

Last Place: Is Arizona Due for School Finance Litigation?

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INTRODUCTION

Arizona has a school funding problem. Arizona schools receive less funding per pupil than schools in any other state.² While correlation is not causation, graduation rates are the lowest in the country.³ Under the pressure of teacher strikes and voter initiatives, the state legislature has finally made small moves to rectify Arizona's chronic underfunding of public schools.⁴ Still, Arizona has a long way to go if its students are going to be able to thrive in the modern world. Of course, the people in the best position to do something about this problem are the state legislators, but they are either unwilling or politically unable to make reforms. While voters and interest groups continue to vie for change in the political space, there is another tool that can be used to compel the legislature to act, one that has been used in Arizona before. That tool is school finance litigation—seeking relief from the Arizona Supreme Court under the authority of the state constitution to compel the legislators to live up to the constitutional requirement that they provide a system of "general and uniform" schools.⁵

This paper examines the prospects of school funding litigation in Arizona in light of its precedents and political climate. There has been little action on this front in the state since 2004. For ten years, between 1994 and 2004, the Arizona Supreme Court took an active position in the school funding controversy, repeatedly having found the legislature's attempts at school finance reform noncompliant with the

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1. The facts and statistics cited in this paper are true as of the time of writing. Some updates to the state rankings and funding data that have occurred since May 2023 have not been incorporated.

2. DANIELLE FARRIE & DAVID G. SCIARRA, EDUC. L. CTR., MAKING THE GRADE 9 (2022), <https://edlawcenter.org/assets/files/pdfs/publications/Making-the-Grade-2022-Report.pdf>.

3. See Sarah Wood, *See High School Graduation Rates by State*, U.S. NEWS & WORLD REP. (Dec. 1, 2023, 10:11 AM), <https://www.usnews.com/education/best-high-schools/articles/see-high-school-graduation-rates-by-state>.

4. See *Arizona School District Spending—Fiscal Year 2021—Analysis and Data File*, ARIZ. AUDITOR GEN. (Mar. 1, 2022), <https://www.azauditor.gov/reports-publications/school-districts/multiple-school-district/report/arizona-school-district-8>.

5. ARIZ. CONST. art. XI, § 1.

Arizona Constitution, saying that the funding system itself created disparities.⁶ Then the court took a sudden shift, choosing to defer to the legislature's judgment on the issue.⁷

This consistent new stance has surely discouraged would-be school finance litigators from bringing suit in Arizona. In this paper, I argue that despite a withdrawn state supreme court, there remain open legal doors in this area. While the Arizona Supreme Court has never actually decided the issue of whether the school system violates the state equal protection clause, I do not see this as the most fertile ground for new claims. More promising are adequacy arguments claiming that the system as a whole does not meet the constitutional standard, possibly incorporating race-based claims.

Currently, political change is more likely than it has been in decades. From the 2018 *Red for Ed* strike,⁸ to the passage of Proposition 208, to the election of Arizona's first Democratic governor since 2009,⁹ there is a political and social pressure building in Arizona around school finance.¹⁰ Still, reform may yet prove elusive, as the incumbent party remains in control of both houses of the state legislature. This paper argues that now may be an opportune time to bring school finance litigation claims, not because the 100% Republican-nominated supreme court is particularly likely to respond to social and political pressures, but because even a negative ruling could push the political momentum past the tipping point.

6. See *Roosevelt Elementary Sch. Dist. v. Bishop*, 179 Ariz. 233 (1994) [hereinafter *Roosevelt I*]; see *Hull v. Albrecht*, 190 Ariz. 520 (1997) [hereinafter *Albrecht I*]; see *Hull v. Albrecht*, 192 Ariz. 34 (1998) [hereinafter *Albrecht II*].

7. See *Roosevelt Elementary Sch. Dist. v. State*, 205 Ariz. 584 (App. Ct. 2003) [hereinafter *Roosevelt II*].

8. *Three Years After Red for Ed: Successes, Shortcomings, and What Comes Next?*, ABC15 Ariz. (May 6, 2021, 5:07 PM), <https://www.abc15.com/news/state/three-years-after-red-for-ed-successes-shortcomings-and-what-comes-next#:~:text=Organizers%20still%20say%2C%20Red%20for,ways%20they%20hadn't%20before.>

9. *Arizona Proposition 208, Tax on Incomes Exceeding \$250,000 for Teacher Salaries and Schools Initiative (2020)*, Ballotpedia, [https://ballotpedia.org/Arizona_Proposition_208,_Tax_on_Incomes_Exceeding_\\$250,000_for_Teacher_Salaries_and_Schools_Initiative_\(2020\)](https://ballotpedia.org/Arizona_Proposition_208,_Tax_on_Incomes_Exceeding_$250,000_for_Teacher_Salaries_and_Schools_Initiative_(2020)) (last visited Feb. 22, 2024).

10. *Arizona Proposition 208, Tax on Incomes Exceeding \$250,000 for Teacher Salaries and Schools Initiative (2020)*, Ballotpedia, [https://ballotpedia.org/Arizona_Proposition_208,_Tax_on_Incomes_Exceeding_\\$250,000_for_Teacher_Salaries_and_Schools_Initiative_\(2020\)](https://ballotpedia.org/Arizona_Proposition_208,_Tax_on_Incomes_Exceeding_$250,000_for_Teacher_Salaries_and_Schools_Initiative_(2020)) (last visited Feb. 22, 2024).

Part I of this paper articulates why change is badly needed in Arizona. Part II discusses the current state of the law to show how the courts have been used to compel change and what arguments are available. This section will include a brief history of school funding litigation nationally, and a deeper dive into Arizona's unique history on the issue. Part III examines scholarly insights that provide further context for the recommendations. Part IV begins with an examination of the current social and political momentum around this issue in Arizona and ends with an exploration of the open legal doors that litigants might utilize to capitalize on that momentum.

I. A STATE IN CRISIS

Arizona's public schools are funded well below the national average, and the state is facing a teacher retention crisis. Funding levels were low before the recession, and they have never recovered to even those pre-recession levels.¹¹ Indeed, Arizona's high school graduation rate is the lowest in the country.¹² The gap between Black and white students in Arizona in both reading and math has only grown over the last twenty years.¹³ In 2022, Arizona students performed below the national average in terms of reading and math.¹⁴ In this section, I attempt to show why change is sorely needed in Arizona's school finance scheme by discussing Arizona's efforts in terms of per-pupil funding compared to other states, the state's teacher retention crisis, and the state's growing trend of parents opting out of the traditional public schools.

11. FARRIE & SCIARRA, *supra* note 2, at 23.

12. See Wood, *supra* note 3.

13. *Achievement Gaps Dashboard*, NATION'S REP. CARD, https://www.nationsreportcard.gov/dashboards/achievement_gaps.aspx (last visited Feb. 10, 2024) (looking at fourth and eighth grade reading and math scores). Interestingly, that trend is not true of Hispanic students over the same time frame. In terms of eighth grade reading and math scores, the gap between white and Hispanic students has narrowed.

14. *Arizona's State Profile*, NATION'S REP. CARD, https://www.nationsreportcard.gov/profiles/stateprofile/overview/AZ?cti=PgTab_OT&chort=2&sub=MAT&sj=AZ&fs=Grade&st=MN&year=2022R3&sg=Gender%3A%20Male%20vs.%20Female&sgv=Difference&ts=Single%20Year&tss=2022R3&sfj=NP (last visited Feb. 10, 2024).

A. Per-Pupil Funding

The Education Law Center's *Making the Grade Report*, analyzing school spending in 2020, gave Arizona an "F" in funding level, a "C" in funding distribution, and an "F" in funding effort.¹⁵ An "F" means that the state is more than two thirds of a standard deviation below the national average.¹⁶ A "C" means that the state is within one third of a standard deviation of the average.¹⁷ In addition, the Albert Shanker Institute's *State School Finance Profile* for Arizona in the 2019-2020 school year gave Arizona last place, forty-eighth out of forty-eight states with possible ratings, in terms of overall fiscal effort, statewide adequacy, and equal opportunity.¹⁸

First, Arizona gets an "F" in funding level. To be more specific, Arizona is in last place, with the lowest per-pupil spending in our nation.¹⁹ At \$10,244 per pupil, Arizona falls \$5,202 short of the national average for 2020, earning the state fifty-first place out of all fifty states and D.C.²⁰ Arizona was in 49th place prior to the recession in the 2008, and funding has gone down by 10% since then, accounting for inflation.²¹

Second, spending in the state falls well below adequate levels. The Albert Shanker Institute measures adequacy of funding based on the amount of spending needed to reach national average test scores.²² Statewide, Arizona ranks forty-fifth out of forty-nine in this category, with the average school district spending 25% below adequate levels, compared to the national average which spends 3% above adequate levels.²³ In total, 87.5% of Arizona students attend a school in an inadequately funded district, compared to 52.2% nationally.²⁴ Funding is below adequate levels in each of the state's ten largest districts, but

15. FARRIE & SCIARRA, *supra* note 2, at 6.

16. *Id.* at 7.

17. *Id.*

18. Arizona School Finance Profile for 2019-20 School Year, ALBERT SHANKER INST., https://www.schoolfinancedata.org/wp-content/uploads/2022/12/profiles20_AZ.pdf (last visited Feb. 21, 2024).

19. FARRIE & SCIARRA, *supra* note 2, at 9.

20. *Id.*

21. *Id.* at 12.

22. Arizona School Finance Profile for 2019-20 School Year, *supra* note 18.

23. *Id.*

24. *Id.*

the degree of the deficit ranges from 2.4% below, to 41.3% below.²⁵ The Institute estimates that closing all these gaps would require \$2.9B in new funding.²⁶ Further, the Albert Shanker Institute compares adequacy between low-poverty districts and high-poverty districts.²⁷ Arizona is 6.1% below adequate spending in its lowest-poverty districts, and 33.9% below in its highest-poverty districts; this represents an opportunity gap of 27.8%²⁸, ranking fifth in the nation out of forty-eight.²⁹ A report by the Arizona Auditor General for 2017 says, “spending by district ranged from \$6,175 per pupil to \$21,446 per pupil.”³⁰ The predictable result of this below adequate spending is that 80% of Arizona school districts perform below average national test scores.³¹

Third, Arizona gets a “C” in funding distribution. This measure indicates the extent to which the state targets extra money to high-poverty school districts.³² A “C” is close to the national average, which doesn’t sound so bad. But the national average is not very good either. Arizona channels 5% more money per pupil to students in high-poverty districts compared to low-poverty districts.³³ This additional spending puts Arizona in twenty-first place out of fifty.³⁴ However, these indications of equality are only a meager victory because educating children in poverty is more expensive; research shows that it may cost two or three times as much to educate children in poverty if you want to

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (being equivalent to \$5,004 per pupil). This comparison is based on the average of the districts in the lowest-poverty quintile compared to the average of those in the highest-poverty quintile.

29. *Id.*

30. ARIZ. AUDITOR GEN., ARIZONA SCHOOL DISTRICT SPENDING, FISCAL YEAR 2017, REP. 18-203, at 9 (2018), https://www.azauditor.gov/sites/default/files/2023-11/18-203_Report_with_Pages.pdf.

31. Arizona School Finance Profile for 2019-20 School Year, *supra* note 18. Only the lowest-poverty quintile was able to beat national average test scores, and them not by much.

32. FARRIE & SCIARRA, *supra* note 2, at 7.

33. *Id.* at 14.

34. *See id.* Relatedly, Arizona channels roughly the same amount of funding to districts with the most and fewest students of color. *See* IVY MORGAN & ARY AMERIKANER, EDUC. TR., FUNDING GAPS 2018 11 (2018), <https://files.eric.ed.gov/fulltext/ED587198.pdf>.

close achievement gaps.³⁵ Therefore, while Arizona is ahead of the curve, its 5% number does not come close to equitable funding. Also, it is important to keep in mind that, although the state channels 5% more to high-poverty districts, its overall funding is ranked last in the country.³⁶ Therefore, even with 5% more, the high-poverty districts are still getting well below the national average.

Fourth, Arizona also gets an “F” in funding effort.³⁷ Funding effort assesses school funding as a percentage of the state’s economy, measured by GDP.³⁸ Arizona spends 2.35% of its GDP on school funding, compared to a national average of 3.6%.³⁹ This puts the state in forty-ninth place for effort, beating out only North Carolina. Arizona’s school funding effort went down by more percentage points than all but two other states between 2008 and 2020, despite a 47% growth in GDP in that timeframe.⁴⁰ The Shanker Institute ranks Arizona forty-eighth out of fifty for spending effort.⁴¹ They write, “AZ’s effort was lower than its 2006 level in 5 of 5 years between 2016-2020; had effort recovered to its 2006 level during these years, total 2016-20 spending would have been \$11.46 billion (26.1 percent) higher.”⁴²

B. A Teacher Crisis

In Arizona’s chronic underfunding crisis, teachers have not been spared. Arizona compensates teachers at one of the lowest rates in the country, leading to teacher shortages, large class sizes, long-term substitutes, and high teacher attrition. These issues came to a head in the *Red for Ed* Strikes of 2018, where thousands of teachers participated in a statewide walkout.⁴³ In 2017, Arizona was ranked forty-fifth for

35. See William D. Duncombe & John Yinger, *How Much More Does a Disadvantaged Student Cost?* (Syracuse U. Ctr. for Pol’y Rsch., Working Paper No. 60, 2004), <http://surface.syr.edu/cgi/viewcontent.cgi?article=1102&context=cpr> (“In a typical aid formula, the extra weight for a pupil from a poor family or with limited English proficiency is about 25 percent. We estimate that these extra weights should be between 111 and 215 percent.”).

36. FARRIE & SCIARRA *supra* note 2, at 9.

37. *Id.*

38. *Id.*

39. *Id.* at 20.

40. *Id.* at 22.

41. Arizona School Finance Profile for 2019-20 School Year, *supra* note 18.

42. *Id.*

43. Jonah Furman, *Massive Crowds Flood Capital as Arizona Teachers Stage First-Ever Statewide Walkout*, LABORNOTES (Apr. 27, 2018), <https://labornotes.org/2018/04/massive-crowds-flood-capital-arizona-teachers-stage-first-ever-statewide-walkout>.

teacher compensation.⁴⁴ It was also ranked third in the country for largest class sizes, constituting six more students per teacher than the national average.⁴⁵ The strike resulted in a promise to Arizona teachers that their salaries would be raised by 20% in three years, which was nearly met.⁴⁶ Even with these raises however, Arizona teacher salaries were still ranked forty-fourth in 2021, moving up the ranks by only one spot.⁴⁷ Class sizes have improved somewhat as well, but are still well above the national average, ranked at tenth biggest in the country.⁴⁸

The teacher retention crisis is a top priority of the newly elected Governor Katie Hobbs, who has created an Educator Retention Task Force in one of her first executive orders.⁴⁹ The order states that an estimated 25,000 individuals with a teaching certification in Arizona are not currently working as teachers, that the average length of teaching experience in the state is only four years, and that average teacher salaries are \$13,000 less than the national average.⁵⁰ The teacher shortage continues despite the previous governor's efforts to relax the requirements for teacher certification.⁵¹

C. Parents Are Opting Out

The problems with Arizona's district schools have motivated many parents to enroll their children in charter or private schools

44. NAT'L EDUC. ASS'N, RANKINGS OF THE STATES 2017 AND ESTIMATES OF SCHOOL STATISTICS 2018 26 (2018), https://www.nea.org/sites/default/files/2020-07/180413-Rankings_And_Estimates_Report_2018.pdf.

45. *Id.* at 24.

46. See ARIZ. AUDITOR GEN., *supra* note 4 (“In fiscal year 2021, the State per pupil spending and instructional spending percentage continued an upward trend, and the State average teacher salary increased to \$56,349—a 16.5 percent increase over 2017’s average, but short of the 20 percent cumulative goal by fiscal year 2021.”).

47. *Research & Publications*, NAT'L EDUC. ASS'N, <https://www.nea.org/research-publications> (last visited Feb. 10, 2024).

48. NAT'L EDUC. ASS'N, RANKINGS OF THE STATES 2021 AND ESTIMATES OF SCHOOL STATISTICS 2022 18 (2022), <https://www.nea.org/sites/default/files/2022-06/2022%20Rankings%20and%20Estimates%20Report.pdf>.

49. *Establishing the Educator Retention Task Force Executive Order 7*, ARIZ. GOVERNOR (Feb. 2, 2023), <https://azgovernor.gov/office-arizona-governor/executive-order/7>.

50. *Id.*

51. See Brooke Wagner, *New Law Takes Effect, Changing Some AZ Teacher Training Requirements*, 13 NEWS (Sept. 24, 2022, 1:40 AM), <https://www.kold.com/2022/09/24/new-law-takes-effect-changing-some-az-teacher-training-requirements/> (discussing SB 1159).

instead. Currently, Arizona is the number one state for the highest percentage of students in charter schools.⁵² In fact, one out of every five public school students in Arizona attends a charter school,⁵³ and that number has nearly doubled in the last ten years.⁵⁴ More than one in four schools are charter schools now.⁵⁵

In addition, Arizona recently became the first state⁵⁶ to enact a universal voucher program, which allows parents of any student to apply for a \$7,000 credit from the state to enroll their child in a private school.⁵⁷ These vouchers used to be available only to parents with children in failing schools, but now it is universal.⁵⁸ The change has largely benefitted wealthier parents.⁵⁹ The new universal voucher program makes it easier than ever for parents to enroll their children in private schools, and 20% of applicants for the voucher are parents who want to move their children out of public school.⁶⁰ Of course, one cannot blame these parents, given the state of the public schools. However, the rise of charter and private schools is cause for concern that the state

52. Jamison White, *I. How Many Charter Schools and Students are There?*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Dec. 19, 2022, 4:10 PM), <https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/>.

53. *Id.*

54. *Charter Schools – Transforming Public Education*, ARIZ. CHARTER SCHS. ASS'N: IMPACT, <https://azcharters.org/impact/> (last visited Feb. 20, 2024).

55. *Id.*

56. Yana Kunichoff, *Ducey Signs Universal School Vouchers into Law; Public Education Advocates Launch Referendum*, AZCENTRAL, <https://www.azcentral.com/story/news/politics/arizona-education/2022/07/07/ariz-governor-signs-universal-school-voucher-law-advocates-vow-fight/7827019001/> (July 7, 2022 at 4:14 p.m.). Since then, Iowa and Utah have begun to offer the same thing. Anna Merod, *2 More States Approve School Voucher Programs*, K-12DIVE (Feb. 3, 2023), <https://www.k12dive.com/news/three-states-universal-school-vouchers/641909/>.

57. See Peter Greene, *Arizona Now Has a Universal School Voucher Program. Who Really Benefits From It?*, FORBES (Nov. 15, 2022, 1:15 PM), <https://www.forbes.com/sites/petergreene/2022/11/15/arizona-now-has-a-universal-school-voucher-program-who-really-benefits-from-it/?sh=775c27983dc5> (discussing an analysis by the Grand Canyon Institute).

58. *Id.*

59. GRAND CANYON INST., UNIVERSAL VOUCHER APPLICATIONS ANALYSIS 1 (2022), https://grandcanyoninstitute.org/wp-content/uploads/2022/11/GCI_Analysis_Universal-Vouchers-Help-High-Income-Earners-the-Most_Nov_6_2022.pdf (“45% of [voucher applicants] now come from the wealthiest quarter of students in the state.”).

60. *Id.* at 4.

legislature will continue to ignore public schools.⁶¹ After all, the legislature was politically motivated to pass the universal voucher program but not to increase public school funding or teacher salaries to adequate levels.

In summary, Arizona public schools are in bad shape. They are funded less than the schools of any other state, even though the state has a large enough economy to do much more. Both the Albert Shanker Institute and the Education Law Center put Arizona in last place for overall funding. Despite the teacher strikes, class sizes are still large and teacher salaries are still low as compared to national averages. The result of this is below-average performance on test scores as well as the highest high school dropout rate in the country. I will now turn to discuss school finance litigation, a potential lever for change, nationally and within the state.

II. THE LEGAL LANDSCAPE

Before discussing the future of school finance litigation in Arizona, we have to cover the past. In this section, I give a brief outline of the legal landscape, and a more in-depth overview of the major cases from Arizona. This brief overview will not only provide a background of the legal arguments that are available, but also tell a story about the tension between the school districts, the state legislature, and the Arizona Supreme Court. I will begin with school finance litigation nationally, discussing the three waves that delineate the major arguments. I will then discuss the major cases and trends in school finance litigation in Arizona.

A. School Finance Litigation Nationally

To provide context for school finance litigation in Arizona, I will briefly overview the legal landscape nationally. This discussion will begin with the watershed case *San Antonio Independent School District v. Rodriguez*, and the consequent shift in focus toward state

61. Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 435-38 (2016) (“In many instances, the financial shortfalls in public school districts are directly related to the expansion and funding of charters.”).

constitutions. This will give an overview of the types of legal arguments and approaches courts have taken across the country. School finance litigation has often been categorized into three waves, *Rodriguez* represents the first wave, state constitution cases based on equal protection claims represent the second wave, and state constitution cases based on adequacy claims represent the third. These waves delineate the trends in school finance litigation, but they are not hard distinctions: many cases are brought that contain elements of both the second and third waves.

1. *First Wave: Rodriguez*

The most important thing about *Rodriguez* is that it contained a declaration that education is not a fundamental right guaranteed by the United States Constitution.⁶² The underlying issue in this case was the unequal funding of school districts in Texas. The plaintiffs were Latino parents of children who attended schools in the Edgewood Independent School District, representing a class of minority students or students who reside in school districts with low property tax bases.⁶³ They used Alamo Heights Independent School District, also in San Antonio, as a point of comparison.⁶⁴ Edgewood's students were 96% minority, and it was the district with the lowest property tax base in the city; they were able to contribute \$26 per pupil in the 1967-68 school year.⁶⁵ On the other hand, Alamo Heights' students were 81% white, it was the district with the highest property tax base, and they were able to contribute \$558 per pupil in the same school year despite taxing property at a lower rate.⁶⁶ The district court found Texas' funding scheme violated the Equal Protection Clause of the Fourteenth Amendment⁶⁷ because, among other

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

63. *Id.* at 4-5.

64. *Id.* at 11.

65. *Id.* at 12.

66. *Id.* at 12-13.

67. The Equal Protection Clause of the Fourteenth Amendment demands, "no state . . . shall deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court cannot interfere with every state law, so the default level of review is rational basis review. This requires state legislators to have a rational basis for their actions. This is a deferential standard. However, when a state law implicates a fundamental right or treats people differently using a suspect classification, such as race, the Court reviews that law with strict scrutiny. This is a much less deferential standard, requiring the law utilize narrowly tailored means to promote a compelling state interest. *See* U.S. CONST. amend. XIV.

things, education is a fundamental interest.⁶⁸ The Supreme Court reversed, finding that education is not a fundamental right such that strict scrutiny must be applied.⁶⁹ The Attorney General of Arizona at the time, Gary Nelson, was among many attorneys general who filed amicus briefs in favor of this result.⁷⁰ *Rodriguez* effectively closed the federal courthouse doors to school finance equal protection claims, leading to a wave of litigation in state courts seeking relief under the various state constitutions.

2. *Second Wave: State Equal Protection Cases*

After *Rodriguez*, many litigants sought relief under their state constitutions' equal protection clauses, often seeking a declaration that education is a fundamental right under state constitutions.⁷¹ These cases were argued by comparing one group of students to another to establish unequal treatment under the state law, implicating the equal protection provisions of state constitutions. A prominent example of the cases in this wave is the 1976 California case *Serrano v. Priest*. The plaintiffs in this case argued that the funding scheme, which relied heavily on property taxes levied by school districts, violated the state's equal protection clause because education is a fundamental right under the California constitution and district wealth is a suspect classification.⁷² The California Supreme Court agreed with both counts, and therefore applied strict scrutiny to the funding regime.⁷³ Under that standard, the state failed to show a compelling state interest; their purported interest, local control, was declared "chimerical"⁷⁴ to poor districts.⁷⁵ This is the ideal ruling for school finance plaintiffs, the highest state court declared education a fundamental right and used strict scrutiny to invalidate the

68. *Rodriguez*, 411 U.S. at 16.

69. *Id.* at 37.

70. *Id.* at 3.

71. See David G. Hinojosa, "Race-Conscious" School Finance Litigation: Is a Fourth Wave Emerging?, 50 U. RICH. L. REV. 869, 872 (2016).

72. *Serrano v. Priest*, 18 Cal. 3d 728, 749 (1976).

73. *Id.* at 768.

74. Definition of chimerical, MIRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/chimerical> (last visited Feb. 11, 2024) (defining "chimerical" as "existing only as the product of unchecked imagination").

75. *Serrano*, 18 Cal. 3d at 768.

current funding scheme. The first school finance litigation case in Arizona contained a similar argument as that in *Serrano* but came to a rather different conclusion and is discussed below.

The second wave saw great gains for a limited time. States with successful equal protection cases saw per-student spending become more equal, and typically saw a greater centralization in educational spending at the state level.⁷⁶ The success of the wave was short-lived, however—between 1979 and 1988, plaintiffs won only 18% of cases.⁷⁷

3. *Third Wave: State Adequacy Cases*

Amidst a nationwide push for standards-based reform in education and equal protection arguments finding less success in courts, advocates began to argue that school systems were inadequate without reference to equality, but with reference to standards instead.⁷⁸ These cases were argued by alleging that the amount provided by the school funding scheme was not enough to meet certain benchmarks, usually based on language in the state's constitution and linked to state standards.⁷⁹ This new approach was attractive to courts for several reasons, including that it avoided some of the tricky political issues with equal protection claims, and that it was easier to rule on, as the equal protection clause in state constitutions touches on a lot more law than the education clause.⁸⁰ This new strain of cases reinvigorated the field, with plaintiffs prevailing in two-thirds of cases between 1989 and 2008.⁸¹

A paradigmatic example of this type of case can be found in *Derolph v. State*. In that case, the plaintiff school districts challenged Ohio's funding scheme on the basis that it violated the Ohio Constitution's requirement that the legislature provide enough funding to secure a "thorough and efficient" school system.⁸² The Ohio Supreme Court's opinion began with a praise of education, and an affirmation of

76. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why it Matters*, 56 EMORY L.J. 545, 558-59 (2006).

77. Michael A. Rebell, *State Courts and Education Finance: Past, Present and Future*, 2021 BYU EDUC. & L.J. 113, 119-20 (2021).

78. *Id.* at 121.

79. *Id.*

80. Koski & Reich, *supra* note 76, at 560-61.

81. Rebell, *supra* note 77, at 120.

82. *Derolph v. State*, 78 Ohio St. 3d 193, 197 (1997).

its central importance to our democratic society.⁸³ The court concluded that the Ohio funding scheme, which relied heavily on district fundraising and awarded state contributions on an arbitrary basis,⁸⁴ was not thorough and efficient.⁸⁵ The legislature was ordered to remedy the system, and the trial court retained jurisdiction to enforce that order.⁸⁶ This case represents a great ruling for adequacy litigation: the Ohio Supreme Court gave teeth to their constitution and ordered the legislature to do their job. Similar arguments were made in an Arizona Supreme Court case discussed below, and the court reached a similar conclusion, although relying on importantly different facts. *Derolph* will return as a useful analog in our discussion of open legal doors in Arizona going forward.

B. Arizona's School Finance Litigation

Arizona's unique history of school finance litigation reflects many of the national themes. For example, the Arizona Supreme Court has ruled that education is a fundamental right under the state constitution.⁸⁷ The court has weighed in on equal protection claims as well as adequacy claims arising from language in the state constitution that says the "legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system."⁸⁸ But not every tactic that has been used nationally has been settled in the state, and this will inform the later discussion about open legal doors. This section outlines the most important cases in the area, and it tells a story about a changing court, an unchanging legislature, and a forgotten promise.

83. *Id.*

84. The results of this funding scheme were dire. Asbestos remained in over 2/3 of Ohio's school buildings. *Id.* at 206. One school building was "sliding down a hill at a rate of an inch per month." *Id.* There was coal dust, cockroaches, ceiling leaks like waterfalls, raw sewage on a baseball field, and a school where handicapped students had to be carried into the library because it was not wheelchair accessible. *Id.* at 207. These schools were getting by without enough textbooks or enough teachers. *Id.* at 208.

85. *Id.* at 210 (citing lack of teachers, supplies, and technology, as well as large student-teacher ratios and deteriorating buildings).

86. *Id.* at 212-13.

87. *Shofstall v. Hollins*, 110 Ariz. 88, 90 (1973).

88. ARIZ. CONST. art. XI, § 1.

1. Shofstall v. Hollins

In 1973, less than eight months after the Supreme Court's decision in *Rodriguez*, the Arizona Supreme Court decided *Shofstall v. Hollins*. This case is important because of its declaration that the Arizona constitution guarantees a fundamental right of education. The case was brought on behalf of two classes of plaintiffs, public school students attending Roosevelt School District and taxpayers in that district.⁸⁹ They made a state equal protection clause claim,⁹⁰ arguing, "the system of financing public schools in Arizona is discriminatory because of the disparity of wealth in school districts; that this disparity results in inequality in education for the students, and an unequal burden on taxpayers in the poorer districts."⁹¹ The court ultimately denied relief to either class of plaintiffs.⁹²

The Arizona Supreme Court began its discussion of this question by declaring that education is a fundamental right.⁹³ This seemed promising, but the court went on to say that "[a] school financing system which meets the educational mandates of our constitution, *i.e.*, uniform, free, available to all persons aged six to twenty-one, and open a minimum of six months per year, need otherwise be only rational, reasonable and neither discriminatory nor capricious."⁹⁴ Despite declaring education a fundamental right, the court applies only a rational basis standard of review for equal protection claims.

Regarding the taxpayers' claim, the court expresses an unwillingness to intrude on local control of taxing matters. The court said, "We find no magic in the fact that the school district taxes herein complained of are greater in some districts than others."⁹⁵ The court does not engage the issue of whether it is unfair to place a larger burden on poorer districts who have a smaller property tax base. The court's characterization of the inequality here as simply a local choice about how much the community wants to pay for education services is

89. *Shofstall*, 110 Ariz. at 88.

90. See ARIZ. CONST. art. II, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporations other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.").

91. *Shofstall*, 110 Ariz. at 89.

92. *Id.* at 90-91.

93. *Id.* at 90.

94. *Id.*

95. *Id.* at 91.

dismissive, given that poor districts do not have much choice in how they fund schools. The court's holdings regarding the equal protection clause would be reconsidered twenty years later.

2. *Roosevelt Elementary School District #66 v. Bishop*

The court took a big turn in *Roosevelt* in 1994.⁹⁶ This case is significant because it represents the high-water mark of the Arizona Supreme Court's willingness to battle with the state legislature over the school funding system. The plaintiffs were four school districts and a class of parents suing the state superintendent of education, Diane Bishop.⁹⁷ They sought a declaration that the school funding scheme was unconstitutional because it violated the state equal protection clause and the "general and uniform" requirement of the Arizona Constitution.⁹⁸ The court addressed the equal protection claim and modified the standard, but ultimately did not apply it here, instead resolving the case by holding that the school funding system did not comply with the "general and uniform" requirement.

School facilities were the focus of the argument in this case.⁹⁹ Inequality between school districts had become quite stark by 1994—some had indoor pools while others lacked libraries.¹⁰⁰ The court asserted that the quality of facilities was directly proportional to property values within the district.¹⁰¹ One district had an assessed taxable property valuation of \$5.8 million per pupil while another had \$749 of taxable property per pupil, the property-poor district having a

96. *Roosevelt I*, 179 Ariz. 233 (1994).

97. *Id.* at 235.

98. ARIZ. CONST. art. XI, § 1 ("The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system. . .").

99. *Compare Roosevelt I*, 179 Ariz. at 233 (not including inadequate teachers in their adequacy claim), with *Derolph v. State*, 78 Ohio St. 3d 193, 197 (1997) (including inadequate teachers in their adequacy claim).

100. *Roosevelt I*, 179 Ariz. at 235 (stating that while some school districts had schools with "indoor swimming pools, a domed stadium, science laboratories, television studios, well stocked libraries, satellite dishes, and extensive computer systems[.]" others had "schoolhouses that [we]re unsafe, unhealthy, and in violation of building, fire, and safety codes. Some districts use[d] dirt lots for playgrounds. There [we]re schools without libraries, science laboratories, computer rooms, art programs, gymnasiums, and auditoriums.").

101. *Id.* at 236.

tax rate of 4.37% while the other had 0.11%.¹⁰² Even the defendant in this case, Superintendent Diane Bishop, “acknowledge[d] that the state budget is insufficient for the capital needs of many school districts . . . [and conceded] that the quality of education a child receives in Arizona should not depend on whether the child lives in a wealthy or poor school district.”¹⁰³

The court took issue with the funding formula. First, the court said that the base-level of funding per student was arbitrary and “unrelated to any minimum amount necessary for a basic education.”¹⁰⁴ Second, the percentage of that base-level a district should provide was also arbitrary, such that the state had to make up the difference in 90% of districts.¹⁰⁵ Then, the districts’ only option to raise more was through bonded indebtedness secured by property taxes, making a district’s ability to fund its schools above the arbitrarily low base-level completely dependent on the value of its property tax base.¹⁰⁶ While facilities are not the only way in which districts were unequal, they are a visible and readily assessable manifestation of the inequality.

The court addressed the equal protection argument first. The plaintiffs argued that, as education is a fundamental right in Arizona, the current funding scheme violated the state equal protection clause because it denied them equal education opportunities because of where they lived.¹⁰⁷ The *Roosevelt* court overturned *Shofstall* to the extent that it used a rational basis review to determine if there had been an equal protection violation of a fundamental right.¹⁰⁸ Going forward, the standard would be strict scrutiny. However, the *Roosevelt* court did not apply the new strict scrutiny standard, preferring to resolve the case under the education provision.¹⁰⁹ The court clarified the level of review necessary for equal protection claims, but did not apply it. This left an

102. Even controlling for the proportion of commercial property, the wealth of the neighborhood made a huge difference: one district had an assessed property value of \$130,778 per pupil while another had \$18,293 per pupil. *Id.*

103. *Id.*

104. *Id.* at 237.

105. *Id.*

106. *Id.*

107. *Id.* at 238.

108. *Id.* (“We agree with the districts that *Shofstall* is not dispositive. We do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to us to be mutually exclusive. If education is a fundamental right, the compelling state interest test [strict scrutiny] ought to apply.”).

109. *Id.*

opportunity open for future litigators to bring claims under the equal protection prong, as we will discuss below.

The court ultimately resolved the case under the “general and uniform” requirement of Article 11, Section 6 of the Arizona constitution. The court discussed how Article 11 was critically important to the drafters of the constitution because “education was responsible for preserving America’s unity while wave after wave of peoples arrived from other countries.”¹¹⁰ The court stated that the sole responsibility to provide schools rests with the state; although the state can delegate its authority to school districts if it chooses, it may not delegate its responsibility.¹¹¹ The court ruled that general and uniform does not require schools or districts be exactly equal, but that funding mechanisms must “provide sufficient funds to educate children on substantially equal terms.”¹¹² To be compliant, the system must provide an adequate education and not be “itself the cause of substantial disparities.”¹¹³ This standard leaves substantial room for remaining inequality for the sake of respecting local control. The court did not articulate what an adequate education requires.

The court then ruled that the disparities at issue in this case were directly caused by the statutory financing scheme. Its flaws were a “heavy reliance on local property taxation, arbitrary school district boundaries, and only partial attempts at equalization.”¹¹⁴ Despite knowing about the property wealth disparities between districts, the legislature chose a system in which districts have to contribute 45%; this inevitably produced disparities.¹¹⁵ The court concluded by saying, “The education provisions of the constitution acknowledge that an enlightened citizenry is critical to the existence of free institutions, limited government, economic and personal liberty, and individual

110. *Id.* at 239.

111. *Id.* at 240.

112. *Id.* at 241.

113. *Id.*

114. *Id.*

115. *Id.* As of 2022, the districts only contribute 40% of school funding. See Sheenae Shannon, *Education Funding and Budget*, ARIZ. EDUC. ASS’N (Apr. 4, 2022), <https://www.arizonaaca.org/resource-library/education-funding-and-budget#:~:text=The%20state’s%20legislative%20body%20is,Arizona%20comes%20from%20the%20state> (“[O]nly 48% of school funding in Arizona comes from the state. . . [F]ederal funding only accounts for 12% of school funding.”).

responsibility. Financing a general and uniform public school system is in our collective self-interest.”¹¹⁶

This case was a victory for plaintiffs. They bolstered the legal standards for both equal protection and “general and uniform” claims, and they got the state’s funding scheme declared unconstitutional. The court charged the legislature with creating a new funding scheme, stating that the trial court “shall retain jurisdiction to determine whether, within a reasonable time, legislative action has been taken.”¹¹⁷ Despite this legal victory, precious little would change.

3. *Aftermath of Roosevelt*

The *Roosevelt* opinion reads like it is going to change everything, but that would not be the case. In fact, it led to ten years of back and forth between the legislature and the court. The legislature would revise the funding scheme, and the court would find those revisions unconstitutional. Finally, in 2004, the court got out of the business, ceding to the legislature once and for all. In this section, I will briefly discuss the cases that arose during the ten years in which the court slowly lost its zeal for school funding equality.

In 1996, two years after *Roosevelt*, the legislature amended the funding scheme—adding a School Capital Equity Fund.¹¹⁸ The amended scheme was deemed to still not comply with *Roosevelt*, because it did not cure the system of inevitably creating disparities.¹¹⁹ The superior court issued an order prohibiting the state from funding public schools unless there was a constitutional funding scheme in place by June 30, 1998, and the supreme court affirmed this order.¹²⁰

In 1997, the legislature amended the system again by adding an Assistance to Build Classrooms (ABC) Fund, which was meant to provide funding for capital improvements to school districts based on their need.¹²¹ The supreme court, in *Albrecht I*, ruled¹²² that it was still

116. *Roosevelt I*, 179 Ariz. at 243.

117. *Id.*

118. *Albrecht II*, 192 Ariz. 34, 36 (1998) (citing *Symington v. Albrecht*, No. CV-96-0614-SA (Ariz. Jan. 15, 1997)).

119. *Id.*

120. *Id.*

121. *Albrecht I*, 190 Ariz. 520, 522 (1997).

122. The majority opinion in *Albrecht I* was written by Justice Martone, who also wrote the majority opinion in *Roosevelt*.

not constitutional. “The ABC legislation deals inadequately with the symptoms and does not address the core problem—heavy reliance on district property taxation with unequal districts.”¹²³ They clarified that the legislature may rely on property taxes, but if they do, they must offer “substantial equalization.”¹²⁴ They charged the legislature with creating a statewide standard for adequate facilities.¹²⁵ The court suggested solutions. The legislature could create a statewide tax to fund school facilities, leaving it up to districts to tax further if they desire, or they could redraw the district lines in a way that made them have comparable property tax bases.¹²⁶ The court concluded by saying, “a reasonable time has passed, and it is now time to act.”¹²⁷

In 1998, the legislature tried again, this time creating the Students Fair and Immediate Resources for Students Today (FIRST) Act.¹²⁸ This case, *Albrecht II*, was decided by the Arizona Supreme Court on June 16, just two weeks ahead of the June 30 deadline.¹²⁹ The court found the Students FIRST Act unconstitutional and extended the deadline by 60 days.¹³⁰ It characterized *Albrecht I* as having a two-part test: requiring minimum adequate facility standards and funding to ensure no district falls below them, and requiring that the funding mechanism itself not cause substantial disparities.¹³¹ The Students FIRST Act satisfied the first prong because it created building standards and a School Facilities Board empowered to promulgate further standards, and it had set aside enough money to meet those standards.¹³² However, the Act failed the second prong because it limited the ability of districts to fundraise if they participated in state funding through the

123. *Albrecht I*, 190 Ariz. at 524.

124. *Id.*

125. *Id.* (defining adequacy “in the first instance, as a legislative task. But, in addition to providing a minimum quality and quantity standard for buildings, a constitutionally adequate system will make available to all districts financing sufficient to provide facilities and equipment necessary and appropriate to enable students to master the educational goals set by the legislature or by the State Board of Education pursuant to the power delegated by the legislature.”).

126. *Id.* at 524-25.

127. *Id.*

128. *Albrecht II*, 192 Ariz. 34, 36 (1998).

129. *Id.*

130. *Albrecht II*, 192 Ariz. 34, 40 (1998).

131. *Id.* at 37.

132. *Id.*

School Facilities Board.¹³³ It represented a systemic, structural difference between districts that “formalize[ed] and perpetuate[ed] a structure that fails the general and uniform test.”¹³⁴

These cases represent the court standing strong on its stance taken in *Roosevelt*. Although it was still unconstitutional because of its fundraising rules, the Students FIRST Act finally complied with the general and uniform requirement in terms of its overall funding structure. It did this by promulgating standards and creating the School Facilities Board which would oversee facilities and distribute funds as needed. The court in *Albrecht II* found, “[t]he Act meets this requirement by mandating that every school district must comply with the standards and by providing state monies sufficient to fund each district's compliance.”¹³⁵ Five years later, the court would continue to find the funding scheme constitutional even though the legislature effectively stripped the School Facilities Board’s funds—representing a 180-degree turn in the court and the new normal for Arizona school finance litigation.

4. *The New Normal*

In 2004, the Arizona Supreme Court officially got out of the business when the Court denied cert in *Roosevelt Elementary School District No. 66 v. State*.¹³⁶ By this time, the legislature had remedied the Students FIRST Act by creating three separate funds: the New Facilities Fund, the Deficiency Correction Fund, and the Building Renewal Fund, all of which the School Facilities Board oversees.¹³⁷ The plaintiffs in this case (including the same school district from *Roosevelt*) argued that the state legislature had failed to fund the Building Renewal Fund (BRF) and won at the lower court.¹³⁸ The Students FIRST Act mandates a formula for how much money the legislature is to distribute to the BRF each year.¹³⁹ The legislature followed the formula for some school years but not for others, sometimes taking back an entire school year’s

133. *Id.* at 39.

134. *Id.*

135. *Id.* at 37.

136. *Roosevelt II*, 205 Ariz. 584 (App. Ct. 2003), *cert. denied*, 2004 Ariz. LEXIS 8 (2004).

137. *Id.* at 586.

138. *Id.* at 588.

139. *Id.* at 586.

funding.¹⁴⁰ This led to terrible conditions in many school district buildings.¹⁴¹ The district office of one school district had rodent infestations, an electrical system so bad employees had to turn the lights off if they wanted to use the copy machine, and such little storage space that they kept records in the restrooms.¹⁴² Another district office had no computer system, so employees had to manage student data by hand, reducing their ability to identify students' needs; another had to house its special education staff in a separate out-building with a leaky roof; and one district had no busses of its own.¹⁴³

For several school years, the legislature distributed funds to the BRF that were less than that required by the formula. The lower court took issue with one in particular for which \$62 million was distributed in the fall, and there were plans to distribute the same amount in the spring in accordance with the formula. Instead of distributing the second half to the BRF in the spring, the legislature transferred \$70 million from the BRF back into the state's general fund.¹⁴⁴ That means that instead of adding \$124 million to the fund that school year as required by the formula, the legislature took \$8 million out. The lower court said, "[S]uch a major devastation of the BRF is unconstitutional in and of itself, and requires no proof of its impact on the affected students' ability to meet required academic standards."¹⁴⁵ After a trial, the court ordered the legislature to restore \$90 million to the BRF.¹⁴⁶

On appeal, the plaintiffs were not so successful. Regarding the underfunded school years, the appeals court said plaintiffs had not proven that the deficiencies in their capital facilities led to a drop in scholastic performance.¹⁴⁷ The court said, "Within the limits of the Constitution, it is not appropriate that a court involves itself in the legislative process such as to question the wisdom or priorities of the [legislature]."¹⁴⁸ And later, "If the question be doubtful, the court will

140. *Id.*

141. *Id.* at 590, n.8.

142. *Id.*

143. *Id.*

144. *Id.* at 588.

145. *Id.*

146. *Id.* at 589.

147. *Id.* at 591.

148. *Id.*

presume that the legislature has not exceeded its powers.”¹⁴⁹ In discussing *Albrecht I* and *II*, the court said that the general and uniform requirement does not require funding of these specific funds, only the overall adequate funding of school districts.¹⁵⁰ The court concluded by saying:

[W]e understand that the Legislature's decision to repeatedly not fully fund the BRF to meet the capital needs of the public schools well may result in large future expenditures, expenditures very possibly greater than what the formula requires, to allow students to achieve academic success. This is a matter of legislative discretion, however.¹⁵¹

The Students FIRST Act was only found to be constitutional in the first place because it created the School Facilities Board and the facilities funds. Yet the court found no constitutional violation when the legislature refused to fully fund them. This represents a large departure from not only *Albrecht II* but also *Roosevelt*. The Arizona Supreme Court declined to review this case, marking the end of the court standing up to the legislature on school funding. Future cases shared this case's emphasis on deference to the legislature.¹⁵²

III. THE ACADEMIC LANDSCAPE

Having laid out the funding crisis and the legal history, I will now address the scholarship in this area before turning to the future of school finance litigation in Arizona. This section provides insights from scholars in this area that shed light on the subject and circumscribe the possibilities. I will address the question of whether more money would in fact help, then I will discuss some scholarly insights regarding equal protection, adequacy, and fourth wave legal arguments.

149. *Id.* (quoting *United States v. Fisher*, 6 U.S. 358, 383-34, 2 L.Ed. 304 (1805)).

150. *Id.*

151. *Id.* at 594.

152. *See, e.g.*, *Kromko v. Ariz. Bd. Of Regents*, 216 Ariz. 190 (2007); *see also, e.g.*, *Craven v. Huppenthal*, 236 Ariz. 217 (2014) *cert. denied*, 2015 Ariz. LEXIS 193 (2015).

A. Would more money help?

There used to be a debate about whether money mattered, that is, whether giving schools more money would actually lead to improvements in academic outcomes. That debate has been settled. Research shows that students exposed to school finance reforms that resulted from school finance litigation received more per-pupil funding than before, with most of the increases going to low-income students.¹⁵³ In turn, students were more likely to graduate high school and attend college, with the biggest increases going to Black students and female students.¹⁵⁴ Further, students exposed to school finance reforms are also likely to see greater lifetime earnings.¹⁵⁵ One study found that a \$1,000 increase in school funding in California led to an average increase in graduation rates of over 5%.¹⁵⁶ One study found, “for low-income children, a 10% increase in per pupil spending each year for all 12 years of public school is associated with 0.46 additional years of completed education, 9.6% higher earnings, and a 6.1 percentage point reduction in the annual incidence of adult poverty.”¹⁵⁷ That said, Arizona’s low level of funding has consequences. Of course, it is wise to save money where you can; simply spending money is not everything. But if schools spend money well, then money certainly matters very much.

B. Equal Protection and Adequacy Arguments

Those seeking to litigate school finance cases now have 50 years of precedent to draw from. Those 50 years have seen cases brought in almost every state, various strategies, and a spectrum of receptiveness from state courts. This subsection will outline some of the lessons

153. Jesse Rothstein & Diane W. Schanzenbach, *Does Money Still Matter? Attainment and Earnings Effects of Post-1990 School Finance Reforms* 12 (Nat’l Bureau of Econ. Rsch., Working Paper No. 29177, 2021), https://www.nber.org/system/files/working_papers/w29177/w29177.pdf.

154. *Id.* at 14.

155. *Id.* at 20.

156. RUCKER C. JOHNSON & SEAN TANNER, LEARNING POL’Y INST., MONEY AND FREEDOM: THE IMPACT OF CALIFORNIA’S SCHOOL FINANCE REFORM, 9 (2018), https://learningpolicyinstitute.org/sites/default/files/product-files/Money_Freedom_CA_School_Finance_Reform_BRIEF.pdf.

157. C. Kirabo Jackson et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q. J. ECON. 157, 160 (2016).

learned from these prior cases. In particular, it will address the strengths, weaknesses, and strategic considerations of both equal protection and adequacy arguments.

Both equal protection and adequacy cases have had significant victories. Favorable equal protection rulings led to greater funding equality between rich and poor districts and greater centralization of funding at the state level.¹⁵⁸ However, as discussed in Part II, this success was short-lived. When litigators switched to adequacy-based arguments, there was another rash of victories. Studies on the effects of these rulings have found that states with court orders increased funding in low-income districts and decreased spending gaps between districts.¹⁵⁹ These funding increases led to low-income students attaining higher levels of completion and achievement in school, and a 20% decrease in adult poverty.¹⁶⁰

There are several reasons why adequacy arguments found success in court when equal protection arguments started to fail. First, adequacy arguments avoided some of the tricky political issues with equal protection claims. For example, when discussing the gap between districts, one raises fears in the elite that their school districts may be levelled down to achieve equality,¹⁶¹ which in fact happened in California.¹⁶² It also avoids some of the concerns about local control as the remedies are less linked to centralization of the funding scheme.¹⁶³ In addition, judges are more comfortable ruling on the education clauses of state constitutions (which implicate little outside of education law) as compared to ruling on equal protection clauses (which implicate far more law).¹⁶⁴

That is not to say that adequacy claims are without drawbacks. One major issue with adequacy claims goes hand-in-hand with one of

158. Koski & Reich, *supra* note 76 at 558-59.

159. Rebell, *supra* note 77, at 138.

160. *Id.*

161. Koski & Reich, *supra* note 76, at 560-61.

162. Rebell, *supra* note 77, at 119 (stating that the *Serrano* mandate led to a “dramatic leveling down of educational expenditures. Whereas California had ranked fifth in the nation in per pupil spending in 1964-65, as of 2015-2016, it had fallen to 41st.”).

163. Koski & Reich, *supra* note 76, at 560-61.

164. *Id.*

its strengths, it accepts inequality.¹⁶⁵ Adequacy arguments do not demand that rich and poor districts receive an equal opportunity to education, they demand that every student receive an education that is above some constitutional floor. While this is beneficial, it ignores the positional nature of education: the value of one's education in the marketplace for work depends on the education of those around you.¹⁶⁶ In addition, unequal education leads to dignitary harms.¹⁶⁷ Therefore, although adequacy arguments have found success, there are valid arguments that they compromised too much.

Litigators and courts have learned significant strategic lessons over the last fifty years of school finance litigation. It is worth noting at the outset that courts got much more deferential after the Great Recession,¹⁶⁸ so old tactics may have to be modified going forward. Despite a range of victories for plaintiffs, not all court orders have been equally effective. On the one hand, plaintiffs want a court order that articulates the purposes of education with particularity, as the Kentucky Supreme Court did in *Rose v. Council for Better Education*.¹⁶⁹ On the other hand, there are fears that too strong a court order will simply be ignored by the legislature or worse.¹⁷⁰ Despite this concern, plaintiffs prefer a court order that gives the other branches of government sufficient guidance on how to execute the articulated right.¹⁷¹ One approach a court could take is appointing an expert consultant to create

165. *Id.* at 556 (“Significantly, [adequacy's] remedial policies do nothing to limit the ability of suburban and wealthy districts to maintain or even increase their competitive advantage over others and therefore do not address the gap in educational resources between rich and poor at all.”).

166. *See id.* at 550.

167. *Id.* at 606.

168. Rebell, *supra* note 77, at 141.

169. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (providing seven capacities that an adequate school system should strive to instill in its students, including sufficient self-knowledge, sufficient training to compete in the job market and academics, and sufficient skills to function in a “complex and rapidly changing society”).

170. *See* Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equity in Public Schools*, 1 Duke F. for L. & Soc. Change 47, 64 (2009) (“In addition to more general political fallout, other costs have included public skepticism about the legitimacy of the remedy in a given case and the legitimacy of courts generally; ping-pong matches between courts and legislatures about school finance schemes; increasingly heated state supreme court elections focusing not on the qualifications of the candidates per se but rather on their positions on specific issues; and proposed court-stripping legislation.”).

171. Rebell, *supra* note 77, at 168.

recommendations.¹⁷² The legislature will need guidance not only on what an adequate education is, but also what they need to do to provide it.¹⁷³ The most effective school finance judgments will order the legislature to show a demonstrable link between the standards of adequacy they have chosen and the amount of money they are dedicating to it.¹⁷⁴ In addition, courts should retain jurisdiction until the legislature has complied in good faith.¹⁷⁵ In some ways, it was inevitable that adequacy cases would become less successful over time. After initial victories led to limited improvement, plaintiffs began to ask for more specific remedies, which implicated greater separation of powers concerns.¹⁷⁶

To avoid separation of powers issues that come with sweeping articulations of rights and the injunctions needed to enforce them, it may be preferable to seek relief on a more individual basis.¹⁷⁷ A court order for an individual remedy would still signal to the legislature and districts what is legal and what is not, and it does not put the court in the position of “legislating”.¹⁷⁸ Dealing with one harm at a time, courts are more likely to actually provide relief, rather than risking “the same cases coming back to the courts again and again due to legislative recalcitrance.”¹⁷⁹ Another scholar argues for the need to deter constitutional violations by imposing daily fines on legislatures for non-

172. *Id.* at 173-74.

173. See Koski & Reich, *supra* note 76, at 566-67 (arguing that many of the mathematical methods of determining cost of an adequate education can be done with an eye toward equity as well).

174. See David G. Sciarra & Danielle Farrie, *From Rodriguez to Abbott: New Jersey's Standards-Linked School Funding Reform*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY* 136, (Charles J. Ogletree, Jr. & Kimberly J. Robinson eds., 2015) (arguing that New Jersey's School Funding Reform Act of 2008 formula should be an example for other states); see also *EQUITY & EXCELLENCE COMM'N, FOR EACH AND EVERY CHILD—A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE* 17 (2013) (With few exceptions, states continue to finance public education through methods that have no demonstrable link to the cost of delivering rigorous academic standards and that can produce high achievement in all students. . . .”).

175. Rebell, *supra* note 77, at 176-77.

176. *Id.* at 154.

177. See Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 989 (2014) (arguing that individual remedies would be more effective at moving the law forward, as rights would be slowly articulated one case at a time).

178. *Id.* at 1015.

179. *Id.*

compliance.¹⁸⁰ Further, any remedy should seek to prevent backsliding when budgets get tighter—rules could be put in place that retain the legislature’s discretion while implementing safeguards against backsliding.¹⁸¹

C. Fourth Wave Arguments

Many scholars have discussed the potential onset of a fourth wave. One has suggested that a new strain of cases may emerge alleging both “the important theories based on inequitably and inadequately financed public education systems, but also address deeper, race-conscious issues that foster inequality in educational opportunities.”¹⁸² This is significant because the other waves have been facially race-neutral.¹⁸³ Of course, race has always been operating in the background of school finance cases, *Rodriguez* was about the inequality between Latino and white school districts.

One possible fourth wave case alleged not only inadequate additional funding to students living in poverty but also a lack of culturally relevant curriculum for Native and Latino students.¹⁸⁴ Another example is *Sheff v. O’Neill*, in which the New Jersey Supreme Court ordered the legislature to remedy de facto race segregation that had occurred in its school districts.¹⁸⁵ While *Sheff* is technically a segregation case, fourth wave cases are those which incorporate both segregation and school finance arguments. One of the challenges in bringing a fourth wave argument is choosing a cause of action. *Sheff* had the advantage of an anti-segregation article in New Jersey’s state constitution.¹⁸⁶ Illinois has explicitly created a cause of action for race-based education

180. Black, *supra* note 61, at 471 (stating that imposing a cost on non-compliance led to “a relatively quick and effective response” in some cases).

181. *Id.* at 474-77 (providing examples of such rules: mandating that low-income districts “be funded at a level no lower than the average per-pupil expenditure in high-performing suburban districts,” and prohibiting “total per-pupil expenditures in disadvantaged districts from declining more than other districts” in the case of a recession).

182. Hinojosa, *supra* note 71, at 870.

183. Bowman, *supra* note 170, at 58.

184. Hinojosa, *supra* note 71, at 875-76 (discussing First Amended Complaint for Declaratory and Injunctive Relief, *Martinez v. New Mexico* (N.M. Dist. Ct. 2014) (No. D-101-CV-2014-00793)).

185. *Sheff v. O’Neill*, 238 Conn. 1 (1996).

186. Bowman, *supra* note 170, at 59.

claims, but no other state has followed suit.¹⁸⁷ Another difficulty in making race-based claims is made bare by the fact that white school district plaintiffs win 73% of school funding cases whereas non-white plaintiffs win only 25%; worse still, urban minority districts win only 12.5%.¹⁸⁸ Despite the difficulties of bringing such a claim and the lack of scholarly consensus about whether a fourth wave is happening or is likely to happen,¹⁸⁹ I will address the potential of this type of claim in my discussion of open legal doors in the next section.

IV. THE FUTURE OF ARIZONA SCHOOL FINANCE LITIGATION

This section has two goals. The first is to paint a picture of the current appetite for change in Arizona. Teacher strikes, voter propositions, a flipped governor seat, and more contribute to a building social and political momentum that threatens the status quo for Arizona school funding. The second is to point to open legal opportunities for future school finance litigation cases. There are various legal arguments that have not been exhausted in Arizona, but the most promising of these is a certain type of adequacy argument. *Albrecht I* is the closest Arizona has come to a typical adequacy case, but it only addressed the funding scheme for facilities. This leaves various arguments on the table. The Arizona Supreme Court has been staunchly deferential to the state legislature in school funding cases in recent years. However, the building social pressure and political changes could indicate that the time to make these new arguments could be coming soon.

A. Building Pressure in the State

As discussed in Section I, Arizona is in bad shape. The state has been idling for a long time. Per-pupil funding has never made it back to the level it was in 2008; the state was near last place in the nation then, and it officially is now.¹⁹⁰ The state is also facing a teacher retention

187. *Id.* at 61.

188. James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 455 (1999).

189. Hinojosa, *supra* note 71, at 873-75.

190. FARRIE & SCIARRA, *supra* note 2, at 12.

crisis, with the third largest class sizes in the nation.¹⁹¹ These issues both contribute to Arizona having the lowest rate of high school completion in the country.¹⁹² This has culminated in a lack of faith in the traditional public school system, leading to a huge rise in charter schools.¹⁹³

In the last five years, there have been several signs of major pushback from Arizona citizens because of these issues. These signs include the teacher walkout as part of the *Red for Ed* Teacher Strikes, Arizona Proposition 208 which would have taxed high-earners in the state to provide more funding for schools, and the election of the state's first Democratic governor since 2009. This section will address each of these signs in turn to show their significance both individually and as part of a growing momentum for change in the state. Importantly, this growing momentum could mean the time for pushing the state supreme court with new school finance litigation could be coming soon.

1. *Red for Ed* Teacher Strikes in 2018

The teacher strikes in 2018 represented a turning point in Arizona's public discourse. In Part I, I discussed how the walkout and demonstration led to a raise in teacher salaries.¹⁹⁴ In fact, teachers were promised a 20% raise over the next 3 years, but then only received 16.5%.¹⁹⁵ However, teacher salaries in Arizona have continued to improve, with Arizona showing the biggest raise for teachers between the 2021 and 2022 school years.¹⁹⁶

In Part I, I focused on the continuing challenges, rather than the extraordinary victory that *Red for Ed* represents. Of course, a 16.5% raise over three years is still remarkable, considering that before the strike, the legislature "refused to consider anything more than a 1%

191. NAT'L EDUC. ASS'N, RANKINGS OF THE STATES 2022 AND ESTIMATES OF SCHOOL STATISTICS 2023, 18 (April 2023), <https://www.nea.org/sites/default/files/2023-04/2023-rankings-and-estimates-report.pdf>.

192. Wood, *supra* note 3.

193. *See Charter Schools – Transforming Public Education*, *supra* note 54.

194. *Arizona School District Spending—Fiscal Year 2021—Analysis and Data File*, *supra* note 4.

195. *Id.*

196. Teacher Pay & Per Student Spending: Rankings & Estimates, NAT'L EDUC. ASS'N (April 2023), <https://www.nea.org/sites/default/files/2023-04/2023-rankings-and-estimates-report.pdf>.

raise” per year.¹⁹⁷ In addition to this victory for teacher compensation, *Red for Ed* also inspired a 10.3% increase in membership in the Arizona Education Association, the state’s largest teacher union.¹⁹⁸ This signals there may be an even greater engagement and willingness to push for change going forward. The movement also garnered attention and public support for the cause of school funding¹⁹⁹: the teachers who walked out made clear that they were not just walking out for themselves, but they were walking out for the children who were languishing in underfunded schools. The president of Arizona Education Association has not ruled out that *Red for Ed* demonstrations could happen again.²⁰⁰ He also credits *Red for Ed* with gathering the public support needed to pass voter Proposition 208.²⁰¹

2. Prop 208

Proposition 208 is another sign that there is political momentum in the state for school funding change. In Arizona, ordinary citizens can initiate state statutes, putting measures on the ballot for direct public votes. In November of 2020, Arizona voters passed Prop 208 by a 51.75% vote.²⁰² This ballot initiative raised income tax on those earning more than \$250,000 per year (or \$500,000 if married) by 3.5%.²⁰³ It was projected to raise \$827 million in the first year.²⁰⁴ The additional revenues raised by this tax increase were meant to increase teacher salaries, improve teacher retention programs, and more.²⁰⁵ The new tax

197. Eric Blanc, *The Red for Ed Movement, Two Years In*, NEW LABOR FORUM (Oct. 3, 2020), <https://newlaborforum.cuny.edu/2020/10/03/the-red-for-ed-movement-two-years-in/>.

198. *Id.*

199. *Id.*

200. *Three Years After Red for Ed: Successes, Shortcomings, and What Comes Next?*, ABC15 ARIZ. (May 6, 2021, 5:07 PM), <https://www.abc15.com/news/state/three-years-after-red-for-ed-successes-shortcomings-and-what-comes-next#:~:text=Organizers%20still%20say%2C%20Red%20for,ways%20they%20hadn't%20before.>

201. *Id.*

202. *Arizona Proposition 208, Tax on Incomes Exceeding \$250,000 for Teacher Salaries and Schools Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Proposition_208,_Tax_on_Incomes_Exceeding_\\$250,000_for_Teacher_Salaries_and_Schools_Initiative_\(2020\)](https://ballotpedia.org/Arizona_Proposition_208,_Tax_on_Incomes_Exceeding_$250,000_for_Teacher_Salaries_and_Schools_Initiative_(2020)) (last visited Feb. 22, 2024).

203. *Id.*

204. *Fann v. State*, 251 Ariz. 425, 440 (2021).

205. *Arizona Proposition 208, Tax on Incomes Exceeding \$250,000 for Teacher Salaries and Schools Initiative (2020)*, *supra* note 202.

was never put into place, however, because it was struck down by the Arizona Supreme Court.

In *Fann v. State*, just less than one year after Prop 208 passed, the Arizona Supreme Court held that it violated the Arizona state constitution.²⁰⁶ In 1980, the Arizona Constitution was amended to limit the amount of tax expenditures by school districts, it was called the Education Expenditure Clause.²⁰⁷ This effectively set a cap on what school districts could spend on education.²⁰⁸ The court ruled that, to the extent that the additional revenues would exceed this limit, the Prop is unconstitutional.²⁰⁹ Whether it actually exceeded the limit was a question of fact to be resolved on remand to the trial court.²¹⁰ On remand, it was determined that it would more likely than not exceed the limit, and was therefore unconstitutional.²¹¹ Then Governor Doug Ducey said, “This ruling is a win for Arizona taxpayers. It is another step in undoing the damage of Prop. 208 and making sure we continue to benefit from having the lowest flat income tax rate in the nation.”²¹² Governor Ducey, himself a wealthy, former-CEO of Cold Stone Creamery, was right, this was a big win for Arizona’s richest taxpayers.²¹³

Of course, Prop 208 being struck down was a blow to the school funding movement in Arizona. While the *Red for Ed* movement gained teachers a 16.5% raise over 3 years, Prop 208 represented something even more impressive. A majority of Arizona voters agreed that the state

206. *Fann*, 251 Ariz. at 430.

207. *Id.* at 433.

208. *Id.*

209. *Id.* at 435.

210. *Id.* at 440.

211. Ruling at pg. 5, *Fann v. State*, CV2020-015495 (2022) (No. 901), <https://www.courthousenews.com/wp-content/uploads/2022/03/CV2020-015495-3.11.2022-Ruling.pdf>.

212. Mary Jo Pitzl, *Judge Deals Fatal Blow to Arizona's Proposition 208, Ending 2-Year Battle Over K-12 Funding*, AZCENTRAL (March 11, 2022, 12:16 PM), <https://www.azcentral.com/story/news/politics/arizona-education/2022/03/11/proposition-208-tax-increase-arizonas-k-12-schools-struck-down/9433246002/>.

213. Aggregate local taxation limits are inherently regressive. They operate to reduce taxes for wealthy property owners, while poor school districts could not raise to the limits if they wanted to and must continue with underfunded services. Mildred Wigfall Robinson, *It Takes a Federalist Village: A Revitalized Property Tax as the Linchpin for Stable, Effective K-12 Public Education Funding*, in THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 170, (Charles J Ogletree, Jr. & Kimberly J. Robinson eds., 2015).

supreme court. At the time of *Roosevelt*, the Arizona Supreme Court consisted of three Republican-appointed justices and two Democrat-appointed justices.²²⁰ Currently, the court consists of seven Republican-appointees.²²¹ While it is not clear how much of a role politics play in the court's recent decisions, it is clear that the current court has cooled on its demands of the state legislature and has shown greater deference since *Roosevelt*. Any success in school finance litigation will not be due to a change in the supreme court, at least not any time soon. Instead, any success must come from the right case and the right arguments. Although the growing political pressure could help persuade the court as well—the justices must be re-elected every 6 years.

In summary, Arizona is experiencing a huge growth in public motivation to change the public school funding regime. Ideally, this will culminate in change through the normal political channels. However, both houses of the state legislature are still controlled by Republicans, which creates real doubts about the amount of change that will be possible through political channels at least for the foreseeable future. That is where litigators come in. Of course, legislation would be the best tool to improve funding for public schools. But litigation can be used to force the legislature to do something when they are otherwise unable or unwilling to do so. The Arizona Supreme Court has commanded the legislature to act before, and they can do so again. The next section will explore possible legal arguments that could be made. This political momentum could mean a state supreme court that is more willing to hold the legislature accountable to the constitution. Or, at the very least, advocates could politically capitalize on even a bad ruling.

B. Open Legal Doors

While the Arizona Supreme Court has ruled on many school finance cases since *Shofstall*, there remain various legal arguments that

220. 1994 Arizona Supreme Court Justices in order of seniority: Stanley G. Feldman (D), James Moeller (R), Robert J. Corcoran (D), Thomas A. Zlaket (R), Frederick Martone (R). List of Justices of the Arizona Supreme Court, Wikipedia, https://en.wikipedia.org/wiki/List_of_justices_of_the_Arizona_Supreme_Court.

221. Hank Stephenson, *Where Court Packing is Already Happening*, POLITICO (Oct. 12, 2020, 4:30 AM), <https://www.politico.com/news/magazine/2020/10/12/where-court-packing-is-already-happening-428601> (explaining that Governor Ducey added two seats to the Supreme Court and filled them both with conservatives).

have not been exhausted in the state. This section will outline those arguments. I will begin with possible equal protection claims, that is, first-wave style claims. Second, I will discuss the opportunity to bring a new adequacy argument that goes beyond facilities. Last, I briefly discuss the potential to bring a fourth-wave style claim—one that alleges inadequacy but incorporates race issues as well. Of course, it is risky to bring any arguments before a state supreme court that has been consistently deferential to the legislature in recent years. I leave it to more practiced hands to decide when the time will be right to bring these claims, but I outline them nonetheless in the hope that time may come soon. I add as well that while the following are all “open” legal doors, some of them are more highly recommended than others, as discussed below.

1. Equal Protection Arguments

As discussed in Section II, the Arizona Supreme Court declared that education is a fundamental right, and the proper standard of review should be strict scrutiny whenever that fundamental right is being provided unequally.²²² However, the *Roosevelt* court did not actually apply the strict scrutiny test because the case was decided on other grounds.²²³ Before one reaches the question of whether the funding regime passes the strict scrutiny test, one must establish the threshold inquiry, that members of a class are being treated unequally. An Arizona Court of Appeals approached this issue in *Craven v. Huppenthal*, where they found no equal protection violation because the plaintiffs failed this threshold inquiry.²²⁴ In that case, the plaintiffs were parents of students at charter schools, alleging an equal protection violation because traditional public schools received more per-pupil funding than the charter schools received.²²⁵ The court did not have to apply strict scrutiny, because the plaintiffs failed on the threshold question of whether they were treated unequally.²²⁶ After all, charter school students

222. *Roosevelt I*, 179 Ariz. 233, 238 (1994).

223. *Id.*

224. *Craven v. Huppenthal*, 236 Ariz. 217, 221 (App. Ct. 2014) *cert. denied*, 2015 Ariz. LEXIS 193 (2015).

225. *Id.* at 218.

226. *Id.* at 221.

were there by choice, and were free to return to traditional public schools if they wished.²²⁷

If a plaintiff did make it past the threshold inquiry, they would then need to establish that the funding scheme is not a narrowly tailored means of fulfilling a compelling state interest. I do not think such a case is likely to succeed today. If a *Roosevelt*-style case were to go before the court today, the state could likely survive strict scrutiny by asserting a compelling governmental interest of local control; although there is variation in the amount spent per pupil between districts, that difference is likely justified because the court wants localities to remain free to go above and beyond state minimum standards should they choose to.²²⁸ This is made more likely by the deferential stance the court has applied to the legislature's determination of how much funding is necessary as a baseline²²⁹ and the concerns with ruling on equal protection grounds discussed in Part III.

Besides a reluctant court, there are other problems with bringing an equal protection claim today. First, as discussed in Part I, Arizona is above average nationally in terms of inequality between its lowest-poverty and highest-poverty districts.²³⁰ While overall per-pupil funding is the lowest in the nation, the funding is at least consistently bad. That is to say, schools are underfunded across the board and in a relatively (compared to other states) equal fashion. Therefore, plaintiffs would be starting off on difficult footing. Further, an equal protection remedy would not get poor districts to a much better position, as most of the relatively well-funded districts in the state still fall below an adequate funding level.²³¹

In conclusion, although it is true that the Arizona courts have not applied the strict scrutiny analysis in an unfavorable way, it is likely that they would if they got the opportunity. That, combined with the fact that an adequacy claim would likely offer a better remedy, makes this the less attractive route to litigate future cases in the state. The door is open, but I doubt there would be anything good behind it.

227. *Id.*

212. *Roosevelt I*, 179 Ariz. 233, 241 (1994).

229. *Roosevelt II*, 205 Ariz. 584, 594 (App. Ct. 2003).

230. Arizona School Finance Profile for 2019-20 School Year, *supra* note 18.

231. *Id.*

2. Adequacy Arguments

The more promising arguments fall under the adequacy category. As with equal protection, there are ways in which adequacy arguments present an open door. That is, there are things on which the Arizona Supreme Court has not issued a negative ruling. Specifically, the court has not heard an adequacy argument directly alleging that the overall basic level of education provided in the state is inadequate under the state constitution.

In *Albrecht I*, the Arizona Supreme Court created a fantastic template for adequacy claims in the context of school facilities but has not been given a case to apply them elsewhere. In *Albrecht I*, the court clarified that once something is ruled inadequate, the legislature must establish minimum adequate standards and ensure that there is enough funding to meet those standards.²³² One should keep in mind that adequacy is not a particularly high bar. In articulating the right to an education in *Shofstall*, the court said, “The constitution, by its provisions, assures to every child a *basic* education.”²³³ The Supreme Court has made clear, “The general and uniform requirement applies only to the state's constitutional obligation to fund a public school system that is adequate. Defining adequacy, in the first instance, is a legislative task.”²³⁴ Therefore, any argument that the school system is inadequate must allege that it does not meet even this basic level. These prior cases and articulations by the Court will serve as the template for other adequacy arguments that are available.

Roosevelt I can be built upon by alleging an inadequate education, rather than just inadequate facilities. Other states have gone so far. For example, in *Derolph*, discussed above, the plaintiffs alleged inadequate facilities, but also inadequate teaching supplies and too few teachers.²³⁵ Another case alleged that unequal teacher salaries across districts meant unequal teacher quality.²³⁶ In California, one case argued that unqualified teachers cannot satisfy the state's obligation to provide

232. *Albrecht I*, 190 Ariz. 520, 524 (1997).

233. *Shofstall v. Hollins*, 110 Ariz. 88, 90 (1973) (emphasis added).

234. *Albrecht I*, 190 Ariz. at 524.

235. *Derolph v. State*, 78 Ohio St. 3d 193, 208 (1997).

236. *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995).

the opportunity for a basic education.²³⁷ Research shows that teacher quality is strong indicator of academic success.²³⁸ *Rose v. Council for Better Education* represents the goal of adequacy litigation. There, the Kentucky Supreme Court invalidated the entire education system, calling it “inadequate and well below the national effort”;²³⁹ it then laid out seven capacities that an education system should strive to develop in students, including communication skills and the ability to compete in the job market.²⁴⁰

Plaintiffs should allege that the system as a whole is inadequate. This argument need not incorporate any comparison between school districts. It should argue that the Arizona constitution guarantees a minimum, basic, adequate education and that the current education being provided falls below that. They could use graduation rates, overall funding effort compared to the nation, the amount of additional money needed to meet national average test scores, average teacher compensation, and other metrics to demonstrate that the current education being offered is below adequate. It should argue that the Arizona constitution requires the legislature to create a system of public schools that enables its students to compete in the labor market, to participate in a democratic society, and maybe more, as in *Rose*. The Arizona Supreme Court has never ruled on such a case. In *Roosevelt I*, the court found the system was not general and uniform because of its inherently unequal funding scheme, but it did not rule on what constitutes an adequate education, or a general and uniform system of education,²⁴¹ or if those words meant anything in reference to what actually happens in schools once the money was handed out.

237. William S. Koski, *Bridging the Teacher Quality Gap: Notes from California on the Potential and Pitfalls of Litigating Teacher Quality*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY* 148-50, (Charles J. Ogletree, Jr. & Kimberly J. Robinson eds., 2015) (discussing *Williams v. California*).

238. DEREK W. BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM* 226 (Robert A. Garda, Jr., John E. Taylor, & Emily G. Waldman eds., 3d ed. 2021).

239. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 198 (Ky. 1989)

240. *Id.* at 212.

241. Other state constitutions contain the same requirement, that the legislature provide a “general and uniform” system of public schools. Courts in those states have come out differently. *E.g.*, *Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009) (holding there is no constitutional guarantee to a certain quality of education); *Save Our Sch. v. Fort Wayne Cmty. Schs.*, 951 N.E.2d 244 (Ind. App. Ct. 2011) (holding there is no constitutional right to receive

Plaintiffs should ask the court to articulate what an adequate education should strive for. Then, as in *Albrecht I*, the legislature should be entrusted to come up with substantive benchmarks and opportunities for improvement and show that the money devoted to education is sufficient to meet those benchmarks. The court can appoint an expert consultant to help the legislature come up with those benchmarks and opportunities for improvement. Regardless of the methods chosen, the legislature should be able to show a demonstrable link between the amount of money allocated and the benchmarks they have chosen. For example, the expert might find that in order to achieve X in terms of outcomes, the legislature should increase teacher compensation by Y. The court should retain jurisdiction to monitor the state's progress until a remedy has actually been achieved.

Any adequacy case should include an allegation that the lack of quality teachers leads to a level of education that falls below the minimum, basic, adequate education guaranteed by the general and uniform provision of the Arizona constitution. Indeed, this has not been argued in the state. It has been demonstrated that teacher quality has an impact on academic performance.²⁴² It has further been demonstrated that compensation factors into teachers' decisions of where to teach.²⁴³ As discussed in Section I, Arizona has some of the largest class sizes and the worst paid teachers in the country, and they have an average of only four years of experience. One could assert that this leads to an overall level of teacher quality that is inadequate.²⁴⁴

Given courts' hostility to school finance claims since 2008, and especially Arizona's strong deferential stance, Professor Bauries' argument for seeking individual injunctive relief, as opposed to system-

an "adequate public education"). See also *Pendleton Sch. Dist. 16R v. State*, 345 Ore. 596 (2009) (finding that plaintiffs' allegations that insufficient funding produced "inadequate" conditions were insufficient to claim that the public education system was no longer uniform). But see *Leandro v. State*, 346 N.C. 336 (1997) (finding the North Carolina Constitution guarantees every child an opportunity to receive a sound basic education, and they list what a basic education should include, including ability to compete in labor market).

242. Black, *supra* note 61, at 441.

243. *Id.* at 449.

244. This is not to say that the teachers in Arizona are not good teachers. It is only to say that improving teacher training and compensation as well as reducing class sizes by employing more teachers would certainly attract more teachers to the state and to the profession. It would also reduce the rate of attrition for teachers. Most teachers in the state would likely agree that more teachers, happier teachers, and more qualified teachers would be better for student outcomes in the state.

wide injunctions,²⁴⁵ makes a lot of sense for the state. Plaintiffs should consider asking courts to use a scalpel instead of a sledgehammer, since they have been hesitant to use either. Of course, a sweeping declaration such as the one in *Rose* would be preferable, but such a declaration would require the court to strain its legitimacy for a cause it likely does not see as worth it.

3. *Fourth Wave Arguments*

One further argument that is open in Arizona, that could be incorporated into a broader adequacy claim, is an argument modelled after *Martinez v. New Mexico*. In that case, the plaintiffs, parents of Latino and Native American students, argued that the education system was inadequate and did not provide appropriate funding to students in poverty.²⁴⁶ What is unique is that they also argued that the education was inadequate because of a lack of culturally relevant curriculum.²⁴⁷ This is a novel approach, but it should not be surprising. Even *Rose*, decided in 1989, includes “sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage” as one of its seven capacities that the Kentucky school system should strive to provide each child.²⁴⁸

Of the students enrolled in Arizona’s schools, over 47% are Latino, over 5% are Black, and over 4% are Native American, while less than 36% are white.²⁴⁹ That said, one could certainly assess the Arizona curriculum to consider a claim of whether it is culturally relevant. Arizona has a tarnished history with Latino Studies courses. When the Tucson Unified School District incorporated Latino Studies options into its curriculum, it caused outrage among Republican lawmakers and was banned in 2010.²⁵⁰

245. Bauries, *supra* note 177.

246. Hinojosa, *supra* note 71, at 876.

247. *Id.* at 877.

248. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 223 (Ky. 1989).

249. 2021-2022 School Year, ARIZ. SCH. REP. CARDS, <https://azreportcards.azed.gov/state-reports> (last visited Feb. 22, 2024).

250. Hank Stephenson, *What Arizona’s 2010 Ban on Ethnic Studies Could Mean for the Fight Over Critical Race Theory*, POLITICO (Jul. 11, 2021, 9:00 PM) <https://www.politico.com/news/magazine/2021/07/11/tucson-unified-school-districts->

While this fourth wave argument is applicable to Arizona students and could be incorporated into a broader adequacy claim, it is unlikely that courts accountable to the fully Republican-appointed Arizona Supreme Court would be as receptive as courts accountable to the fully Democrat-appointed New Mexico Supreme Court. Incorporating race into an adequacy claim acknowledges the elephant in the room, that most often students of color bear the brunt of inadequate funding. However, it is uncertain, even doubtful, that the Arizona Supreme Court would look kindly on abandoning the color-blind approach.

Now, just because these arguments have not been made before does not guarantee that they would be successful. They would still be facing a very deferential state supreme court. And of course, the success of any case depends on the parties involved. In offering these recommendations, I aim solely to point to areas that have not been ruled out. I do not claim to know the right time or the right way to bring these cases, I only claim that they could be brought, and that similar claims have led to positive outcomes in other states. Further, although it is risky, even a bad ruling could lead to a good outcome, as it could become a *cause célèbre* in the growing political momentum.

V. CONCLUSION

The Arizona public school system is in crisis. The state legislature has reluctantly granted small concessions in recent years, but it has only just moved the needle. Arizona remains in last place in terms of overall funding and funding effort. While school finance litigation in the state is fraught with challenges, most of them are not due to bad precedent in the state. Indeed, many legal doors remain open to would-be school finance plaintiffs. This paper has examined the history of school finance litigation in the state, and offered some suggestions of what the future may look like. The state is changing, and voters have proven in recent years that the impetus for reform is growing. But political change is not guaranteed. School finance litigation could still play an important role in reshaping Arizona's desperately inadequate school finance system.

mexican-american-studies-program-498926 (discussing that lawmakers banned the ethnic studies courses despite evidence that it raised graduation rates among Latino students).