Roger Williams University Law Review

Volume 5 | Issue 2 Article 5

Spring 2000

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I. INTRODUCTION

Any legal challenge to a state system of financing public education is based on the premise that all children of the state are equally important and that society owes to each an equal share of the state's fiscal responsibility and wealth.[1] Fiscal equity is simply a mechanism designed to ensure equality of educational opportunities. Few would argue against such a premise, at least philosophically. The problem is in translating that premise into a legal duty to distribute the state's resources among its schoolchildren on a fully equitable basis. The Rhode Island Supreme Court has ruled that the current system of distributing state aid to local school districts offends neither the Education Clause nor the Equal Protection Clause of the Rhode Island Constitution.[2] The federal courts, at least for now, present the only legal forum in which this mixed question of law and policy may be decided.

Forty-six years ago, the United States Supreme Court issued its landmark desegregation decision, *Brown v. Board of Education*.[3] In rejecting the existing standard of "separate but equal," the Court issued the following admonishment to federal, state and local lawmakers:

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1. *See* Ellwood P. Cubberley, School Funds and Their Apportionment (1906).
2. *See* City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).
3. 347 U.S. 483 (1954).

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[4]

The above-quoted passage has often been cited as establishing a right of equal opportunity to a public education.

In 1973, the Court placed severe constraints on *Brown*'s apparent guarantee of educational equality when it examined the issue of financial equity in the Texas public school system.[5] The case of *San Antonio Independent School District v. Rodriguez*[6] is most often cited for the proposition that education is not a "fundamental right" under the United States Constitution.[7] The Supreme Court also apparently closed the door on future cases based upon a right to equal protection by the poor, stating that wealth is not a "suspect classification" for equal protection purposes.[8] Conversely, *Rodriguez* and its progeny also suggest that the Supreme Court believes that: (1) access to a "minimally adequate" public education is a constitutionally protected right and (2) opportunity of education, where the state has undertaken to provide it, must be made available to all on equal terms.

For the last twenty-seven years, it has been commonly presumed that the federal courts would prove fatally unsympathetic to another Constitution-based challenge to a state's system of distributing money to its local school districts, no matter how inequitable the system proved to be. In the aftermath of *Rodriguez* to the present day, most states have experienced lawsuits similar to *City of Pawtucket*, whereby state systems of educational financing have been challenged based on guarantees of educational equality in state constitutions. Despite the rash of state cases, there have been very few federal constitutional challenges to inequities in

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4. *Id.* at 493.

5. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959.

6. *Id.*

7. *See, e.g., City of Pawtucket*, 662 A.2d at 60.

8. *See Rodriguez*, 411 U.S. at 40.

school financing since 1973.[9] A 1998 case from the Southern District of New York, *African American Legal Defense Fund, Inc. v. New York State Department of Education*,[10] is a typical example of the cursory manner in which federal courts apply the holdings of *Rodriguez* to education financing litigation. The court in *African American* held that *Rodriguez* stands for the propositions that the poor can never be a suspect class, that education is not a fundamental right and that the proper standard of constitutional analysis was whether New York's statutory scheme of educational finance "bears some rational relationship to a legitimate state purpose."[11] The reluctance of the lower federal courts to explore the holdings in *Rodriguez* presents a somewhat puzzling scenario. The Court's holding in *Rodriguez*, although usually cited as espousing certain universal principles, was in part very fact specific, and thus potentially distinguishable from situations arising in other states.

First, although education may not be a "fundamental" right, the Supreme Court recognized it as an "important" one.[12] Problems with identifying the disadvantaged individuals in *Rodriguez* as a "suspect class" had as much to do with the manner in which the disadvantaged group was defined by the plaintiffs as it did with the underlying constitutional analysis.[13] Secondly, the Texas school districts had a state constitutional right to raise taxes to pay for local education;[14] neither Rhode Island school districts nor their municipal governments have any such rights independ-

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9. *But see* Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) (holding that plaintiff parents of schoolchildren had stated Title VI action against state officials and challenging the alleged racially discriminatory effect of public school funding) (discussed *infra*, section V).

10. 8 F. Supp.2d 330, 335 (S.D.N.Y. 1998).

11. *Id.* (quoting *Rodriguez*, 411 U.S. at 44).

12. *Rodriguez*, 411 U.S. at 40.

13. *See id.* at 28. The court stated:

> [A]ppellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against 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. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id.

14. *See id.*

ent of legislative discretion. There is truly only one statewide system of public education in Rhode Island, which raises serious questions about a court's reliance on the legislature's alleged protection of "local control" as a rationale for upholding an inequitable system of education finance. Finally, a detailed review of the Supreme Court's education cases since *Rodriguez* reveals that the Court is willing to apply "heightened scrutiny" in cases involving unequal educational opportunities. Thus, it would appear that Rhode Island's system of financing public education is vulnerable to a constitutional challenge based on the Fourteenth Amendment's guarantee of equal protection and due process. This article will analyze the most recent developments in educational financing litigation, with a specific eye toward determining the likelihood of a successful challenge to Rhode Island's financing statute via the federal courts.

There are numerous grounds for mounting a federal challenge to the current system. Federal statues, in particular, may provide grounds for a legal challenge to Rhode Island's education financing scheme. As with the equal protection claim, actions brought under Title VI of the Civil Rights Act[15] or the Equal Educational Opportunities Act ("EEOA")[16] would allege discriminatory state action in denying equal access to public education. Rhode Island school districts can be encouraged by two recent cases arising in New York which have successfully used Title VI, the EEOA and the Equal Protection Clause to challenge "race-based" decisions in allocating state resources for education.[17] A strong case can be made that Rhode Island's system of financing public education discriminates against minority schoolchildren living in our inner cities. Additionally, the Third Circuit has recently held, in *Powell v. Ridge*,[18] that it was inappropriate for the District Court for the Eastern District of Pennsylvania to dismiss the plaintiffs' Title VI challenge to Philadelphia's public education financing system.[19] The plaintiffs had argued that the funding scheme "result[ed] in proportionately less funding per child to school districts with high

15. 42 U.S.C. § 2000d (1994).

16. 20 U.S.C. §§ 1701-1758 (1994).

17. *See* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995); United States v. City of Yonkers, 96 F.3d 600 (2d Cir. 1996).

18. Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999)

19. *See id.*

proportions of non-white students than to school district with high proportions of white students."[20]

The vast majority of Rhode Island's minority schoolchildren, many of whom are living at or below the poverty line, are concentrated in the state's large urban school districts. Despite that fact, the state has continued to fund public education via a financial aid formula that results in less money being distributed to an impoverished population of young urban minorities than is being spent on a largely white and comparatively privileged suburban population. The state has an affirmative obligation to ensure that public education is "available to all on equal terms."[21] Where protected classes are affected disproportionately by state action, the state must be prepared to demonstrate that its system of financing public education is the least discriminatory method of preserving the supposed governmental goal of preserving "local control" over education. It is unlikely, however, that the State of Rhode Island can meet this standard.[22]

This article concludes that the present system of financing public education in Rhode Island is vulnerable to a challenge in the federal courts. As the following sections demonstrate, Rhode Island's factual scenario presents a compelling argument challenging the present system. The most difficult aspect of such a challenge would be getting the facts of the case to the factfinder, be it jury or judge. Any of the poorer urban districts with high percentages of minority students willing to undertake such a legal challenge would first have to survive a motion to dismiss.

II. Surviving the Motion to Dismiss

Motions to dismiss may be granted for a number of reasons, including a failure to state a claim upon which relief can be granted, lack of personal or subject matter jurisdiction, or failure to join an indispensable party. Identifying the proper defendants in such a hypothetical challenge would pose no problems; Rhode Island's Supreme Court has made it perfectly clear that the General Assembly is solely responsible for the current condition of pub-

20. *Id.* at 396.

21. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

22. This approach may require the urban school districts to propose a remedy, i.e., an alternative method of funding that likewise allows for local control, but without a disparate impact on minority students.

lic education in Rhode Island.[23] However, more significant legal hurdles exist, including the following:

> 1) Establishing a particular school committee's capacity to sue the General Assembly, a question governed by the doctrine of sovereign immunity, as well as the 11th Amendment's prohibition against one entity of a state suing another in federal court;
> 2) Establishing that school committee's standing to bring an action based on a violation of the federal Constitution or a federal statute;
> 3) Distinguishing or limiting previous United States Supreme Court decisions applying a mere "rational basis analysis" to education finance controversies; and,
> 4) Rebutting the inevitable charge that a school committee comes to the federal court with "unclean hands" due to its failure to desegregate its own schools, as evidenced by racially biased distribution of funds within the school district.

These issues present substantial, although not necessarily fatal, obstacles to having constitutional and statutory claims heard by a federal district court. Overcoming these largely procedural impediments could conceivably present greater difficulty than proving the substantive merits of the underlying case.

A necessary premise of any federal challenge to Rhode Island's public education financing structure would be that the various plaintiff school districts are unable to guarantee a minimally adequate education to their students as a result of inequitable financing. It is always uncomfortable for school officials to acknowledge deficiencies in their own system, especially deficiencies that give rise to legal liability. Moreover, once the allegation of denial of a basic education is raised, that deficiency must be affirmatively linked directly to the state's system of finance, overcoming the likely argument that such results are attributable to alleged "dysfunction" within a given school department. A potential plaintiff would first be required to prove that it is unable to provide a minimally adequate education to a significant number of its students, and then it would have to prove that more money would remedy these inadequacies.

If race in fact were to become an issue, the plaintiff school district(s) would also have to be prepared to weather charges that

23. *See, e.g.*, City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).

they have not done enough to desegregate their schools. Litigation designed to increase the amount of state funds flowing into a given school district on the basis of its minority population would most certainly not be successful if the state could show that the district does not provide equal educational opportunities to whites and minorities with the money it already has.

A statewide system of financing public education can be challenged in three distinct ways:

1) Sufficiency: the total amount of money available to local school districts;

2) Vertical Equity: the distribution of so-called "state aid" to disadvantaged school districts; and,

3) Horizontal Equity: the distribution of education dollars among similarly situated schoolchildren in different districts.

There is no question that less money is spent on educating urban school children, on a per-pupil basis, than in many more affluent suburban communities. There is also no question that the vast majority of Rhode Island's minority population lives in Providence and a few other chronically underfunded urban areas, notably Pawtucket, Woonsocket and Central Falls. Thus, an initial threshold of successful litigation requires statistical proof that Rhode Island spends less on its minority schoolchildren than it spends on its white children.

Four potential causes of action are discussed herein: constitutional violations of the Fourteenth Amendment's guarantees of equal protection and substantive due process, and violations of the Equal Educational Opportunities Act and Title VI of the Civil Rights Act and their respective implementing regulations. All four claims would assert the rights of schoolchildren to certain protections embodied in the Fourteenth Amendment. The relative likelihood of success under these four possible causes of action can be appraised only through an in-depth analysis of relevant Supreme Court decisions. Consideration of the many issues implicated in a federal suit to challenge Rhode Island's system of educational finance reveals an arduous road to success. That should not cloud the fact that litigation in federal court is perhaps the only legal avenue to trigger desperately needed reform of our system of financing public education.

III. Equal Protection as a Basis for Challenging the Current Financing Structure

A. *An Equal Protection Overview*

The Fourteenth Amendment to the Federal Constitution prohibits each state from depriving any person of life, liberty or property without due process of law or denying any person within its jurisdiction the equal protection of the laws.[24] The Fourteenth Amendment was enacted shortly after the Civil War; its primary purpose was to prevent official conduct discriminating on the basis of race.[25] Today, the most vital component of the Fourteenth Amendment is the Equal Protection Clause, which proscribes state action that has the effect of denying to any race, class or individual the equal protection of the laws.

"Equal protection" requires that all persons shall be treated alike under like circumstances, both in terms of liabilities imposed and benefits conferred.

> The Equal Protection [C]lause of the Fourteenth Amendment provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are applied in an arbitrary or capricious way.[26]

Of course, few actions of government fail to create classifications of individuals. Most laws are designed to treat differently situated persons differently. The constitutional question, however, is whether the state's manner of differentiating among individuals acts to discriminate on the basis of unacceptable criteria, such as race or gender.

Any system of legislative classification must be reasonably related to some legitimate governmental purpose. The question of

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24. Section 1 of the Fourteenth Amendment of the United States Constitution reads in full as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the Equal Protection of the laws.

U.S. Const. amend. XIV, § 1.

25. *See* Washington v. Davis, 426 U.S. 229, 259 (1976).

26. Jones v. Helms, 452 U.S. 412 (1981).

how closely the court scrutinizes the relationship between the state's goal and the means by which it attempts to further that goal is based upon two factors. The first, is whether the right allegedly affected is "fundamental," i.e., explicitly contained in the Constitution. The second is whether the classification is "suspect" as a result of prior government discrimination against members of the same class. A classification will not be deemed "suspect" unless there is a showing of legislative *intent* to discriminate against the disfavored class; discriminatory or disproportionate impact, by itself, will not suffice under the Equal Protection Clause to prove the requisite discriminatory animus.[27]

If the challenged legislation involves either a fundamental interest *or* a suspect classification, the court will engage in "strict scrutiny" of the law as written or applied. Under strict scrutiny, the state must prove that its classification was *necessary* to further some *compelling* governmental interest.[28] The strict scrutiny standard is extremely high and few laws will survive its application. Conversely, failure to prove an infringement of a fundamental right or discriminatory impact on a suspect class will result in the court's application of a "mere rational basis" standard. Under this highly deferential analysis, there is a judicial presumption of constitutionality.[29] Once attacked, the state must prove only that its classification bears a *rational* relation to a *legitimate* legislative purpose, regardless of whether a valid purpose is stated in the law or the legislative history.[30]

The Supreme Court has also relied upon a "heightened" or "intermediate level" scrutiny on a number of occasions, notably regarding classifications not traditionally thought of as "suspect," such as alienage, illegitimacy and gender. Heightened scrutiny has been described as requiring a *substantial* relation to an actual, *important* governmental interest.[31] The question of when a public education case will trigger heightened scrutiny has never been de-

27. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); *Davis*, 426 U.S. at 484-85 (1976).

28. *See* Dunn v. Blumstein, 405 U.S. 330 (1972).

29. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), *reh'g denied,* 411 U.S. 959 (1973).

30. *See* Minnesota v. Clover Leaf Creamery Co. 449 U.S. 456, 461 (1981); *Rodriguez*, 411 U.S. at 33.

31. *See* Craig v. Boren, 429 U.S. 190 (1976).

finitively answered by the Court, although it has clearly applied a heightened standard of review in certain cases.

Any discussion regarding the use of the Equal Protection Clause to challenge a state's system of financing public education must begin with *San Antonio Independent School District v. Rodriguez*.[32] Decided by the United States Supreme Court in 1973, *Rodriguez* contains several holdings that must be reconciled or distinguished by subsequent actions brought on similar grounds. *Rodriguez* held that:

> 1) Education is not a fundamental right explicitly or tacitly guaranteed by the Federal Constitution;
> 2) Wealth is not a suspect classification, therefore the poor do not represent a suspect class;
> 3) Cases alleging merely relative, as opposed to absolute, deprivation of educational benefits will be gauged on a mere "rational basis" standard;
> 4) Local control of public education is a legitimate state interest;
> 5) Inequities exist in public schools, but that is an issue for legislative action, not judicial intervention.[33]

Rodriguez is less frequently cited for some equally interesting language which suggests that the Court's ruling should be strictly limited to the facts as presented in that case. A more discretely defined plaintiff class would have avoided the Court's admonishment in *Rodriguez* that the case came to them "with no definitive description of the classifying facts or delineation of the disfavored class."[34] To prove purposeful discrimination, one must first be able to define with particularity the category of individuals who have been denied equal protection of the laws. *Rodriguez* concluded that no evidence had been introduced to prove that the poorest people, those whose rights were asserted, were concentrated in the poorest plaintiff school districts.[35]

Even if the plaintiffs in *Rodriguez* had constituted a suspect class, there was no evidence introduced that they had suffered an "absolute deprivation" of the desired benefit. "[A]t least where wealth is involved, the Equal Protection Clause does not require

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32. 411 U.S. 1 (1973).
33. *See id.* at 40.
34. *Id.* at 19.
35. *Id.* at 23.

absolute equality or precisely equal advantages."[36] Proof of direct injury is a crucial element of any constitutional challenge to public educational funding. *Rodriguez* suggests that denial of a "minimally adequate" education to any individual or group would be a denial of equal protection of the laws. It should also be noted that *Rodriguez* may have been decided differently if the plaintiffs had been members of a traditionally disadvantaged population, such as blacks or certain ethnic groups. Without a traditional disfavored classification, the Court emphasized the plaintiffs' inability to refute the State of Texas' position that every child in every school district in the state received an adequate education.[37] No court has yet definitively defined a "minimally adequate" education, but it is clear that failure to provide the basic skills of literacy and citizenship would trigger at least heightened scrutiny, regardless of whether the classification was "suspect."

Once it determined to apply minimal scrutiny, the *Rodriguez* Court relied heavily on the fact that Texas school committees had a right under their state constitution to raise taxes, thereby equating local tax raising authority with local control. Rhode Island school committees, conversely, do not have a similar right under their state constitution to raise educational funds through local taxes. In Rhode Island, it is the legislature that has the final say in regard to both local tax authority and local control over public education.[38]

B. *Identifying the Plaintiff Class*

One of the most troubling aspects of a federal case dealing with educational finance is the difficulty of placing a group of plaintiffs into a neat category for the purposes of constitutional analysis. In fact, this hurdle has been a problem common to most educational finance cases heard by the various federal courts. The reasons for this difficulty may be traced to specific language contained in *Rodriguez*, the Supreme Court's seminal case in this area, as well as various plaintiffs' continued inappropriate reliance on a poor school district's relative lack of taxable property base as proof of its inability to provide certain favored services.

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36. *Id.* at 37.
37. *See id.* at 24-25.
38. *See* City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).

It is not enough for a school district plaintiff to point out inequities in finances or shortcomings in educational opportunities. An equally vital part of education finance litigation is the adequate description and identification of a plaintiff class whose constitutional interests are being abridged. This exercise requires answers to three questions:

1) Who has been directly harmed by the allegedly illegal distribution of education dollars?

2) Who has standing to bring a legal challenge to the system of financing?

3) Who belongs to an appropriately described class of injured persons for the purposes of equal protection and Title VI?

As the following analysis demonstrates, decisions regarding the identification of the plaintiffs and plaintiff class will likely prove to be highly predictive of the suit's likelihood of success.

A preliminary decision would involve determining whether to include all of a given district's schoolchildren in the plaintiff class due to economic discrimination, or whether certain sub-groups within the school system, such as children belonging to traditionally disadvantaged minority or ethnic groups, or children living below the poverty line, would face fewer hurdles in terms of constitutional analysis. A Title VI or EEOA action presents no such difficulties; those statutes are limited to protection of the rights of racial minorities.

Identifying the injured class of plaintiffs raises largely strategic questions. The precision with which a plaintiff class should be identified rests largely on the burden of proof that a group of individuals would face in court. A case can certainly be made that every child currently enrolled in a poor school district has been deprived of a certain equality of education as compared to the students of wealthier districts. Indeed, this is the traditional, inclusive approach to education finance litigation. One of the reasons for this approach lies with the lure of easy statistical proof—simply compare available tax bases and per-pupil expenditures between poor and wealthy communities.

Rodriguez points out three major problems with this approach. First, defining the plaintiff as a "district" effectively removes the discussion a step away from the individuals who actually have con-

stitutional rights to assert.[39] The suit thereby becomes derivative, adding a question of whether school district officials have sufficient standing to bring a third party action on behalf of their affected students.[40] The second problem lies with defining the class of affected plaintiffs.[41] Even the poorest school districts contain some individuals who are relatively wealthy. Defining a class of "poor," by reference to an entire school district is overinclusive, in that it necessarily includes individuals within the district who do not meet the poverty description, and it is also underinclusive because it does not contain similarly situated poor individuals residing in other districts. As the Court noted in *Rodriguez*, "[t]here is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts."[42] Third, the definition of harmed individuals must also provide a clear delineation of a "disfavored class" for the purpose of equal protection analysis.[43] This was one of several fatal errors for the *Rodriguez* plaintiffs. Ideally, the class can be defined in the traditional constitutional terms of a historically recognized "protected class." This is a finite list of classes of individuals who have historically been the victims of government discrimination: race, ethnicity, national origin, gender, or age.

Rodriguez represents a surprising willingness on the part of the Supreme Court to rely on statistical and sociological analysis to identify the class of disadvantaged individuals. However, it also made clear that federal courts should demand precision in such calculations. *Rodriguez* stated that:

> [I]t should be recognized that median income statistics may not define with any precision the status of individual families within any given district. A more dependable showing of comparative wealth discrimination would also examine factors such as the average income, the mode, and the concentration of poor families within the district.[44]

In other words, school districts are not poor; people are poor.

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39. *See Rodriguez*, 411 U.S. at 24-25.
40. *See id.*
41. *See id.*
42. *Id.* at 23.
43. *See id.* at 40.
44. *Id.* at 38 & n.61.

The *Rodriguez* Court's discussion of wealth as a classification suggests that it might have applied a heightened level of scrutiny under different circumstances, or with different plaintiffs.[45]

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[46]

Rodriguez thus demonstrates how *not* to bring an equal protection claim in regard to a school financing system.

The plaintiff class cannot be nebulous; it must be defined with precision. To represent a "suspect class," the plaintiffs must belong to a discrete group that has been discriminated against in the past. A classification based on race, ethnicity or national origin would of course trigger strict scrutiny. However, one does not need a "suspect" class in order to trigger intermediate or heightened scrutiny. In *Plyler v. Doe*[47] the Supreme Court noted that the children of illegal immigrants, although not a "suspect class," were a "discrete class of children not accountable for their disabling status."[48]

Plyler leaves the door open to an argument that poor children could constitute an illegal classification if the class can be defined with sufficient particularity. Children raised in poverty, similar to children of illegal aliens, are clearly not "accountable for their disabling status."[49] Triggering a heightened level of review requires a discretely described group of plaintiffs who are powerless over their classification, and who have suffered a cognizable injury to some "important" right. Children of the urban poor undoubtedly meet this description: the problem lies in setting the parameters of the class with sufficient specificity to avoid charges that it is overinclusive or underinclusive.

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45. *See id.* at 40.

46. *Id.*

47. 457 U.S. 202 (1982).

48. *Id.* at 223.

49. *Id*; *see, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988) (emphasis added). The court stated: "We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should *on that account alone* be subjected to strict Equal Protection scrutiny."

Difficulties in narrowing the plaintiff class can be avoided if a school district can prove that its schoolchildren make up a class of individuals that have been previously subjected to overt discrimination by the State of Rhode Island. For example, it may be shown that the General Assembly performed acts of *de jure* discrimination by funneling low income housing, traditionally accessed predominantly by minorities, into lower income urban districts. The state arguably then ensured that these lower income areas received less money for education than more affluent, non-minority communities.

Such a scenario, which may have in fact occurred in Rhode Island during the 1970s and 1980s, would avoid difficult identification issues simply on the weight that the Legislature itself created the class against which it later discriminated. Linking housing discrimination and education discrimination is hardly a new idea. However, it has rarely been used as a significant factor in educational finance cases. A classification based on wealth and situs within the state may in fact trigger heightened scrutiny if it can be shown that the state has purposefully denied that particular group equal access to certain benefits in the past.

The final consideration in defining the plaintiff class relates to standing. Standing to sue means that the party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.[50] Standing to assert constitutional rights, either under color of a statute such as Title VI, or directly under the Fourteenth Amendment via Section 1983 of the Civil Rights Act, requires personal injury to the plaintiff(s) bringing the action.[51] Class actions are allowed under both constitutional actions brought pursuant to 42 U.S.C. § 1983 and § 1985, and statutory actions under Title VI of the Civil Rights Act or the Equal Educational Opportunity Act. A class action can only be brought by a member of a group of similarly situated individuals too numerous to join as separate plaintiffs.

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50. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

51. *See* Mitchell v. United States, 313 U.S. 80 (1941). The Court held:

> It is the individual who is entitled to the Equal Protection of the laws, and not merely a group of individuals or a body of persons according to their numbers; a constitutional right to be free from discrimination cannot be made to depend on the number of persons discriminated against, the essence of the right being a personal one.

Id.

Representative actions are those in which an interested, though not necessarily injured, individual or group brings an action on behalf of injured plaintiffs who cannot otherwise seek justice on their own. Although generally disfavored, these "third party" or associational standing actions have been allowed in situations in which broad-based infringement of constitutional rights are implicated.

Certainly, the argument could be made that a poor school district has a sufficient cognizable interest in protecting the constitutional and statutory rights of its students, to allow the committee to serve in a representative capacity. Students currently suffering from discriminatory government action obviously have standing in their respective individual capacities. Properly identified classes of disadvantaged persons, such as urban minorities living below the poverty line, would also be viable plaintiffs, especially where the state itself has helped to create the classification.

Finally, there is the possibility of creating a coalition of like-minded individuals and groups, including a school committee, students and community groups, solely for the purpose of bringing the litigation and assisting in the implementation of a remedy. This approach was used to great effect in the recent case of *Campaign for Fiscal Equity v. State*,[52] which bears the name of the coalition that demonstrated that New York's system of financing public education violated the implementing regulations of Title VI.

A similar coalition, formed to protect the interests of urban schoolchildren in the participating urban Rhode Island school districts would need to meet certain standing requirements.[53] Such an association or coalition would have standing only to seek equi-

52. 655 N.E.2d 661 (N.Y. 1995); *see also* Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) (upholding the right of plantiff organizations to sue, and finding that "[t]he standing of the plaintiff organizations to bring this suit is consistent with [a] long line of cases in which organizations have sued to enforce civil rights, civil liberties, [and] environmental interests").

53. *See* Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012, 1016 (6th Cir. 1989). The court held:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id.

table relief,[54] but it is doubtful that a school district could pursue an action for damages regardless of this limitation. The only potential difficulty in seeking standing for an "equity in school finance" coalition would be the requirement of independent standing for each association comprising the coalition.

Once the standing hurdle is satisfied, and it presents no greater difficulty than careful planning and pleading, the coalition model offers several benefits. First, the coalition would face no difficulty in establishing its "capacity to sue," given that it would not be a municipal body.[55] Second, the cost of the suit would be spread beyond the participating school committees. Third, and perhaps most important, a properly conceived coalition/non-profit corporation would wield a considerable amount of community and political clout not available to school districts acting alone. Based upon these considerations, the hypothetical litigation contemplated herein could then be brought by the coalition and representative students, possibly joined by a few taxpayers and parents.

C. *Judicial Scrutiny*

The Equal Protection Clause requires that "all persons similarly situated. . . be treated alike."[56] However, the Supreme Court has cautioned that "the Constitution does not provide judicial remedies for every social and economic ill."[57] To prove a violation of the Fourteenth Amendment, one must show that the state has engaged in *intentional* discrimination.[58] Of course, any law or policy that differentiates between those who receive a certain benefit and those who do not can be said to contain a "discriminatory" classification. For example, wealthy individuals are discriminated against in the form of higher tax rates and ineligibility for a wide variety of social welfare benefits distributed only to the poor. Only

54. *See id.* at 1017 (citing International Union v. Brock, 477 U.S. 274, 288 (1986)).

55. In *Campaign for Fiscal Equity,* 655 N.E.2d at 663 n.1., the plaintiff school districts were dismissed as party plaintiffs due to a lack of capacity to sue. The not-for-profit corporation/coalition, which included the same school districts as members, were not affected by the court's capacity analysis.

56. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

57. Maher v. Roe, 432 U.S. 464, 479 (1977).

58. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Washington v. Davis, 426 U.S. 229 (1976) (emphasis added).

certain discriminatory classifications, however, will offend the Constitution.

The United States Supreme Court has adopted three distinct tiers of analysis for resolving Equal Protection Clause claims. The initial phase of review requires the court to examine the nature of the interest affected and the manner in which the legislature has assigned liability or distributed benefits. Legislative judgments that interfere with fundamental Constitutional rights or that involve "suspect" classifications trigger strict judicial scrutiny, whereby the state bears the burden of proving that its chosen classification was necessary to further a compelling governmental interest.[59] In the vast majority of cases falling within the categories of economic and social welfare legislation, neither a fundamental interest nor a traditional suspect class is implicated. The reviewing court therefore engages in a highly deferential "rational basis" test, in which "the classification at issue bears some fair relationship to a legitimate public purpose."[60]

On rare occasions, the Supreme Court has engaged in an intermediate level of scrutiny, but usually only in cases impacting on a "semi-suspect" classification such as gender, illegitimacy, or illegal alien status. This "heightened scrutiny" test requires the reviewing court to determine whether the complained of classification is substantially related to an important governmental objective.[61] Under this test, the state must carry the burden of "showing an exceedingly persuasive justification for the classification."[62]

Equal protection plaintiffs need not limit themselves to arguing for the imposition of one level of scrutiny at the exclusion of the other two. Judicial scrutiny is applied as a result of a shift of the burden of persuasion to the state once the complainant class has satisfied certain preliminary requirements. Finally, there must be an ongoing "case or controversy" involving actual injury to the plaintiff class. Second, the plaintiffs must prove that they are sufficiently affected to have "standing," a requirement that also includes a showing that their alleged injuries are redressable by the courts. Finally, the plaintiffs must convince the court that it has

59. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973), *reh'g denied*, 411 U.S. 959.

60. Plyler v. Doe, 457 U.S. 202, 216 (1982).

61. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

62. United States v. Virginia, 518 U.S. 515, 524 (1996).

personal jurisdiction over the plaintiffs and defendants as well as subject matter jurisdiction over the issues raised in the complaint.

1. *Problems Associated with Obtaining Strict Scrutiny Review*

Rodriguez notably held that public education is not a "fundamental right" guaranteed by the Constitution. However, in the same case the Supreme Court also ruled that education is an "important" right in that it is inextricably linked to the exercise of other rights recognized as fundamental, such as the right to vote, the right to free speech and its corollary right to receive information.[63] In addition, the Court has held that a *total* deprivation of public education is actionable under the Equal Protection Clause,[64] and suggested that failure to provide a "minimally adequate" education may be tantamount to a total deprivation.[65] As *Papasan v. Allain*[66] and *Plyler v. Doe*[67] make clear, even a showing of complete deprivation in the form of the denial of a minimally adequate education would not necessarily trigger strict scrutiny, only heightened scrutiny.[68]

Thus, because education is not a fundamental right, a plaintiff school district would need to show that its schoolchildren, being deprived of equal opportunity, are a suspect class in order to trigger strict judicial scrutiny. Application of strict scrutiny would virtually assure success in federal court, for the burden on the state would be extraordinarily high. The *Rodriguez* Court stated:

> If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants carry a "heavy burden of justification," that the State must demonstrate that its educational system has been structured with "precision," and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic

63. *See Rodriguez*, 411 U.S. at 36.

64. *See id.* at 38.

65. *See* Papasan v. Allain, 478 U.S. 265, 285 (1986). The Court stated:

> As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions of whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringing that right should be accorded heightened Equal Protection review.

Id.

66. *Id.*

67. 457 U.S. 202 (1982).

68. *See Papasan*, 478 U.S. at 285; *Plyler*, 457 U.S. at 216.

> means" for effectuating its objectives, the Texas system and its counterpart in virtually every other State will not pass muster.[69]

Rodriguez is often cited as authority for the proposition that wealth is not a suspect class.[70] It is closer to the truth, however, to say that the *Rodriguez* plaintiffs failed to show that the State of Texas discriminated against a definable category of poor persons. A 1969 case which is infrequently cited, *McDonald v. Board of Election*,[71] specifically held that classifications based on wealth would be "highly suspect and thereby demand a more exacting judicial scrutiny."[72]

Minorities, as determined by race, ethnicity and national origin, are the paradigmatic examples of suspect classifications. Obviously, the similarly situated urban areas of Providence, Woonsocket, Pawtucket, and Central Falls have populations high in minorities relative to the rest of the state. Approximately half of the state's minorities live in Providence. Merely proving a correlation between a high minority population and a relative disparity in the amount of state controlled educational funding would not be sufficient to trigger strict scrutiny. The potential plaintiff must prove *purposeful* discrimination.[73]

There are three ways a statute can be shown to be discriminatory: (1) the law discriminates on its face; (2) the law, although facially neutral, is administered in a discriminatory manner; or (3) although facially neutral and administered in a non-discriminatory way, the statute was nevertheless enacted to further a discriminatory purpose.[74] The plaintiffs would have to show that government officials were motivated primarily, or even predominantly by discriminatory intent. "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that

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69. *Rodriguez*, 411 U.S. at 16-17 (citing Dunn v. Blumstein, 405 U.S. 330, 343 (1972)).

70. *See* City of Pawtucket v. Sundlun, 662 A.2d 40, 60 (R.I. 1995).

71. 394 U.S. 802 (1969).

72. *Id.* at 807.

73. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

74. *See* Snowden v. Hughes, 321 U.S. 1, 8 (1944), *reh'g denied*, 321 U.S. 804 (1944).

a particular purpose was the 'dominant' or 'primary' one."[75] What is required, however, is a preliminary showing that the state action was motivated at least *in part* by a racially or other discriminatory purpose. Once it is shown that a state decision was motivated at least in part by a racially discriminatory purpose, the burden shifts to the government to show that the same result would have been reached even without the consideration of race or other suspect classification.[76]

A poor school district might be able to posit such a claim if housing numbers and distribution of state and federal aid display evidence of disparate impact upon minorities, and it can be shown that the General Assembly knew of the disparate impact and did nothing to cure it.[77] The "adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance," is a factor to be taken into account in providing discriminatory intent.[78] In other words, discriminatory animus may be proved by a *failure to act*, if it can be shown that the defendant officials actually knew of the discriminatory impact of their actions or inactions.[79]

Problems with the formulation of such an argument are fourfold. First, there is the identification of a suspect class. Although a high percentage of minorities live in poor school districts, not all minorities reside there. Problems similar to those raised in *Rodriguez* therefore surface in regard to the class being both overinclusive and underinclusive. Second, and closely related, is the issue of proving discriminatory intent against a class of minority schoolchildren. Disparate impact is not enough. Even under the relaxed standard espoused by the Second Circuit in *Yonkers* and *Arthur v. Nyquist*, it still must be demonstrated that the defendant state officials knew their policies had a discriminatory impact and did nothing.

Third, a complete, rather than a relative deprivation of education benefits must be shown. This can be demonstrated only by proving that impoverished schoolchildren have been denied a mini-

75. *Arlington Heights*, 429 U.S. at 265.

76. *See id.* at 270 n.21.

77. *See* United States v. City of Yonkers, 96 F.3d 600 (2d Cir. 1996).

78. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979).

79. *See, e.g.*, Arthur v. Nyquist, 573 F.2d 134, 141 (2d Cir. 1978), *cert. denied*, 439 U.S. 860 (1978) (A finding of *de jure* segregation was based upon acts of commission or omission by government officials.).

mally adequate education, i.e., one that provides them with the tools necessary to exercise their right to free speech and the right to vote. Fourth, if such a deprivation can be shown, it must then be proven that the state's system of financing public education is the *sole* cause of such deprivation.

Proving that one's own school system has been constitutionally inadequate, and further proving that the school district shares no blame for such inadequacies, will certainly be a difficult task. In any event, it is unlikely that a district could convince the court that strict scrutiny is appropriate without a "smoking gun," i.e, that the state had discriminated against the plaintiff class in the past. While strict scrutiny would virtually ensure a victory, it would take an extremely creative argument to convince the court to apply it.

2. *The Likelihood and Advantages of Heightened Scrutiny Review*

Heightened scrutiny is closer to the rational basis standard than it is to strict scrutiny. It can arguably be thought of as rational basis "with teeth." The Supreme Court has relied upon heightened scrutiny in a small handful of education cases, although its use has always been limited strictly to the facts and circumstances presented. The Court has not adopted a blanket approach to heightened scrutiny that provides clear guidance to the lower courts. Each case must be examined on its own merits.

Although poverty may not itself be a "suspect classification," the Court clearly has engaged in "heightened scrutiny" analysis in regard to the poor where a fundamental interest is at stake, such as voting[80] or the right to travel.[81] In similar kind, the Court has engaged in a form of intermediate or heightened scrutiny in several of its cases dealing with public education. Given that there is more than mere economic interests at stake, heightened scrutiny is the appropriate measure by which such classifications should be judged.

In the 1982 case of *Plyler v. Doe*, the Supreme Court invalidated a Texas law that withheld state funds from local school districts for education of children not legally admitted to the United

80. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).
81. *See* Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969).

States.[82] Although limited specifically to the facts presented in that case, *Plyler* explicitly used a heightened level of scrutiny in a case dealing with equal educational opportunities.[83] In *Kadrmas v. Dickinson Public Schools*,[84] the Supreme Court declined to apply this new standard in an education case involving access to free transportation, but did formally recognize the existence of an intermediate level of "heightened scrutiny."[85]

> Relying primarily on *Plyler v. Doe*, however, appellants suggest that North Dakota's 1979 statute should be subjected to "heightened" scrutiny. This standard of review, which is less demanding than "strict scrutiny" but more demanding than the standard rational relation test, has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy. . . . In *Plyler*, which did not fit this pattern, the State of Texas had denied to the children of illegal aliens the free public education that it made available to other residents. Applying a heightened level of equal protection scrutiny, the Court concluded that the State had failed to show that its classification advanced a substantial state interest.[86]

Clearly, the best chance of prevailing on the merits of a school finance case lies in the application of the intermediate level of heightened scrutiny.

One commentator who has reviewed the string of Supreme Court cases discussing or applying intermediate scrutiny has suggested a template for use in triggering heightened scrutiny in education cases:

> The "fundamental rights" approach set forth in *Plyler* begins with the identification of important interests, notes the existence of a disabling classification, and assesses the consequences of the deprivation. Whether an intermediate level of review is triggered by this combination in a school setting appears to depend on three factors: (1) denial of equal opportu-

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82. *See* Plyler v. Doe, 457 U.S. 202, 229-30 (1982).

83. *See id.* (The legislation at issue could "hardly be considered rational unless it furthers some substantial goal of the State.").

84. 487 U.S. 450 (1988).

85. *Id.* at 459.

86. *Id.* (citations omitted).

> nity, (2) a disabling classification, and (3) a case-by-case examination of the consequences of deprivation.[87]

These three factors may be paraphrased as requiring: a complete deprivation of a minimally adequate education, a discrete and arguably "suspect" plaintiff class, and injury-in-fact proximately caused by the challenged state action.

While the Supreme Court has not closed the door on recognizing a denial of a "minimally adequate" education as tantamount to a complete deprivation, it has hesitated to discern the precise parameters of the requisite degree of "inadequacy." It is clear that the Court is referring to a quantitative standard, for it has repeatedly asserted that relative comparisons in regard to quality of program offerings play no part in constitutional analysis. It is equally clear that the Supreme Court would require linkage between the inadequacy of the education provided and students' subsequent inability to exercise those "fundamental rights and liberties" that are explicitly protected by the Constitution, i.e., the right to the effective exercise of free speech and the intelligent utilization of the right to vote.[88]

Plaintiffs in a school finance case must prove a nexus between the alleged inadequacies present in the school system and a denial of students' fundamental rights. The *Rodriguez* court found that:

> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a state's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment

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87. Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy after Kadrmas v. Dickinson Public Schools*, 74 Cornell L. Rev. 1078, 1100 (1989) (footnotes omitted).

88. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33, 36-37 (1973), *reh'g denied*, 411 U.S. 959 (1973).

> of the rights of speech and of full participation in the political process.[89]

Defining exactly how much education is enough to meet the Court's "minimally adequate" standard remains clouded. A system of schools that does not provide its students with the basic skills of literacy would clearly fail to meet the standard.[90] How much additional schooling is "necessary to prepare citizens to participate effectively and intelligently in our open political system"[91] has never been answered by the courts. Dicta from the Supreme Court, however, suggests that an eighth grade education may be the minimally allowable level of education to ensure "self-reliant and self-sufficient participants in society."[92]

In *Wisconsin v. Yoder*[93] the Supreme Court held that the State of Wisconsin could not apply its compulsory education law so as to require Amish children to attend school beyond the age of sixteen.[94] Rejecting the state's argument that additional schooling beyond age sixteen was necessary to ensure that the children would have the requisite skills to exercise their fundamental rights and liberties, the Court noted that "there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education [beyond the eighth grade]."[95]

The precise standard may be unclear, but we do know that the courts are amenable to hearing the opinions of "social scientists" as to the adequacy of a given school system.[96] Expert testimony defining the amount of education necessary to exercise the right to vote and the right to free speech could come from both political scientists and professional educators, the more renowned the better. It would then need to be proven that graduates of the plaintiff

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89. *Id.*

90. *See generally* Plyler v. Doe, 457 U.S. 202, 222 (1982) (stating that "[i]lliteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life").

91. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

92. *Id.*

93. 406 U.S. 205 (1972).

94. *See id.* at 234.

95. *Id.* at 227.

96. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 77 (1979) (stating that social scientists have observed that public schools impart the necessary values to ensure the maintenance of a democratic political system); Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (relying on writings of modern social scientists in the opinion).

schools do not meet the standard the experts had described. This could be accomplished in part through anecdotal evidence, and in part through statistical analysis.

For example, a correlation between the amount and quality of education and the likelihood of ex-students exercising their rights to vote could clearly be made. Alternatively, it could also be shown that an inadequacy of educational programming resulted in a substantially higher likelihood of joblessness in later life. As the Supreme Court has observed, "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[97]

A second area of potential circumstantial evidence lies in the area of standardized testing of educational achievement in certain basic skills. However, great care must be exercised in the use of such statistics. First, a causal relationship between educational opportunities and outcomes, and a lack of adequate financial support from the state must be established. Second, experts must contain their opinions within the quantitative parameters set by the Supreme Court. Simply demonstrating that plaintiff schoolchildren from urban areas do not perform as well as children in suburban districts, does little to further a claim predicated on the Equal Protection Clause. For example, one prominent advocate for school reform has stated that high percentages of students falling two years below grade level on standardized tests would suffice to prove the "inadequacy" of a school system.[98] While this may be true from an educator's point of view, it does not necessarily reflect the required nexus to the basic skills of citizenship and free speech a court will require.

The difference lies in the third element of the standard suggested by Stuart Biegel, the "consequences of deprivation."[99] This injury-in-fact requirement must be addressed in the context of a necessary nexus to a denial of students' ability to exercise the fundamental rights referenced above. The two most encouraging Supreme Court decisions in this area are undoubtedly *Plyler* and *Papasan*. *Plyler* dealt with a "complete denial of education" to a

97. Plyler v. Doe, 457 U.S. 202, 221 (1982).

98. *See* Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 787-89 n.5 (1985).

99. Biegel, *supra* note 87, at 1100.

discrete class, while *Papasan* implicitly equated a "deprivation" of a "minimally adequate education" with not being taught "to read and write."[100] The minimally adequate standard should be seen for what it is—a guarantee to a "basic floor of opportunity."[101]

Notwithstanding that caveat, heightened scrutiny is the most promising avenue for an equal protection challenge to Rhode Island's system of financing public education. Clearly the current system is inequitable, and clearly urban school districts are graduating students with deficient skills. However, a legal challenge must be crafted with the utmost precision. The plaintiff class must be identified with particularity. The plaintiffs' injuries must be real and affirmatively linked to students' abilities to exercise their constitutional rights and liberties. The case law is replete with examples of the pitfalls exposed by unsuccessful plaintiffs making similar arguments. Future litigants must learn from the mistakes of these crusading plaintiffs and avoid over-reliance on qualitative comparisons and statistical analyses that prove only that one school district has less to spend than another. It must never be forgotten that it is the students, not the school districts, who hold the constitutional rights which the courts have the duty to protect.

3. *The Possibility of Rational Basis Review*

Few legislative acts have ever been held to be unconstitutional under the "mere rational basis" level of Equal Protection Clause analysis. The state need only show that its actions are rationally related to a legitimate purpose.[102] However, there are gradations of scrutiny within the rational basis standard. The key to crafting a plausible argument lies in convincing the reviewing court that it should not follow the most deferential standard possible, which would require the plaintiffs "to negative every *conceivable* basis" that might support the challenged legislation.[103] *Rodriguez* suggests that the Supreme Court would not rely on the "conceivable

100. *Plyler*, 457 U.S. at 221-22; Papasan v. Allain, 478 U.S. 265, 287 (1986).

101. Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982) (interpreting guarantee of equal educational opportunity embodied in the Education of the Handicapped Act, 20 U.S.C. §§ 1400-1461, since reauthorized and renamed the Individuals with Disabilities Education Act).

102. *See Plyler*, 457 U.S. at 216.

103. Heller v. Doe, 509 U.S. 312, 320 (1993) (emphasis added) (citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973).

basis" standard in a case involving an "important" right such as education:[104]

> If [strict scrutiny is not required], the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, *articulated* state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.[105]

There are two lines of attack available under the rational basis standard. The legitimacy of the state's purpose underlying its system of finance, namely local control over education can be challenged, or a case can be made that the current system of finance is not rationally related to the furtherance of that goal.

We know from *City of Pawtucket* that the General Assembly will rely on the argument that its system of financing public education is based on its protection of "local control" over educational decision-making.[106] This is understandable, for it has been a winning argument for defendant state officials in virtually every similar equal protection case to date.

It would indeed be difficult to overcome the many years of jurisprudence upholding the validity of "local control" as a legitimate interest of state legislatures.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . [L]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'[107]

There are many other examples of courts' acceptance of "local control" as a viable state purpose. There is frankly little likelihood

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104. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35-37 (1973), *reh'g denied*, 411 U.S. 959 (1973).

105. *Id.* at 17 (emphasis added).

106. *See* City of Pawtucket v. Sundlun, 662 A.2d 40, 62 (R.I. 1995).

107. Martinez v. Bynum, 461 U.S. 321, 329 (1983) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)) (arguably applying heightened scrutiny, the Supreme Court upheld a Texas statute allowing school districts to deny education to any child who, living apart from his or her parents or legal guardian, moved to the school district for the primary purpose of attending its schools).

that any federal court would refuse to acknowledge the furtherance of local control as a "legitimate" legislative goal.

Therefore, to have any hope of success under the rational basis standard, an attack must be able to be made on the state's purpose in taking its challenged action, as bearing no rational relationship to its stated goal. As *Martinez* at least implies, local control refers to a municipality's right to provide the best education possible, provided the town or city itself pays the premium for the added or improved services.[108]

No one really suggests that inequities in statewide education financing are fair. The argument in support of such inequitable financing is that it is an unfortunate, but unavoidable result of protecting "local control" over public education. Allowing local municipalities to raise and spend as much as they want in their own school systems is seen by many to be an inherent and inalienable right.

The premise that the current system of financing is rationally related to the goal of preserving local control can be attacked on two levels. First, the connection between local control over educational policy and local authority to raise funds through municipal taxation is at best tenuous. In Rhode Island, administrative agencies fall under the control of the General Assembly, making administrative action a legislative, as opposed to executive, responsibility. The extent of local control over public education is strictly a matter of discretion for the General Assembly, absent any constraints contained in our state constitution. *City of Pawtucket* established that such controls are few and far between.[109]

There is no reason that "local control" should rest upon municipalities' ability to fund their school systems. The current degree of local control over educational policy is largely measured by state statutes governing the rights and responsibilities of local school committees, local school officials and the Rhode Island Department of Education ("RIDE"). In the world of educational finance, "local control" is simply shorthand for the right of the wealthy to have state government provide their children with better educations than are afforded poor, minority children.

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108. *See id.*

109. *See City of Pawtucket*, 662 A.2d at 62.

Second, at least in Rhode Island, the concept of "local" fund raising is illusory. Given our somewhat unique state constitution, the General Assembly possesses near plenary authority over all taxing and spending by both state and local government. All taxes, including "local" property taxes, are taxes of the state. In other words, local cities and towns have no inherent, constitutional right to raise money via the property tax or any other means. Such rights are granted solely at the whim of the state legislature, which could eliminate that authority by simple majority vote at any time. Distinguishing between "local" and "state" funding can mean the difference between success or failure in an equal protection claim.

In the 1986 case of *Papasan v. Allain*,[110] the Supreme Court examined Mississippi's distribution of funds generated by a grant of federal land to its school districts. In finding that the state's inequitable distribution of funds violated the Equal Protection Clause, the Court also clarified that *Rodriguez* should not be viewed as a complete bar to a federal challenge to state financing schemes.[111] The *Papasan* Court did, however, state:

> *Rodriguez* did not, however purport to validate all funding variations that might result from a state's public school funding decisions. It held merely that the variations that resulted from allowing local control over local property tax funding of the public schools were constitutionally permissible *in that case*.[112]

The *Papasan* Court had no difficulty in distinguishing *Rodriguez* as limited to a situation involving local funding.[113] The Supreme Court apparently believed that there is an obvious and *necessary* link between local control over public education, which has always been a constitutional sacred cow,[114] and partial funding of public education from local property taxes. Only when the

110. 478 U.S. 265 (1986).

111. *See id.* at 281, 287.

112. *Id.* at 287 (emphasis added).

113. *See id.*

114. *See* Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (stating that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process").

funding at issue is clearly state or federal in origin will the federal courts apply heightened scrutiny. The court stated that:

> This case is therefore very different from *Rodriguez*, where the differential financing available to school districts was traceable to school district funds available from local real estate taxation, not to a state decision to divide state resources unequally among school districts. The rationality of the disparity in *Rodriguez*, therefore, which rested on the fact that funding disparities based on differing local wealth were a necessary adjunct of allowing meaningful local control over school funding, does not settle the constitutionality of disparities alleged in this case[.][115]

The degree to which *Papasan* distinguishes *Rodriguez* on the basis of the source of the funds at issue bodes well for a new school finance suit alleging discrimination in the distribution of state-controlled funds. Statistical analysis will clearly show that in Rhode Island, less money is spent on urban students, who happen to represent the vast majority of minority schoolchildren in the state. The first step in eliminating these inequities is to establish that they result from state action.

Rhode Island law has clearly established that all taxes are taxes of the state and that municipalities raise funds strictly as a result of the largesse of the General Assembly. Unlike Texas, where local school districts have a constitutional right to tax property for the purpose of financing education, Rhode Island school districts are completely reliant on the legislature. It has long been settled in this state that the power to impose taxes rests exclusively with the state legislature, and cannot be exercised except in pursuance of legislatively granted authority:

> That the power of taxation is legislative and cannot be exercised otherwise than under the authority of the legislature is too well settled to require more than passing mention . . . . [Even in the case of delegation to municipalities,] the power must be expressly and distinctly granted, and must be exercised in strict conformity to the terms of the grant[.][116]

The authority to assess and tax personal and real property is likewise granted exclusively to the legislature, as evidenced by the following language from Article VI, § 12 of the Rhode Island

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

116. Cole v. Warwick & Coventry Water Co., 35 R.I. 511, 519-20 (1913).

Constitution, last amended during the 1986 Constitutional Convention: "The General Assembly shall, from time to time, provide for making new valuations of property, for the assessment of taxes, in such manner as it may deem best."[117]

In other words, the General Assembly has adopted a state system of financing public education that relies in part on its legislative delegation of its taxing authority to the cities and towns. There simply is no local property taxation in Rhode Island; it is all part of a larger state scheme.

Thus, the traditional local control argument should be viewed as less valid in Rhode Island than in other jurisdictions. The degree to which municipalities are free to exercise local control is completely dependent on the General Assembly. If our state legislature wanted to eliminate local property taxes tomorrow, it could do so. If it wanted to grant local school committees plenary control over school systems, funded entirely by funds generated by statewide taxes, that would also be permissible under our state constitution. There is no requisite link between property taxes and local control where local control is strictly a question of legislative intent. The *City of Pawtucket* decision may not represent a victory for advocates of equity in school finance, but it does point out that final responsibility for *all* aspects of public education rests exclusively with the General Assembly.[118] In Rhode Island, at least, "local" control is a misnomer.

Although the plaintiffs' burden under minimum scrutiny would be a heavy one, a case can be made that *Rodriguez* would not preclude an education finance case in a state where local control and local taxation are both governed exclusively by legislative action. There should be no presumption that the grant of local powers to tax is necessary to provide the requisite degree of local control over educational decision-making. Moreover, the very grant of local fundraising authority is the vehicle by which urban students are arguably denied equal educational opportunities.

D. *Scope of the Remedy*

In arguing that the current system of finance is discriminatory, plaintiff school committees would obviously be seeking a dec-

117. R.I. Const. art. VI, § 12.
118. *See* City of Pawtucket v. Sundlun, 662 A.2d 40, 62 (R.I. 1995).

laration that such a system is unconstitutional. The parameters of what would constitute an acceptable system of finance would not necessarily be addressed by the court. Obviously, the state cannot be permitted to continue a practice that has an adverse impact on minority students. Many educators believe that urban and/or poor schoolchildren actually require greater resources than more affluent suburban children in order to be afforded equality of educational opportunity. Expert testimony establishing that an augmentation of financial aid would directly increase educational opportunities for the disfavored class of plaintiffs will be a necessary component of a federal action challenging the current financing system.

In *Rodriguez*, the Supreme Court made the following observation on the controversy surrounding the issues of money and educational quality:

> Each of the appellees' possible theories of wealth discrimination is founded on the assumption that the quality of education varies directly with the amount of funds expended on it and that, therefore, the difference in quality between two schools can be determined simplistically by looking at the difference in per-pupil expenditures. This is a matter of considerable dispute among educators and commentators.[119]

The Court's observation is perhaps less true than it was twenty-seven years ago. There is increasing consensus that money does matter in regard to the quality of educational programming. What is most important about the above-quoted statement from *Rodriguez* is the fact that the Court found sociological research to be relevant to its decision.[120] The statement also implies that the potential scope of the requisite remedy impacted on the Court's decision whether to declare Texas' system of education finance unconstitutional.[121]

A federal court will not order a remedy that does not resolve the constitutional issues before it. A substantial part of any challenge to an educational financing scheme must therefore be devoted to crafting a suitable remedy. Horizontal equity can be addressed by ensuring that per-pupil expenditures are distributed

119. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23-24 n.56 (1973), *reh'g denied*, 411 U.S. 959 (1973).

120. *See id.*

121. *See id.*

equally among whites and minorities and between rich and poor, regardless of where they may live within the state. Vertical equity is somewhat more complicated, for it requires that such expenditures are adequate to provide a meaningful education to every Rhode Island resident. If it can be proved that plaintiff children have greater needs than advantaged children, a "weighted" system favoring the traditionally disadvantaged population of urban poor would be a viable remedy.

The parameters of a requested remedy are largely matters of strategy and policy rather than legal reasoning. For that reason, the plaintiffs will need to be intimately involved in the decision-making process of whether to commit themselves to certain requested remedies, or whether an attempt should be made to bifurcate the issues of liability and remedy, as occurred in *City of Pawtucket*. One of the reasons asserted by the Rhode Island Supreme Court for its decision in the first equity case was its hesitancy to involve itself as final arbiter of what it perceived would be an ongoing debate over the adequacy of public education programs if it upheld the Superior Court's decision.[122]

> [T]he absence of justiciable standards could engage the court in a morass comparable to the decades-long struggle of the Supreme Court of New Jersey that has attempted to define what constitutes the "thorough and efficient" education specified in that state's constitution.[123]

Some discussion of acceptable remedies should therefore be included in a legal challenge to the current system of financing education, if only to assuage the court's concerns that its involvement would constitute "legislating" from the bench.[124] The more cogent and efficient the proposed remedy, the greater the likelihood the court would order its implementation.

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122. *See Pawtucket*, 662 A.2d at 63.

123. *Id.* at 59.

124. The United States Supreme Court apparently shares this concern. Writing in concurrence in *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring), a recent desegregation case, Justice O'Connor noted that the Constitution "limit[s] the judiciary's institutional capacity to prescribe palliatives for societal ills."

IV. SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment's prohibition against deprivation of life, liberty or property without due process of law is closely related to the guarantee of equal protection. Due process has both procedural and substantive elements and, like equal protection, is protected by different tiers of judicial analysis.[125] *Brown v. Hot, Sexy and Safer Productions, Inc.*[126] a recent First Circuit case, contains an excellent description of the standards applicable in our jurisdiction:

> The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life liberty or property without due process of law." The substantive component of due process protects against "certain government actions regardless of the fairness of the procedures used to implement them." There are two theories under which a plaintiff may bring a substantive due process claim. Under the first, a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. Under the second, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the state's conduct "shocks the conscience."[127]

Thus, similar to equal protection, the court's initial inquiry is whether the governmental action infringes on a fundamental right explicitly or implicitly guaranteed by the Constitution.

To date, the only rights recognized as "fundamental," other than those specifically mentioned in the Bill of Rights, are those that reflect a right of personal autonomy, e.g., decisions related to sex, marriage, child-bearing (birth control and abortion) and child-rearing. The right to privacy, although not mentioned in the Constitution, has been firmly established as a fundamental, substantive right guaranteed by the Fourteenth Amendment's protection of individuals' liberty interests. If a fundamental right is affected, the court engages in a "strict scrutiny" analysis similar to that utilized for equal protection claims.

The Supreme Court has taken a restrictive approach to substantive due process in recent years as a result of wide-ranging

125. *See* Unity Ventures v. Lake County, 841 F.2d 770, 775 n.2 (7th Cir. 1988).
126. 68 F.3d 525 (1st Cir. 1995).
127. *Id.* at 531 (citations omitted).

criticism that such cases allowed the judiciary to substitute its judgment for that of the legislative branch, i.e., to "legislate" from the bench.[128] As a result, federal courts will now engage in a highly deferential "mere rationality" standard of analysis to substantive due process, unless it is shown that a fundamental right is affected. No statute affecting purely economic interests has been overturned under the mere rationality standard in over fifty years.[129]

The current judicial standard is so lenient that the court will consider even hypothetical reasons to support challenged legislative action, regardless of whether such rationales were ever considered by the lawmakers.[130] Unfortunately, the same minimal level of scrutiny will be applied to cases that go beyond purely economic harm, provided that a fundamental right is not implicated.[131] Under the mere rationality test, a statute will be held unconstitutional only upon a showing of a violation or deprivation that is arbitrary, capricious and "shocking to the conscience."[132]

> To satisfy the "shock the conscience" standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.[133]

Government action that is simply "incorrect or ill-advised" will pass constitutional muster.[134]

On the other hand, the level of scrutiny applied in substantive due process cases impacting a "fundamental right" is quite stringent. Where a fundamental right is involved, the government

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128. *See, e.g.,* Ferguson v. Skrupa, 372 U.S. 726, 730 (1962) (articulating that the Court has "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

129. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

130. *See, e.g.,* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harming with a particular school of thought.").

131. *See* Whalen v. Roe, 429 U.S. 589 (1977) (upholding a New York statute requiring recordkeeping of all users of certain prescription drugs).

132. Collins v. City of Harker Heights, 503 U.S. 115, 126, 128 (1992).

133. Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995).

134. Bishop v. Wood, 426 U.S. 341, 350 (1976).

must demonstrate that its actions are "the least restrictive means" available to further a "compelling state interest."[135] *Roe v. Wade*[136] is the most famous of the Supreme Court's substantive due process cases. However, since *Roe v. Wade* was decided in 1973, the Supreme Court has been extremely reluctant to expand the scope of substantive due process protections:

> The Court is most vulnerable and its comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution .... There should be, therefore, great resistance to expand the substantive reach of the [Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental.[137]

Notwithstanding likely judicial resistance, the success of a substantive due process claim rests on the plaintiffs' ability to frame their claim in the guise of protecting a fundamental interest.

In this context, the analysis is the same under both the Due Process and Equal Protection Clauses.[138] If it can be proved that students are denied access to a "minimally adequate" education, thereby triggering "strict scrutiny" under equal protection analysis, a valid substantive due process claim emerges. Unfortunately, lower federal courts are understandably hesitant to make the determination that public education is a fundamental right, given the apparent ruling to the contrary in *Rodriguez*.

In *Goss v. Lopez*,[139] a *procedural* due process case, the Supreme Court held that suspension of a student from public school implicated the child's property interest in attending a state established and maintained school system. However, *Goss v. Lopez* provides little weight to the argument that education is a substantive, "fundamental" right.[140] Virtually every substantive due process case involves either a recognized property or liberty inter-

135. Zablocki v. Redhail, 434 U.S. 374, 396 (1978) (Powell, J., concurring).
136. 410 U.S. 113 (1973).
137. Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).
138. *See* Bussey v. Harris, 611 F.2d 1001, 1006 (5th Cir. 1980).
139. 419 U.S. 565 (1975).
140. *See id.* at 583-84.

est.[141] Although students do have a property interest in their education, the right to attend a public school is a state-created, rather than fundamental, right for the purposes of the substantive Due Process Clause.[142]

Wood v. Strickland[143] continues to represent current Supreme Court reasoning on substantive due process concerns in public education. The Court stated: "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion . . . [but] which do not rise to the level of violations of specific constitutional guarantees."[144] Some plaintiffs have attempted to rely on substantive due process claims in school finance cases, but so far with little success.[145] The only hope of prevailing on a substantive due process claim is to convince the court that the current system of financing prevents the delivery of even minimally adequate services. This will be difficult for three reasons. First, the many positive attributes of a school system will be used as evidence to rebut such an allegation. Second, the standard of "minimally adequate" will likely be lower than the plaintiff might like, closer to illiterate than computer illiterate. Third, arguing that students are being denied a minimally adequate education could put the plaintiff district in a rather delicate position, especially if it is proven that inadequacies exist, but the district fails to prove that state funding is at fault. The blame would then rest with the plaintiff school department. Thus, it would need to be *proved* that more money would solve the problem in order to avoid liability for the school system.

It is far more likely that the court would reject a "fundamental interest" argument and apply a mere rational basis test to any sub-

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141. For example, cases alleging economic injury will always implicate the person's right to acquire and hold property, but that does not make the person's property interest a fundamental right.

142. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) (noting that although it is societally important, "[p]ublic education is not a 'right' granted to individuals by the Constitution").

143. 420 U.S. 308 (1975).

144. *Wood*, 420 U.S. at 326 (citations omitted).

145. *See, e.g.*, Leandro v. State, 468 S.E.2d 543, 551 (N.C. Ct. App. 1996) (holding that "absent a properly asserted fundamental right, plaintiff parties' substantive due process claims cannot be maintained"); Exira Community Sch. Dist. v. State, 512 N.W.2d 787 (Iowa 1994) (describing how equal protection and due process claims were dismissed after court applied rational basis test because of *Rodriguez*).

stantive due process claims. It would therefore need to be demonstrated that the state's actions are so arbitrary and capricious that they "shock the conscience." In either scenario, the standard is an extremely stringent one.

V. TITLE VI

Title VI of the Civil Rights Act is essentially a codification of the Fifth and Fourteenth Amendments' guarantee to equal protection, specifically limited to programs receiving federal funds.[146] The Supreme Court has ruled that the protections of Title VI are co-extensive with the Equal Protection Clause.[147] Therefore, there must be a showing of intentional, or "purposeful," discrimination to succeed on a statutory Title VI claim.[148] The same arguments required under the Equal Protection Clause for a showing of intentional discrimination would apply here. The key is to show that the legislature knew of a disparate distribution of total funds among the races, but did nothing to cure the problem. *United States v. City of Yonkers*,[149] a desegregation case, contains an excellent discussion of the use of statistical evidence of disparate impact as circumstantial evidence of purposeful discrimination.

A Title VI action brought pursuant to the federal regulations that implement Title VI, however, does *not* require a showing of purposeful discrimination. The regulations promulgated under the auspices of Title VI incorporate a "disparate impact" standard, mandating that recipients of federal funding may not:

> utilize 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

146. 42 U.S.C. § 2000d (1988) (Title VI provides, in pertinent part:

> [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.).

147. *See* Guardians Assoc. v. Civil Service Comm'n, 463 U.S. 582 (1983).

148. *See id.* at 607 (concluding that although "discriminatory intent is not an essential element of a Title VI violation" recovery by a plaintiff would only be in the form of "injunctive, noncompensatory relief for . . . [such] unintended violations").

149. 96 F.3d 600 (2d Cir. 1996).

> objectives of the program as respect individuals of a particular race, color, or national origin.[150]

Discrimination can thus be proved by discriminatory effect, regardless of discriminatory intent.

In *Georgia State Conference of Branches of NAACP v. Georgia*,[151] the Eleventh Circuit set forth a concise statement of the required elements of a prima facie case of disparate impact under the Title VI regulations:

> The plaintiff first must show by a preponderance of the evidence that a facially neutral practice has a racially disproportionate effect, whereupon the burden shifts to the defendant to prove a substantial legitimate justification for its practice. The plaintiff then may ultimately prevail by proffering an equally effective alternative practice which results in less racial disproportionality or proof that the legitimate practices are a pretext for discrimination.[152]

The burden of proof is clearly substantially lower than under an Equal Protection Clause analysis.

A validly stated cause of action under the Title VI regulations thus has two components: "whether a challenged practice has a sufficiently adverse racial impact—in other words, whether it falls significantly more harshly on a minority racial group than on the majority—and, if so, whether the practice is nevertheless adequately justified."[153] Statistics comparing benefit distribution or access patterns among members of the protected class and the overall population play a key role in demonstrating an adverse racial impact.[154] Indeed, the lure of a regulatory Title VI action is that the case can be proven statistically.

Once a prima facie case is established, the burden of persuasion shifts to the state to defend the challenged practice by way of a legitimate nondiscriminatory reason.[155] If the defendant meets its burden and demonstrates that the challenged practice is justified or necessary, the plaintiff can still prevail by showing that

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150. 34 CFR § 100.3(b)(2) (1999).

151. 775 F.2d 1403 (11th Cir. 1985).

152. *Id.* at 1417 (citations omitted).

153. Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1523 (D.M.D. Ala. 1991) (citations omitted).

154. *See Georgia State Conference*, 775 F.2d at 1417.

155. *See* Larry P. v. Riles, 793 F.2d 969, 982-83 (9th Cir. 1984).

"less discriminatory alternatives" were available to further the purportedly legitimate interest.[156]

The first use of Title VI in education finance litigation occurred in New York in the case of *Campaign for Fiscal Equity, Inc. v. State*.[157] In *Campaign for Fiscal Equity*, the plaintiff students complained that state decisions concerning allocation of education aid constituted the "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race."[158] The complaint challenged the manner in which the state allocated education aid, alleging that the present methodology has a disparate impact on the state's racial and ethnic minorities, the vast majority of whom attend New York City public schools.[159]

The plaintiffs in *Campaign for Fiscal Equity* had a slightly easier statistical case than would any of Rhode Island's poor urban school districts, due to the fact that state allocations were less for New York urban districts than for surrounding suburbs.[160] In New York the state allocated only 34% of all state education aid to a school district containing 37% of the state's students, 81% of whom were minorities comprising 74% of the state's minority student population.[161] A similar analysis for Providence, for example, reveals that Rhode Island allocates 22% of all state education aid to a school district containing 16% of the state's students, 73% of whom are minorities comprising 58% of the state's minority student population.[162] However, when the same numbers are calculated using combined state and local dollars, the results are similar to those found in New York. For example, four Rhode Island school districts, Providence, Pawtucket, Central Falls and Woonsocket comprise 79% of the state's minority student population and 29.9% of the state's total student population. Totaling state and local contribution reveals that 29.9% of the population, 79% of

156. *See* Abermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

157. 655 N.E.2d 661 (N.Y. 1995).

158. *Id.* at 669 (quoting 34 C.F.R. § 100.3(b)(2) (1999)).

159. *See id.* at 670.

160. *See id.*

161. *See id.*

162. *See* R.I. Dept. of Educ. 1995 Dist. and Sch. Profiles. This information is on file at the Rhode Island Department of Education.

whom are minorities, received only 26.8% of the total money available in 1995.[163]

Notwithstanding slight changes in pleadings and proof, *Campaign for Fiscal Equity* provides strong support for a similar action in Rhode Island based upon the Title VI regulations. The burden faced by poor, urban schoolchildren, and those similarly situated, can be found in the following holding of New York's highest court:

> We conclude that plaintiffs have stated a cause of action for violation of Title VI's implementing regulations . . . .
>
> . . . . Initially, it is undisputed that New York State is the recipient of federal funds for education. Moreover, plaintiffs complain of a benefit distribution practice which allegedly has the effect of subjecting minority students to discrimination on the basis of their race, color, or national origin. Plaintiffs support their allegations statistically, pointing to the disparity between the total and per capita education aid distributed to the City's predominantly minority student population as opposed to the amount distributed to the State's nonminority students. Since defendants have not yet advanced a substantial justification for the challenged practice at this procedural point, plaintiffs' cause of action under the Title VI regulations should be reinstated.[164]

Standing requirements under Title VI are clearly defined. A Title VI plaintiff must be an "intended beneficiary of, an applicant for, or participant in a federally funded program."[165] The Eleventh Circuit has held that schools (a state university) do not have standing under Title VI.[166] In a companion case to *Campaign for Fiscal Equity,* the New York Court of Appeals held that school boards lacked the legal capacity to bring a Title VI action and the case, therefore, was decided only as to the remaining plaintiffs.[167] However, one of those remaining plaintiffs was the coalition/not-for-profit corporation for which the case is named, an association that included the very school committees dismissed as party's plain-

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163. *See id.*

164. *Campaign for Fiscal Equity*, 655 N.E.2d at 670-71 (citing Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1523 (D.M.D. Ala. 1991)).

165. Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1235 (7th Cir. 1980).

166. *See* United States v. Alabama, 791 F.2d 1450 (11th Cir. 1986).

167. *See* City of New York v. State, 655 N.E.2d 649, 651 (N.Y. 1995).

tiff.[168] Although it is doubtful that an individual school committee would have independent standing to bring a Title VI claim, that does not mean that a school committee could not be part of a larger coalition that would survive legal challenges to its standing.

In *Powell v. Ridge*,[169] the United States Court of Appeals for the Third Circuit overturned a district court dismissal of a Title VI disparate impact complaint regarding the Philadelphia school system.[170] In that case, the plaintiffs pled, among other things, intentional discrimination under Title VI, disparate impact under the federal regulations promulgated under Title VI, and a § 1983 action.[171] The Third Circuit found that anti-discrimination groups and individual children clearly had standing to bring this type of action in federal court.[172] The court left unanswered the question, however, of whether school communities or municipalities had such standing.[173] The court also found that the Title VI implementing regulations supported a private cause of action, and that in addition to any rights available thereunder, individuals could bring an action under § 1983.[174] The Third Circuit, in a strongly worded decision, held that the complaint should not have been dismissed by the District Court, and that the plaintiffs should have been allowed the opportunity to prove disparate impact.[175] The Third Circuit's decision was appealed to the United States Supreme Court by the defendants. On September 6, 1999, certiorari was denied by the United States Supreme Court.[176] The matter, then, was left in the posture that the Philadelphia plaintiffs would be allowed in the federal District Court to attempt to prove that under Title VI and the implementing regulations, the defendant has created a funding mechanism which discriminates against minorities.

Although Title VI regulations contemplate a hearing procedure for complaints brought thereunder, case law indicates that

168. *See id.*
169. 189 F.3d 387 (1999).
170. *See id.* at 395-96.
171. *See id.* at 391.
172. *See id.* at 404.
173. *See id.* at 405.
174. *See id.* at 403.
175. *See id.* at 405.
176. *See* Ryan v. Powell, 120 S. Ct. 579 (1999); Ridge v. Powell, 120 S. Ct. 579 (1999).

there is no requirement that a plaintiff exhaust administrative remedies prior to bringing action in federal court.[177] In summary, a legal action to challenge Rhode Island's system of funding under Title VI is highly viable. Procedural and jurisdictional issues are relatively minor. Legal claims that assert any form of racial discrimination in the state's system of funding should be preceded by an in-depth analysis of the plaintiff school district's ability to proclaim itself a "unitary" school district, i.e., one that provides equal educational opportunities to all, regardless of color.

VI. The Viability of a Cause of Action Under the Equal Educational Opportunity Act

Like Title VI, the Equal Educational Opportunity Act[178] ("EEOA") is essentially a statutory codification of the protections embodied in the Equal Protection Clause.[179] For all intents and purposes, the EEOA is a desegregation statute. Its primary purpose is to limit the ability of federal courts to order forced busing to remedy segregation in the schools.[180] Despite its most frequent application in desegregation cases, an argument can be made that the jurisdiction of the EEOA is substantially more expansive. The statute provides, in pertinent part:

> The Congress declares it to be the policy of the United States that —
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
> (2) the neighborhood is the appropriate basis for determining public school assignments.
> . . .
> In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.[181]

177. *See* Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012, 1015 (6th Cir. 1989); Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 736 (3d Cir. 1983).

178. 20 USC § 1701-1758 (1994).

179. *See* United States v. School Dist. of Ferndale, 577 F.2d 1339, 1346 (6th Cir. 1978).

180. *See* United States v. City of Yonkers, 96 F.3d 600, 619 (2d Cir. 1996).

181. 20 U.S.C. § 1701(a), (b) (1994).

The mandate to the states is even more explicit: "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin."[182]

Unlike equal protection claims, suits brought under the EEOA can be brought against state agencies, not just state officials.[183] The EEOA "obviously reflects Congress's intention to hold the states and their agencies liable."[184] Similar to an equal protection claim, suit brought pursuant to the EEOA must prove purposeful discrimination against a suspect class. "Congress did not intend the statute to afford protections against racial discrimination beyond those already provided under the Fifth and Fourteenth Amendments of the Constitution."[185]

Although the EEOA is appealing in that it has been recognized as including the state's "obligation to supervise the local districts to ensure compliance,"[186] and despite its far-reaching language requiring "equal opportunity," it is doubtful that this statute will play a successful part in litigation brought by a plaintiff school district. First, the EEOA has never been successfully used in an education finance case. Despite the broadly worded language of the Act, the courts have traditionally viewed the EEOA strictly as a "desegregation" statute. The court would likely be hesitant to expand the scope of the Act's application without existing legal support for a broader interpretation.

Second, because the EEOA was designed by Congress to eliminate vestiges of segregation, i.e., "dual" school systems, a plaintiff district would have to be absolutely sure that its internal policies do not evidence any discriminatory or segregative elements. In other words, the potential plaintiff must be able to demonstrate that it is a "unitary" school system, one that provides absolute equal opportunities to whites and minorities alike. Failure to meet such a standard prior to alleging state discrimination could be embarrassing, or worse.

182. 20 U.S.C. § 1703 (1994).
183. *See* 20 U.S.C. § 1703 (a)-(f) (1994).
184. United States v. City of Yonkers, 96 F.3d 600, 619 (2d Cir. 1996).
185. United States v. City of Yonkers, 888 F. Supp. 591, 594 (S.D.N.Y. 1995).
186. Idaho Migrant Council v. Board of Educ., 647 F.2d 69, 71 (9th Cir. 1981).

VII. Potential Roadblocks and Defenses

A. *The Doctrine of "Unclean Hands"*

The potential plaintiff must be prepared to demonstrate that it is an efficient and lean organization, able to function reliably despite years of chronic underfunding. Performance audits, trimming of "unnecessary" programs or personnel, and drastic changes in educational policy are often suggested as ways in which costs may be trimmed at the local level. Alternatively, the state may attempt to link increased state aid to increased state control, as it has done in Central Falls.

A related argument will be the charge that more money will not make a difference, due to the oppressive impact of socio-economics on urban children. This argument is little more than barely veiled racism, and should be revealed as such the next time it is raised as a reason to deny poor districts additional funds. The fact that poor urban children face greater adversities than suburban students is an argument for increased funding, not adherence to the status quo.

Of course, no school district is without failings. Anecdotal evidence of an urban school district's internal shortcomings will be used to support the state's denial that inadequate funding is the proximate cause of substandard educational opportunities in the urban school districts. To the extent that the state is able to show that the plaintiff district is to blame for its own inadequacies, it will prevail. There is always the danger that the plaintiff will be unable to demonstrate that the funding system is the proximate cause of such inadequacy. However, the success of that defense is doubtful, especially given the Rhode Island Supreme Court's recent ruling in *City of Pawtucket* that the General Assembly has nearly absolute control over all aspects of public education, especially finance.[187]

A more immediate problem arises if the potential plaintiff group alleges that the state system of finance discriminates on the basis of race. Many might claim that it is the district itself, not the state, that is guilty of racial discrimination. The United States Supreme Court has identified six areas of educational opportunity as the most important indicia of a racially segregated school sys-

187. *See* City of Pawtucket v. Sundlun, 662 A.2d 40, 62 (R.I. 1995).

tem: inequality of student assignments, faculty, staff, transportation, extracurricular activities and facilities.[188] Bringing a suit in federal court prior to eliminating all vestiges of segregation would open the potential plaintiff to charges that it comes to the court with "unclean hands," meaning that the judiciary would be powerless to provide equitable relief. Any indication that our plaintiff school district is anything less than an integrated, unitary school system in regard to the six factors listed above would create potentially serious problems for school finance litigation. It would be all too easy to become defendants in a desegregation case while simultaneously attempting to prove statewide discrimination against minorities. A plaintiff school district, student or community action organization would need to show that it is solely a lack of funding, not a lack of will, that stands in the way of full implementation of a plan to achieve the desired unitary status. Whether to bring suit on behalf of minority schoolchildren, including a Title VI or EEOA action, is answerable only by dealing with desegregation one way or another. Several scenarios are possible: desegregation or discriminatory distribution of local funds are not placed at issue because the district can prove that it currently operates a bias-free, unitary school system; the school committee shows that its attempts to achieve full implementation of its "plan" have been stymied by a lack of funds; the school district steels itself for the possibility of participating in the finance litigation as a defendant or third-party defendant rather than a plaintiff; or race is not used as a basis for invalidating the current scheme of financing public education in Rhode Island's cities. Due to the strength of the case for racial discrimination in distribution of state funds, the last option should be viewed strictly as one of last resort.

B. *Issue and Claim Preclusion*

Collateral estoppel bars re-litigation of issues actually heard and decided by a court of competent jurisdiction, even if a different party seeks to have the same issue heard by a different court. For example, the City of East Providence would be collaterally estopped from bringing an action to have the Education Clause of the Rhode Island Constitution interpreted as a guarantee of equality

188. *See* Missouri v. Jenkins, 515 U.S. 70, 88 (1995) (quoting Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991); Green v. School Bd., 391 U.S. 430, 435 (1968)).

in education; despite East Providence not being a party, that issue was conclusively decided in *City of Pawtucket*.[189] Unlike *res judicata*, collateral estoppel is limited to issues actually litigated and decided in the prior action.

For purposes of collateral estoppel (issue preclusion) and *res judicata* (claim preclusion), the extent of the prior state ruling will be based on state law. None of the urban city plaintiffs in *City of Pawtucket* raised any of the federal claims contemplated herein. Because a decision on federal grounds was not necessary to the Rhode Island Supreme Court's decision, there can be no preclusive effect given to the prior case in terms of Fourteenth Amendment or Title VI causes of action.

C. *Standing*

Standing is a question of the court's jurisdiction over the subject matter or persons before it. The issue of standing is jurisdictional and cannot be waived. It can be raised at any time prior to, during, or even after trial, and it can be raised by the court *sua sponte*. Congress clearly set forth an identifiable protected class under Title VI and the EEOA, and a school committee's interest in such an action would only be in a representative capacity, if directly involved at all. A school committee's standing to bring a constitutional claim is a more complicated issue.

There are three general prerequisites for standing to bring a constitutional claim: injury in fact, causality and redressability.[190] The First Circuit provides no guidance on the issue of the standing of school committees to bring constitutional claims. Other Circuits are split on the issue, despite an implicit recognition of school committees' standing by the Supreme Court. In *Washington v. Seattle School District*,[191] the Court awarded a school committee attorneys' fees on the committee's equal protection claim, but never directly addressed the issue of standing. Despite this silence, the fact remains that standing is jurisdictional, meaning that the Supreme Court only had the authority to grant attorneys' fees if the school committee had standing to bring the underlying action.

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189. 662 A.2d at 62.

190. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

191. 458 U.S. 457 (1982).

An earlier Supreme Court decision, *Board of Education v. Allen*,[192] explicitly held that members of a school board had standing to bring constitutional challenge to state law, at least under the circumstances presented.[193] The Court found that board members were placed in a position of having to choose between violating their oaths of office to uphold the Constitution and refusing to comply with a state law, a step that would be likely to "bring their expulsion from office and also a reduction in state funds for their school district."[194] It should be noted that the Court focused extensively on the personal standing of individual school board members, as opposed to standing of the organization itself.

Despite the 1968 decision of *Board of Education v. Allen*, the Sixth, Ninth and Eleventh Circuit Courts of Appeal have explicitly held that school committees or local boards of education lack standing to bring constitutional claims.[195] Frankly, none of these cases are especially persuasive, but they will provide fodder for the state in defense to a challenge. The Fifth Circuit has the strongest case on point. In *Rogers v. Brockette*,[196] the Fifth Circuit Court of Appeals explicitly held that school committees are "persons" under constitutional analysis and that school committees are not barred from suing their respective state governments.[197] Unfortunately, *Rogers* has been criticized and/or limited by subsequent decisions in other jurisdictions, such as those cited above.

In a desegregation case, *School Board v. Baliles*,[198] the Fourth Circuit held that a school district had standing to bring constitutional claims to challenge the state's failure to fund a remediation plan.[199] The court identified three independent reasons for its ruling: 1) "derivative standing" to sue on behalf of its students; 2) standing to sue the state where state-imposed segregation impeded the school district's ability to carry out its own constitutional duty to redress effects of segregation; and, 3) direct economic in-

192. 392 U.S. 236 (1968).

193. *See id.* at 241 n.5.

194. *Id.*

195. *See* United States v. Alabama, 791 F.2d 1450, 1455 (11th Cir. 1986); Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk, 91 F.3d 1240, 1242 (9th Cir. 1996); Gwinn Area Community Sch. v. State, 741 F.2d 840, 844 (6th Cir. 1984).

196. 588 F.2d 1057 (5th Cir. 1979), *cert. denied,* 444 U.S. 827 (1979).

197. *See id.* at 1065-66.

198. 829 F.2d 1308 (4th Cir. 1987).

199. *See id.* at 1311.

jury to the school district as a result of the state's unconstitutional conduct.[200] It is informative to note that the Richmond school district was unable to show the requisite state action to maintain its suit, which was subsequently dismissed.[201]

In *Indian Oasis-Baboquivari Unified School District v. Kirk*,[202] the Ninth Circuit held that a local school committee did not have standing to challenge the State of Arizona's redistribution of state aid for education based on the relative "wealth" of the affected school districts.[203] Although the court repeatedly referenced the school committee's lack of "standing," its rationale belied a concern that the committee lacked the legal capacity to assert a claim against the state in federal court.[204] The Ninth Circuit's reasoning was largely dependent on its own circuit precedent, and the decision should not be overly persuasive to a district court in the First Circuit.

A strongly reasoned dissent in *Indian Oasis-Baboquivari Unified School District* argued that the majority's decision was clearly erroneous.[205] Circuit Judge Reinhardt's dissent contains an extensive review of standing-related decisions from other jurisdictions, focusing extensively on the Supreme Court case of *Washington v. Seattle School District*[206] and the Fifth Circuit's decision in *Rogers v. Brockette*.[207] The dissent also analogized the claims presented by the school board in light of the Supreme Court's tri-parte criteria for standing set forth in *Lujan v. Defenders of Wildlife*.[208] One of the cases cited by Judge Reinhardt is from the District of Puerto Rico, a sister district to Rhode Island, in which the court held that

200. *See id.*

201. *See id. Baliles* provides somewhat chilling evidence of the danger of alleging discriminatory actions on the part of state government when one's own district has not achieved unitary status.

202. 91 F.3d 1240 (9th Cir. 1996).

203. *See id.*

204. *See id.* ("[S]chool districts, which are creatures of the Arizona constitution and state statutes, lack the independent identity necessary to confer standing to assert a claim against the state in federal court.").

205. *See id.* at 1245-61 (Reinhardt, J., dissenting).

206. 458 U.S. 457 (1982).

207. 588 F.2d 1057 (5th Cir. 1979).

208. 504 U.S. 555 (1992).

municipal corporations face no *per se* standing bar to a constitutional claim brought under the First Amendment.[209]

The question of whether a local plaintiff school committee will be found to have standing to bring a federal suit against the State of Rhode Island in federal court cannot be easily answered due to the split in circuits and the lack of binding precedent in our own First Circuit. However, a solid argument can be made that members of school committees do have standing to raise constitutional issues in federal court, provided that it can be shown that the members share a constitutional duty that directly conflicts with the complained-of state action. Rhode Island law also allows courts to waive the requirement of standing where the plaintiff demonstrates that its suit forwards a "substantial public interest."[210] This likely would have been the supreme court's rationale for granting standing to school committees and municipalities in *City of Pawtucket* if it had directly addressed the standing issue.

Standing under federal civil rights statutes such as the Equal Educational Opportunity Act ("EEOA") and Title VI should be less problematic, simply because Congress has identified the class of individuals each law is designed to protect. The EEOA is a desegregation statute designed to "specify appropriate remedies for the elimination of the vestiges of dual school systems,"[211] i.e., historical segregation. In *City of Yonkers*, the Second Circuit recently held that local school boards have standing under the EEOA to sue the State of New York in federal court, noting that the Act expressly abrogates the state's Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA.[212] However, determining that a school district *can* bring an EEOA action is not the same as deciding it *should* bring such an action.

Title VI of the Civil Rights Act protects against discrimination under any program or activity that receives funding from the federal government. The aforecited *Campaign for Fiscal Equity* case, brought in part by the New York city school board, is the first reported decision involving a Title VI claim brought to challenge a

209. *See* Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk, 91 F.3d 1240, 1255 n.10 (9th Cir. 1996) (Reinhardt, J., dissenting) (citing Santiago Collazo v. Franqui Acosta, 721 F. Supp. 385 (D.P.R. 1989)).

210. Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992).

211. 20 U.S.C. § 1702(b) (1989).

212. *See* United States v. City of Yonkers, 96 F.3d 600, 611 (2d Cir. 1996).

state system of education finance. School officials were denied the "capacity" to sue under Title VI in that case and their standing or lack thereof was not addressed by the court. In general, claims brought under civil rights statutes need to be brought by individuals alleging direct injury by virtue of some proscribed state action.

There are obviously strategic advantages to supporting an independent Title VI or EEOA action, especially in light of the *Campaign for Fiscal Equity* decision. However, as argued above, a potential plaintiff should take steps to avoid liability under these two statutes by moving towards a "unitary" status. There does exist a slim possibility of bringing a derivative, or representative suit on behalf of the district's schoolchildren, but the school district would have to show that its interests were identical to those of the true plaintiffs. This would be extremely difficult to prove if the students' claims reflected equally poorly on both the state and the plaintiff school district.

In addition, the doctrine of *jus tertii* generally prevents litigants from asserting the constitutional rights of third parties. There is a narrowly drawn exemption to the general rule, which might apply to an educational finance suit. The school committee, or the members of the plaintiff school committee, would have to show that the constitutional rights of third parties (students) would be adversely affected if the suit is dismissed *and* that the committee has a "special relationship" with the injured third parties.[213] The test is much easier to satisfy if the litigant can show that state action is preventing the third party from exercising its constitutional rights, and even more so if the state action is preventing the litigant from observing the third party's rights.[214] The fact that children are themselves dependent on their parents to protect their legal rights due to their legal "infancy" only adds to the necessity of having another litigant bring suit on their collective behalf.

D. *"Capacity to Sue" v. "Standing" to Sue*

Although many courts use the terms interchangeably, capacity to sue and standing to sue present two distinct legal challenges.

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213. *See* Singleton v. Wulff, 428 U.S. 106, 114-15 (1976) (Blackmun, J., plurality opinion).

214. *See* Barrows v. Jackson, 346 U.S. 249, 256-59 (1953).

Capacity to sue is dependent on the plaintiff's ability or authority to bring a specific legal action. For example, mental incompetence or infancy may affect an individual's capacity to sue. Standing is more a question of whether the plaintiff has a sufficient interest in the litigation to bring suit.

Capacity raises especially interesting questions when one is dealing with a governmental entity. There is no common law right for school committees to even exist, never mind sue. The question therefore becomes one of the legislature's intent to allow local school committees to sue the legislature itself. Thus, regardless of whether the plaintiff finds itself in a federal forum, the issue of capacity will be decided on the basis of Rhode Island law.[215] Unfortunately, the Rhode Island Supreme Court is a bench that has not distinguished the doctrines of capacity and standing with any clarity.

The Providence School Committee was allowed to intervene as an appellee in the *City of Pawtucket* case. It would thus appear that Rhode Island's highest court sees no issue of capacity in regard to a school committee suing the state. However, the issue of capacity was never raised in that case. Unlike standing, which is jurisdictional, lack of capacity to sue is a ground for dismissal that must be raised by motion or it is otherwise waived.[216] The previous equity case therefore cannot supply the answer to the question of a school committee's capacity to bring suit in federal court.

Federal courts generally recognize the common law prohibition against municipal suits against the state, or "parent," of the municipality. Under this view, a municipal corporation is created by the state solely for the better ordering of government. It therefore has no independent "privileges or immunities under the federal Constitution which it may invoke in opposition to the will of its creator."[217] The Rhode Island Supreme Court has embraced this view, recognizing "the long established and universal principle that a municipality has no inherent right to self-government nor

215. *See* Corrente v. State, 759 F. Supp. 73, 80 (D.R.I. 1991) ("Capacity to sue is governed by the law of the state in which the district court is held.").

216. *See* City of New York v. State, 655 N.E.2d 649, 652 (N.Y. 1995).

217. Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933).

can it invoke the Equal Protection Clause of the XIV amendment."[218] The Court has also held that:

> The [school] committee stands in no stronger position against the state than a municipality does. Article XII of the Rhode Island Constitution vests the State Legislature with sole responsibility in the field of education. School committees act merely as agents of the state in fulfilling their statutorily conferred duties.[219]

The case quoted above, *Brown v. Elston*, is an example of a court not bothering with the distinction between capacity and standing. Clearly, the court is addressing the issue of the ability or authority of a municipality or school committee to bring *any* constitutional claim against the parent; the issue of standing is much more fact specific. In any event, there will clearly be difficulties in asserting a plaintiff school committee's capacity to sue the state in federal court.

However, such difficulties would not extend to the individual members of a school committee. In *Members of Jamestown School Committee v. Schmidt*,[220] members of two school committees brought suit on their own behalf, and the federal district court heard their case alleging that a Rhode Island statute was unconstitutional under the Establishment Clause.[221] Judge Pettine made a point of noting that he did "not decide whether the school committees would themselves have the capacity under Rhode Island law to bring this suit."[222] While the ability of a school committee as a body to bring suit may be questioned, capacity would not present a problem to the members of a committee bringing suit individually. Similarly, capacity should not be a problem for a coalition of groups that included school committees as members.

E. *The Eleventh Amendment of the United States Constitution*

Closely related to the issues of the legal capacity and standing of a municipal body to sue its parent state is the question of state

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218. Chariho Regional High Sch. Dist. v. Town Treasurer, 280 A.2d 312, 318 (R.I. 1971).

219. Brown v. Elston, 445 A.2d 279, 285 (R.I. 1982) (citations omitted).

220. 427 F. Supp. 1338 (D.R.I. 1977).

221. *See id.* at 1340 n.1.

222. *Id.*

governments' immunity from suit in federal court. The Eleventh Amendment reads as follows:

> 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.[223]

It has long been recognized that the Eleventh Amendment bars suits brought by citizens of a state against their state government.

However, in *Ex Parte Young*,[224] the Supreme Court held that "a suit to enjoin as unconstitutional a state official's action was not barred by the Amendment."[225]

> This holding was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity. . . . Thus, the official, although acting in his official capacity, may be sued in federal court.[226]

The Supreme Court has further circumscribed the *Young* exception to Eleventh Amendment immunity by limiting its application to situations involving "ongoing" violations of federal law or the federal Constitution.[227]

Papasan v. Allain involved a claim that the State of Mississippi was distributing funds raised by virtue of state ownership of certain lands provided by the federal government for public education purposes.[228] Noting the current and ongoing injury to the disfavored class, the Court declared that the plaintiffs' suit fell within the exemption created under *Young*:[229]

> This alleged ongoing constitutional violation—the unequal distribution by the State of the benefits of the State's school lands—is precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*. It may be that the current disparity results directly from the same

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223. U.S. Const. amend. XI.

224. 209 U.S. 123 (1908).

225. Papasan v. Allain, 478 U.S. 265, 276 (1986).

226. *Id.* at 276-77 (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984); Hutto v. Finney, 437 U.S. 678, 692 (1978)).

227. *See* Milliken v. Bradley, 433 U.S. 267, 289-90 (1977).

228. *See Papasan*, 478 U.S. at 274-75.

229. *See id.* at 282.

> actions in the past that are the subject of the petitioner's trust claims, but the essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State.[230]

The Eleventh Amendment should not be a major concern for a potential plaintiff. The issues raised are largely ones of pleading. Therefore, the complaint must be carefully drafted so as to avoid potential problems. First, the suit must be brought against individually-named state officials acting in their official capacities, not against the state itself. Second, the alleged constitutional violation must be ongoing and result in personal injuries.[231] Each of these elements required by *Young* and its progeny can be met in a constitutional case challenging Rhode Island's system of financing public education. Of course, the Eleventh Amendment also applies to statutory actions. However, the Civil Rights Act specifically provides for a waiver of states' claims to sovereign immunity under the Eleventh Amendment:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.[232]

Sovereign immunity should therefore raise no serious obstacles to a well-pleaded complaint.

VIII. CONCLUSION

Despite two decades of reluctance by the federal judiciary to tackle the constitutional implications of school finance, the federal courts represent a viable forum in which to challenge the inadequacy and inequity of Rhode Island's current system of financing public education. The most promising causes of action lie under the Equal Protection Clause of the federal Constitution and the implementing regulations of Title VI of the Civil Rights Act. The key to persuading the court to halt continued inequitable financing of urban schools lies in proving that reliance on "local" property taxes

230. *Id.*
231. *See* Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985).
232. 42 U.S.C. § 2000d(7) (1989).

bears no rational relation to the furtherance of local control over educational policy.

There is no question that urban minorities, many of whom live at or below the poverty line, are adversely affected by the legislature's reliance on municipal wealth as determinative of the quality and breadth of educational opportunities. Statistical analysis will certainly show that racial and ethnic minorities and the urban poor are disproportionately impacted by the manner in which education funds are distributed across Rhode Island. Poor students are substantially less likely to obtain a minimally adequate education than are their wealthy suburban counterparts.

Several significant hurdles must be overcome before the Federal District Court would reach the merits of a school finance case. The most problematic of these difficulties are: identifying a plaintiff class with the requisite constitutional particularity, overcoming charges that local school committees lack the legal authority to challenge state action in federal court, proving that the plaintiff district's educational offerings are not "minimally adequate," and dealing with the inevitable charges that the urban school districts are themselves guilty of discriminating against their minority students by their failure to achieve "unitary," color-blind status.

Potential procedural difficulties relating to standing, and capacity to sue could be largely overcome by the formation of a plaintiff "coalition." Most of the hurdles described herein are limited to actions in which a plaintiff school committee is a lone named plaintiff. There is no question that students within the beleaguered cities would have independent standing to bring the constitutional and Title VI claims described herein. A plaintiff coalition would need to show an intimate relationship to those students' needs and further be able to show that the representative students have rights that will go unprotected unless the coalition is allowed to further its suit.

Creation of a coalition to oversee the legal action and subsequent implementation of a judicial remedy would minimize many of the potential roadblocks standing in the way of a successful presentation of our case for equity in school finance. There is also the possibility of spreading the costs of litigation among coalition participants, which would eliminate the necessity of a plaintiff school committee bearing the full burden of retaining litigation counsel and the numerous experts required in the type of action

discussed in this article. Finally, a well-conceived coalition would likely be able to generate a broader base of community support than would a school committee acting alone.

It would admittedly be difficult to prevail on a legal challenge to school finance in federal court. However, litigation may be the only option left available to Rhode Island's disadvantaged children and school districts if the legislature once again fails on its promise to create a fully equitable system of financing public education in Rhode Island. It is generally accepted that poor urban children are denied access to equal educational opportunities enjoyed by their suburban counterparts. The only question is whether the General Assembly will address its outdated, inefficient and unfair system of financing public education prior to one or more of Rhode Island's urban school districts testing the judicial waters of our federal court system.