Articles

Circumventing *Rodriguez*: Can Plaintiffs Use the Equal Protection Clause to Challenge School Finance Disparities Caused by Inequitable State Distribution Policies?

By: Preston C. Green* and Bruce D. Baker**

Introduction

In 1973, the Supreme Court ruled in *San Antonio Independent School District v. Rodriguez* that funding disparities among school districts caused by local property taxation did not violate the Equal Protection Clause.[1] Applying the rational basis test, the Court concluded that local property taxation was rationally related to the purpose of local control.[2] However, local property taxation is not the sole cause of funding disparities between rich and poor school districts. A great deal of inequality is caused by state school-funding distribution policies, such as weighted aid policies that are designed to address educational cost differences among school districts.

Thirteen years after *Rodriguez*, the Supreme Court held in *Papasan v. Allain* that *Rodriguez* did not foreclose Equal Protection Clause challenges to unequal state distribution policies.[3] The Court ruled that classifications created by these policies would also have to withstand rational basis analysis.[4] This legal strategy is underdeveloped. A Kansas school finance case, *Robinson v. Kansas*,[5] might breathe new life into *Papasan*-based school finance litigation. In *Robinson*, the Tenth Circuit has ruled that plaintiffs may proceed with their claim that Kansas' low

* Associate Professor, Department of Educational Policy, Research, and Administration, University of Massachusetts, Amherst. I thank Julie Mead, David Schimmel, Fiona Greaves, and Julie Underwood for their comments on prior drafts of the article.

** Associate Professor, Department of Teaching & Leadership, University of Kansas.

1. 411 U.S. 1, 55 (1973).
2. *Id.* at 54-55.
3. 478 U.S. 265 (1986).
4. *Id.*
5. 117 F.Supp.2d 1124 (D.Kan. 2000), *aff'd* 295 F.3d 1183 (10th Cir. 2002).

enrollment weighting provision, which provides additional funding to small districts, violates the Equal Protection Clause.[6]

This article examines the pending Kansas school finance case to determine the viability of Equal Protection Clause challenges to weighted aid policies. Part I provides an overview of the three periods, or "waves," of school finance litigation. This overview explains how litigants have tried to remedy inequalities caused by local property taxation. We explain that the success of second and third wave litigation has been limited by: (1) the complexities involved in developing equality and adequacy measures that have a sufficient connection between differential governmental treatment and educational injury; and (2) the doctrine of local control.

Part II discusses the *Papasan* and *Robinson* cases. We observe that there are several reasons for pursuing *Papasan*-based Equal Protection Clause challenges: (1) a great deal of funding inequality between rich and poor districts is caused by weighted aid policies; (2) political considerations and lack of technical capacity in the design of these distribution policies might render them vulnerable to Equal Protection Clause challenges; and (3) plaintiffs might be able to avoid the measurement and local control problems that have limited the second and third waves of school finance litigation.

Part III analyzes Kansas' pending *Papasan*-based Equal Protection Clause challenge. We conclude that if the District Court of Kansas applies traditional rational basis analysis, it will probably find that the low enrollment weighting provision is rationally related to the legitimate governmental interest of equalizing cost differences between low- and high-enrollment school districts. The plaintiffs will likely claim that the state could have adopted less discriminatory means to accomplish this goal. However, the Supreme Court rejected this argument in *Rodriguez*.

The district court might, however, apply heightened rational basis review, which is more critical of governmental classifications than traditional rational basis, to find that the low enrollment weighting provision violates the Equal Protection Clause. On occasion, courts have applied heightened rational basis scrutiny to invalidate differential governmental treatment. However, the facts in *Robinson* differ in one key fashion from the most analogous situations in which courts have applied heightened rational basis scrutiny. The latter cases involved situations in which differential governmental policies treated similarly situated entities in an unequal fashion. By contrast, in *Robinson*, there are educational cost differences relating to size between low- and high-enrollment school districts.

Part IV discusses the implications of our analysis for school finance litigation. We observe that plaintiffs from poor school districts

6. *Robinson*, 295 F.3d at 1190-91.

might have little success with *Papasan*-based challenges. Because weighted aid provisions are designed to meet legitimate governmental purposes, their claims would also amount to whether states could have adopted less discriminatory means to accomplish the policies' goals. We also assert that plaintiffs should look into alternative strategies to challenge disparities created by weighted aid policies. One approach would be for citizens to bring suit under Section 1983[7] to enforce the Department of Education's (DOE) implementing regulations, which forbid recipients of federal funding from implementing policies that have a disparate impact on the basis of race. Another approach would be for plaintiffs to mount state constitutional challenges to weighted aid provisions.

I. Overview of School Finance Litigation

Scholars generally divide school finance litigation into three periods, or "waves," in which one legal strategy dominates.[8] In the first two waves, plaintiffs asserted that state funding systems' reliance on local property taxes discriminated against poor school districts in violation of federal and state equal protection clauses, respectively. In the third wave, plaintiffs alleged that disparities caused by local taxation prevented poor school districts from providing an adequate education as defined by state education clauses. A discussion of each wave follows below.

A. First Wave

During the first wave of school finance litigation, which lasted from the late 1960s to 1973, plaintiffs from poor school districts tried to convince that disparities created by local property taxation violated the Equal Protection Clause. In *Serrano v. Priest* ("*Serrano I*"),[9] the California Supreme Court held that California's school finance system, which relied heavily on local property taxes, violated the Equal Protection Clause. The court found that strict scrutiny was applicable because local property taxation created a suspect classification on the basis of wealth, and education was a fundamental right under the U.S. Constitution.[10] The court then rejected the assertion that the fiscal

7. 42 U.S.C. §1983.

8. *See, e.g.*, Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 n.9 (1995); William Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV 597 (1994).

9. 487 P.2d 1241 (1971).

10. *Id.* at 1250-59.

scheme was necessary to advance local administrative control because "[n]o matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts."[11] The court also rejected the claim that local property taxation was necessary to promote local fiscal choice. In fact, poor districts were deprived of fiscal choice because their low tax bases limited the amount of money they could spend on education.

In *Rodriguez*, however, the U.S. Supreme Court ended the first wave by ruling that Texas' reliance on local property taxation did not violate the Equal Protection Clause. The Court refused to apply strict scrutiny, finding that wealth was not a suspect classification,[12] and education was not a fundamental right.[13] Applying the less stringent rational basis test, the Court held that the use of local property taxation was rationally related to encouraging local control of public schools.[14] By becoming involved in educational decisions at the local level, community members demonstrated their depth of commitment to public education.[15] Local control also provided each locality with the means for participating "in the decisionmaking process of determining how local tax dollars will be spent."[16] In addition, local control enabled school districts "to tailor local programs for local needs"[17] and encouraged "experimentation, innovation, and a healthy competition for educational excellence."[18]

The Court rejected the argument that the use of local taxation was irrational because this approach did not provide the same level of fiscal choice and flexibility to all districts. The Court observed:

> While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. . . . It may not be condemned simply because it imperfectly effectuates the State's goals.[19]

The Court also rejected the argument that the use of local taxation was irrational because there were other financial systems that would have created less drastic disparities in educational funding. The state would

11. *Id.* at 1260.
12. *Rodriguez*, 411 U.S. at 18-28.
13. *Id.* at 29-39.
14. *Id.* at 47-55.
15. *Id.* at 49.
16. *Id.* at 50.
17. *Id.*
18. Rodriguez, 411 U.S. at 50.
19. *Id.* at 50-51.

be required to find the least restrictive means for achieving its purpose only in situations where strict scrutiny was applicable.[20]

B. Second Wave

The second wave of school finance litigation began in 1973 with the New Jersey Supreme Court's decision in *Robinson v. Cahill*.[21] During this wave, plaintiffs generally responded to *Rodriguez* by asserting that funding inequality between rich and poor districts violated the equal protection and education clauses of state constitutions. This litigation strategy required plaintiffs to convince courts that these state constitutional provisions were different from the U.S. Constitution's Equal Protection Clause.

Occasionally, plaintiffs were successful. In *Serrano v. Priest* ("*Serrano II*"),[22] for example, the California Supreme Court held that *Rodriguez* did not foreclose an equal protection challenge under the state's equal protection provisions. The court explained that the state's equal protection provisions, "while substantially the equivalent" to the Equal Protection Clause of the U.S. Constitution, have "an independent vitality which . . . may demand an analysis different from that which would obtain if only the federal standard were applicable."[23] The court went on to find that strict scrutiny was appropriate under the state constitution and that reliance on local property taxation was not a necessary means to achieve a compelling state interest.[24]

Serrano II notwithstanding, second wave litigation was largely unsuccessful. During this wave, plaintiffs prevailed in seven states[25] but lost in fourteen others.[26] One reason for this lack of success relates to the difficulties involved in measuring equality. Peter Enrich identifies several equality measures that courts can use. A major weakness of these formulations, he points out, is that none of them make a clear connection between differential governmental treatment and the impact

20. *Id.* at 51.

21. 303 A.2d 273 (N.J. 1973).

22. 557 P.2d 929 (1976).

23. *Id.* at 950 (internal quotations omitted).

24. *Id.* at 952-53.

25. *See* DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); *Serrano II*, 557 P.2d at 929; Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelley, 255 S.E.2d 859 (W.Va. 1979); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

26. *See* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1982); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); Britt v. North Carolina St. Bd. of Educ., 357 S.E.2d 432 (N.C. 1987); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Bd. of Educ. of the City of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979); Olson v. State, 554 P.2d 139 (Or. 1976); Fair Sch. Fin. Council of Oklahoma v. State, 746 P.2d 1135 (Okla. 1987); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

on the quality of children's education.[27] Enrich explains that "[t]he proliferation of possible measures both dilutes the potency of equality's appeal and offers multiple footholds for attacks on equality's claims."[28]

Some equality measures focus on differential governmental treatment. An example of this type of measurement is actual funding among districts.[29] This standard has the virtue of being easily quantifiable.[30] It has the additional advantage of being widely viewed as a means for comparing the quality of education among school systems.[31] However, designing a remedy for this measure would be difficult because it fails to account for other factors that might cause differences in educational quality.[32] Furthermore, remedies that seek to address spending disparities might be susceptible to attacks that they interfere with local political autonomy.[33]

Other equality measures focus on the quality of education. An example of this type of measure is student outcomes.[34] Measurable outcomes could include preparation for the workplace, higher education, and society.[35] This measure has the virtue of focusing on the fundamental aspect of equality. Any equalization measure that fails to bring about equality in outcomes might be of questionable value.[36] However, designing a remedy for this measure would be problematic because it focuses on differences for which the school finance system might not be responsible.[37]

Another reason for the lack of success of second wave litigation is the doctrine of local control. Rich districts have found arguments for local governmental and fiscal autonomy useful in their fight to maintain a competitive advantage in providing educational services and post-school opportunities for their students. Peter Enrich explains the appeal of this doctrine to rich school districts in the following manner:

> The argument for local control has the great virtue of framing [the concerns of rich districts] in an apparently neutral manner. Local control over local resources gives all districts, not merely the wealthy ones, the power to decide how heavily to spend on schools. And it guarantees to all districts, whatever their wealth, that local resources are spent to benefit local children. The fact that these universal

27. Enrich, *supra* note 8 at 145.
28. *Id.* at 147.
29. *Id.*
30. *Id.*
31. *Id.* at 145-48.
32. Enrich, *supra* note 8 at 148.
33. *Id.*
34. *Id.* at 151.
35. *Id.*
36. *Id.* at 152.
37. Enrich, *supra* note 8 at 152.

> attributes of local control have radically different implications for differently situated districts does not strip the structure of its formal neutrality, making it an ideal guise for the defense of privilege.
>
> Arguments for local control have the added virtue of evoking several other powerful currents of our political and legal value system. The imagery of local control paints the contrast between local school district and state in a manner reminiscent of the familiar contrasts between individual and government, and between private and public. Preserving local fiscal autonomy against state domination is akin to protecting individual control over one's person and over the use of one's private property against governmental constraint. In each case, what is at stake is depicted as the freedom to deploy one's own resources for one's own purposes and benefit.[38]

State courts often find local control arguments very appealing. During the second wave, eleven cases employed rational basis analysis to the plaintiffs' constitutional challenges on local taxation. Ten of these courts ruled that local taxation was rationally related to the purpose of maintaining local control.[39] For example, in *Board of Education, Levittown Union Free School Dist. v. Nyquist*,[40] a case upholding New York's school finance system against a state equal protection challenge, the Court of Appeals of New York explained:

> It is the willingness of the taxpayers of many districts to pay for and to provide enriched educational services and facilities beyond what the basic per pupil expenditure figures will permit that creates differentials in services and facilities. Justification for a system which allows for such willingness was recognized by the Supreme Court of the United States in *San Antonio School Dist. v. Rodriguez*.[41]

---

38. *Id.* at 159-60.

39. *See* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Lujan v. Colorado St. Bd. of Educ., 649 P.2d at 1005 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1982); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1986); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Bd. of Educ. of the City of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair Sch. Fin. Council v. State, 746 P.2d 1135 (Okla. 1987); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989). The only second wave case to hold that reliance on local taxation fails the rational basis test was *DuPree*, 651 S.W.2d at 90.

40. 439 N.E.2d 359 (N.Y. 1982).

41. Id. at 367 (citing *Rodriguez*, 411 U.S. at 48 n.102 (1973)).

Even when courts have ruled that local control considerations do not justify funding disparities caused by local property taxation, politicians may hesitate to implement remedies that infringe upon local and fiscal autonomy, such as raising taxes, because of the political consequences. The aftermath of *Abbott v. Burke*,[42] an equality decision that occurred after the second wave, is a case in point. In *Abbott*, the state supreme court ruled that poor urban school districts had to receive substantially the same level of funding as rich districts.[43] Governor Jim Florio and the legislature responded to *Abbott* by passing the Quality Education Act, which included a $2.8 billion increase in taxes.[44] This tax package was cited as a major reason for Governor Florio's subsequent re-election defeat.[45]

C. Third Wave

In the third wave, which started in 1989 and continues at the today, plaintiffs have asserted that systems of school funding prevent states from providing poor districts with a constitutionally mandated minimum, or adequate, level of education. This strategy uses state education clauses, which define the state's constitutional duty to provide an education. The seminal third wave case is a 1989 decision, *Rose v. Council for Better Education*.[46] In *Rose*, the Kentucky Supreme Court ruled that the state's educational system violated its education clause by failing to provide its students with an adequate education.[47] The court then identified several requirements that the state had to meet to fulfill its constitutional mandate, including the provision of sufficient oral and written communication skills as well as academic or vocational skills.[48]

Supporters contend that adequacy arguments are more likely than equality arguments to rebuff objections based on local control. Adequacy does not conflict with local taxation because school districts are not required to provide equal resources.[49] Moreover, adequacy approaches do not conflict with local governance of schools because districts can still dedicate additional resources or develop distinctive educational programs.[50] Plaintiffs have had more success under the third wave than the second wave. Courts in thirteen states have invalidated their school finance systems in whole or in part under an adequacy

42. 575 A.2d 359 (N.J. 1990).
43. *Id.*
44. N.J. Stat. Ann. §§ 18A:7D-1 to -37 (West 1999).
45. Joseph F. Sullivan, *Paying For New Jersey's Schools: The Overview: New Jersey Court Orders New Plan for School Funds*, N.Y. TIMES, Jul. 13, 1994, at A1.
46. 790 S.W.2d 186 (Ky. 1989).
47. *Id.* at 189.
48. *Id.* at 212.
49. Enrich, *supra* note 8 at 170.
50. *Id.*

rationale,[51] while courts in twelve states have upheld their school finance systems.[52]

However, measurement difficulties have also limited the success of adequacy challenges. According to Peter Enrich, "adequacy arguments must confront not only the problems faced by equality arguments in determining whether the relevant dimension for measurement is school funding, or educational inputs, or student outcomes, but also the additional question of what quantity of funding, what level of services, or what degree of student achievement suffices to meet the constitutional demand."[53]

Because adequacy is difficult to define, some courts have either refused to declare such a standard, or deferred to the state legislatures' definition of an adequate education. Such deference virtually guarantees that the plaintiffs will be unable to succeed in their adequacy claim.[54] *Unified School District No. 229 v. Kansas*[55] is illustrative. In *Unified School District*, the Kansas Supreme Court refused to define the state constitution's requirement of a "suitable" education, but instead applied the standards of the legislature and the state board of education.[56] Not surprisingly, the state court found that the state's school finance system was constitutionally adequate.[57]

Another potential roadblock for adequacy formulations is their potential to limit local autonomy. To determine whether students are meeting certain outcomes, a court could apply guidelines as to *how* school districts spend their money. As one commentator notes, "[t]axpayers who might revolt when courts tell them to spend more on

---

51. *See* Opinion of Justices, 624 So.2d 107 (Ala. 1993) (advisory opinion to legislature on the question of whether the legislature had to comply with lower court decision); Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d. 806 (Ariz. 1994); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Comm. for Educ. Equality v. State, 878 S.W.2d 446 (Mo. 1994); Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Brigham v. State, 692 A.2d 384 (Vt. 1997); Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995).

52. *See* Matanuska-Susitna Borough Sch. Dist v. State, 931 P.2d 391 (Alaska 1997); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993); Exira Comm. Sch. Dist. v. State, 512 N.W.2d 787 (Iowa 1994); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994); Charlet v. State, 713 So.2d 1199 (La. Ct. App. 1998); Sch. Admin. Dist. No. 1 v. Commissioner, 659 A.2d 854 (Me. 1995); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Campaign for Fiscal Equity v. State, 744 N.Y.S.2d 130 (N.Y. App. Div. 2002); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Or. 1991); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994).

53. Enrich, *supra* note 8, 170-71.

54. Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867, 1884 (1998).

55. 885 P.2d 1170 (Kan. 1994).

56. *Id.* at 1186.

57. *Id.* at 1187.

other schools are just as likely to revolt when courts also tell them how to spend their money."[58]

Massachusetts' experience with education reform supports this assertion. In 1993, the Supreme Judicial Court of Massachusetts ruled in *McDuffy v. Secretary of the Executive Office of Education* that the state's school finance system failed to provide an adequate education for poor school districts.[59] Shortly after this decision, the state passed the Massachusetts Education Reform Act ("MERA").[60] MERA required the state to "employ a variety of assessment instruments" that were "criterion referenced, assessing whether students are meeting the standards" established by the state board of education.[61]

The state responded by implementing the Massachusetts Comprehensive Assessment System (MCAS).[62] Public school students are required to take a series of tests in four subject areas from the third to the tenth grade: English language arts; mathematics; science and technology; and history and social sciences.[63] Starting with the graduating class of 2003, students must pass both the tenth grade language arts and mathematics tests in order to obtain a high school diploma.[64] Surprisingly, the most visible protesters of the MCAS have been white, middle-class parents, some of whom come from the best school districts in the state.[65] These parents argue that the time requirements and academic focus of the MCAS would mean fewer classes in electives such as art, music, and computer science that are not part of the test.[66]

II. *Papasan* and *Robinson*

In *Papasan*, the Supreme Court indicated that *Rodriguez* did not foreclose Equal Protection Clause challenges to disparities caused by state distribution policies. Citing *Papasan*, the District Court of Kansas in *Robinson* refused to dismiss an Equal Protection Clause challenge to the state's low enrollment weighing. This Part summarizes the *Papasan* and *Robinson* cases and discusses how these cases might address the

58. Joseph S. Patt, Note, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 563 (1999).

59. 615 N.E.2d 516 (Mass. 1993).

60. MASS. GEN. LAWS ANN. ch. 69 (2002).

61. *Id.* at §11.

62. MASS. REGS. CODE tit. 603, § 30.00 (2002).

63. Mass. Dep't of Educ., *What Is Tested on the MCAS? at* http://www.doe.mass.edu/mcas/overview_faq.html#faq2. (last visited Aug. 1, 2002).

64. Mass. Dep't of Educ., *What Are the State Testing Requirements? at* http://www.doe.mass.edu/mcas/overview_faq.html#faq1 (last visited Aug. 1, 2002).

65. Ed Hayward, *A True Test—MCAS Stands at Crossroads of Mass. Ed Reform*, THE BOSTON HERALD, Apr. 16, 2000, at 1.

66. *Id.*

measurement and local control problems that have limited second and third wave litigation.

A. *Papasan v. Allain*

In *Papasan*, plaintiffs alleged that Mississippi's unequal distribution of educational funds from "Sixteenth Section or Lieu Lands" violated the Equal Protection Clause. The Fifth Circuit Court of Appeals held that *Rodriguez* was controlling and that the disparities created by the state's distribution of funds was constitutional.[67] The Supreme Court reversed and remanded the case to trial court.

While the Court agreed with the Fifth Circuit's holding that the rational basis test should be applied to the plaintiffs' claim, it disagreed with the court of appeals' conclusion that *Rodriguez* was controlling.[68] In *Rodriguez*, the Court explained, the plaintiffs' contention was that Texas' overall school funding system was unconstitutionally discriminatory.[69] *Rodriguez* examined the basic structure of the funding system and found that funding disparities from local taxation were rationally related to local control over school funding levels.[70] However, *Rodriguez* did not validate all funding variations that might arise from a state's school funding decision. It validated only those variations that resulted from permitting local control over local property taxation.[71]

The Court then distinguished the claim in *Papasan* from *Rodriguez*. In *Papasan*, the plaintiffs did not challenge the constitutionality of the overall funding system or the local property tax component of that system.[72] Rather, the plaintiffs challenged the constitutionality of a "state decision to divide state resources differently among school districts."[73] Therefore, *Rodriguez* did not settle the constitutionality of the disparities alleged in *Papasan*.[74] Little has come from the Supreme Court's decision in *Papasan*. On remand, the parties settled the case out of court without a judicial determination of whether the funding disparities violated the Equal Protection Clause.[75]

---

67. 756 F.2d 1087 (5th Cir. 1985).
68. 478 U.S. 265, 286-87.
69. *Id.* at 287.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Papasan*, 478 U.S. at 288.
74. *Id.*
75. The parties stipulated in a consent judgment that "[t]hese disparities [in school funding] are discriminatory, without a rational basis and are in violation of the plaintiffs' equal protection rights secured by the Fourteenth Amendment of the United States Constitution," Papasan v. Allain, 1989 U.S. Dist. LEXIS 17535 (N.D. Miss. 1989).

B. *Robinson v. Kansas*

The *Robinson* case might breathe new life into *Papasan*-based school finance litigation. In *Robinson*, the plaintiffs alleged that two provisions of the state's School District Finance and Quality Performance Act of 1992 violated the Equal Protection Clause. First, the plaintiffs challenged the state's "low enrollment weighting," whereby the state distributes additional funds to school districts with fewer than 1,725 students.[76] The plaintiffs also attacked the statute's provision permitting individual districts to pass "local option budgets" to supplement funding received from the state.[77] The district court dismissed the plaintiffs' challenge to the local option budgets. *Rodriguez* was controlling because the disparities were attributed to the varying wealth of school districts.[78] However, the court refused to dismiss the plaintiffs' Equal Protection Clause challenge to the low enrollment weighting. *Papasan* was controlling because the low enrollment weighting was a disbursement of funds from the state to the school districts.[79]

On appeal, the defendants sought to have the plaintiffs' Equal Protection Clause claim dismissed on Eleventh Amendment grounds. The Eleventh Amendment prohibits federal lawsuits against an unconsenting state by the state's own citizens.[80] The Tenth Circuit Court of Appeals refused to dismiss the Equal Protection claim because the plaintiffs had: (1) brought claims against the state's governor, the chairperson of the state board of education, and the commissioner of the state board of education in their official capacities; and (2) sought relief in the form of an injunction barring them from enforcing state laws that were in violation of federal law.[81] The Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in their official capacities.[82]

C. Reasons for Pursuing *Papasan*-Based Litigation

One reason for pursuing *Papasan*-based school finance challenges is that weighted aid adjustments, such as Kansas' low enrollment weighting, could cause poor school districts to receive less funding than

76. *Robinson*, 117 F.Supp.2d at 1150.
77. *Id.*
78. *Id.*
79. *Id.*
80. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI.
81. *Robinson*, 295 F.3d at 1190.
82. *Id.* at 1190-91.

their richer counterparts. It is important to recognize that some cost adjustments are intended to compensate schools and districts for the additional costs of meeting the needs of students with special needs, such as students with disabilities and students with other compensatory educational needs including limited English proficiency. From 1998 to 1999, twenty-nine states provided aid to local districts to support compensatory programming, and twenty-four states provided aid to local districts to support programming for limited English proficient students.[83] Many such adjustments provide greater portions of aid to poorer school districts, either because more students requiring compensatory education reside in such districts, or because the aid is allocated on a means tested (local district capacity) basis, or both.[84]

However, other cost adjustments may favor wealthier school districts. These adjustments are designed to compensate schools for district, rather than student, characteristics. District characteristics might include economies of scale and geographic cost adjustments. Economies of scale adjustments, which are designed to make up for the greater unit educational costs incurred by smaller school districts, tend to benefit small rural districts, which in some states have relatively high taxable property value compared to urban districts with respect to the numbers of students served in local public schools. Geographic adjustments, which are intended to compensate districts for different costs of teachers and other personnel, might benefit wealthier districts because they tend to employ more qualified and more experienced teachers and are able to pay higher wages and provide more desirable working conditions for those teachers.[85] States incorporating cost of living related adjustments into their funding formulas include Alaska, Colorado, Florida, Ohio, Texas and Virginia.[86]

The package of cost adjustments that exists in any single state's school finance policy is negotiated via the political process.[87] As such, one can reasonably expect the balance of benefits of pupil weights to reflect the balance of political power between wealthy and poor school districts as much, if not more than, the balance of educational needs. For example, legislators representing wealthy school districts can more than offset the compensating effects of poverty adjustments that advantage

83. NATIONAL CENTER FOR EDUCATION, STATISTICS, PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA: 1998-99, *available at* http://www.nces.ed.gov/edfin/state_finance/StateFinancing.asp (last visited Sept. 4, 2002).

84. Bruce D. Baker, *Living on the Edges of School-Funding Policies: The Plight of At-Risk, Limited-English-Proficient and Gifted Children*, 15 EDUC. POL. 674 (2001).

85. Hamilton Lankford et al., *Teacher Sorting and the Plight of Urban Schools: A Descriptive Analysis*, 24 EDUC. EVAL. AND POL'Y ANALYSIS 37 (2002).

86. HELEN LADD & JANET HANSEN, MAKING MONEY MATTER: FINANCING AMERICA'S SCHOOLS (1999).

87. Bruce D. Baker, *supra* note 84; Bruce D. Baker & Michael Imber, *Rational Educational Explanation or Politics as Usual? Evaluating the Outcome of School Finance Litigation in Kansas*, 25 J. OF EDUC. FIN. 121 (1999); David Colton, *The Weighting Game: Two Decades of Fiscal Neutrality in New Mexico*, 22 J. OF EDUC. FIN. 28 (1996).

poor districts by implementing geographic cost adjustments that advantage wealthier districts.

Another reason for pursuing *Papasan*-based litigation is that the *Robinson* case shows that this legal approach might address the measurement problems that have limited the success of second and third wave litigation. Recall that plaintiffs have had trouble in second and third wave litigation establishing a measure that connects differential governmental treatment from effects on educational quality. Plaintiffs may not have such a difficult time in the *Robinson* case. First, the measure advocated by plaintiffs—a comparison of the funding provided by the state to low- and high-enrollment districts—is easily quantifiable. Additionally, this standard does not interfere with the low-enrollment district's ability to raise funds for education.

This second advantage might actually appear to weaken the ability of the *Robinson* plaintiffs to establish a nexus between differential governmental treatment and the impact on children's education. However, the difference in enrollment received by low- and high-enrollment districts is quite large. Districts with 100 pupils receive $4,360.78 per pupil in low enrollment aid, while districts with more than 1,725 students receive only $241.47 per pupil in "correlation" aid, which is the enrollment adjustment for large districts.[88] Plaintiffs might be able to convince a court that such large differences in funding might create a connection between the differential governmental treatment and educational quality.

A third reason for pursuing *Papasan*-based litigation is that the remedy might be less likely to interfere with local control. *Robinson* demonstrates this assertion. If the district court were to find that the classifications created by the low enrollment aid violated the Equal Protection Clause, the remedy might involve the following: (1) eliminating the enrollment adjustments altogether, or (2) adjusting the enrollment aid to reflect a more equitable distribution between low- and high-enrollment districts. Neither of these remedies substantively alter districts' ability to raise local revenues, though options that reduce aid in any one district might influence that district's need or desire to raise additional local revenues. Further, these options require no additional revenues, meaning that a remedy need not require changes in state tax policy, or shifting of state general funds from other services to public education.

88. KANSAS LEGIS. RESEARCH DEP'T., SCHOOL DISTRICT FINANCE AND QUALITY PERFORMANCE ACT – FORMULA FOR COMPUTING GENERAL STATE AID (2000-01 SCHOOL YEAR) *available at* http://skyways.lib.ks.us/kansas/ksleg/KLRD/sdf_and_qpa_memo.pdf (last visited Aug. 7, 2002).

III. Legal Analysis of *Robinson*

As *Papasan* and *Robinson* make clear, Equal Protection Clause challenges to unequal state distribution policies would be subject to the rational basis test. One possible reason for the lack of *Papasan*-based school finance litigation is that the rational basis analysis is generally very deferential to the legislature.[89] However, on occasion, courts have used heightened forms of rational basis scrutiny to invalidate differential governmental action. This Part describes Kansas' enrollment policies, hypothesizes the plaintiffs' constitutional challenge, and analyzes the challenge under the traditional rational basis test. We also examine the state's enrollment weightings under heightened rational basis scrutiny.

A. Description of Kansas' Enrollment Policies

The purpose for Kansas' enrollment weighting provisions was to reflect additional costs for operating small and large school districts.[90] The state's low enrollment weighting applies to districts with under 1,725 pupils. These weights are based on 1991-92 school district general funds per pupil.[91] This weight is computed by calculating the median budgets per pupil at three points (75-125 pupils; 200-399 pupils; more than 1900 pupils).[92] These three points are then connected with straight-line segments for calculating supplemental aid for districts with enrollments between 100 and 300, and 300 and 1,725.[93] The low enrollment weighting provides a weight of 1.14 (114% supplement) to the district with 100 pupils, .58 (58% supplement) to the district with 300 pupils, and .0632 to districts with 1,725 pupils. In addition, the state provides a weight of .0632 (6.32% supplement) to districts enrolling over 1,725 pupils.[94] The 6.32% supplement is referred to as "correlation" weighting for the large districts. The state calculates the supplemental aid allocations by adding "weighted pupils" to district enrollments and then allocating general fund aid per weighted pupil.[95]

In 2000-01, districts with 100 pupils received $4,360.78 per pupil in low enrollment aid. The low enrollment aid for districts between 100 and 300 pupils ranged from $4,360.78 to $2,207.70 per pupil.[96] The low enrollment aid for pupils between 300 and 1,725 students ranged from

89. Between 1972 and 1996, the Supreme Court analyzed 110 cases under rational basis scrutiny. It found for the government in all but 10 cases. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 370 (1999).

90. KANSAS LEGIS. RESEARCH DEP'T., *supra* note 88 at 2.

91. *Id.* at 2-3.

92. *Id.*

93. *Id.*

94. *Id.* at 6.

95. *Id.* at 3.

96. KANSAS LEGIS. RESEARCH DEP'T., *supra* note 88 at 5.

$2,207.70 to $241.47 per pupil.[97] Additionally, districts with over 1,725 pupils received a correlation weight of $241.47 per pupil.[98]

The plaintiffs will probably argue that the state legislature's enrollment adjustments were based on the incorrect assumption that all spending differences across districts in 1991 were reflective of cost differences. The state legislature failed to account for any other factors that might have caused differences in spending such as the relatively high taxable property wealth of the low enrollment school districts. Table 1 reveals that the smallest districts in the state, which spent 2.14 times as much as the largest districts, possessed 3.25 times more property wealth per pupil. Table 1 also shows that the districts with 200 to 400 pupils, which spent 1.58 times as much as the largest districts, had 1.76 times the property wealth.

Table 1

Data Underlying the Original "Cost" (Expenditure) Analysis

Enrollment	Median Revenue per Pupil 1991 (ratio to >1,900)	Median Assessed Valuation per Pupil 1991 (ratio to >1,900)
75 – 125	$7,337 (214%)	$75,718 (325%)
200 – 400	$5,406 (158%)	$41,007 (176%)
> 1,900	$3,426	$23,292

At the time the Kansas low enrollment weight was calculated, significant precedents had already been established in other states, notably Texas, and in academic literature regarding the necessity to control for local fiscal capacity differences when estimating costs using expenditure data.[99] Table 2 compares Kansas's median revenue per pupil for the three points used to compute the low enrollment weighting with the median revenue adjusted for property wealth and local fiscal capacity. These controls would significantly reduce the disparities between low enrollment and high enrollment districts. Controlling for property values would reduce disparities between districts enrolling more than 1,900 students and those enrolling 100 students by $2,267. It would also reduce disparities between districts enrolling more than 1,900 students and those enrolling 300 students by $1,329. Controlling for local district capacity would reduce the disparities between districts enrolling 1,900 students and those enrolling 100 students by $2,130. It would also

97. *Id.*
98. *Id.* at 7.
99. David H. Monk, *Education Costs and Small Rural Schools*, 16 J. OF EDUC. FIN. 213 (1990).

reduce the disparities between districts enrolling 1,900 students and those enrolling 300 students by $1,158.

Table 2.

Comparison of Median Revenue Per Pupil with Controls for Property Wealth and Local District Capacity

Enrollment	Median Revenue Per Pupil	Controlling for Property Wealth[100]	Controlling for Local District Capacity[101]
75-125	$7,337 (214%)	$5,070 (148%)	$5,207 (152%)
200-400	$5,406 (158%)	$4,077 (119%)	$4,248 (124%)
> 1,900	$3,426	$3,426	$3,426

Table 3 compares the amount of enrollment weighting that Kansas school districts received in 2000-01 with the amounts that they would have received with controls for property wealth or more refined measures of district fiscal capacity. Controlling for property wealth alone would have decreased low enrollment aid to a district with 100 pupils by $2,716.30 and would have decreased low enrollment aid to a district with 300 pupils by $1,556.76. Controlling for district fiscal capacity, as measured by tax price and median family income, would have decreased low enrollment aid to a district with 100 pupils by $2,579.26 and would have decreased low enrollment aid to a district with 300 pupils by $1,385.46.

100. BAKER AND IMBER, *supra* note 87.

101. Bruce D. Baker, *Expert Witness Report on Behalf of the Plaintiffs: Analysis and Opinions on the Suitability of the Kansas School District Finance Act, Montoy v. State of Kansas, No.99-C01788 (Shawnee County District Court)* 24 (2001). Capacity is defined as local district tax price (cost in property taxes to the voter in a house of median value of raising an additional $1 in education revenues) and median family income.

Table 3.

Comparison of 2000-01 Low Enrollment Using Median Revenue Per Pupil with Controls for Property Wealth and Local District Capacity

Enrollment	Median Revenue Per Pupil	Controlling for Property Wealth	Controlling for Local District Capacity
100	$4,360.78	$1,644.48	$1,781.52
300	$2,207.70	$650.94	$822.24
1,725	$241.47	$241.47	$241.47

B. Analysis under Traditional Rational Basis Scrutiny

Under traditional rational basis analysis, a classification would be constitutional "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"[102] or if "there is a plausible policy reason for the classification."[103] A legislature need not "actually articulate at any time the purpose or rationale supporting its classification."[104] The burden is on the plaintiffs to "negate every conceivable basis which might support [the classification] whether or not the basis has a foundation in the record."[105] A legislature's classification "may be based on rational speculation unsupported by evidence or empirical data."[106] Furthermore, a classification does not fail rational basis review "because it is not made with mathematical nicety or because in practice it results in some inequality."[107]

The *Robinson* plaintiffs would have little chance of succeeding if courts adopt traditional rational basis scrutiny. A plausible rationale exists for the state to provide more funding to low-enrollment districts than to their high-enrollment counterparts: small districts have higher unit costs of education. This phenomenon is known as economies of scale. A substantial body of empirical research supports the Kansas legislature's assumption that economies of scale do exist in public education systems.[108]

Furthermore, under traditional rational basis analysis plaintiffs could demonstrate that less drastic means were available to accomplish the goals of the low enrollment weighting. The *Rodriguez* case supports

102. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).
103. Nordlinger v. Hahn, 505 U.S. 1, 11 (1992).
104. *Id.* at 15.
105. Heller v. Doe, 509 U.S. 312, 320-21(1993) (internal citations and quotations omitted).
106. *Beach Communications*, 508 U.S. at 315.
107. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (internal quotations omitted).
108. M. Andrews et al., *Revisiting Economies of Size in American Education: Are We Any Closer to a Consensus? Working Paper, Maxwell School, Center for Policy Research, Syracuse University* (2001).

this contention. In *Rodriguez*, the Supreme Court rejected the claim that Texas's school finance system was unconstitutional because the defendants failed to use approaches that would have provided the same level of local control and fiscal flexibility to school districts while achieving greater equality.[109] As the Court explained, "only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative."[110]

C. Analysis under Heightened Rational Basis Scrutiny

The district could apply heightened rational basis review, which is more critical of governmental classifications than traditional rational basis, to find that the low enrollment weighting provision violates the Equal Protection Clause. On occasion, the Supreme Court has used heightened rational basis analysis to invalidate differential governmental treatment. Robert Farrell has identified three types of heightened rational basis analysis:[111] (1) ends analysis, in which classifications have been invalidated for seeking impermissible purposes;[112] (2) means analysis, in which the constitutional deficiency arises from the lack of a sufficient connection between the governmental classification and legitimate purposes;[113] and (3) combination analysis, the classification has been declared unconstitutional because some of the governmental purposes were impermissible and the classification was insufficiently related to other legitimate purposes.[114]

Ends or combination heightened rational basis analysis would be inapplicable to *Robinson* because the goal of low enrollment aid—to equalize cost differences due to economies of scale—is legitimate. Plaintiffs would instead try to convince the district court to apply means analysis by proving that an insufficient connection exists between the means and the ends.

Robinson is a comparative Equal Protection Clause case in which the plaintiffs are challenging the disparate levels of funding provided to

---

109. *Rodriguez*, 411 U.S. at 50-51.

110. *Id.* at 51.

111. FARRELL, *supra* note 89.

112. *E.g.*, Romer v. Evans, 517 U.S. 620 (1996) (concluding that a Colorado constitutional amendment that forbade the state from prohibiting discrimination against homosexuals was passed for the impermissible purpose of discriminating against homosexuals).

113. *E.g.*, Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336 (1989) (finding that the tax assessment scheme that treated similarly situated owners of real property unequally was not rationally related to goal of assessing property at true current value).

114. *E.g.*, Zobel v. Williams, 457 U.S. 55 (1982) (ruling that an Alaska statute that would distribute dividends from the state's oil fund according to length of residency was enacted for the impermissible purpose of awarding citizens for past contributions, and that statute was not rationally related to legitimate goals of encouraging individuals to live in the state, or encourage sensible management of the oil fund).

low- and high-enrollment school districts. The most analogous case in which the Supreme Court applied heightened rational basis analysis is *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*.[115] In *Allegheny Pittsburgh*, the Supreme Court used means-oriented heightened rational basis analysis to strike down an assessment scheme that resulted in the unequal evaluation of similarly situated property. The county's tax assessor valued real property on the basis of its recent purchase price.[116] Thus, properties that had been transferred recently were valued based on their previous assessments with minor adjustments.[117] As a consequence of this approach, recently purchased property was assessed and taxed at much higher levels than similarly situated property that had remained with its owner for a long time.[118] The petitioners' property had been assessed at approximately eight to thirty-five times more than comparable neighboring property over the course of more than ten years.[119]

The county argued that its assessment scheme was rationally related to the purpose of assessing properties at true current value.[120] The county made use of the "exceedingly accurate information about the market value" for recently purchased property.[121] As data grew stale, it adjusted the assessment based on perceptions of the general change of property values.[122] Although "not intend[ing] to cast doubt upon the theoretical basis of such a scheme,"[123] the Court ruled that the assessment scheme was unconstitutional. The Equal Protection Clause permitted a state to "divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable."[124] However, the assessment scheme was unreasonable in light of the fact that West Virginia's constitution and laws required all property to be assessed at a uniform rate according to its market value.[125]

Also, in *Weissman v. Evans*,[126] the Court of Appeals of New York used means-oriented rational basis scrutiny to invalidate a state court budget act insofar as it created a two percent salary disparity between district court judges in Suffolk County and their counterparts in adjoining Nassau County. The court ruled in this fashion because of expert testimony demonstrating that the two counties "constituted a true unity of . . . judicial interest . . . indistinguishable by separate geographic

115. 488 U.S. 336 (1989).
116. *Id.* at 338.
117. *Id.*
118. *Id.*
119. *Id.* at 344.
120. *Allegheny Pittsburgh*, 488 U.S. at 343.
121. *Id.*
122. *Id.*
123. *Id.* at 343.
124. *Id.* at 344.
125. *Id.* at 345.
126. 438 N.E.2d 397 (N.Y. 1982).

considerations, that the jurisdiction, practice and procedures of each of the District Courts and the functions, duties and responsibilities of their Judges are identical . . . and, that, for practical purposes, . . . their caseloads are substantially the same."[127]

A key difference exists between *Allegheny* and *Weissman* on the one hand, and *Robinson* on the other. The former two cases involved disparities between similarly situated parties. As we have demonstrated in *Robinson*, however, the educational costs are different between the size of Kansas' low- and high-enrollment districts. Therefore, *Allegheny Pittsburgh* and *Weissman* would not be applicable to *Robinson*. *Cass v. State*[128] supports this conclusion. In *Cass*, the Court of Appeals of New York upheld provisions of the Unified Court Budget Act that created salary disparities between New York City metropolitan area judges and judges of coordinate jurisdiction across the state.[129] Statewide differences in population, caseload, and cost of living provided a rational basis for the salary differentials.[130]

IV. Implications for School Finance Litigation

Our analysis of the pending Kansas school finance challenge has several implications for school finance litigation. We discuss some of these implications below.

A. Implications for Other *Papasan*-Based School Finance Challenges

First, our analysis suggests that statewide comparative Equal Protection Clause challenges to weighted aid provisions would probably fail. Plaintiffs would have to demonstrate that there are no appreciable differences between the classifications created by weighted aid provisions. If differences existed, then the plaintiffs' claims would be reduced to whether states could have adopted less discriminatory means to address the provisions' policy goals. As *Rodriguez* makes clear, courts would not conduct this inquiry under rational basis review.

However, school districts might succeed in Equal Protection Clause challenges to weighted provisions that provide unequal funding to similarly situated school districts. A state might base a weighted aid policy on data that was accurate at the time of the policy's implementation, but the data could change over time. Failure to update the data in a timely fashion could result in a school district's incorrect classification, and the weighted aid policy could provide that district with

127. *Id.* at 399 (internal citations omitted).
128. 448 N.E.2d 786 (N.Y. 1983).
129. *Id.*
130. *Id.* at 787.

less funding than its similarly situated counterparts. *Allegheny* and *Weissman* suggest that a court might apply heightened rational basis analysis in this situation to hold that the weighted aid provision violates the Equal Protection Clause.

B. Possible Legal Alternatives to *Papasan*

The limitations of *Papasan*-based school finance litigation indicate that plaintiffs should develop alternative legal challenges to disparities caused by unequal distribution policies. One strategy employs the Department of Education's (DOE) implementing regulations to Title VI of the Civil Rights Act of 1964.[131] Section 601 of Title VI provides that: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[132] Title VI prohibits only intentional discrimination; however, Section 602 authorizes agencies providing financial assistance to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance."[133] Pursuant to Section 602, the DOE promulgated implementing regulations that forbid organizations receiving federal funding from adopting policies that have a disparate impact on minorities.[134]

The *Robinson* plaintiffs also alleged that Kansas' low enrollment provision and local option budgets, which permit school districts to supplement state funding, violated Title VI and the DOE implementing regulations.[135] The district court denied the defendants' motion to dismiss because the plaintiffs had an implied right under Title VI to enforce the implementing regulations.[136] In *Alexander v. Sandoval*,[137] however, the Supreme Court foreclosed Title VI as a vehicle for enforcing the DOE implementing regulations by ruling that Section 602 did not create such an implied private right of action under Title VI.

The *Robinson* plaintiffs responded to *Sandoval* by attempting to enforce the Title VI implementing regulations under 42 U.S.C. Section 1983, which provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by

131. 42 U.S.C. § 2000d *et seq.* (2002).
132. 42 U.S.C. § 2000d (2002).
133. 42 U.S.C. § 2000d-1 (2002).
134. Specifically, the DOE regulations forbid funding recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program as respects individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (2002).
135. *Robinson*, 117 F.Supp. at 1128, 1139.
136. *Id.* at 1139.
137. 532 U.S. 275 (2001).

anyone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State."[138] The Tenth Circuit Court of Appeals ruled that the plaintiffs' disparate impact claims could still be brought against state officials for prospective injunctive relief through an action under Section 1983.[139] In reaching this conclusion, the court cited Justice Stevens' dissent in *Sandoval*, which stated that the Section 1983 enforcement option was still open to plaintiffs.[140]

In *Campaign for Fiscal Equity v. State*, a New York trial court ruled that the state's school finance system violated the DOE's implementing regulations as enforced by Title VI.[141] After the *Sandoval* decision, the plaintiffs tried to enforce the implementing regulations under Section 1983. A New York appellate court reached the opposite conclusion of the Tenth Circuit in *Robinson* and denied the plaintiffs' claim.[142] The appellate court observed that the cases deciding whether a federal "law" gave rise to a Section 1983 claim had generally construed the term to apply to "statutes."[143] Also, the contrast between the language "Constitution and laws" and "statute, ordinance, regulation, custom, or usage" in Section 1983 showed that Congress differentiated between statutes and regulations, and that regulations, standing alone, were not "laws" under Section 1983.[144]

Furthermore, the appellate court asserted that those cases that had ruled that federal regulations, standing alone, could support a Section 1983 claim either assumed so without any analysis or were misinterpreted. In *Wright v. City of Roanoke Redevelopment and Housing Authority*,[145] the Supreme Court ruled that tenants living in low-income housing units could bring a Section 1983 suit against a city housing agency on the ground that the defendant had violated the Brooke Amendment to the Housing Act of 1937 and the Department of Housing and Urban Development's ("HUD") implementing regulations.[146]

The New York appellate court ruled that the proper inquiry under Section 1983 was whether the regulation further defined or fleshed out the content of a right already recognized under the statute.[147] The DOE implementing regulations failed under this analysis because the regulations did not flesh out the content of a statutory right, but rather contradicted Title VI.[148] The appellate court acknowledged that *Sandoval* had assumed that the implementing regulations could proscribe

138. 42 U.S.C. § 1983 (2002).
139. *Robinson*, 295 F.3d at 1187.
140. *Id.* (citing *Sandoval*, 532 U.S. at 299-300 (Stevens, J., dissenting)).
141. 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).
142. 744 N.Y.S.2d 130 (N.Y. App. Div. 2002).
143. *Id.* at 146.
144. *Id.*
145. 479 U.S. 418 (1987).
146. *Id.* at 419.
147. *Campaign for Fiscal Equity*, 744 N.Y.S.2d at 147.
148. *Id.*

activities that had a racially disparate impact and that this view had been expressed in previous cases.[149] However, "such statements were 'in considerable tension' with the [Supreme] Court's holding in other cases that 42 U.S.C. § 601 forbids only intentional discrimination."[150]

Another strategy calls for plaintiffs to revamp second wave school finance litigation by expressly going after weighted aid provisions that create disparities between rich and poor districts. Five state courts have held that education is a fundamental right under their constitutions and have found their school finance systems unconstitutional.[151] Such a finding is significant because these states might require strict scrutiny when reviewing state actions that interfere with fundamental rights.[152] This option was not available to the *Robinson* plaintiffs because the state Supreme Court had ruled that education was not a fundamental right under the Kansas constitution in upholding the low enrollment weighting provision against a state equal protection clause challenge.[153] But if education were a fundamental right in the state and strict scrutiny were appropriate, a state constitutional challenge to the low enrollment weighting might have succeeded on the ground that the provision was not narrowly tailored.

Conclusion

In *Papasan*, the Supreme Court ruled that *Rodriguez* did not foreclose Equal Protection Clause challenges to unequal state distribution policies and that these provisions would be subject to rational basis analysis.[154] In *Robinson*, the plaintiffs have attempted to revitalize *Papasan*-based school finance litigation by challenging Kansas' low enrollment weighting provision under the Equal Protection Clause.[155] There are several reasons for pursuing *Papasan*-based Equal Protection Clause challenges, including the fact that plaintiffs might be able to

149. *Id.* (citing Guardians Ass'n v. Civil Service Comm'n of New York City, 463 U.S. 582 (1983); Alexander v. Choate, 469 U.S. 287 (1985)).

150. *Id.*

151. *See* Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); Serrano v. Priest, 487 P.2d 1241, 1255 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186, 206 (Ky. 1989); Pauley v. Kelly, 255 S.E.2d 859, 878 (W.Va. 1979); Washakie Co. Sch. Dist. v. Herschler, 606 P.2d 310, 333 (Wyo. 1980). Courts in five other states have found that education is a fundamental right but have upheld their school finance systems: Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) (but see Roosevelt v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) (declining to decide whether education is a fundamental right under the state's constitution); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Bismarck Public Sch. Dist. v. State, 511 N.W.2d 247, 256 (N.D. 1994); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989).

152. John Dayton, *Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 EDUC. L. REP. 447, 453 (2001).

153. *Unified Sch. Dist. No. 229*, 885 P.2d at 1189.

154. *Papasan*, 478 U.S. at 288.

155. *Robinson*, 117 F.Supp.2d at 1128.

avoid the measurement and local control problems that have limited the second and third waves of school finance litigation.

However, if the District Court of Kansas uses traditional rational basis analysis, it will probably rule that the low enrollment provision is rationally related to the legitimate governmental interest of equalizing cost differences between low- and high-enrollment school districts. Furthermore, the plaintiffs would probably claim that the low enrollment weighting provision is irrational because the state could have employed less discriminatory methods. The Supreme Court rejected this argument in *Rodriguez*.[156] The court could use means-oriented heightened rational basis scrutiny to invalidate Kansas' low enrollment policy. However, such a finding would be a major departure from the most applicable heightened rational basis decisions, which have applied such scrutiny to situations in which the government treated similarly situated individuals unequally. *Robinson* is different because there are educational cost differences related to size between Kansas' low- and high-enrollment school districts.[157]

The *Robinson* case suggests that plaintiffs from poor school districts will have little success with *Papasan*-based challenges. Because weighted aid provisions are designed to meet legitimate governmental purposes, their claims would also amount to whether states could have adopted less discriminatory means to accomplish the policies' goals. The *Robinson* case also suggests that plaintiffs should develop other approaches to challenging disparities created by weighted aid provisions, including Section 1983/disparate impact claims and state constitutional challenges.

156. *Rodriguez*, 411 U.S. at 51.
157. *See* M. Andrews et al., *supra* note 108.