

APPENDIX: TEXT AND PRECEDENT FOR
REPRESENTATIONAL ADEQUACY CLAIMS UNDER FIFTY
STATE CONSTITUTIONS

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This Appendix supplements the Article, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders* in the print edition of the *William & Mary Law Review*.¹ The Appendix provides, in tabular form, a state-by-state overview of textual and precedential toeholds for the “representational adequacy” claims that the article proposes and defends. The table indicates whether the state constitution features a “free and open” or “free and equal” elections clause; a guarantee of “equal voting power”; and specific prohibitions about undue favoritism or lack of competition in the design of legislative districts. It also notes whether school-finance plaintiffs have scored any victories, and whether the state’s courts have held any education claims nonjusticiable. Because nonjusticiability rulings are specific to a legal theory or requested remedy, a state may have experienced both plaintiff victories and nonjusticiability holdings in education cases. (I reference nonjusticiability holdings in the table not because they necessarily foreclose representational adequacy claims, but because they are precedents that would have to be distinguished.)

In the Article, I recommended bringing the initial representational adequacy claims in states with either (1) express limitations on favoritism in districting, or (2) generally worded electoral guaran-

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1. Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 WM. & MARY L. REV. 1601 (2018).

tees and favorable education precedents.² The twenty-two states that meet one or both of these criteria are highlighted.

State	Free & Open, Equal ³	Equal Voting Power ⁴	Districts: Undue Favoritism ⁵	Schools: Plaintiff Victory ⁶	Schools: Nonjusticiability ⁷
Alabama					✘ ⁸
Alaska				✓	
Arizona	✓		✓ ⁹	✓	
Arkansas	✓			✓	
California			✓ ¹⁰	✓	✘ ¹¹
Colorado	✓				
Connecticut				✓	
Delaware	✓		✓ ¹²		
Florida			✓ ¹³		✘ ¹⁴
Georgia					
Hawaii			✓ ¹⁵		
Idaho				✓	
Illinois	✓				✘ ¹⁶
Indiana	✓				✘ ¹⁷
Iowa					
Kansas				✓	
Kentucky	✓			✓	
Louisiana				✓	
Maine					
Maryland	✓			✓	
Massachusetts	✓	✓ ¹⁸		✓	
Michigan					✘ ¹⁹
Minnesota					
Mississippi					
Missouri	✓				✘ ²⁰
Montana	✓			✓	
Nebraska	✓				✘ ²¹
Nevada					

2. See *id.* Part III.D.

State	Free & Open, Equal ³	Equal Voting Power ⁴	Districts: Undue Favoritism ⁵	Schools: Plaintiff Victory ⁶	Schools: Nonjusticiability ⁷
New Hampshire	✓	✓ ²²		✓	
New Jersey				✓	
New Mexico	✓			✓	
New York				✓	
North Carolina	✓			✓	
North Dakota		✓ ²³		✓	
Ohio			✓ ²⁴	✓	
Oklahoma	✓				✗ ²⁵
Oregon	✓			✓ ²⁶	
Pennsylvania	✓			✓	✗ ²⁷
Rhode Island					✗ ²⁸
South Carolina	✓	✓ ²⁹		✓	
South Dakota	✓				
Tennessee	✓			✓	
Texas				✓	
Utah	✓				
Vermont	✓			✓	
Virginia	✓				
Washington	✓		✓ ³⁰	✓	
West Virginia		✓ ³¹		✓	
Wisconsin					
Wyoming	✓			✓	

3. Information in this column is from the Appendix in Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144-49 (2014). The reader is referred to Douglas's paper for citations to the state constitution in question.

4. Included here are constitutions that provide for an "equal right to elect," or something similarly evocative of equal voting power.

5. A check in this column indicates that the section of the state constitution addressing legislative districts spells out criteria or objectives that go beyond "traditional" notions about territorial community, compactness, and the minimization of political subdivision splits, which might be used to anchor representational adequacy claims about partisan/ideological symmetry or responsiveness. Several constitutions include specific protections for the voting power of racial or ethnic minorities, which are not referenced here because I do not see how they could support more general claims about representational adequacy.

6. A check in this column indicates that the state is currently coded as a “plaintiff victory” state or a “mixed” state per the website SchoolFunding.Info. *See Summary of School Funding Court Cases (1973-2017)*, SCHOOLFUNDING.INFO, <http://schoolfunding.info/litigation-map/> [<https://perma.cc/PE57-2P35>] (providing summaries of judicial decisions in each state). In a handful of the plaintiff victories, the court relied on an equity/equal protection theory rather than an adequacy theory. Because the line between “adequacy” and “equity” theories is indistinct, *see* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1187-88 (2003); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1233-36 (2008), and because a state court that reads the state constitution’s equal protection guarantee expansively in education cases might well do the same in representation cases (going beyond federal interpretations of equal protection under the U.S. Constitution in both domains), this Appendix does not distinguish equity and adequacy holdings.

7. States with the cautionary “✖” in this column are those whose courts have rejected at least one education rights claim on justiciability grounds. Bear in mind that some of these holdings might be distinguished in a future case, particularly if the plaintiff develops a “legislative duty” theory that does not require the court to pass on the actual quality of schools (or representation) in the context of the particular case. *See* Christopher S. Elmendorf & Darien Shanske, *Solving “Problems No One Has Solved”: Courts, Causal Inference, and the Right to Education*, 2018 U. ILL. L. REV. (forthcoming) (manuscript at 19-24). Additionally, in some other states, courts issued rulings for the defendant that, while not explained in justiciability/separation-of-powers terms, have the effect of foreclosing claims (such as, by adopting a conventional rational basis standard of review).

8. *Ex Parte* James, 836 So. 2d 813, 818-19 (Ala. 2002) (per curiam).

9. ARIZ. CONST. art. IV, pt. 2, § 1(14)(F) (“To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.”); *id.* § 1(15) (“Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.”).

10. CAL. CONST. art. XXI, § 2(e) (“The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.”).

11. *See* Vergara v. State, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016) (effectively applying rational basis review to state education code).

12. DEL. CONST. art. II, § 2A (stating that districts shall “not be so created as to unduly favor any person or political party”).

13. FLA. CONST. art. III, § 21(a) (“No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”).

14. *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 406-07 (Fla. 1996) (per curiam).

15. HAW. CONST. art. IV, § 6 (“No district shall be so drawn as to unduly favor a person or political faction.”).

16. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1192-93 (Ill. 1996).

17. *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009).

18. MASS. CONST. pt. 1, art. IX (“[T]he inhabitants of this commonwealth ... have an equal right to elect officers, and to be elected, for public employments.”).

19. *See Mich. Educ. Ass'n v. Superintendent of Pub. Instruction*, 724 N.W.2d 478 (Mich. Ct. App. 2006) (dismissing challenge to state education fund expenditure for lack of standing).

20. *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 488, 494 (Mo. 2009).

21. *Neb. Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman*, 731 N.W.2d 164, 180-83 (Neb. 2007).

22. N.H. CONST. pt.1, art. XI (“[E]very inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.”).

23. N.D. CONST. art. IV, § 2 (“The legislative assembly shall guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates.”).

24. OHIO CONST. art. XI, § 6(A) (“No general assembly district plan shall be drawn primarily to favor or disfavor a political party.”).

25. *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1065-66 (Okla. 2007).

26. Though not coded as “plaintiff victory” or “mixed” by SchoolFunding.Info, I have so coded Oregon here because the state’s supreme court did in fact rule for the plaintiffs on the constitutional sufficiency of school funding. *See Pendleton Sch. Dist. 16R v. State*, 200 P.3d 133 (Or. 2009). At the remedy stage, however, the court relied on an unusual provision of the state constitution that restricted school-finance remedies to the issuance of a report. *See id.* at 142, 145.

27. *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 113-14 (Pa. 1999).

28. *City of Pawtucket v. Sundlun*, 662 A.2d 40, 56-57 (R.I. 1995).

29. S.C. CONST. art. I, § 5 (“[E]very inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.”).

30. WASH. CONST. art. II, § 43(5) (“The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.”).

31. W. VA. CONST. art. II, § 4 (“Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved.”).