SURVIVING *RODRIGUEZ*: THE VIABILITY OF FEDERAL EQUAL PROTECTION CLAIMS BY UNDERFUNDED CHARTER SCHOOLS

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Since their introduction in the early 1990s, charter schools, which provide a hybrid educational form that combines public funding with many of the educational policy freedoms that attend private schools, have experienced growing popularity across the country. As their numbers continue to increase, funding for charter schools has become more of a concern. Statistics indicate that charter school funding, which derives from federal, state, and local sources, has not kept pace with the funding accorded traditional public school systems. This disparity has led some charter school constituents to consider equal protection challenges against these allegedly discriminatory funding regimes. The Supreme Court's 1973 decision in San Antonio Independent School District v. Rodriguez*, however, has led many to conclude that the doors to the federal courthouse remain closed to equal protection litigants protesting inequities in school funding. The author begins by presenting background information on federal equal protection jurisprudence, the charter school concept, and the purported discrepancies in charter school funding. After discussing the continued viability of education as a fundamental right, he then considers the Court's* Rodriguez *decision in light of its subsequent rulings in* Papasan v. Allain *and* Plyler v. Doe. *Following an examination of charter school characteristics relevant to charter school equal protection challenges, the author contends that* Papasan *and, to a lesser extent,* Plyler*, present alternative avenues that would allow charter school plaintiffs to circumvent the* Rodriguez *barriers. He concludes that, ironically, charter school plaintiffs have the strongest chance to raise a successful federal equal protection claim by confronting the government's lowest hurdle: rational basis review. Under what he terms the "*Papasan *exception," Rubio contends that* Rodriguez *explicitly made itself inapplicable to a state's decision to*

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divide resources unequally among its school districts and that, therefore, federal equal protection challenges remain available to charter school litigants who have inexplicably been denied access to entire categories of state funds.

I. INTRODUCTION

Over the past fifteen years, charter schools have assumed an increasingly prominent position within the mural of American education. Though Minnesota passed the nation's first charter law less than twenty years ago,[1] data indicate that charter schools currently number over four thousand and have an aggregate enrollment in excess of one million students.[2] Charter schools have grown in stature as well, from their genesis as educational oddities into a movement that represents one of today's most significant reform developments in American public education.[3] Today, charter schools enjoy broad support in both educational and political circles and pose a serious threat to proponents of the educational status quo.[4]

Despite this growing popularity, however, it appears that many states across the country are not funding charter schools at the same level as more traditional public schools.[5] One study estimates this disparity to be as much as 30% in some states.[6] In light of this apparent inequity, this note asks whether, and if so under what circumstances, students and other individuals connected to a charter school may raise a successful federal equal protection challenge to these funding regimes. The note concludes that, despite the Supreme Court's ruling in *San Antonio Independent School District v. Rodriguez*[7] directing courts to employ mere rational basis scrutiny to school funding equal protection challenges, subsequent rulings by the Court, most notably *Papasan v. Allain*,[8] indicate

1. Judith Johnson & Alex Medler, *The Conceptual and Practical Development of Charter Schools*, 11 STAN. L. & POL'Y REV. 291, 293 (2000).

2. CTR. FOR EDUC. REFORM, NATIONAL CHARTER SCHOOL DATA: 2007–2008 NEW SCHOOL ESTIMATES (2008), *available at* http://www.edreform.com/_upload/CER_charter_numbers.pdf [hereinafter NATIONAL CHARTER SCHOOL DATA].

3. *See* Robert J. Martin, *Rigid Rules for Charter Schools: New Jersey as a Case Study*, 36 RUTGERS L.J. 439, 440–42 (2005).

4. Within educational circles, the charter school movement generally enjoys support from individual parents, students, teachers, and reform-oriented organizations, but it generally does not enjoy support from groups associated with traditional systems of public education, including, most notably, national teachers' unions. *See generally* CHESTER E. FINN, JR. ET AL., CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION 169–91 (2000). Charter schools also enjoy wide-ranging support from all parts of the American political spectrum. *See* DANNY WEIL, CHARTER SCHOOLS: A REFERENCE HANDBOOK 1–3 (2000).

5. *See* discussion *infra* Part III.B.1.

6. *See* THOMAS B. FORDHAM INST., CHARTER SCHOOL FUNDING: INEQUITY'S NEXT FRONTIER 1 (2005) [hereinafter FORDHAM STUDY].

7. 411 U.S. 1 (1973).

8. 478 U.S. 265 (1986).

that in certain situations such challenges may well be able to survive the *Rodiguez* equal protection analysis.

This note examines the present funding inequities that face many charter schools and explains how these inequities may provide adequate grounds for successful federal equal protection challenges to state funding regimes. To begin, Part II discusses the basic contours of federal equal protection analysis and provides a general introduction to charter schools. Part III then analyzes the hurdles that a charter school plaintiff[9] is likely to face in raising her federal equal protection challenge and details the funding and non-funding characteristics of charter schools relevant to clearing those hurdles. Finally, Part IV recommends when and how a charter school plaintiff may successfully challenge a state funding regime under present equal protection jurisprudence.

II. BACKGROUND

Before analyzing potential federal equal protection attacks on the funding of charter schools, it is appropriate to place the question in context. To that end, this section details the basic contours of federal equal protection law and provides an overview of the charter school system.

A. Federal Equal Protection Analysis: An Overview

The Fourteenth Amendment of the Constitution of the United States mandates that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."[10] This provision, governing all actions by which state governments classify individuals and subject them to different benefits or burdens under the law, has become the "single most important concept in the Constitution for the protection of individual rights."[11] At its essence, the Equal Protection Clause guarantees similar treatment by the government to individuals who are similarly situated.[12] In safeguarding this guarantee, courts seek to ensure that where a law, either on its face or as applied, classifies persons for unequal benefit or burden, the law's asserted purpose bears a sufficient relationship to the classifications it creates.[13]

9. This note uses the term "charter school plaintiff" to refer to any litigant—typically a charter school student, group of students, or the parents or other legal representatives of such students—who might bring her equal protection claim based on injuries sustained through the operation of the charter school, not to the school itself as a litigant.

10. U.S. CONST. amend. XIV, § 1.

11. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.1, at 680 (7th ed. 2004). Although the Equal Protection Clause of the Fourteenth Amendment by its own terms applies only to the states, the Supreme Court applies the same standard to the actions of the federal government under the Due Process Clause of the Fifth Amendment. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); *see also* NOWAK & ROTUNDA, *supra*, § 14.1, at 682 (referring to the Court's test for federal laws under the Fifth Amendment Due Process Clause as an "equal protection guarantee").

12. NOWAK & ROTUNDA, *supra* note 11, § 14.2, at 682.

13. *See id.* § 14.3, at 685.

The most critical question in raising a successful equal protection challenge is the standard of review that a court will employ to test the challenged classification.[14] Under the Supreme Court's present equal protection jurisprudence, there are three primary standards of review that courts may apply when confronted with an equal protection challenge to a government act: (1) a deferential "rational relationship" test, (2) an intermediate or "heightened" standard of review, and (3) a "strict scrutiny" test.[15] Because a court's conclusion depends largely upon which standard it employs, it is important to understand the criteria courts use to determine the applicable standard.

The lowest level of equal protection scrutiny is the Court's "rational relationship" test.[16] Under this test, a court will not independently review the relationship between the purpose of the challenged law and its perceived classifications. Instead, it will affirm the law as long as the court discerns "that the classification at issue bears some fair relationship to a legitimate public purpose."[17] A court should employ this standard unless the challenged law implicates a fundamental constitutional right or involves a burden upon some "suspect" class.[18] Most laws involving economic regulation or regulation of some aspect of general social welfare[19] will fall within this category.[20] As will be further discussed, challenges involving alleged injuries based on inadequate systems of public education typically proceed under this standard as well.

The intermediate standard of review is a more recent development in the Court's equal protection jurisprudence.[21] This standard requires

14. A viable equal protection challenge includes many elements. In addition to other threshold and jurisdictional hurdles that a plaintiff must surmount, a plaintiff seeking to invoke a court's review of a federal equal protection challenge must first demonstrate that the injury alleged was the result of state action. This state action requirement is certainly relevant to potential equal protection challenges by charter school plaintiffs, who would have to allege that the inequitable funding of the charter school was indeed a result of a state action. Such an inquiry might well turn on whether the charter school in question was found to be a public or a nonpublic school, a question considered *infra* Part III.B.2.a.

15. NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 687–92.

16. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–99 (1937).

17. Plyler v. Doe, 457 U.S. 202, 216 (1982). *See generally* NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 687.

18. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). A "suspect" class, the burdening of which receives strict scrutiny for equal protection and due process purposes, has been interpreted by the Court to include classifications involving race or national origin, *see* NOWAK & ROTUNDA, *supra* note 11, § 14.5, at 734; gender, *see id.* § 14.20, at 884; and illegitimacy, *see id.* § 14.14, at 866, are also classes that receive heightened judicial protection, though not strict scrutiny. The U.S. Supreme Court first articulated the idea of the "suspect" class in *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

19. Examples of regulations that could fall into this category include mandatory retirement laws, *e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991), tax regulations, *e.g.*, Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989), and other economic regulations, *e.g.*, Ne. Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159 (1985).

20. NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 686–87.

21. The first scholarly notice of the "intermediate" standard came in 1972 by Professor Gerald Gunther, who referred to the Court's decisions as "intervention without 'strict scrutiny.'" Gerald

the government to demonstrate that the classification imposed by the challenged law is "substantially related" to some "important" government interest.[22] The Court's "strengthened 'rationality' scrutiny"[23] allows a reviewing court to independently scrutinize the legitimacy of the law's purported relationship to the classifications it creates without demanding that the government meet the weighty compelling interest test discussed below under "strict scrutiny."[24] Although this intermediate standard developed primarily within equal protection challenges that involved classifications based on gender or illegitimacy,[25] the Court has applied intermediate scrutiny in other settings, including at least one instance involving the funding and provision of public education.[26]

The final category of equal protection involves the highest level of judicial review, often referred to as "strict scrutiny." Courts will employ the strict scrutiny test to equal protection claims only where the claim involves the classification of a "suspect" class or where the burden created by the challenged law impedes the exercise of a fundamental constitutional right.[27] To survive strict scrutiny, the government must demonstrate that the classification imposed by the challenged law is both necessary and narrowly tailored to meet some compelling government interest.[28] Although the government need not show the absolute necessity of the law,[29] the burden of this standard is clearly difficult for the government to overcome.

To summarize, it is a court's assessment of the nature of the classification created and the burden imposed that largely determines the outcome of any equal protection challenge. If the classification created by the challenged law involves a "suspect" class or if it burdens a right deemed "fundamental," then the court will employ the strict scrutiny test and the law is far less likely to pass constitutional muster. If, alternately, the created classification does not involve a group that receives particular

Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972).

22. Craig v. Boren, 429 U.S. 190, 197–98 (1976); *see also Plyler*, 457 U.S. at 218 n.16 (recognizing the equal protection analysis employed in *Craig* as an "intermediate" level of judicial scrutiny).

23. Gunther, *supra* note 21, at 21.

24. NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 689.

25. *See id.* at 688.

26. *See Plyler*, 457 U.S. 202. *But see* NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 689 (stating that the standard applied to equal protection challenges involving classifications based on U.S. citizenship is unclear).

27. *See* NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 691. With regard to the burdening of a fundamental right, the proper constitutional analysis is made under equal protection auspices where the law burdens one class of persons only, as taken against a law that burdens the exercise of some fundamental right for all persons, for which the inquiry would be properly made under substantive due process. *Id.* For state actions alleged to involve a racially discriminatory suspect classification, the regulation or state action is subject to strict judicial scrutiny only where it is found to have a racially discriminatory purpose, as opposed to a racially disproportionate impact. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

28. NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 687.

29. *Id.*

judicial protection or implicate any fundamental right, then the court will conduct the broadly deferential rational basis test and the law will likely survive. Finally, in a narrower subset of cases primarily involving laws whose classifications involve gender, illegitimacy, or arguably U.S. citizenship, the court will scrutinize the law under an intermediate standard.

Although equal protection claims are currently among the most widely employed legal mechanisms for the protection of individual rights,[30] the place of school funding challenges among viable federal equal protection claims remains unsettled.[31]

B. Placing Charter Schools in Context

Before discussing more specifically where equal protection claims based on school funding fit into equal protection law, it is first important to provide some background information regarding charter schools. To that end, this section first defines charter schools by briefly describing their history and general characteristics before discussing the basic contours of charter school funding.

1. Characteristics and History of Charter Schools

Charter schools are public schools of choice created and operated under the terms of a state contract or charter.[32] The parties involved are a school operator, any one of a variety of individuals, groups, or organizations,[33] and the sponsor, a public entity vested by statute with the responsibility of authorizing the creation of charter schools.[34] Typically, a charter school is created either by converting a traditional public or private school or by starting up a new school as a charter.[35] The critical characteristic of the charter is that the school operator generally receives some degree of freedom from the rules under which other public schools operate in exchange for her commitment to meet the other terms of the charter, which will often include both operational guidelines and student-

30. *Id.* § 14.1, at 680.

31. *See* John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2399–400 (2004).

32. Katrina E. Bulkley & Priscilla Wohlstetter, *Introduction* to TAKING ACCOUNT OF CHARTER SCHOOLS: WHAT'S HAPPENED AND WHAT'S NEXT? 1, 1 (Katrina E. Bulkley & Priscilla Wohlstetter eds., 2004).

33. *See* Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 896–97 (2001); *see also* WEIL, *supra* note 4, at 6.

34. Johnson & Medler, *supra* note 1, at 291; Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 350 (2003).

35. *See* Sandra Vergari, *Introduction* to THE CHARTER SCHOOL LANDSCAPE 1, 3 (Sandra Vergari ed., 2002).

achievement criteria.[36] Thus, charter schools enjoy greater autonomy at the price of increased accountability.[37]

Despite this increased autonomy, charter schools, like other public schools, remain subject to state law and regulation.[38] The charter school movement involves an effort to obtain a degree of freedom from the state's close control wherein charter school reformers seek flexibility from the web of state regulation that governs traditional public schools.[39] State laws creating charter schools, however, vary widely in the degree of autonomy extended to charter schools, so this freedom is significant only in proportion to the relative "strength" of a state's charter school statute.[40] Any discussion of charter schools must therefore keep in mind both the variety that characterizes the national charter movement and the role of state statutes in determining the nature of these variances.

Since their introduction in the late 1980s, charter schools have enjoyed an explosive rate of growth and development. Former American Federation of Teachers president Albert Shanker and educational consultant Ray Budde are widely credited with introducing the basic charter school idea.[41] Activists and legislators in the state of Minnesota seized upon the idea, crafting the nation's first charter school law in 1991.[42] California followed suit the next year.[43] By the end of 1996, twenty-five states and the District of Columbia had passed charter school laws.[44] This remarkable growth has continued over the last decade, so that today there are almost four thousand charter schools operating in forty states and the District of Columbia with a combined enrollment of over one million students.[45]

This overview hardly begins to describe the great variety that exists among the thousands of charter schools across the country. Those details relevant in the equal protection context are the subject of further analysis in Part III below; others are simply beyond the scope of this note.

36. *See* Mead, *supra* note 34, at 350.

37. *See* Vergari, *supra* note 35, at 10.

38. *See* PRESTON C. GREEN III & JULIE F. MEAD, CHARTER SCHOOLS AND THE LAW: ESTABLISHING NEW LEGAL RELATIONSHIPS 5–8 (2004).

39. *See* Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43, 43–44 (2004).

40. Vergari, *supra* note 35, at 5–7. Charter school proponents typically describe charter school statutes that provide more permissive standards for creation and operation as "strong," and those with more restrictive standards as "weak." *See* CTR. FOR EDUC. REFORM, CHARTER SCHOOLS: CHANGING THE FACE OF AMERICAN EDUCATION TODAY, PART 2: RAISING THE BAR ON CHARTER SCHOOL LAWS, 2006 RANKING AND SCORECARD 5 (Jeanne Allen & Shaka Mitchell eds., 2006) (listing ten criteria for "what makes a charter school law strong"). For a chart ranking all charter school laws throughout the United States, see CTR. FOR EDUC. REFORM, 2008 CHARTER SCHOOL LAWS AT-A-GLANCE (2008), *available at* http://www.edreform.com/_upload/ranking_chart.pdf.

41. *See, e.g.*, FINN ET AL., *supra* note 4, at 18.

42. Johnson & Medler, *supra* note 1.

43. Amy Stuart Wells, *Charter School Reform in California: Does It Meet Expectations?*, 80 PHI DELTA KAPPAN 305, 306 (1998).

44. *See* Vergari, *supra* note 35, at 6 tbl.1.1.

45. NATIONAL CHARTER SCHOOL DATA, *supra* note 2.

The next section introduces the characteristic of charter schools that lies at the core of the question presented: charter school funding.

2. Funding Charter Schools: A Background

A state's mechanisms of charter school funding are a central consideration in any equal protection challenge to that state's funding regime. The paragraphs below outline the general sources of charter school funding, while the analysis in Part III illuminates in greater detail the sources and extent of the claimed funding disparities that confront many of America's charter schools. The reader should keep in mind that charter schools, though uniform in their role as alternatives to mainstream public schools, are by definition creatures of state statute, and as such present specific funding pictures that vary from state to state.

Although specific circumstances may vary, the basic components of the charter school funding picture are generally the same. Most charter schools receive the bulk of their funding from public coffers. Like other public schools, these funds originate from three different revenue sources: federal, state, and local governments.[46] An additional source of public school funding is often facilities or capital accounts, which typically come from local revenue streams.[47] The way in which states allocate these funds is generally determined by each state's charter school statute, although some charter schools are able to negotiate additional public funding that is outside the statutory scheme.[48] As detailed below, concerns regarding these funding sources are at the core of recent complaints in some states alleging systematic underfunding of charter schools.

For at least some charter schools, private funding provides an additional revenue stream that deserves mention. One recent study, in fact, estimated that private funding comprises 3% of the revenues upon which charter schools nationwide depend.[49] While it is clear that the extent of private funding varies widely, charter school revenues from private

46. *See* FORDHAM STUDY, *supra* note 6, at 3.

47. *Id.* at 11. The issue of facilities funding raises one of the more significant concerns in assessing the adequacy of funds for many charter schools: the availability of startup funds. *See* BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE: AVOIDING THE PITFALLS, FULFILLING THE PROMISE 108 (1999). Depending on the particular state statute and the particular provisions of the charter's operation within that statute, lack of available startup funds can often constitute one of the most significant roadblocks to individuals and organizations seeking to open a charter school. *Id.* at 110–14. Although the financial concerns raised by startup costs might well be relevant in any given challenge, the analysis undertaken in this note will focus only on disparities that exist in continuing streams of revenue. Apart from their uses as startup funds, however, facilities or capital funding streams are highly relevant as ongoing revenue streams. *See infra* text accompanying notes 126–38.

48. *See* UCLA CHARTER SCHOOL STUDY, BEYOND THE RHETORIC OF CHARTER SCHOOL REFORM: A STUDY OF TEN CALIFORNIA SCHOOL DISTRICTS 34–35, *available at* http://www.gseis.ucla.edu/docs/charter.pdf [hereinafter UCLA STUDY].

49. FORDHAM STUDY, *supra* note 6, at VII.

sources can often be significant.[50] In any event, absent certain circumstances,[51] the fact that a charter school receives some private funding should not prevent it from proceeding with an otherwise meritorious equal protection claim.

C. Funding as Grounds for Equal Protection Claims

Like funding plaintiffs at any school, charter school plaintiffs face a formidable jurisprudential hurdle in attempting to state a viable federal equal protection challenge. In considering the place of school funding challenges within the universe of equal protection claims, this section discusses the historical justification for funding equity claims and then describes the Supreme Court's landmark decision in *San Antonio Independent School District v. Rodriguez*.

1. The Historical Case for Funding Equity and Equal Protection Challenges

The model for challenges to a system of school funding on grounds that it systematically disadvantages some group of students traces back to the earliest days of public education in the United States. By 1800, systems of public education, operated by units of local government and funded through state and local coffers, were common throughout the New England states.[52] The first challenge to one of these systems on grounds of unequal or inadequate distributions in funding came in 1819 in *Commonwealth v. Inhabitants of Denham*.[53] The issues presented there prompted a statement by the Supreme Judicial Court of Massachusetts that articulated principles which remain central to the justification for equal protection school funding challenges: "The schools required by the statute are to be maintained for the benefit of the whole town, as it is the wise policy of the law to give all the inhabitants equal privileges, for the education of their children in the public schools."[54] This statement, given that states had only recently broken from the English model of purely private systems of education,[55] represents early judicial recognition of the connection between public funding and educational equity.

Despite this early start, more robust efforts to broadly challenge the responsibility of state governments to maintain equitable educational

50. *See* FORDHAM STUDY, *supra* note 6, at 25; HASSEL, *supra* note 47, at 122; UCLA STUDY, *supra* note 48, at 35; John Morley, Note, *For-Profit and Nonprofit Charter Schools: An Agency Costs Approach,* 115 YALE L.J. 1782, 1805 (2006).

51. *See* discussion *infra* Part III.B.2.a.

52. Denise A. Hartman, *Constitutional Responsibility to Provide a System of Free Public Schools: How Relevant is the States' Experience to Shaping Governmental Obligations in Emerging Democracies?*, 33 SYRACUSE J. INT'L L. & COM. 95, 97–98 (2005).

53. 16 Mass. (1 Tyng) 141 (1819).

54. *Id.* at 146.

55. *See* Hartman, *supra* note 52, at 97.

funding structures waited until after the Supreme Court's 1954 ruling in *Brown v. Board of Education*.[56] The *Brown* Court's sweeping description of the central place of public education among the responsibilities of the State recognized school expenditures as a lever of equality.[57] The broad language employed in *Brown* and the constitutional theories that attended subsequent Supreme Court civil rights rulings eventually sparked direct constitutional challenges to school funding regimes.[58]

Consistent with the historical emphasis on the right to funding equity, two of the most significant early challenges proceeded on equal protection grounds. The first, *Serrano v. Priest*,[59] was a class action by public school students and parents claiming that the system of public school financing in California violated the equal protection guarantee of the Fourteenth Amendment of the U.S. Constitution.[60] The Supreme Court of California, in what would essentially become the blueprint for analyzing equal protection challenges to school funding regimes,[61] ruled that the school financing system did in fact violate the Fourteenth Amendment of the U.S. Constitution.[62]

Shortly after the landmark *Serrano* ruling and similar rulings in subsequent decisions by other state courts of last resort,[63] the Supreme Court of the United States considered an equal protection challenge to a school funding regime in *San Antonio Independent School District v. Rodriguez*.[64] The Supreme Court's decision in *Rodriguez*, which established the benchmark for school funding challenges on equal protection grounds, is of central importance in this note's analysis below.

56. 347 U.S. 483 (1954).

57. *Id.* at 493 ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . 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.").

58. Dayton & Dupre, *supra* note 31, at 2358; *see also* Sheryll D. Cashin, *American Public Schools Fifty Years After* Brown*: A Separate and Unequal Reality*, 47 HOW. L.J. 341, 347 (2004) (noting the connection between *Brown* and the generation of school funding challenges that began in the 1970s).

59. 487 P.2d 1241 (Cal. 1971).

60. *Id.* at 1244.

61. *See* Dayton & Dupre, *supra* note 31, at 2359 (noting that the *Serrano* decision was the first to establish judicially manageable standards for funding equity challenges and that it "framed the issues that would become prominent in subsequent school funding cases based on equal protection claims: (1) whether education is a fundamental right; (2) whether the court would apply strict scrutiny; and (3) whether the state's goal of promoting local control constituted a sufficient justification for the challenged funding system under the court's standard of review").

62. *Serrano*, 487 P.2d at 1265.

63. *E.g.*, Milliken v. Green, 203 N.W.2d 457, 471 (Mich. 1972); Robinson v. Cahill, 303 A.2d 273, 295–96 (N.J. 1973).

64. 411 U.S. 1 (1973).

2. *The Supreme Court and School Funding Challenges:* Rodriguez

Equity-based challenges to school funding regimes state the claim along standard equal protection lines: that the funding program violates the Fourteenth Amendment because of the educational harm that results from failing to fund the claimant's school or schools equally with schools attended by other individuals or groups similarly situated.[65] The Supreme Court's most significant articulation of the equal protection analysis in an equity-challenge setting came in *Rodriguez*.

The claim, brought by Mexican-American parents whose children attended the Edgewood Independent School District of San Antonio, charged that the funding structure of the Texas public schools unconstitutionally discriminated against students residing in districts with a low property tax base in violation of the Equal Protection Clause.[66] The plaintiffs alleged that the funding system systematically resulted in schools in poorer neighborhoods being funded at significantly lower levels than those schools in more wealthy neighborhoods.[67] The district court found that the funding system involved a suspect classification, wealth, and further that the burdened right, education, was a fundamental right implicitly guaranteed by the Constitution. The court therefore applied the strict scrutiny test and ruled that the Texas funding structure violated the Equal Protection Clause.[68]

The Supreme Court, however, disagreed with the conclusions of the district court and reversed.[69] Writing for the Court, Justice Powell concluded that "the Texas system does not operate to the peculiar disadvantage of any suspect class."[70] The more significant aspect of the holding for present purposes, however, was the Court's articulation that education was not among those fundamental rights demanding application of the strict scrutiny standard.[71] While recognizing the significance of public education as a service of the State[72] and the close "nexus" between education and the "effective exercise" of other fundamental constitutional rights like speech,[73] the Court nonetheless found the right to education neither explicitly nor implicitly guaranteed by the Constitution and thus

65. The harm that an equity school funding plaintiff must show is ultimately an educational harm, not a financial one. Therefore, central among the analysis of courts considering equal protection challenges based on funding regimes have typically been discussions of the strength of the relationship between funding levels and educational quality. *See*, *e.g.*, *id.* at 42–43; *see also* Dayton & Dupre, *supra* note 31, at 2378 ("Since *Serrano v. Priest*, no plaintiff has ultimately prevailed without convincing the court of the existence of a positive correlation between expenditures and educational opportunity." (citations omitted)).

66. *Rodriguez*, 411 U.S. at 4–5.

67. *Id.* at 11–12.

68. *Id.* at 16.

69. *Id.* at 6.

70. *Id.* at 28.

71. *Id.* at 37.

72. *Id.* at 30.

73. *Id.* at 35–36.

not fundamental.[74] Having found that the challenged funding structure did not involve any suspect class and did not burden any fundamental right, the Court applied the rational relationship test and concluded that the state's interest in providing local control over education readily justified its decision to use local property taxes to fund local schools.[75]

The *Rodriguez* decision has widely been thought to practically shut the doors of the federal courthouse to school funding litigants. Subsequent decisions by the Court, however, particularly the Court's 1986 decision in *Papasan v. Allain*,[76] define a limited class of funding claims that lie beyond the reach of *Rodriguez*. It is the argument of this note that, in light of the present state of the funding schemes, some charter schools may be uniquely positioned to avail themselves of this class of claims.

III. ANALYSIS

Analyzing the prospects of a charter school plaintiff who raises an equal protection challenge to a state funding scheme in federal court implicates two pivotal issues: (1) the way in which courts have applied the equal protection analysis in the school funding setting;[77] and (2) the relevant characteristics of the charter school's claim, including the nature of its funding disparity allegations.

A. Stating a Viable Equal Protection Claim for School Funding

The Supreme Court's ruling in *Rodriguez* has profound implications for equal protection challenges to school funding structures.[78] First and perhaps most significantly, the Court's refusal to recognize education as a fundamental right carried consequences that are difficult to overstate from the perspective of a potential funding plaintiff.[79] Furthermore, its determination that the state's interest in preserving local control over education provided a rational basis for the funding disparity that resulted

74. *Id.* at 33–35. At least one state court, on the other hand, has applied the same "explicit/implicit" inquiry to reach the opposite result, finding that education is a fundamental right by virtue of its specific articulation within the state constitution. *See* Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

75. *Rodriguez*, 411 U.S. at 50–55.

76. 478 U.S. 265 (1986).

77. There are, of course, jurisdictional requirements that a charter school plaintiff must meet. In general, jurisdictional issues have not kept otherwise meritorious complaints out of court. Dayton & Dupre, *supra* note 31, at 2377; *see, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981) ("[W]e know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs' claim of constitutional infringement an abdication of our constitutional duties." (quoting Bd. of Educ., Levittown Union Free Sch. Dist., Nassau County v. Nyquist, 443 N.Y.S.2d 843, 854 (N.Y. App. Div. 1981))). Nonetheless, at least one state court has recently held a school funding equity challenge to be a nonjusticiable claim more appropriate for legislative determination. *Ex parte* James, 836 So. 2d 813, 819 (Ala. 2002).

78. *See* NOWAK & ROTUNDA, *supra* note 11, § 14.45, at 1092 (calling *Rodriguez* "[t]he most important decision of the Court concerning a 'right' to education").

79. *See* discussion *infra* Part III.A.1.

from the localized tax structures has proven to be a far-reaching logic that encourages broad deference to legislative determinations of public school funding.[80] In short, some have argued that *Rodriguez* effectively shut the federal courthouse door to the plaintiff bringing a school funding equity challenge.[81]

1. Education as a "Fundamental" Liberty

Perhaps the most significant single component of the *Rodriguez* opinion was its conclusion that education is not a "fundamental" right. As previously noted, this determination in equal protection jurisprudence essentially means that education is not a right the impingement of which will be reviewed under the Court's strict scrutiny standard of review.[82] Although the Court's pronouncement has proven immune to substantial challenge and is widely regarded as conclusive on the question,[83] the question is significant enough to merit some treatment here.

The list of rights that the Supreme Court has blessed as "fundamental" is indeed distinguished. For example, the Court has held as fundamental, and therefore subject to strict scrutiny, any classification involving a burden placed upon the right to privacy,[84] the right to vote,[85] the panoply of First Amendment rights,[86] and all but one of the Bill of Rights's provisions guaranteeing fairness before the criminal justice system.[87] As articulated in *Rodriguez*, the Court's criteria for determining whether a right is fundamental explicitly tracks the rights established under the Constitution of the United States.[88] Courts generally hold that

80. *See* John Dayton, *An Anatomy of School Funding Litigation*, 77 EDUC. L. REP. 627, 627–34 (1992).

81. Dayton & Dupre, *supra* note 31, at 2352.

82. *See supra* text accompanying note 27.

83. No subsequent decision by the Court has disturbed the strength of the *Rodriguez* determination on this question. *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988); Papasan v. Allain, 478 U.S. 265, 283–84 (1986); Plyler v. Doe, 457 U.S. 202, 221 (1982); *see also* Dayton, *supra* note 80, at 627 ("The *Rodriguez* decision ended hopes for a U.S. Supreme Court public school funding equity mandate of national scope.").

84. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965). In the equal protection setting, the Court has applied the right to privacy, which the *Griswold* Court first explicitly recognized as existing in the "penumbras" of several constitutional guarantees, *id.* at 484, to a narrow subset of laws that target reproduction, contraception, abortion, and marriage. NOWAK & ROTUNDA, *supra* note 11, § 14.26, at 915.

85. *See* Reynolds v. Sims, 377 U.S. 533, 560 (1964).

86. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (religion: establishment clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (religion: free exercise clause); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (assembly and petition); Near v. Minnesota, 283 U.S. 697, 707 (1931) (press) ; Stromberg v. California, 283 U.S. 359, 369 (1931) (speech).

87. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (holding that the Sixth Amendment right to counsel was a "fundamental safeguard[] of liberty . . . equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment"). *See generally* NOWAK & ROTUNDA, *supra* note 11, § 14.41, at 1081–85. The Fifth Amendment's right of an accused to a grand jury is the only of its rights not yet protected as fundamental under the Fourteenth Amendment. *Id.* at 1082.

88. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30–31 (1973) (citing Shapiro v. Thompson, 394 U.S. 618, 642 (1969)).

other interests are matters of economics or social welfare and thus will employ the rational relation test unless the challenged law involves classification of a suspect class.[89] The right to education, however, is among a small number of interests that may arguably receive heightened equal protection consideration, even though the Court has declined to classify them as "fundamental."[90]

As the plaintiffs in *Rodriguez* recognized, there is a significant argument that a better conclusion would include the right to education as a fundamental right to which the Court's strict scrutiny protection should apply. Indeed, the Court's own logic in its watershed *Brown* opinion seems to lead directly to that conclusion:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . 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.[91]

By this logic, the *Rodriguez* plaintiffs argued that education is a prerequisite to the full exercise of any number of the rights that the Court has deemed fundamental in its jurisprudence.[92] In addition, a number of states have recognized the fundamental nature of the right to education.[93] Further, the fundamental right of every person worldwide to an education is recognized throughout international law, perhaps most notably in Article 26 of the Universal Declaration of Human Rights.[94]

In *Rodriguez*, however, the Supreme Court refused to consider any of these rationales determinative. In his *Rodriguez* opinion, Justice Powell unequivocally asserted the Court's conviction regarding the importance of the right to education, affirming the appellate court's recognition of "the grave significance of education both to the individual and to our society"[95] and endorsing the sweeping language of *Brown*.[96] He refused, however, to take the critical next step, stating instead that edu-

89. NOWAK & ROTUNDA, *supra* note 11, § 14.42, at 1085–86.

90. *Id.* at 1086.

91. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

92. *See Rodriguez*, 411 U.S. at 35.

93. *See, e.g.*, Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

94. *See* Universal Declaration of Human Rights art. 26, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. DOC. A/810 (Dec. 10, 1948); *see also* Vijayashri Sripati & Arun K. Thiruvengadam, *India: Constitutional Amendment Making the Right to Education a Fundamental Right*, 2 INT'L J. CONST. L. 148, 149 (2004).

95. *Rodriguez*, 411 U.S. at 30.

96. *Id.* at 29–30.

cation's social or individual significance, no matter how grave, could not qualify it as a fundamental right where the Constitution did not make that status plain.[97] The Court's refusal in *Rodriguez* and subsequent decisions to classify the right to education as fundamental has left school funding equal protection plaintiffs without access to strict scrutiny review and searching for avenues around *Rodriguez* and into federal court.

2. Limiting Rodriguez*:* Plyler v. Doe*[98] and* Papasan v. Allain*[99]*

The taxing standard imposed by the *Rodriguez* decision on would-be school funding plaintiffs is unmistakable. The Court's subsequent rulings, however, indicate that there exist categories of equal protection school funding challenges that may lie beyond the reach of *Rodriguez*. One of these is *Plyler v. Doe*. In *Plyler*, the Court invalidated on equal protection grounds a Texas law that denied public school access to the children of illegal aliens.[100] The Court, seeming to employ its intermediate level of scrutiny, reached this result without finding that the law involved a suspect classification or targeted a fundamental right.[101] Given the singular nature of the claim presented in *Plyler*, however, it seems likely that the decision's practical impact and chances to extend its use of intermediate scrutiny will be sharply limited.[102] Nonetheless, as will be further discussed below, the door to equity challenges may remain cracked.[103]

For at least some potential charter school funding plaintiffs, the Court's ruling in *Papasan v. Allain* may offer an even more plausible opportunity. In *Papasan*, the plaintiffs challenged the state of Mississippi's determination to distribute unequally funds from the state's "Sixteenth Section" lands in a manner that denied the funds altogether to certain districts.[104] The Court, in an opinion written by Justice White, held that the district and appellate courts had improperly dismissed the equal protection claim under *Rodriguez*.[105] Although its determination that the courts below had improperly applied *Rodriguez* prevented the Court from conducting any formal equal protection analysis, the opinion none-

97. *Id.* at 30–34.
98. 457 U.S. 202 (1982).
99. 478 U.S. 265 (1986).
100. *Plyler,* 457 U.S. at 230.
101. *See id.* at 219, 221.
102. Arguably, the application of *Plyler* could be limited to plaintiffs claiming that the state has "den[ied] a discrete group of innocent children . . . free public education." *Id.* at 230. For a discussion of the implications of *Plyler* for the Court's intermediate scrutiny analysis, see NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 688–89.
103. *But see* Dayton & Dupre, *supra* note 31, at 2369 (arguing that the "crack in the federal door" was closed by the Court's decision in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), which held that denying access to bus transportation to public school did not violate an indigent plaintiff's equal protection rights).
104. *Papasan*, 478 U.S. at 287–88.
105. *Id.* at 292.

theless marked an unmistakable limit on the reach of *Rodriguez*. Stating that "*Rodriguez* did not . . . purport to validate all funding variations that might result from a State's public school funding decision,"[106] Justice White went on to distinguish the *Papasan* claim from that in *Rodriguez*:

> 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 the 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 the disparities alleged in this case . . . .[107]

Thus, without varying its equal protection analysis as applicable to a school funding plaintiff, *Papasan* provides guidance for stating a viable equal protection claim against a school funding regime even where a plaintiff is unable to invoke the Court's intermediate scrutiny.[108] The *Papasan* Court particularly focused on the fact that the funding inequity challenged by the plaintiff's claim involved the State's discretionary distribution of State funds.[109] Justice White held that the disparity challenged in *Papasan* resulted from "a state decision to divide state resources unequally among school districts."[110] For the *Papasan* majority, the Court's holding in *Rodriguez* was inapplicable to a challenge of a state's discretionary withholding from some public schools of an entire revenue stream available to other public schools.[111] The limitation carved out in *Papasan* is one from which charter school plaintiffs may be able to benefit.

The ability of any student, parent, or other charter school plaintiff to state a viable claim under this regime, of course, will largely depend on the particular factual allegations that she can make regarding the

106. *Id.* at 287.

107. *Id.* at 288 (emphasis added).

108. The Court's ruling in *Papasan* has also been credited for sparking another line of school funding challenges based on equal protection grounds: adequacy challenges. *See* Dayton & Dupre, *supra* note 31, at 2391–92. Adequacy challenges typically seize on language from *Rodriguez* in which the Court conceded that while the Constitution does not protect education as a fundamental right, "some identifiable quantum of education" might be protected. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973). Although the Court in *Papasan* found insufficient the allegation that the Mississippi funding structure deprived the plaintiffs of such a minimally adequate education, *Papasan*, 478 U.S. at 286, funding challenges since *Papasan* have increasingly relied on this theory with mixed results. *See* Dayton & Dupre, *supra* note 31, at 2393–94. While adequacy challenges may be a useful strategy for some plaintiffs, it seems unlikely that many charter school plaintiffs could easily state the sort of claim that could meet the Court's challenge to the *Papasan* plaintiffs: to show "that schoolchildren . . . are not taught to read or write [or] that they receive no instruction even in the educational basics." *Papasan*, 478 U.S. at 286.

109. *See Papasan*, 478 U.S. at 288.

110. *Id.*

111. *See id.* at 287–88. Where the decision involved an entire funding source, the significance of the withheld funds relative to the overall funds was not important. *See id.* at 288 n.18.

funding of the charter school. To come within the exception to *Rodriguez* identified in *Papasan*, a plaintiff needs to identify some revenue stream generally available to some or most public schools that is denied to plaintiff's school by a State decision. Where a charter school plaintiff successfully alleges such a decision as the source of the funding inequity, *Papasan* indicates that she will survive a motion to dismiss based on *Rodriguez*. It remains, therefore, to consider those characteristics of charter schools that will be relevant to any charter school plaintiff's equal protection funding challenge, including the precise nature and extent of the funding inequity in question.

B. Charter Schools and Equal Protection Challenges

When a charter school plaintiff challenges a school funding regime based on the equal protection guarantee of the Fourteenth Amendment, courts should consider a number of characteristics of the particular charter school. Obviously, the most significant of these will often be the precise contours of the challenged funding scheme, particularly the sources and the degree of the allegedly disparate funding. The primary goal of this section, therefore, is to detail how and to what extent charter schools are being underfunded.

1. "Inequity's Next Frontier"?: Funding Disparities in Charter Schools

Given the structural realities of charter school funding described previously,[112] perhaps it should not be surprising that concerns of widespread underfunding have long attended the charter school movement.[113] Charter school advocates argue that charter schools in many states are often funded at lower levels than are other public schools.[114] Recently, reports highlighting two specific aspects of this alleged underfunding have given rise to heightened concerns that some funding regimes may violate the demands of equal protection: the alarming extent of the disparity that seems to exist in some jurisdictions, and, perhaps more significantly, the sources of the disparity.

112. *See* discussion *supra* Part II.B.2.

113. *See generally* FORDHAM STUDY, *supra* note 6.

114. *But see, e.g.*, GREEN & MEAD, *supra* note 38, at 59–60 (noting that charter school funding in a number of states is at 100% of public school funds); WEIL, *supra* note 4, at 67–68 (noting the arguments made by the American Federation of Teachers that charter schools create a general drain on school funds).

a. The Degree of Disparity: Funding Gaps in Per-Pupil Spending

A 2005 report published by the Thomas B. Fordham Institute titled *Charter Schools: Inequity's Next Frontier*,[115] offers a stark picture of charter school funding shortages.

The data collected as part of the Fordham study indicated that for the seventeen jurisdictions covered, there was a significant and nearly ubiquitous shortfall in the overall per-pupil revenues available to charter schools as opposed to district schools.[116] Table 1 below, reproduced from the Fordham report, compares the per-pupil revenues of district schools to those of charter schools in each of the jurisdictions studied. Only one state, Minnesota, provided greater levels of funding to its charter schools than to its district schools, while the other sixteen jurisdictions provided funding to their charter schools at lower levels than they did to their district schools.[117] Measured in this way, the underfunding ranged from a disparity of 4.8% to 39.5%, with ten of the sixteen underfunding jurisdictions showing disparities that exceeded 20%.[118] The mean variance among the seventeen jurisdictions was a funding disparity of 21.7%, with the aggregate disparity totaling over one billion dollars.[119]

TABLE 1
STATE DISPARITIES BETWEEN CHARTER AND DISTRICT FUNDING, 2002–03[120]

State	District PPR	Charter PPR	Variance	% Variance
Minnesota	$10,056	$10,302	$245	2.4%
New Mexico	$9,020	$8,589	($430)	-4.8%
North Carolina	$7,465	$7,051	($414)	-5.5%
Florida	$7,831	$6,936	($896)	-11.4%
Michigan	$9.199	$8,031	($1,169)	-12.7%
Texas	$8,456	$7,300	($1,155)	-13.7%
Colorado	$10,270	$8,363	($1,908)	-18.6%

(*Continued on next page*)

115. FORDHAM STUDY, *supra* note 6.

116. The study focused on sixteen states and the District of Columbia. FORDHAM STUDY, *supra* note 6, at 135. These jurisdictions were selected either on the basis of the length of time that the charter laws had been in force or the relative concentration of charter schools in the jurisdiction. *Id.* The data compiled as a part of the survey was collected directly through the individual states, and with respect to the revenue data, the study included all revenues including one-time startup funds provided to charter schools. *Id.* at 135–36. Although the report notes concerns over the "maze of web sites, audits, and other information" relied upon for the data, *id.* at 136, the level of detail available from state sources made it the preferable source, *id.* at 135, and the report is careful to note those states for which data was not readily forthcoming. *See, e.g.*, *id.* at 16 tbl.11 (cataloging the "data quality" by state).

117. *Id.* at 1; *see infra* tbl.1.

118. FORDHAM STUDY, *supra* note 6, at 1.

119. *Id.* at 2.

120. Table reproduced from FORDHAM STUDY, *supra* note 6, at 1 tbl.1.

TABLE 1—*Continued*

State	District PPR	Charter PPR	Variance	% Variance
Arizona	$8,503	$6,771	($1,732)	-20.4%
New York	$13,291	$10,548	($2,743)	-20.6%
Washington, D.C.	$16,117	$12,565	($3,552)	-22.0%
Illinois	$8,801	$6,779	($2,023)	-23.0%
Missouri	$12,640	$9,003	($3,638)	-28.8%
Wisconsin*	$10,283	$7,250	($3,034)	-29.5%
Georgia*	$7,406	$5,125	($2,281)	-30.8%
Ohio*	$8,193	$5,629	($2,564)	-31.3%
California*	$7,058	$4,835	($2,223)	-31.5%
South Carolina*	$8,743	$5,289	($3,453)	-39.5%
State Averages	**$8,504**	**$6,704**	**($1,801)**	**-21.7%**

Of arguably equal significance in light of the racial and socioeconomic segregation that exists in many charter schools[121] is the finding that the funding disparity was greater for charter schools located in large urban areas. Of the twenty-seven "large districts" studied, only one, Albuquerque, New Mexico, provided greater funds to charter schools than to its district schools. The other twenty-six large districts demonstrated funding disparities, with seventeen of them at a rate greater than 20%.[122] The mean percent variance among the twenty-seven "large districts" was a funding disparity of 23.5%.[123]

b. The Sources: Lack of Access to State Facilities Funds

In addition to quantifying the disparities, the Fordham study explored the sources of the underfunding. The study identified four basic sources of charter school revenues: federal, state, local, and facilities funds.[124] The role played by private funds in charter school funding was considered in the study, but it was not included in the analysis of funding disparities.[125] With respect to these four categories, the study qualified

121. *See* discussion *infra* Part III.B.2.b.

122. *See* FORDHAM STUDY, *supra* note 6, at 2–3 tbl.2. Of these twenty-six large districts, the smallest disparity occurred in St. Paul, Minnesota, at 9.1%, while the greatest occurred in San Diego, California, at 40.4%. *Id.* at 2 tbl.2. The report does not define by what criteria a "large district" was determined.

123. *Id.* at 3.

124. *Id.*

125. Private loans and donations, of course, could well be a significant factor in any full assessment of the true extent of the charter school funding picture. *See* UCLA STUDY, *supra* note 48, at 35–39. Arguably, if the availability of private money were great enough to cover whatever disparity existed from other sources, the unequal funding argument would disappear. Charter school advocate groups, including the Fordham Institute, do not argue that private money is somehow fundamentally

the level of access enjoyed by a state's charter schools to each as either "full access," "partial access," or "no access."[126]

As seen in Table 2, the picture that emerges of the access to funds by revenue source indicates that the funding difficulties experienced by charter schools often arises from deficiencies in multiple sources. With respect to the first two categories, federal and state funds, the report characterized the access of charter schools in about half the states as full and in the other half as partial.[127] The situation with respect to local and facilities funds was even less promising. For local funds, charter schools in eleven of the jurisdictions enjoyed only partial access, while four had no access.[128]

Facilities funds, however, are the source to which charter schools enjoy the least access. Of the surveyed jurisdictions, only five had partial access and twelve, a full two-thirds, had no access.[129] No surveyed jurisdiction enjoyed full access. Given the significance of this funding stream to many schools, the near denial of all facilities and capital funding is widely recognized as the most acute problem facing many charter schools.[130]

TABLE 2
NUMBER OF STATES PROVIDING ACCESS TO SPECIFIC REVENUE SOURCE[131]

Type of Funding	Full Access	Partial Access	No Access	Not Applicable
FEDERAL	7	9	0	1
STATE	9	8	0	0
LOCAL	0	11	4	2
FACILITIES	0	5	12	0

Of the myriad costs that confront individuals hoping to open and operate a charter school, few are of more significant concern than the costs of opening and operating the facility.[132] Meeting facility costs such as building codes, insurance issues, and other local regulations in the process of preparing a physical structure for use as a charter school building are only some of the daunting startup costs that charter operators must overcome.[133] Rent and renovation costs are also an unavoidable

different and, therefore, not appropriate for consideration in the calculus, but rather that the amount of private funds is simply inadequate as a quantitative matter to alter the calculus significantly. For discussion of the impact of private funds, see *supra* notes 49–51 and accompanying text.

126. *See* FORDHAM STUDY, *supra* note 6, at 11.
127. *See id.* at 12 tbl.8.
128. *See id.*
129. *See id.*
130. *Id.* at 13.
131. Table reproduced from FORDHAM STUDY, *supra* note 6, at 3 tbl.3.
132. *See* WEIL, *supra* note 4, at 66.
133. *Id.*

part of every charter school's ongoing expenses.[134] Facilities funding is thus critical to the operation of most charter schools.[135]

As documented by multiple studies, including the Fordham study, many charter schools lack access to regular facility funds. Typically, public school districts cover facility costs by selling tax-exempt bonds, accessing funds from local taxes, or collecting state appropriations.[136] In a report to Congress in 2000, the U.S. General Accounting Office stated that charter schools often could not access these sources of facilities funding because they operated outside the school district[137] and that, while alternative sources for such funding existed, they were typically inadequate to meet facility needs.[138] According to this report, the primary alternative source for many charter schools was the per-pupil allotments from the district and the state.[139] The GAO findings regarding the scarcity of facility funds for charter schools were consistent with those made in 2005 by the Fordham Institute, who reported that in practice only five of the seventeen jurisdictions surveyed enjoyed even partial access to district and state facility funds, while the other eleven had no access to these funds.[140] Thus, the Fordham report concluded that it was "very uncommon" for states to provide fair access to facility funds for charter schools.[141] Ultimately, it is this aspect of the funding disparity, the complete and discretionary denial of an entire class of funds, that may prove key in stating a winning equal protection claim.

2. Other Charter Characteristics Relevant in an Equal Protection Claim

Although the degree and sources of the funding disparity are sure to be the central focus of a charter school plaintiff's claim, other charter school characteristics may also prove relevant in an equal protection challenge. For many plaintiffs, two of the most significant of these will be the charter school's status as a public school and the school's demographic makeup.

134. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, CHARTER SCHOOLS: LIMITED ACCESS TO FACILITY FINANCING 13 (2000) [hereinafter GAO REPORT].

135. *See id.*; FORDHAM STUDY, *supra* note 6.

136. GAO REPORT, *supra* note 134, at 8.

137. *Id.* at 9–10.

138. *Id.* at 13–16. The alternative sources discussed included private loans, which are unavailable to many charter schools whom private lenders consider credit risks, *id.* at 14, two federal assistance programs, *id.* at 15, and private donations, *id.* at 16.

139. *Id.* at 12–13.

140. FORDHAM STUDY, *supra* note 6, at 12 tbl.8. The report also found that seven states allowed charter school access to facility funds by statute, but that none of these provided full access in practice, and that two of these, Arizona and California, provided no access whatsoever. *Id.* at 12.

141. *Id.* at 13.

a. Public or Private?

Whether they are nontraditional or public/private hybrids, the novel structure of charter schools has prompted serious inquiry as to whether they are genuine public schools. Such concerns are significant in an equal protection challenge because, as articulated above, raising an equal protection challenge requires that the plaintiff show that she is similarly situated to those receiving preferential funding.[142] Thus, an equal protection challenge to a state public school funding regime could not proceed where the charter school fails to meet the definition of a public school.

At first glance, charter schools seem to exhibit certain key characteristics typically associated with both public and nonpublic schools. Like public schools, charter schools are open to all students, are fully accountable to the state educational structure, and do not charge tuition.[143] Like many private schools, however, charter schools, though accountable for their results, are free to adopt independent means to achieve such results.[144] Additionally, as with students in private schools, students attend charter schools because they choose to do so, not because of any geographic boundary or district policy.[145]

Beyond these general observations, the "public" status of charter schools has come under scrutiny in a number of ways. Most fundamentally, charter schools may be vulnerable to challenges as private or nonpublic under state constitutions. In several states, opponents have challenged charter schools as being fundamentally distinct from other public schools under state constitutional provisions.[146] In challenges, state appellate courts have held that charter schools as created under the specific statute in question were sufficiently "public" to survive the challenge.[147] For these courts the key inquiry was the degree of the state government's ultimate control by virtue of the charter school's accountability to the state.[148]

In addition to concerns regarding state constitutions, charter schools may face challenges to their public status due to their function as nonprofit or for-profit entities. Although the charter statutes in most states require the operation of charter schools as nonprofit entities, there are

142. NOWAK & ROTUNDA, *supra* note 11, § 14.2, at 682 ("The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government.").

143. FINN ET AL., *supra* note 4, at 15. With regard to tuition, there are only three states that do not expressly prohibit charter schools from charging tuition, while three others actually allow charter schools to charge tuition but only in circumstances under which any public school could do so. Mead, *supra* note 34, at 367.

144. FINN ET AL., *supra* note 4, at 15.

145. *Id.*

146. *See* GREEN & MEAD, *supra* note 38, at 31–35.

147. *Id.*

148. *Id.* For a thorough treatment of the blurry statutory lines that often mark charter schools as public schools, see Mead, *supra* note 34.

five states with enabling statutes that contain no such restrictions.[149] Charter schools in each of these five states may be operated on a for-profit basis.[150] Though there have not been any rulings on whether such a for-profit structure defeats a charter school's status as a public school, in 2003, the Department of Education withheld federal funds from for-profit charters in Arizona under Title I and the Individuals with Disabilities Education Act on this ground.[151] Even in states that require charter schools to maintain themselves as nonprofits, the charter schools may contract with for-profit companies for the operation and management of the schools.[152] Courts that have considered challenges to the nonprofit status of schools operated by for-profit companies have primarily sought to determine whether the operation of the school was sufficiently independent from the for-profit company to meet the state's nonprofit requirement.[153]

These concerns regarding the good claim of any given charter school to "public" status must be considered by any would-be charter school plaintiff seeking to state a good equal protection challenge. They may, as noted above, be fatal to plaintiffs who are unable to demonstrate that the charter school in question is indeed public.

b. Demographic Composition of the Charter School

Another potentially important characteristic of a charter school challenge to a school funding regime is the racial and economic patterns of the student population served. Such patterns are relevant because, as described above, a federal court will subject the challenged funding practice to the strict scrutiny test if the plaintiff can show that the practice differentiates on the basis of a "suspect" classification.[154] The Supreme Court's decision in *Plyler* demonstrated, however, that student plaintiffs who are members of a vulnerable group, even if not of a "suspect class," can influence the Court to evaluate using its intermediate level of scrutiny.[155]

149. GREEN & MEAD, *supra* note 38, at 24 (noting that the statutes of Arizona, Colorado, New York, Virginia, and Wisconsin contain no requirement of charter school nonprofit operation).

150. *Id.*

151. U.S. DEP'T OF EDUC., OFFICE OF INSPECTOR GEN., FINAL AUDIT REPORT No. ED-OIG/A05-D0008, at 1, 4 (2003).

152. *See* GREEN & MEAD, *supra* note 38, at 24–26.

153. *See id.* at 25–26.

154. Thus, though no Supreme Court school funding challenge has involved such a claim, if a charter school plaintiff could show that the funding regime differentiated between the charter school and other schools on the basis of the racial identity or national origin of the student population, then the state would have to satisfy the strict scrutiny test. *See* NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 687–88.

155. Plyler v. Doe, 457 U.S. 202, 220 (1982) (stating that although the children, as illegal aliens, were not members of any "suspect" class, the statute that "impose[d] its discriminatory burden on the basis of a legal characteristic over which children can have little control" was one for which "[i]t is . . . difficult to conceive of a rational justification").

In terms of both socioeconomic and racial characteristics, the demographic makeup among charter schools varies widely from state to state and school to school. The Fordham study, for example, found that "[i]n most states, charter schools serve a comparable or higher percentage of students eligible for free and reduced price lunches than district schools."[156] Another national study estimated that as compared to other public schools, charter schools enroll a significantly higher percentage of African-American students (33% to 17%) and a significantly lower percentage of white students (43% to 59%).[157] The same study further observed that charter schools were often racially segregated—particularly for black charter school students, 70% of whom were found to attend charter schools where the student population was between 90% and 100% minority.[158] Although such data support the conclusion that charter schools may exacerbate racial segregation,[159] in an equal protection challenge, they may allow students in schools with largely minority student populations to gain some traction.

IV. RESOLUTION: WINNING A SCHOOL FUNDING CHALLENGE

Raising a successful challenge to a school funding regime under the Supreme Court's present equal protection jurisprudence is indeed a daunting proposition.[160] Nonetheless, as the *Plyler* and *Papasan* decisions demonstrate, it is possible for school funding litigants to succeed even under the Court's rule in *Rodriguez*.[161] Having considered both the standard of law that a litigant raising such a claim faces and the relevant aspects of charter school funding that might support this claim, the resolution below identifies and evaluates three distinct avenues along which a charter school plaintiff bringing an equal protection funding challenge in federal court might successfully proceed: (1) seeking to persuade a federal court to employ the strict scrutiny standard by arguing education as a fundamental right, (2) showing that the challenged system and the characteristics of the plaintiff warrant intermediate scrutiny as applied in

156. FORDHAM STUDY, *supra* note 6, at 7. For a catalog of state-by-state percentages of eligible students in both charter and district schools, see *id.* at 8. Eligibility for free or reduced price lunches is one common marker of the extent to which any given school or district serves student populations from lower family income ranges. As noted in this study, however, the decision by some charter schools not to participate in collecting this information may significantly undermine the data's reliability. *Id.* at 7.

157. ERICA FRANKENBERG & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., CHARTER SCHOOLS AND RACE: A LOST OPPORTUNITY FOR INTEGRATED EDUCATION 22–23, 23 tbl.2 (2003).

158. *Id.* at 23 tbl.3, 23–24.

159. *See* Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 802 (2005). *See generally* FRANKENBERG & LEE, *supra* note 157.

160. *See* Dayton & Dupre, *supra* note 31, at 2382 (characterizing *Rodriguez* as having "put an end to claims based on the federal constitution").

161. *See* Papasan v. Allain, 478 U.S. 265, 288–89 (1986); Plyler v. Doe, 457 U.S. 202, 230 (1982); discussion *supra* Part III.A.2.

Plyler, and (3) asserting that the funding disparity under the challenged system falls within the limited exception to *Rodriguez* identified by the *Papasan* court. This note concludes that while the first two options are unlikely to be available, the *Papasan* exception may offer many charter schools solid footing from which to bring a federal equal protection claim.

A. A Lost Cause?: Education as a "Fundamental Right"

Any plaintiff raising an equal protection challenge will stand the greatest chance of success where the court applies its strict scrutiny review.[162] This requires, however, that the court determine either that the challenged law impinges on a fundamental right or that it classifies persons for disparate treatment on the basis of a "suspect" classification.[163] In the context of school funding challenges in federal court, the *Rodriguez* determination that education is not a fundamental right[164] and that wealth is not a suspect classification[165] practically forecloses any opportunity of convincing a federal court to employ strict scrutiny.

This is not to say, however, that litigants should abandon the effort to persuade the federal courts that the right to education is fundamental. Given the Supreme Court's recognition of the significance of an individual's interest in obtaining an education[166] and its willingness, under certain conditions, to employ its intermediate standard of review for a claimed infringement on the right to an education,[167] it is clear that education is among those rights which have been the "subject of great debate as to their constitutional significance."[168] Moreover, the Court's remarkably sweeping recognition of the importance of education in *Brown v. Board of Education*[169] seems to support the argument that, for at least that moment, the Court stood ready to recognize the fundamental nature of the interest in education. The widespread recognition of education as a fundamental right in the legal systems of states[170] and in international

162. *See* discussion *supra* Part II.C.

163. *See* NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 687.

164. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

165. *Id.* at 28–29.

166. Borrowing often from the language and tenor of its landmark *Brown* ruling, *see supra* note 57, the Court generally characterizes the significance of the interest in education in the most expansive terms. *See, e.g.*, *Rodriguez*, 411 U.S. at 29 (noting that *Brown*'s characterization of education as "'perhaps the most important function of state and local governments' . . . has lost none of its vitality with the passage of time" (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954))).

167. *See* Plyler v. Doe, 457 U.S. 202, 220 (1982); *see also* NOWAK & ROTUNDA, *supra* note 11, § 14.3, at 689 (listing the Court's analysis in *Plyler* among the limited examples of the Court's intermediate test).

168. NOWAK & ROTUNDA, *supra* note 11, § 14.42, at 1086.

169. *See supra* note 57.

170. *See, e.g.*, Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

law[171] additionally militates in favor of the Court's reconsidering its refusal to find education to be a fundamental right.

Despite these arguments, however, the Court has not indicated that it is willing to reconsider its present position regarding education. Until the Court does come to such a conclusion, school funding challenges in federal court, including those lodged against funding regimes alleged to discriminate against students in charter schools, will have to succeed, if at all, without the benefit of the strict scrutiny test.

B. Winning Under Intermediate Review

Even without access to the strict scrutiny standard, however, the Supreme Court's decision in *Plyler v. Doe* may offer the charter school funding litigant some hope of successfully triggering the Court's intermediate standard. Though not as demanding as the strict scrutiny test, this "heightened scrutiny" allows the court to independently inquire into the relationship between the state interest in the challenged practice and the burden that it imposes. Although it is arguable that a properly positioned charter school plaintiff could frame her claim to fall within the language of *Plyler*, it seems more likely that with respect to school funding litigants, *Plyler* will be limited to its facts.

To place herself within *Plyler*'s holding, a charter school litigant would have to present a claim mirroring the unique circumstances in that case. The language of the Court supported the conclusion that the key element in deciding to employ the heightened standard was the fact that the Texas law prohibited any access to education to a particularly sympathetic group: the children of illegal immigrants.[172] The question then becomes whether a charter school plaintiff could state a similar claim. Although not beyond doubt, it is unlikely given the set of conditions described in this paper that a charter school plaintiff would be able to successfully invoke the *Plyler* intermediate review of a funding scheme.

Given the high levels of segregation that characterize many urban charter schools,[173] it may be that a properly situated plaintiff could articulate a claim that would present the court with a similar party-based consideration as that in *Plyler*. A court might well find that students at a heavily minority charter school were particularly vulnerable in the same sense as the *Plyler* plaintiffs. This possibility notwithstanding, however, no charter school litigant would be able to allege that the challenged funding regime results in the complete denial of the benefits of education. The challenged Texas law in *Plyler* withheld all state funds for the

171. *See supra* note 94 and accompanying text.

172. *See Plyler*, 457 U.S. at 219–20 (stating that "[t]he children who are plaintiffs in these cases are special members of this underclass [of illegal aliens]" and noting that "directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice").

173. *See* discussion *supra* Part III.B.2.b.

education of the children and authorized denying them enrollment at all.[174] The closest that a charter school litigant could come to such an allegation would be to point to a funding scheme that denied a complete category of funds, such as the denial of facility funds that occurs in many states.[175] Because the language of *Plyler* forecloses its application except where a complete denial of education is involved,[176] this allegation would be insufficient to invoke the intermediate scrutiny standard.

C. Surviving Rational Basis: The Papasan *Exception to* Rodriguez

Thus, the Court's equal protection jurisprudence makes it unlikely that a charter school plaintiff could invoke either strict or intermediate scrutiny to challenge a school funding scheme. Its opinion in *Papasan v. Allain*, however, may provide an avenue to a viable equal protection funding challenge that charter school plaintiffs are uniquely well positioned to access at present. In the literature, *Papasan* has regularly been lauded as having first recognized and given vitality to the language from *Rodriguez* indicating that "some identifiable quantum of education" may be constitutionally fundamental.[177] While the so-called adequacy challenges that arise from this language are significant aspects of the equal protection landscape, they are claims that are ill suited for most charter school plaintiffs.[178] In fact, the *Papasan* plaintiffs themselves were unable to show the "radical denial of educational opportunity" that the Court demanded for this sort of claim.

The window of opportunity that the *Papasan* Court opened for charter school plaintiffs is not, however, related to whatever implications its ruling may have had for adequacy claims, but rather to the concrete language by which it affirmatively limited the reach of *Rodriguez*. Initially recognizing that "*Rodriguez* did not . . . purport to validate all funding variations that might result from a State's public school funding decisions," the Court in *Papasan* went on to identify a specific class of funding decisions to which *Rodriguez* was inapplicable: those involving "a state decision to divide state resources unequally among school dis-

174. *Plyler*, 457 U.S. at 205.

175. *See* discussion *supra* Part III.B.1.b .

176. *See Plyler*, 457 U.S. at 223 ("But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

177. *See* Dayton & Dupre, *supra* note 31, at 2391–92; NOWAK & ROTUNDA, *supra* note 11, § 14.45, at 1093 n.8. *Papasan* has thus been credited with giving rise to the line of "adequacy" equal protection challenges to school funding regimes. *See* Dayton & Dupre, *supra* note 31, at 2391–93; *supra* note 108.

178. For a discussion of adequacy challenges, see *supra* note 108. *See also* Dayton & Dupre, *supra* note 31, at 2391–93.

tricts."[179] The rational basis justifying the funding regime in *Rodriguez*, according to the Court in *Papasan*, had been "that funding disparities based on differing local wealth were a necessary adjunct of allowing meaningful local control over school funding."[180] The Court distinguished the funding determination challenged in *Papasan* as involving a discretionary allocation of state funds by state officials and thus held it beyond the protection of the local control justification in *Rodriguez*.[181]

Papasan stands for the proposition that where a discretionary decision results in an absolute deprivation of a category of state funds to the detriment of some identifiable class of schools and their students, the challenged funding regime is beyond the holding in *Rodriguez*. A school funding claim stating such an allegation should survive the pleading stage and require that the state demonstrate some rational basis for its decision other than the local control justification relied upon in *Rodriguez*. In light of the extent of underfunding faced by charter schools throughout the country—particularly the absolute deprivation of entire categories of funding streams, most notably the facilities funds—many are particularly well positioned at present to state precisely such a claim.

Ultimately, the reach of this strategy may be limited by the procedural posture in which *Papasan* was decided. The Court in *Papasan* merely decided that the plaintiff's equal protection claims were sufficient to survive the rule in *Rodriguez*, and it remanded for further consideration of whether the funding determination in question had a rational basis.[182] For this reason, the opportunity identified in this note should not be overstated. *Papasan* allows a charter school that can allege a discretionary deprivation of an entire category of state funds to formulate a good equal protection claim in federal court. It would still remain for the plaintiff to demonstrate that the funding determination bore no rational relationship to a legitimate state interest. In light of the prevailing agreement among commentators that *Rodriguez* acted to essentially foreclose federal equal protection claims on funding grounds, an open door into federal court is a clear step toward vindicating the harm of funding schemes that disadvantage charter schools. Thus, the opportunity available under the *Papasan* exception, though not a panacea, is a significant one that may assist charter school advocates as they seek access to much needed state resources.

179. Papasan v. Allain, 478 U.S. 265, 287–88 (1986).

180. *Id.* at 288.

181. *Id.*

182. *Id.* at 292. Mississippi had argued that the funds in question were not distributed in a discretionary fashion but rather were distributed pursuant to the provisions of a federal trust agreement. *Id.* at 289.

V. CONCLUSION

Since the Supreme Court's ruling in *San Antonio Independent School District v. Rodriguez*, many have argued that school funding plaintiffs could not state a viable equal protection claim in federal court. The funding situation that many charter schools in the country face, however, may uniquely position them to take advantage of an exception to *Rodriguez* that the Court identified in its opinion in *Papasan v. Allain*. Specifically, the levels of underfunding that at least one report has found, combined with the complete deprivation of facilities funds that charter schools in many states must endure, seem to bring these charter schools squarely within the *Papasan* Court's ruling and provide them a much needed avenue into federal court.