the case comes before the Court. In each such case, the resolution of the dispute

[82] Id. at 71–72 (Marshall, J., dissenting) (citation omitted).

[83] 163 U.S. 537 (1896). See Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, Inequitable Schools Demand a Federal Remedy, Education Next, https://www.educationnext.org/inequitable-schools-demand-federal-remedy-forum-san-antonio-rodriguez/ [https://perma.cc/E4UR-ZZBQ] (last visited Jan. 15, 2023).

[84] Michelle Adams and Derek W. Black, Equality of Opportunity and the Schoolhouse Gate, 128 Yale L.J. 2302, 2323–24 (2019).

will depend on the jurisprudential and political perspectives of the current Justices who are sitting on the Court at the time that the case is decided. In other words, the outcome will depend on the makeup of the Court, which will in turn be determined by a variety of factors, including but not limited to the timing of vacancies, the ideological and jurisprudential agenda of the president charged with filling each vacancy, the degree of the president's commitment to making choices who will advance his agenda once on the Court, and the success of the president in identifying candidates that will actually advance the agenda and having those candidates confirmed.[85] In controversial cases, it is the interaction among these factors, rather than the abstract merits of legal arguments, that has the greatest influence on the evolution of constitutional doctrine.

[85] See Mark A. Graber, The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order, 4 Ann. Rev. L. Soc. Sci. 361, 364 (2008) (noting that the Court's decisions reflect the views of "[some] subset of the lawmaking elite"); Richard H. Pildes, Is the Supreme Court a "Majoritarian" Institution?, 4 Sup. Ct. Rev. 103, 140 (2010) (noting "[t]he role of luck" in determining the makeup of the Court).