THE DECEPTIVE PROMISE OF *VERGARA*: WHY TEACHER TENURE LAWSUITS WILL NOT IMPROVE STUDENT ACHIEVEMENT

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INTRODUCTION

For over half a century, parties have turned to courts to carry out broad social reforms of schools,[1] prisons,[2] mental hospitals,[3] and other social institutions. In *Brown v. Board of Education*, the landmark school desegregation case, the Supreme Court used its power to rule segregation based on race unconstitutional in public schools.[4] In the following decades, courts have similarly used their power in the context of broad social issues.[5] With regard to cases involving social issues, the nation maintains a continuing dialogue about the role that courts play in a democratic society,[6] particularly in providing equal protection under the law.[7] This dialogue recognizes that courts have a singular role in enforcing state and federal constitutional rights, while at the same time seeks to balance the power among the different branches of government.[8] Because the judiciary is generally not as politically accountable as the other branches of government, some commentators argue that judicial restraint is especially important.[9]

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1 *See, e.g.*, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

2 *See, e.g.*, Cooper v. Pate, 378 U.S. 546 (1964).

3 *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975).

4 *Brown I*, *supra* note 1, at 495.

5 DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (explaining how the power of American judges to make social policy has been significantly broadened in recent years).

6 ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003) (describing the problem that schools and other important institutions are controlled by attorneys and judges instead of governors and mayors, and advocating for restoring control of these institutions to officials that are democratically elected and therefore accountable).

7 RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 18 (2d ed. 1997) (critiquing judicial activism in modern times through analysis of the rewriting of the Fourteenth Amendment by Supreme Court justices who are "virtually unaccountable, irremovable, and irreversible").

8 For an argument that courts should play an important but very limited role in our complex society, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (explaining the scope of the American doctrine that allows the judiciary to declare legislative acts unconstitutional).

9 For historical arguments advocating for judicial restraint, see *Trop v. Dulles*, 356 U.S. 86, 119 (1958) (Frankfurter, J., dissenting), which stated that the only restraint upon judicial power is self-restraint, and *Lochner v. New York*, 198 U.S. 45, 74–75 (1905) (Holmes, J., dissenting), which stated that in deciding whether a law is constitutional, "my agreement or disagreement has nothing to do with [it] . . . ." *See generally* Baker v. Carr, 369 U.S. 186, 333 (1962) (Harlan,

In the recent case of *Vergara v. State*, commonly referred to as *Vergara v. California*, Judge Treu of the Los Angeles County Superior Court used the court's power to effect a new type of social reform: he became the first judge in any court in the United States to strike down a state's teacher tenure and dismissal laws.[10] He reasoned that California's laws made it impossible to remove ineffective teachers from the classroom.[11] Judge Treu concluded that California's teacher tenure and dismissal statutes "impose a real and appreciable impact on students' fundamental right to equality of education *and* that they impose a disproportionate burden on poor and minority students."[12] *Vergara* is a potentially landmark case, although its ruling is stayed pending appeal.[13] Plaintiffs in New York have filed a similar lawsuit, and commentators expect to see more teacher tenure lawsuits in other states and cities.[14]

This Note evaluates the promise of teacher tenure lawsuits in state courts to improve student achievement, and argues that lawsuits such as *Vergara* will ultimately be unsuccessful in doing so. The Note draws on lessons from education litigation reform efforts over the last seventy years, particularly school finance litigation. Part I provides background information about the persistent problem of poor student achievement in American public education in the last seven decades, and describes school finance litigation as the major reform effort to improve student achievement. Part II discusses *Vergara* and teacher tenure litigation more broadly as the newest wave of litigation attempting to improve student achievement. Part III compares teacher tenure litigation to school finance litigation and proposes that teacher tenure litigation will

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J., dissenting) ("I would think it all the more compelling for us to follow this principle of self-restraint when what is involved is the freedom of a State to deal with so intimate a concern as the structure of its own legislative branch."); Griffin v. Illinois, 351 U.S. 12, 33 (1956) (Harlan, J., dissenting) ("[T]he Court should refrain from deciding the broad question urged upon us until the necessity for such a decision becomes manifest . . . ."); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 239 (1962) ("The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own . . . ."); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) ("[T]he Court's function is to decide cases involving specific issues and particular parties. The Court does not sit to make announcements of abstract principles or to give advisory opinions."); Sanford V. Levinson, Note, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973) (discussing the underpinnings of Frankfurter's theory of judicial restraint).

10 Vergara v. State, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014).

11 *Id.* at *5–6.

12 *Id.* at *4. Because the court determined that the challenged statutes discriminated against minorities, particularly those who lack sufficient power to seek redress through the political process, it applied strict scrutiny, a higher level of judicial scrutiny to evaluate them. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (establishing that legislation that curtails important personal liberties is subject to "more searching judicial inquiry").

13 *Vergara*, 2014 WL 6478415, at *7.

14 *See infra* Part II.B.

likely be unsuccessful in improving student achievement in the United States for the following four reasons: (i) courts will find that teacher tenure lawsuits present a nonjusticiable political question; (ii) plaintiffs in teacher tenure lawsuits will lose on the merits, especially in states that do not recognize education as a fundamental right; (iii) courts cannot fashion meaningful remedies for plaintiffs in teacher tenure lawsuits; and (iv) even if plaintiffs in teacher tenure lawsuits surmount those obstacles, the lawsuits will not significantly improve student achievement because the complicated factors that affect student achievement are beyond the scope of teacher tenure laws.

I. IMPROVING STUDENT ACHIEVEMENT IN AMERICAN PUBLIC EDUCATION

As the Supreme Court noted in the historic 1954 case, *Brown v. Board of Education*, "[t]oday, education is perhaps the most important function of state and local governments."[15] Despite the critical importance of public education, the American school system has failed many students. There is strong evidence that poor student achievement—low student performance and a racial and socioeconomic achievement gap—continues to plague the American education system.[16] Consequently, almost all litigation involving education reform in the last seven decades has been aimed at improving educational achievement for all children.

A. *Problems of Student Achievement*

1. Low Student Performance

Despite decades of effort, the problem of low student performance persists. Student achievement has stagnated over the past several decades.[17] Data from the Organization for Economic Cooperation and

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15 *Brown I*, 347 U.S. 483, 493 (1954).

16 The publication of a 1983 report during Reagan's presidency, NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), https://datacenter.spps.org/uploads/SOTW_A_Nation_at_Risk_1983.pdf, was a landmark study of the modern American educational system. The report contributed to the growing claim that American schools were failing students, and sparked a host of education reform efforts. *See* ROSS MILLER, ASS'N OF AM. COLLS. AND UNIVS., A SUMMARY OF EFFORTS IN SCHOOL REFORM SINCE 1983 (2000), http://www.greaterexpectations.org/briefing_papers/SchoolReform.html.

17 PASCAL D. FORGIONE, JR., U.S. DEP'T OF EDUC., ACHIEVEMENT IN THE UNITED STATES: PROGRESS SINCE A NATION AT RISK? 3–4 (1998), http://nces.ed.gov/pressrelease/reform/pdf/reform.pdf.

Development (OECD)[18] shows no significant change in the average performance of American high school students over time.[19] Long-term trends in reading, science, and mathematics achievement show that there has been minimal change across the assessment years.[20] American children are not reading at grade level: 65% of all American fourth-grade students scored below proficient on the 2013 National Assessment of Educational Progress (NAEP) reading test.[21] In middle school, student performance further declines: only 36% of eighth-grade students read at or above grade level.[22] Likewise, just one out of four eighth-grade students can write proficiently,[23] and only 18%, 27%, and 23% of eighth-grade students are proficient in U.S. history, geography, and civics, respectively.[24]

American students trail behind their peers in other developed countries, especially in mathematics and science. A 2012 analysis of student performance ranked the United States seventeenth out of thirty-four OECD countries in reading, twentieth in science, and twenty-seventh in mathematics performance.[25] The same data also shows no significant changes in the average performance of American fifteen-year-old students in reading, science, and mathematics over time.[26] In fact, the standing of American students declines relative to international students as they progress through school: students perform above the

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18 "The Organization for Economic Cooperation and Development (OECD) is a unique forum where the governments of 34 democracies with market economies work with each other, as well as with more than 70 non-member economies to promote economic growth, prosperity, and sustainable development." *What is the OECD?*, USOECD, http://usoecd.usmission.gov/mission/overview.html (last visited May 31, 2015); *see What We Do and How*, OECD, http://www.oecd.org/about/whatwedoandhow (last visited May 31, 2015).

19 ORG. FOR ECON. CO-OPERATION & DEV., PROGRAMME FOR INTERNATIONAL STUDENT ASSESSMENT (PISA) RESULTS FROM PISA 2012: UNITED STATES 1 (2012) [hereinafter PISA 2012], http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf.

20 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., A FIRST LOOK: 2013 MATHEMATICS AND READING: NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4 AND 8, at 5 (2013), http://nces.ed.gov/nationsreportcard/subject/publications/main2013/pdf/2014451.pdf (showing that from 1990 to 2013 mathematics scores have increased twenty-nine and twenty-two points out of 500 points for fourth and eighth graders, respectively, and reading scores have increased five and eight points out of 500 points for fourth and eighth graders, respectively).

21 *Id.* at 7.

22 *Id.*

23 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., WRITING 2011: NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 8 AND 12, at 1 (2012), http://nces.ed.gov/nationsreportcard/pdf/main2011/2012470.pdf.

24 *New Results Show Eighth-Graders' Knowledge of U.S. History, Geography, and Civics*, NATION'S REP. CARD, http://www.nationsreportcard.gov/hgc_2014 (last visited May 31, 2015).

25 PISA 2012, *supra* note 19, at 1.

26 *Id.* at 2.

international average in fourth grade, near the international average in eighth grade, and well below it in twelfth grade.[27]

Low student performance means that many American children are not prepared to succeed in college or compete for jobs in the modern economy.[28] Only one in four high school students graduates ready for college in all four core subjects—English, reading, mathematics, and science.[29] Once students arrive in college, approximately 20% of them enroll in remedial courses.[30] Only slightly more than half of American students complete college, making the United States one of the lowest-ranked OECD countries for this indicator.[31] Postsecondary education is important for modern students: individuals with higher levels of education earn more and are more likely than others to be employed.[32] In 2012, about one-third of existing jobs were those that typically require postsecondary education for entry.[33] The Department of Labor projects that occupations requiring postsecondary education for entry will grow faster than average over the next decade.[34] At the current pace, the United States falls at least three college million degrees short of filling those positions.[35]

2. The Achievement Gap

In addition to the general problem of low student performance, the American education system continues to face an academic achievement

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27 FORGIONE, *supra* note 17, at 3.

28 *See, e.g.*, Kelsey Sheehy, *High School Students Not Prepared for College, Career*, U.S. NEWS & WORLD REP. (Aug. 22, 2012, 8:00 AM), http://www.usnews.com/education/blogs/high-school-notes/2012/08/22/high-school-students-not-prepared-for-college-career.

29 ACT, THE REALITY OF COLLEGE READINESS 2013: NATIONAL 3 (2013) http://www.act.org/readinessreality/13/pdf/Reality-of-College-Readiness-2013.pdf.

30 DINAH SPARKS & NAT MALKUS, U.S. DEP'T OF EDUC., FIRST-YEAR UNDERGRADUATE REMEDIAL COURSETAKING: 1999–2000, 2003–04, 2007–08, at 1–2 (2013), http://nces.ed.gov/pubs2013/2013013.pdf.

31 OECD, EDUCATION AT A GLANCE 2013: OECD INDICATORS 71 (2013), http://www.oecd.org/edu/eag2013%20(eng)--FINAL%2020%20June%202013.pdf.

32 SANDY BAUM ET AL., COLLEGEBOARD, EDUCATION PAYS 2013: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 5 (2013), http://trends.collegeboard.org/sites/default/files/education-pays-2013-full-report.pdf. College-educated adults are also more likely to receive health insurance and pension benefits from their employers. *Id.*

33 DIV. OF OCCUPATIONAL EMP'T PROJECTIONS, U.S. BUREAU OF LABOR STATISTICS, EDUCATION AND TRAINING OUTLOOK FOR OCCUPATIONS, 2012–22, at 1 (2012), http://www.bls.gov/emp/ep_edtrain_outlook.pdf.

34 *Id.* at 2.

35 ANTHONY P. CARNEVALE ET AL., HELP WANTED: PROJECTIONS OF JOBS AND EDUCATION REQUIREMENTS THROUGH 2018: EXECUTIVE SUMMARY 1 (2010), https://georgetown.app.box.com/s/28gamdlhtll4fsmyh48k.

gap that cuts along racial and socioeconomic lines.[36] This disparity in academic performance between poor, minority students and their wealthier, white peers still remains wide.[37] Trend data from the NAEP shows the magnitude of the achievement gap.[38] Although the achievement gap between white students and black and Hispanic students has narrowed in recent years, there are still large disparities between the groups.[39] A 2009 report found that white students had higher scores than black students[40] and Hispanic students[41] by an average of more than twenty test-score points on NAEP mathematics and reading assessments.[42] And a 2013 report found that white twelfth-grade students still outperformed Hispanic and black twelfth-grade students in mathematics and reading.[43] In each year from 1990 to 2012, the high school dropout rate for blacks and Hispanics was higher than for whites.[44] The achievement gap between low-income and high-income students is also startling. For example, fourth-grade students from higher-income backgrounds have consistently achieved higher average reading scores.[45] High school dropout rates are much higher for

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36 Sabrina Tavernise, *Poor Dropping Further Behind Rich in School*, N.Y. TIMES, Feb. 10, 2012, at A1, http://www.nytimes.com/2012/02/10/education/education-gap-grows-between-rich-and-poor-studies-show.html. For a general explanation of the achievement gap, see *Achievement Gap*, EDUC. WK. (July 7, 2011), http://www.edweek.org/ew/issues/achievement-gap.

37 Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, *in* WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES 91, 94–95 (Greg J. Duncan & Richard J. Murnane eds., 2011).

38 ALAN VANNEMAN ET AL., U.S. DEP'T OF EDUC., ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: STATISTICAL ANALYSIS REPORT (2009), http://nces.ed.gov/nationsreportcard/pdf/studies/2009455.pdf; F. CADELLE HEMPHILL ET. AL., U.S. DEP'T OF EDUC., ACHIEVEMENT GAPS: HOW HISPANIC AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: STATISTICAL ANALYSIS REPORT (2011), http://nces.ed.gov/nationsreportcard/pdf/studies/2011459.pdf.

39 F. CADELLE HEMPHILL ET. AL., *supra* note 38, at 10–61; ALAN VANNEMAN ET AL., *supra* note 38, at 6–49.

40 ALAN VANNEMAN ET AL., *supra* note 38, at iii.

41 F. CADELLE HEMPHILL ET. AL., *supra* note 38, at iii.

42 *Id.*, *supra* note 38, at iii–iv; ALAN VANNEMAN ET AL., *supra* note 38, at iii.

43 In mathematics, 33% of white students scored at or above the proficient level, compared with 12% of Hispanic and 7% of black students. In reading, 47% of white students scored at or above the proficient level, compared with 23% of Hispanic and 16% of black students. *2013 Mathematics and Reading: Grade 12 Assessments*, NATION'S REP. CARD (2013), http://www.nationsreportcard.gov/reading_math_g12_2013.

44 GRACE KENA ET AL., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2014, at 143 (2014), http://nces.ed.gov/pubs2014/2014083.pdf.

45 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., READING 2011: NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4 AND 8, at 18 (2011), http://nces.ed.gov/nationsreportcard/pdf/main2011/2012457.pdf.

children who live in poverty.[46] Moreover, only 9% of students from the lowest income bracket earned a bachelor's degree by the time they turned twenty-four, compared to 77% of students from the top income quartile.[47]

This achievement gap has a profound effect on the U.S. economy. A single high school dropout costs the country approximately $260 thousand in lost earnings, taxes, and productivity over the course of her lifetime.[48] If the educational attainment of blacks, Hispanics, and Native Americans increases to that of white students by 2020, the United States could realize additional personal income of more than $310 billion.[49] Additionally, closing the racial achievement gap substantially increases annual GDP: if the United States had closed the achievement gap between white students and their black and Hispanic peers in 1998, annual GDP would have increased by up to an additional $525 billion, or 4% of GDP.[50]

B. *School Finance Reform: Major Litigation Efforts to Improve Student Achievement in the Last Seven Decades*

Education reformers have tackled these student achievement problems in a variety of ways, using legislatures, administrative agencies, and courts. This Note focuses on the role that courts have played in education reform, particularly school finance litigation. The new teacher tenure lawsuits have the same unifying goal as previous education reform efforts—that is, to improve student achievement. In the seven decades since *Brown* abolished state-imposed racial

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46 In 2013, 89.3% of twelfth-grade students in the lowest quartile of family income graduated with a diploma, compared with 96.8% of twelfth-grade students in the highest quartile of family income; in 2012, the numbers were 88.2% and 98.1%, respectively. *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS (2014), https://nces.ed.gov/programs/digest/d14/tables/dt14_219.75.asp?current=yes.

47 PELL INST. FOR THE STUDY OF OPPORTUNITY IN HIGHER EDUC. & PENNAHEAD, INDICATORS OF HIGHER EDUCATION EQUITY IN THE UNITED STATES 31 (rev. ed. 2015), http://www.pellinstitute.org/downloads/publications-Indicators_of_Higher_Education_Equity_in_the_US_45_Year_Trend_Report.pdf.

48 JASON AMOS, ALLIANCE FOR EXCELLENT EDUC., DROPOUTS, DIPLOMAS, AND DOLLARS: U.S. HIGH SCHOOLS AND THE NATION'S ECONOMY 11 (2008), http://www.doe.virginia.gov/support/prevention/dropout_truancy/resources/dropouts_diplomas_dollars.pdf. Amos also claims that the United States could realize a combined savings and revenue of nearly eight billion dollars each year if just 5% of all dropouts stayed in school and attended college. *Id.* at 2.

49 *Id.* at 42.

50 MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS 17 (2009), http://mckinseyonsociety.com/downloads/reports/Education/achievement_gap_report.pdf. Moreover, "[t]he magnitude of this effect will rise in the years ahead as blacks and [Hispanics] become a larger proportion of the [American] population." *Id.*

segregation in schools,[51] courts have played a role in education reform in the United States.[52] This role has included imposing desegregation decrees,[53] upholding affirmative action programs,[54] upholding alternatives to public education and school choice programs,[55] restructuring special education,[56] and striking down school financing

51 *Brown I*, 347 U.S. 483 (1954).

52 William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Years After Rose*, 98 KY. L.J. 789, 790 (2009).

53 Courts began issuing desegregation decrees after *Brown I*, 347 U.S. at 495, which declared that separate schools are "inherently unequal." Between 1955 and 1960, federal district courts held more than 200 desegregation hearings. *Brown v. Board: Timeline of School Integration in the U.S.*, 25 TEACHING TOLERANCE, Spring, 2004, http://www.tolerance.org/magazine/number-25-spring-2004/feature/brown-v-board-timeline-school-integration-us. These desegregation decrees were attempts to remedy the problems of low student performance and the minority achievement gap. Robert L. Crain & Rita E. Mahard, *How Desegregation Orders May Improve Minority Academic Achievement*, 16 HARV. C.R.-C.L. L. REV. 693, 694–95 (1981). In *Milliken v. Bradley*, 433 U.S. 267, 274–75, 280, 287 (1977), the Supreme Court held that the duty to desegregate requires not merely pupil reassignment but also compensatory or remedial reading programs, guidance and counseling programs, and teacher and administrator retraining. Over the next forty years, the Supreme Court handed down a series of rulings extending and clarifying school desegregation.

54 One of the primary reasons for implementing affirmative action policies is to close the achievement gap. *See* Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Spring 1998), http://www.brookings.edu/research/articles/1998/03/spring-education-darling-hammond; CHRISTOPHER COTTON, ET AL., AFFIRMATIVE ACTION AND HUMAN CAPITAL INVESTMENT: EVIDENCE FROM A RANDOMIZED FIELD EXPERIMENT: NBER WORKING PAPER NO. 20397 (rev. ed. 2015), http://www.nber.org/papers/w20397 (finding strong evidence that affirmative action can narrow achievement gaps). In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Supreme Court held that universities may use race as a factor in admissions. Since then, courts have upheld some affirmative action policies and prohibited others. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (prohibiting use of race in college and university admissions in Louisiana, Texas, and Mississippi), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003). Most recently, in *Grutter*, 539 U.S. 306, *superseded by constitutional amendment*, MICH. CONST. art. I, § 26, and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Supreme Court upheld diversity as a rationale for affirmative action programs in higher education admissions.

55 In the past decade, plaintiffs' goal in school choice litigation has been to improve low student performance and close the achievement gap. *See* Locke v. Davey, 540 U.S. 712 (2004) (upholding a publicly-funded scholarship program that excluded students pursuing a degree in devotional theology); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding a school voucher plan). In *Zelman*, 536 U.S. at 649, for example, the Supreme Court upheld the voucher program because it had a valid secular purpose of "providing educational assistance to poor children in a demonstrably failing public school system." Moreover, the expansion of state charter laws and charter schools in the past two decades stems from a goal of closing the achievement gap and improving educational outcomes for children. *See* OFFICE OF INNOVATION & IMPROVEMENT, U.S. DEP'T OF EDUC., K–8 CHARTER SCHOOLS: CLOSING THE ACHIEVEMENT GAP 7 (2007), http://www2.ed.gov/admins/comm/choice/charterk-8/report.pdf.

56 Over the past several decades, courts have helped develop special education. *See generally* Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, 6 FUTURE OF CHILDREN 25, 25 (1996), http://www.princeton.edu/futureofchildren/publications/docs/06_01_01.pdf. In the span of a few years, from 1971–73, federal courts clarified that public schools owed students the equal protection of the law without discriminating based on disability. *See, e.g.*, Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 307 (E.D. Pa. 1972); Pa. Ass'n for Retarded Children v.

schemes.[57] Although these reforms have influenced public education to varying degrees, the bulk of education reform litigation has involved school funding or school financing.[58]

Understanding the history of school finance litigation is crucial to understanding the new teacher tenure litigation. Plaintiffs have brought school finance lawsuits since the 1970s, and continue to do so today.[59] Although the contours of school finance litigation have shifted, the underlying purpose—providing equal educational opportunity to students—remains the same.[60] Since the 1970s, school reform litigation in state courts has primarily focused on challenges to school financing schemes.[61] School financing schemes or systems are the ways in which state legislatures allocate money to fund public schools throughout a state.[62] Typically, finance systems fund local schools through a combination of local property taxes, statewide funds, and federal money.[63] In school finance litigation, parties challenge the constitutionality of public school financing methods.[64] The cases attempt either to obtain more funding for all schools, or to obtain substantially equal funding for all of the school districts within the state.[65]

School finance litigation is commonly thought of as occurring in three "waves" of reform, classified by the plaintiffs' arguments.[66] The first wave consisted of equal protection claims under the U.S.

Pennsylvania, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971). Since then, Congress enacted several statutes requiring schools to provide services to students with special needs. The main federal statutes involving special education are the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1450 (2012), the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012). Federal courts have also interpreted these statutes specifying the requirements for special education programs. *See, e.g.*, Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Bd. of Educ. v. Rowley, 458 U.S. 176 (1982); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989); Howard S. v. Friendswood Indep. Sch. Dist., 454 F. Supp. 634 (S.D. Tex. 1978).

57 *See infra* notes 58–109 and accompanying text.

58 *See* Koski, *supra* note 52.

59 Linda Wilkins Rickman, *School Finance Reform Litigation: A Historical Review*, 58 PEABODY J. EDUC. 218 (1981).

60 *Id.*

61 *See* Jared S. Buszin, Comment, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613 (2013).

62 *Id.* at 1617 n.14.

63 *See* Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1245–46 (Cal. 1971) (in bank).

64 William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1639 (1989).

65 *Id.* at 1639–40.

66 Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 704 (2010); Buszin, *supra* note 61, at 1617.

Constitution,[67] the second equity wave consisted of equal protection claims under state constitutions,[68] and the third adequacy wave consisted of adequacy claims under the education provisions of state constitutions.[69] Within each wave, plaintiffs built off of the success of plaintiffs in other states by copying their legal arguments.[70]

In the first wave of school finance litigation, advocates argued that financing disparities between school districts violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[71] The first wave began in 1971 in California with *Serrano I*, in which the California Supreme Court held that the state's school finance system violated the guarantees of equal protection in both the California and United States Constitutions.[72] *Serrano I* sparked similar lawsuits in about thirty other states.[73]

However, this legal theory was short-lived. In *San Antonio Independent School District v. Rodriguez* in 1973, the Supreme Court rejected both of plaintiffs' arguments that school finance systems triggered strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[74] The Court did not recognize education as a fundamental right under United States Constitution, and did not recognize wealth as a suspect classification.[75] The Court held that: (i) plaintiffs failed to prove that identifiably "poor" people lived in districts with lower property taxes, or that poverty caused "absolute deprivation of education";[76] (ii) school spending was not correlated with family income;[77] and (iii) district wealth was too "large, diverse, and amorphous" a class to receive strict scrutiny.[78] Because strict scrutiny was not triggered, the Court applied a rational relation analysis and concluded that Texas's school financing scheme was rationally related to the legitimate state interest of local school control.[79] *Rodriguez* thus

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67 Buszin, *supra* note 61, at 1618.

68 *Id.* at 1619.

69 *Id.* at 1621.

70 *Id.*

71 The Equal Protection Clause provides: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

72 *Serrano I*, 487 P.2d 1241, 1244 (Cal. 1971) (in bank).

73 *See* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 224 n.24 (1990) (citing Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099, 1101 (1977)).

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

75 *Id.*

76 *Id.* at 25.

77 *Id.* at 26–27.

78 *Id.* at 27–29.

79 *Id.* at 54–55. The notion that local control is a legitimate interest for funding disparities has been sharply criticized by courts and scholars both before and after *Rodriguez*. *See, e.g.*,

foreclosed the use of federal courts in challenges to school finance systems, and forced education reformers to pursue education reforms with the states.[80]

After *Rodriguez*, the second wave of "equity" school finance cases began.[81] In the second wave, plaintiffs challenged school finance schemes in state courts under state constitutions, either under state equal protection clauses, state education clauses, or both.[82] The second wave began with *Robinson v. Cahill*, a decision by the New Jersey Supreme Court that ruled that the public school financing system was unconstitutional.[83] Unlike the United States Constitution, which does not contain an express education provision,[84] all state constitutions (except for Mississippi) do.[85] Some of the plaintiffs in the second wave were successful in striking down their states' school finance systems.[86]

During the second wave, some state courts invalidated the state's school finance system based on the state's education clause alone,

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Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983); Serrano v. Priest (*Serrano II*), 557 P.2d 929 (Cal. 1976) (in bank), *cert. denied sub nom.* Clowes v. Serrano, 432 U.S. 907 (1977); *Serrano I*, 487 P.2d 1241, 1260 (Cal. 1971) (in bank) (asserting that local control is a "cruel illusion for the poor school districts"); Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 705–10 (1995); Jennifer M. Palmer, Comment, *Education Funding: Equality Versus Quality—Must New York's Children Choose?*, 58 ALB. L. REV. 917 (1995).

80 William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1198 (1996). The Supreme Court did leave a very narrow opening in the federal Equal Protection Clause for education reform litigators. The Court implied that a financing system might violate equal protection if the school system is inadequate to the extent that it effectively deprives children of their First Amendment rights or rights to vote. *Rodriguez*, 411 U.S. at 35, 37. But because this avenue is so narrow, plaintiffs bring their suits in state courts, where they have a better chance of winning.

81 Buszin, *supra* note 61, at 1619.

82 Dietz, *supra* note 80, at 1198.

83 Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

84 *Rodriguez*, 411 U.S. at 35.

85 *See* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § VII, para. 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2nd, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4, para. 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14, R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1; Buszin, *supra* note 61, at 1619.

86 Buszin, *supra* note 61, at 1620.

without relying on the state's equal protection clause.[87] These equity arguments based on education clauses did not demand an equal education, but rather an equal system—including facilities, money, and classroom sizes.[88] The plaintiffs in these cases argued for equality of per-pupil revenues across school districts or fiscal neutrality so that the personal wealth of the school district would not be the sole source of revenues for the district.[89]

Another important aspect of second wave school finance cases was that courts began to rely on state constitutional arguments.[90] The highest courts in most states relied heavily upon the education clause in the state constitution, and sometimes used the education clause in conjunction with the equal protection clause in the state constitution in hearing equity cases.[91]

Ultimately, most school finance cases switched from "equity" cases (the second wave) to "adequacy" cases (the third wave) because plaintiffs stopped winning under equity arguments.[92] This third wave began with a series of plaintiff victories in Montana,[93] Kentucky,[94] and Texas[95] in 1989 and continues to the present.[96] Adequacy claims emphasize the quality of education rather than equality of funding.[97] In successful adequacy cases, courts struck down school finance systems because the quality of education failed to meet some minimum level, not because some districts received more funds than others.[98]

Adequacy claims also differ from equity claims in that they always rely on the education clauses alone, rather than the equal protection

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87 Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 317–18 (1991); Amy Conant, Note, *RIF'd Off: The Denial of Education Opportunities Through Seniority-Based Layoff Policies and the Judiciary's Role in Reform*, 19 WASH. & LEE J. C.R. & SOC. JUST. 469 (2013).

88 Conant, *supra* note 87, at 484.

89 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 (2006).

90 *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": from Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1157–62 (1995); Thro, *supra* note 64, at 1653–56.

91 *See, e.g.*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (finding that an analysis of the education provision reinforces the holding that the funding scheme was unconstitutional under the equality provision); Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980) (bolstering the state's equality provision with the state's education provision to find the funding scheme unconstitutional).

92 Conant, *supra* note 87, at 484–85.

93 Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989), *amended by* Helena Elementary Sch. Dist. No. 1 v. State, 784 P.2d 412 (Mont. 1990).

94 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 213 (Ky. 1989).

95 Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989).

96 William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603 (1994).

97 *Id.*

98 *Id.*

clauses, of states' constitutions.[99] The education clauses can be classified as creating three types of legislative duties.[100] First, the "establishment provisions" in seventeen state constitutions merely impose a legislative duty to create and maintain a public education system.[101] Second, the "quality provisions" in eighteen constitutions impose a legislative duty to create a "thorough," "efficient," or "thorough and efficient" public education system.[102] Third, the "high duty" provisions in fourteen constitutions impose a higher legislative duty to provide for education than for other areas.[103]

There are several advantages for plaintiffs to using adequacy arguments. Adequacy arguments are grounded in an explicit textual source for creating a state duty to provide education;[104] this eliminates the problem that plaintiffs faced during the first wave.[105] Adequacy lawsuits also appeal to traditional conceptions of fairness because most people agree that children are entitled to a basic level of education, whereas the concept of inequality is more politically polarizing.[106] Finally, under adequacy arguments, a plaintiff's success does not threaten to spur lawsuits in other public sectors that the government funds, because an adequacy claim is limited to the interpretation of the education clause.[107] These characteristics have helped more plaintiffs succeed in adequacy claims than in equality claims.[108]

Although school finance litigation has increased funding in public schools, student achievement has not increased proportionately.[109] Unfortunately, the problem of poor student achievement still remains.

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99 *Id.* For a list of the education clauses in forty-nine states' constitutions, see *supra* note 85.

100 Buszin, *supra* note 61, at 1621.

101 *Id.* One example is Connecticut's education clause: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." CONN. CONST. art. VIII, § 1.

102 Buszin, *supra* note 61, at 1621–22. One example is Illinois's education clause: "The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law." ILL. CONST. art. X, § 1.

103 Buszin, *supra* note 61, at 1622. One example is Georgia's education clause: "The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia . . . [which] shall be free and shall be provided for by taxation . . . ." GA. CONST. art. VIII, § 1, para. I.

104 Buszin, *supra* note 61, at 1622.

105 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution."); *see supra* notes 78–80 and accompanying text.

106 Buszin, *supra* note 61, at 1622.

107 *Id.*

108 *Id.*

109 *See supra* Part I.A.

II. TEACHER TENURE REFORM: NEWEST LITIGATION EFFORT TO IMPROVE STUDENT ACHIEVEMENT

School finance litigation served as the prelude to the newest initiative in education reform: teacher quality—or more specifically, teacher tenure—litigation. *Vergara* and its successor lawsuits challenge teacher tenure and dismissal laws. Some commentators describe this new effort as a "fourth wave" of school quality litigation. *Vergara* could serve as the first lawsuit in this fourth wave of litigation, which is based on teacher quality rather than school funding.[110]

A. Vergara v. State

The plaintiffs in *Vergara* brought a lawsuit in 2012 to remedy the problems of low student performance and the achievement gap in California.[111] Like educational adequacy cases, *Vergara* focused on the quality, not the equality, of education.[112] The complaint alleged that teacher quality is the most important school-related factor that influences student achievement.[113] It further alleged that removal of the challenged statutes regarding teacher tenure and dismissal would have a "pronounced, life-altering impact" on the performance of students who otherwise would have been assigned those grossly ineffective teachers.[114]

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110 Nipun Kant, *Teachers, School Spending, and Educational Achievement: Toward a New Wave of School Quality Litigation*, STUDENT SCHOLARSHIP PAPERS 18–19 (2014), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1131&context=student_papers.

111 First Amended Complaint for Declaratory and Injunctive Relief at 1, 4–5, Vergara v. State, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014) (No. BC484642), 2012 WL 10129922.

112 As Judge Treu explained in his opinion: "While [previous education reform cases] addressed the issue of a lack of *equality* of educational *opportunity* based on the discrete facts raised therein, here this Court is directly faced with issues that compel it to apply these constitutional principles to the *quality* of the educational experience." *Vergara*, 2014 WL 6478415, at *1.

113 Theodore B. Olson, a partner at Gibson, Dunn & Crutcher, is lead co-counsel for the plaintiffs in *Vergara*. *Our Team / Legal Team*, STUDENTS MATTER, http://studentsmatter.org/legal-team (last visited May 31, 2015). Students Matter is the nonprofit organization that sponsors the case. Students Matter quotes Dr. John Deasy, the Superintendent of the Los Angeles Unified School District, as asserting: "[T]he most important factor [in student achievement] is a teacher—a highly effective teacher." *Why Teachers?*, STUDENTS MATTER, http://studentsmatter.org/our-case/vergara-v-california-case-summary/why-teachers (last visited May 31, 2015). *See generally* JENNIFER KING RICE, TEACHER QUALITY: UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES v (2003), http://s2.epi.org/files/page/-/old/books/teacher_quality_exec_summary.pdf; RAND EDUC., TEACHERS MATTER: UNDERSTANDING TEACHERS' IMPACT ON STUDENT ACHIEVEMENT (2012), http://www.rand.org/content/dam/rand/pubs/corporate_pubs/2012/RAND_CP693z1-2012-09.pdf ("Teachers matter more to student achievement than any other aspect of schooling.").

114 First Amended Complaint, *supra* note 111, at 10.

Plaintiffs presented evidence that grossly ineffective teachers were "disproportionately assigned to schools serving predominantly minority and economically disadvantaged students."[115] Their evidence included a study of the Los Angeles Unified School District, which found that a poor student is more than twice as likely to have an ineffective English-Language Arts teacher than a wealthier peer, and 66% more likely to have an ineffective math teacher.[116] The plaintiffs' evidence showed that these patterns were even more pronounced for minority students, with Hispanic and black students two to three times more likely to have ineffective teachers compared to their white and Asian peers.[117]

Because *Vergara* was the first case challenging teacher tenure laws, the court relied on previous education cases, especially those concerning finance reform.[118] Significantly, the *Vergara* court applied the holdings from *Serrano I* and *Serrano II*, that education was a "fundamental interest" under the California state constitution.[119] Applying strict scrutiny, the court held that the challenged statutes "impose a real and appreciable impact on students' fundamental right to equality of education."[120] The *Vergara* court applied strict scrutiny to the challenged statutes because it previously recognized education as a fundamental right in *Serrano II*, when the California Supreme Court explained: "Under the strict standard applied in [suspect classifications or fundamental interests] cases, the state bears the burden of establishing not only that it has a Compelling interest which justifies the law but that the distinctions drawn by the law are Necessary to further its purpose."[121] Accordingly, the defendants bore the burden of establishing that the State had a compelling interest that justified the challenged statutes, and that the statutes were necessary to further that interest.[122] The court ultimately held that the state did not have a compelling interest that justified any of the challenged statutes, and it therefore ruled that the statutes were unconstitutional under California's constitution.[123]

The *Vergara* court struck down three types of statutes: the Permanent Employment Statute, the Last-In-First-Out (LIFO) Statute, and the Dismissal Statutes.[124] First, according to the court, the

115 *Id.* at ¶ 13.
116 *Id.* at ¶ 42.
117 *Id.*
118 Vergara v. State, No. BC484642, 2014 WL 6478415, at *1 (Cal. Super. Ct. Aug. 27, 2014).
119 *Id.* (quoting *Serrano II*, 557 P.2d 929, 948 (Cal. 1976) (in bank)).
120 *Id.* at *4.
121 *Serrano II*, 557 P.2d at 948 (quoting *Serrano I*, 487 P.2d 1241, 1249 (Cal. 1971) (in bank)).
122 *Vergara*, 2014 WL 6478415, at *4.
123 *Id.* at *7.
124 *Id.*

Permanent Employment Statute granted teachers tenure too quickly, before their performance could be reliably evaluated.[125] Second, the court held that the strict LIFO Statute mandated that younger teachers be laid off before older teachers, without regard to teacher effectiveness.[126] Third, the court deemed the Dismissal Statutes' process for firing ineffective teachers too procedurally burdensome.[127] According to the court, these statutes, individually and collectively, kept ineffective teachers in the classroom. As a result, they violated students' fundamental right to equality of education and disproportionately burdened poor and minority students.[128]

Vergara emphasized an overarching theme in California's education case law: the state constitution is the final guarantor of an equal and meaningful education opportunity to students in California.[129] The court outlined the numerous strong provisions of the California Constitution that were pertinent to the case.[130] California does not specify in its constitution the level of quality of the "system of common schools" that the legislature must provide, but California's case law interpreting education as a fundamental right bolstered the plaintiffs' constitutional education claims.[131] California has recognized education as a fundamental right since *Serrano I* in 1971,[132] and reaffirmed its recognition in *Serrano II*[133] and *Butt v. State*.[134]

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125 *Id.* at *4–5.

126 *Id.* at *6–7.

127 *Id.* at *5–6.

128 *Id.* at *7. Because the court determined that the challenged statutes discriminated against minorities, particularly those who lack sufficient power to seek redress through the political process, it applied strict scrutiny, a higher level of judicial scrutiny to evaluate them. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

129 *Vergara*, 2014 WL 6478415, at *3.

130 *Id.* There are three relevant provisions. CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ."); CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual [and] scientific . . . improvement."); CAL. CONST. art. IX, § 5 ("The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district . . . .").

131 *Vergara*, 2014 WL 6478415, at *1, *4.

132 *Serrano I*, 487 P.2d 1241 (Cal. 1971) (in bank) (holding that California's school financing system violated the equal protection rights of students under the California Constitution).

133 *Serrano II*, 557 P.2d 929, 951 (Cal. 1976) (in bank) (asserting that the funding system "affect[ed] the fundamental interest of the students of this state in education").

134 Butt v. State, 842 P.2d 1240 (Cal. 1992) (in bank) (holding that the premature termination of the school term would impose a real and appreciable impact on students' fundamental right to basic educational equality).

Commentators regard *Vergara* as a potentially landmark case with far-reaching implications,[135] although the ruling is stayed pending an appeal.[136] Teacher tenure remains a hot-button issue that has been the subject of political debate.[137] Proponents of teacher tenure reform have secured many legislative victories,[138] but *Vergara* was the first judicial victory for those proponents.[139] Education Secretary Arne Duncan endorsed the decision in *Vergara*, stating, "equal opportunities for learning must include the equal opportunity to be taught by a great teacher."[140] On the other hand, the President of the American Federation of Teachers lamented that "the rhetoric and lack of a thorough, reasoned opinion is disturbing," and declared that "[n]o wealthy benefactor with an extreme agenda will detour us from our path to reclaim the promise of public education."[141]

B. *Teacher Tenure Lawsuits in Other States*

Following *Vergara*, plaintiffs in New York brought similar lawsuits challenging the state's teacher tenure and dismissal laws.[142] In New

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135 Editorial, *A School Reform Landmark*, WALL ST. J. (June 10, 2014, 7:27 PM), http://online.wsj.com/articles/a-school-reform-landmark-1402442804; Haley Sweetland Edwards, *The War on Teacher Tenure*, TIME (Oct. 30, 2014), http://time.com/3533556/the-war-on-teacher-tenure.

136 Press Release, Students Matter, Plaintiffs File Merits Brief in Appeal of Historic *Vergara v. California* Ruling (June 24, 2015), http://studentsmatter.org/wp-content/uploads/2015/06/SM_Release_Brief-In-Opposition_6.23.15.pdf; *see also* Adam Nagourney, *California Governor Appeals Court Ruling Overturning Protections for Teachers*, N.Y. TIMES, Aug. 31, 2014, at A15, http://www.nytimes.com/2014/08/31/us/california-governor-fights-decision-on-teacher-tenure.html.

137 Press Release, U.S. Dep't of Educ., Statement from U.S. Secretary of Education Arne Duncan Regarding the Decision in Vergara v. California (June 10, 2014), http://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-regarding-decision-vergara-v-califo.

138 Press Release, Mich. Gov. Rick Snyder, Teacher Tenure Reform Signed Into Law (July 19, 2011), http://www.michigan.gov/snyder/0,1607,7-277-57577-259445--,00.html; Press Release, State of N.J. Dep't of Educ., Christie Administration Advances Regulations to Implement Statewide Educator Evaluation Systems Provided for in Landmark Tenure Reform Law (Mar. 6, 2013), http://www.nj.gov/education/news/2013/0306tnj.htm; Nona Willis Aronowitz, *Tenure Rules Linked to Teacher Evaluations in More States*, NBC NEWS (May 21, 2014, 10:17 PM), http://www.nbcnews.com/news/us-news/tenure-rules-linked-teacher-evaluations-more-states-n111651.

139 Tom Watts, *California Teacher Tenure*, HARV. L. & POL'Y REV. (June 11, 2014), http://harvardlpr.com/2014/06/11/california-teacher-tenure.

140 Press Release, U.S. Dep't of Educ., *supra* note 137.

141 Press Release, Am. Fed'n of Teachers, Statement from AFT President Weingarten on Vergara Decision (June 10, 2014), http://www.aft.org/press-release/statement-aft-president-weingarten-vergara-decision.

142 Beth Fertig et al., *Teacher Tenure Lawsuits Spread from California to New York*, NPR (July 28, 2014, 4:03 PM), http://www.npr.org/blogs/ed/2014/07/28/336050469/teacher-tenure-challenge-spreads-from-california-to-new-york.

York, two groups filed suit: the New York City Parents Union (*Davids v. State*) and Campbell Brown's Partnership for Educational Justice (*Wright v. State*).[143] The judge hearing the two lawsuits consolidated them into one, *Davids*.[144] *Vergara* heavily influenced the New York cases: the legal team spearheading *Davids* is led by Theodore J. Boutrous, lead counsel for the *Vergara* plaintiffs;[145] Students Matter, the organization sponsoring *Vergara*, is also supporting the *Davids* plaintiffs,[146] and the *Wright* plaintiffs cite *Vergara* in their complaint.[147] The New York court has denied the defendant' motion to dismiss, noting that "any constitutional challenges to the sections of the Education Law that are the subject of this lawsuit, is a matter for another day."[148]

There are two major distinctions between *Davids* and *Vergara*: a legal difference in the recognition of education as a fundamental right, and the substance of the challenged statutes. First, New York does not recognize education as a fundamental right under its state constitution and will not apply strict scrutiny in the case.[149] Accordingly, the plaintiffs in *Davids* do not allege an equal protection violation, but

143 Complaint for Declaratory and Injunctive Relief, Wright v. State, Index No. A00641/2014 (N.Y. Sup. Ct. July 28, 2014), http://nylawyer.nylj.com/adgifs/decisions14/072914summons.pdf; Verified Amended Complaint, Davids v. State, Index No. 101105/14 (N.Y. Sup. Ct. July 24, 2014), http://studentsmatter.org/wp-content/uploads/2014/08/SM_NY_Amended-Complaint_07.25.14.pdf; *see also* DAVIDS V. N.Y., http://davidsvny.org (last visited Sept. 25, 2015); *New York Lawsuit*, EDUC. JUST., http://edjustice.org/projects/new-york-lawsuit (last visited Sept. 25, 2015).

144 *See* Stephen Sawchuk, *New York Teacher-Protection Lawsuits Combined*, EDUC. WK.: TEACHER BEAT (Sept. 12, 2014, 11:07 AM), http://blogs.edweek.org/edweek/teacherbeat/2014/09/new_york_tenure_lawsuits.html.

145 Press Release, Students Matter, Students Matter to Join New York Education Lawsuit, *Davids v. State of New York* (Aug. 6, 2014), http://studentsmatter.org/wp-content/uploads/2014/08/SM_NY_PressRelease_Final_08.06.14.pdf.

146 *Id.*

147 Complaint for Declaratory and Injunctive Relief, *supra* note 143, at 19.

148 Decision & Order, Davids v. State, Index No. 101105/2014, at 17 (N.Y. Sup. Ct. Mar. 12, 2015), http://lawprofessors.typepad.com/files/2015-march-motion-to-dismiss-denied--a-043---davids-wright.pdf. The defendants' motion to dismiss was based on several grounds, including nonjusticiability and failure to state a claim. Memorandum of Law in Support of United Federation of Teacher's Motion to Dismiss, Davids v. State, Index No. 101105/2014 (N.Y. Sup. Ct. Oct. 28, 2014), http://online.wsj.com/public/resources/documents/UFT1028.pdf; Brian Charles, *Legal Fight over Teacher Tenure Continues*, CHALKBEAT N.Y. (Dec. 8, 2014, 1:11 PM), http://ny.chalkbeat.org/2014/12/08/legal-fight-over-teacher-tenure-continues.

149 N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."); *see also* Devora Allon, Litigation Partner, Kirkland & Ellis LLP, Panel 1: Something to Cheer or Something to Fear? at Teachers College, Columbia University Discussion: Courts, Teachers, and Student Rights: Are *Vergara*, *Davids*, and *Wright* Steps Forward or Missteps? (Dec. 3, 2014).

rather a violation of the state constitution's education provision.[150] Unlike the plaintiffs' complaint in *Vergara*, which alleged that the challenged statutes disproportionately burdened poor and minority students, the plaintiffs' complaint in *Davids* alleges that the challenged statutes violate New York students' rights to a sound basic education without distinguishing between different types of students based on socioeconomic status.[151] Second, the substance of the challenged statutes differs. Whereas teacher tenure decisions in California are made after only two years, the teacher tenure decisions in New York are made after three.[152] Although both New York and California's teacher disciplinary and dismissal processes are lengthy and expensive, the individual steps outlined in their respective statutes differ.[153] However, the LIFO statutes in both states are similar in that New York and California are two of only ten states that mandate layoffs based solely on seniority.[154]

In addition to the pending lawsuit in New York, commentators expect *Vergara* to spark more teacher tenure lawsuits in states and counties across the country.[155] Students Matter, the organization sponsoring the *Vergara* plaintiffs, describes itself as a "*national* non-profit organization dedicated to sponsoring impact litigation" regarding teacher quality, and describes *Vergara* as the "*first* case" sponsored by Students Matter.[156] StudentsFirst, another organization supporting the *Vergara* plaintiffs,[157] is considering filing additional lawsuits in

150 Verified Amended Complaint, *supra* note 143; *see also* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 330 (N.Y. 2003) (interpreting the New York Constitution's education provision as ensuring students a sound basic education).

151 *See* Complaint for Declaratory and Injunctive Relief, *supra* note 143, at 3 ("This suit seeks to strike down the legal impediments that prevent New York's schools from providing a sound basic education to all of their students . . . ."); Verified Amended Complaint, *supra* note 143, at 14; Allon, *supra* note 149 (explaining that the New York lawsuits allege that there is "a district-wide failure across geographic and socioeconomic strata").

152 Although the tenure decision is technically made in New York after three years, it is effectively made after only two years. The tenure decision is made based on two years of data, because teacher evaluations from the previous year are not released until the following September. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 143, at 10; Angelia Dickens, *Vergara's Effects Ripple Out to New York State*, STUDENTSFIRST (July 31, 2014), https://studentsfirst.org/blogs/entry/vergaras-effects-ripple-out-to-new-york-state; *see also* Allon, *supra* note 149.

153 *See* CAL. EDUC. CODE §§ 44934, 44938, 44944 (West 2015); N.Y. EDUC. LAW § 3020-a (McKinney 2015); *see also* Allon, *supra* note 149.

154 *See* CAL. EDUC. CODE § 44955 (West 2015); N.Y. EDUC. LAW § 2585(3) (McKinney 2015).

155 Jennifer Medina, *Judge Rejects Teacher Tenure*, N.Y. TIMES, June 11, 2014, at A1, http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html.

156 STUDENTS MATTER, OVERVIEW 1, 2 (2013) (emphasis added), http://studentsmatter.org/wp-content/uploads/2013/02/SM_Overviews_02.25.131.pdf.

157 Fertig et al., *supra* note 142.

Minnesota, Connecticut, New Jersey, and Tennessee.[158] Other scholars have predicted the states in which plaintiffs could likely succeed in bringing teacher tenure lawsuits.[159] If the *Davids* plaintiffs succeed in New York on a claim alleging a violation of the state constitution's education clause, it will pave the way for future litigation in other states that, like New York, do not recognize education as a fundamental right under their state constitution. Potential plaintiffs may be waiting to see whether *Vergara* is upheld on appeal and whether *Davids* is successful at trial before proceeding to file similar teacher quality lawsuits in other states.

III. TEACHER TENURE LITIGATION WILL BE UNSUCCESSFUL IN IMPROVING STUDENT ACHIEVEMENT

Teacher tenure lawsuits will not succeed in improving student achievement because they will face challenges at the procedural, merits, and remedial stages of the litigation, and because they will ultimately have a limited impact on student achievement. Education reformers should not devote resources to pursuing teacher tenure and teacher quality reform through courts, and should instead seek reform through legislatures and administrative agencies. Reformers have spent many decades using courts to effect education reform, but even their judicial victories have largely been unsuccessful in improving student achievement. Because school finance litigation is among the most well-developed litigation regarding education, future teacher tenure lawsuits will apply many of the same legal theories—and face the same challenges—as those cases. The future success of teacher tenure lawsuits in state courts will largely mirror that of the school finance cases.

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158 *Id.*; Claudio Sanchez, *Q&A: Michelle Rhee on Teacher Tenure Challenges*, NPR (July 30, 2014, 8:03 AM), http://www.npr.org/blogs/ed/2014/07/30/336056230/q-a-michelle-rhee-on-teacher-tenure-challenges.

159 Kant, *supra* note 110. Kant outlines a classification of the most viable states by dividing them into five categories. *Id.* at 21. The most viable states are those like Connecticut where courts have struck down state finance systems that affect teacher quality, and recognized teacher quality has important effects on student learning. *Id.* A second set of states, including Kentucky and Tennessee, struck down school financing schemes partly due to their assumed premise that disparate funding affects teacher retention. *Id.* at 22. The third set of states, including New Jersey, explicitly acknowledged that factors such as teacher quality affect student achievement, but expressed concern over the measurement of such factors. *Id.* A fourth set of states, including Arizona and Idaho, decided school finance cases without discussing the effect of funding on teachers. *Id.* at 23. Finally, a fifth set of states, including Colorado, decided school financing cases by showing significant deference to the other two branches. *Id.* at 23–24.

A. *Teacher Tenure Lawsuits Raise Political Question and Separation of Powers Concerns*

Just like many school finance lawsuits, some teacher tenure lawsuits will face political question and separation of powers concerns, and will therefore be dismissed before courts reach the merits. The separation of powers doctrine is the principle that "one branch of government cannot exercise the powers delegated to another branch by the Constitution."[160] One way a court applies the separation of powers doctrine is through the political question doctrine,[161] which it invokes when it faces an issue that is inappropriate for judicial review.[162] In *Baker v. Carr*, the seminal case asserting the political question doctrine, the Supreme Court outlined six factors to determine whether an issue presents a nonjusticiable political question.[163] Two of those factors are particularly relevant in education litigation: the "textually demonstrable constitutional commitment of the issue to a coordinate political department" and the absence of "judicially discoverable and manageable standards" to resolve the issue.[164] Although some commentators doubt whether the political question doctrine applies to state cases at all,[165]

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160 Bess J. DuRant, *The Political Question Doctrine: A Doctrine for Long-Term Change in Our Public Schools*, 59 S.C. L. REV. 531, 538 (2008); *see also* Kilbourn v. Thompson, 103 U.S. 168, 190 (1880).

161 Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

162 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.8.1 (3d ed. 2006).

163 *Baker*, 369 U.S. at 217. The six factors in determining whether a case involves a political question are:

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] or a lack of judicially discoverable and manageable standards for resolving it; [(3)] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] or an unusual need for unquestioning adherence to a political decision already made; [(6)] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

164 *Id.*

165 G. ALAN TARR & MARY C.A. PORTER, STATE SUPREME COURTS IN STATE AND NATION 44–45 (1988) ("[W]hereas federal courts have developed the 'political questions' doctrine to avoid impinging on coordinate branches of the national government, such separation-of-powers concerns seldom affect state courts."); Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 422 (1984) (noting the refusal of state courts to "slavishly parrot the federal judiciary's conception of political questions"); Christine M. O'Neill, Note, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545 (2009).

many state courts nonetheless apply political question doctrine and separation of powers principles in deciding cases.[166]

Because school finance lawsuits are the leading examples of cases in which state courts developed the political question doctrine in education litigation, understanding those cases is crucial to understanding the same challenges in teacher tenure litigation. Seven states found school finance cases nonjusticiable because of concerns about the separation of powers or political question violations.[167] These states varied in their rationales for doing so.[168] Three of these states cited *Baker v. Carr* and the political question doctrine,[169] two states referred more broadly to general concerns about separation of powers,[170] and the remaining two states relied on both state and federal political question jurisprudence.[171]

Plaintiffs in teacher tenure lawsuits already face similar separation of powers and political question concerns that school finance lawsuits did. Although the defendants in *Vergara* did not raise justiciability challenges, the defendants in *Davids* did,[172] and future defendants in similar lawsuits will likely raise them as well.

1. Commitment of Education to Legislative Branch

Many commentators and courts believe that school finance litigation fundamentally implicates the separation of powers concern because they believe that when a court reaches the merits of these cases,

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166 See *infra* Part III.A.1–2. Forty states contain express separation-of-powers provisions in their constitutions. *See* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 337 (2003).

167 *See, e.g.*, *Ex parte* James, 836 So. 2d 813, 819 (Ala. 2002); Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164 (Neb. 2007); Okla. Educ. Ass'n v. State *ex rel.* Okla. Legislature, 158 P.3d 1058, 1065–66 (Okla. 2007); Marrero *ex rel.* Tabalas v. Commonwealth, 739 A.2d 110, 113–14 (Pa. 1999); City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (R.I. 1995); *see also* O'Neill, *supra* note 165.

168 Illinois, Florida, and Rhode Island used federal, but not state, precedent. O'Neill, *supra* note 165, at 560–66. Alabama and Oklahoma used neither state nor federal precedent. Nebraska and Pennsylvania used both federal and state precedent. *Id.* at 566–70.

169 *Id.* at 560–66; *see, e.g.*, *Chiles*, 680 So. 2d at 408; *Edgar*, 672 N.E.2d at 1191–93; *Sundlun*, 662 A.2d at 58.

170 O'Neill, *supra* note 165, at 566–70; *see, e.g.*, *James*, 836 So. 2d at 819; *Okla. Educ. Ass'n*, 158 P.3d at 1065–66.

171 O'Neill, *supra* note 165, at 570–76; *see, e.g.*, *Heineman*, 731 N.W.2d at 176 (explaining that the distribution of powers clause in Nebraska constitution prohibits one branch of government from exercising the duties of another branch); *Marrero*, 739 A.2d at 113–14 (citing previous Pennsylvania state court cases for its explanation of the political question doctrine).

172 Memorandum of Law in Support of United Federation of Teacher's Motion to Dismiss, *supra* note 148, at 21.

the court oversteps into the legislature's domain.[173] Almost all state constitutions textually commit the provision of education to the legislature.[174] Furthermore, decisions regarding school funding are policy determinations that the legislature, as a collaborative and politically accountable unit, is better suited to make.[175] To answer the question of whether a school financing scheme is constitutional, a court would need to direct the legislature on how to allocate funds, which is traditionally a policy determination.[176] Indeed, several states concluded that school finance issues are nonjusticiable because they should be left to the legislative branch.[177] As the Illinois Supreme Court held in *Committee for Educational Rights v. Edgar*, "questions relating to the quality of education are solely for the legislative branch to answer."[178]

Just as many state courts found that school finance cases were nonjusticiable because education is textually committed to the legislative branch, state courts will likely make the same determination in future teacher tenure cases. Although the issues presented in teacher tenure lawsuits do not implicate budgetary allocation (which is traditionally left to the legislative branch to determine), they still implicate the way in which resources are distributed between school districts.[179]

2. Lack of Judicially Discoverable and Manageable Standards in Education

In school finance litigation, several state courts found that school finance cases were nonjusticiable because there were no judicially

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173 *See* Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 589 (2004) (discussing the Illinois Supreme Court's recognition of "separation of powers concerns inherent in school finance litigation").

174 *See* statutes cited *supra* note 85.

175 DuRant, *supra* note 160, at 536.

176 *Id.*

177 *See, e.g.*, Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) ("[A]ppellants have failed to demonstrate . . . an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature . . . ."); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981) ("[W]ithin the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973))); City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (R.I. 1995); Obhof, *supra* note 173.

178 Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1189 (Ill. 1996). The court also explained that the school finance case was nonjusticiable because the separation of powers doctrine prohibits a court from making an "initial policy determination," and the court would not "presume to lay down guidelines or ultimatums for [the legislature]." *Id.* at 1191–92 (alterations in original).

179 Buszin, *supra* note 61.

manageable and discoverable standards by which to measure the adequacy or equity of education resulting from school funding.[180] Courts doubted that using per-pupil expenditures was a manageable yardstick by which to measure the adequacy or equity of school financing schemes.[181]

The profound skepticism about the ability of courts to develop discoverable standards in school finance cases indicates that they will also be skeptical in teacher tenure cases because courts lack judicially manageable and discoverable standards by which to evaluate teacher quality.[182] Finding an adequacy standard in school finance cases—in which the budgetary inputs were readily quantifiable—was difficult enough.[183] Finding a standard in teacher tenure cases—when teacher evaluation methods are frequently disputed—is even less manageable.[184] Although *Vergara* took for granted that the social science evidence presented was reliable enough to conclude that the teacher tenure and dismissal laws had a "real and appreciable impact" on a significant number of California students,[185] the same will likely not be true in other states.[186] Additionally, defendants in future teacher tenure lawsuits could successfully counter plaintiffs' evidence with their own evidence.[187]

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180 For a general explanation of judicially discoverable and manageable standards, see *Baker v. Carr*, 369 U.S. 186 (1962). The doctrine has been applied to school finance cases. *See, e.g.*, *Chiles*, 680 So. 2d at 406–07 ("To decide such an abstract question of 'adequate' funding, the courts would necessarily be required to subjectively evaluate the Legislature's value judgments as to the spending priorities . . . ." (quoting the trial court order)); *Edgar*, 672 N.E.2d at 1191 ("What constitutes a 'high quality' education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards."); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 178–83 (Neb. 2007) (emphasizing lack of judicially discoverable and manageable standards finding school finance adequacy claim nonjusticiable); Marrero *ex rel.* Tabalas v. Commonwealth, 739 A.2d 110 (Pa. 1999) (finding school finance to be political question because of lack of judicially manageable standards).

181 *See Marrero*, 739 A.2d at 112–13 ("Even were this Court to attempt to define the specific components of a 'thorough and efficient education' in a manner which would foresee the needs of the future, the only judicially manageable standard this court could adopt would be the rigid rule that each pupil must receive the same dollar expenditures . . . . [H]owever, . . . expenditures are not the exclusive yardstick of educational quality, or even of educational quantity . . . . The educational product is dependent upon many factors, including the wisdom of the expenditures as well as the efficiency and economy with which available resources are utilized." (alterations in original) (quoting Danson v. Casey, 399 A.2d 360, 366 (Pa. 1979))).

182 *See Baker*, 369 U.S. at 217.

183 Dietz, *supra* note 80.

184 It is very difficult for a court to determine whether a particular teacher evaluation method is an accurate standard by which it can make a judicial determination. For a discussion of the ongoing controversy surrounding teacher evaluation standards, see *infra* notes 196–198 and accompanying text.

185 Vergara v. State, No. BC484642, 2014 WL 6478415, at *4 (Cal. Super. Ct. Aug. 27, 2014).

186 *See infra* notes 228–232 and accompanying text.

187 *See, e.g.*, BRIAN A. JACOB, DO PRINCIPALS FIRE THE WORST TEACHERS?: NBER WORKING PAPER NO. 15715, at 20 (2010), http://www.nber.org/papers/w15715.pdf (describing a recent

Moreover, some courts will likely dismiss teacher tenure lawsuits because the social science evidence that plaintiffs present is judicially unmanageable. Courts have been using—and sometimes misusing—social science evidence in deciding education cases as far back as *Brown v. Board of Education*, in which the Court used empirical evidence to support its conclusion that *de jure* segregation "generates a feeling of inferiority as to [the] status [of black students] in the community that may affect their hearts and minds in a way unlikely ever to be undone."[188] After *Brown*, courts have misused social science research[189] by misapplying empirical research,[190] misconstruing or ignoring contradictory data,[191] and changing the law to avoid the facts.[192] As more social science research in the field of education emerges, it is even more important that courts use valid and relevant evidence.[193]

The methods used to evaluate teachers are generally known as "value added models" (VAMs) and use students' standardized test scores to determine teacher effectiveness.[194] The *Vergara* court used

study on teacher retention after a change that greatly reduced costs of firing teachers in a public school system that found thirty to forty schools did not dismiss any teachers after the change).

188 *Brown I*, 347 U.S. 483, 494 (1954). Scholars have criticized the Court's use of social science evidence by questioning the validity of the evidence relied upon in footnote 11 or the Court's interpretation of it. Kant, *supra* note 110, at 28.

189 David L. Faigman, "*Normative Constitutional Fact-Finding*": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 550 (1991).

190 *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978) (holding that a Georgia state statute authorizing criminal conviction upon unanimous vote of five instead of six jurors was unconstitutional, despite ample contradictory social science evidence that did not support distinction between five- and six-member panels).

191 *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880 (1983) (misinterpreting American Psychiatric Association amicus brief supporting assessment that psychiatrists and psychologists cannot reliably predict future dangerousness of particular criminal), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, PL 104-132, 110 Stat. 1214, *as recognized in* Slack v. McDaniel 529 U.S. 473, 480–81 (2000).

192 *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (ignoring evidence that race played a factor in defendant's conviction, but changing law that to establish Eighth Amendment violation, petitioner must introduce evidence that prosecutor's discretion in his particular case resulted in an arbitrary and capricious decision); Lockhart v. McCree, 476 U.S. 162 (1986) (rendering social science evidence irrelevant by shifting focus from concern over aggregate effect of death qualification increasing conviction rates to concern over whether death qualification created bias in petitioner's jury).

193 There are many generally accepted principles of high-quality social science research, including that research findings should have economic rather than statistical significance and suggest a causal effect rather than a mere correlation. For a general discussion of causality in policy analysis, see Daniel E. Ho et al., *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 POL. ANALYSIS 199 (2007), http://pan.oxfordjournals.org/content/15/3/199.full.pdf+html.

194 VAMs purport to be able to predict, using a complicated computer model, how students with similar characteristics are supposed to perform on the exams and how much growth they are supposed to achieve over time. They then rate teachers on how much their actual students compare to the theoretical students. For an explanation of how VAMs attempt to predict the

VAM-based testimony to determine that there were 2,750 to 8,250 grossly ineffective teachers teaching in the California public school system.[195] Within the teaching community, however, there are concerns about the validity and reliability of value added models.[196] These concerns caution that the models are likely inadequate standards by which to measure educational adequacy. Many scholars are also critical of using VAMs because they are unreliable.[197] In the past year, teachers across the country have filed lawsuits challenging the teacher evaluation systems in their school systems as being unfair, arbitrary, and inaccurate.[198] It is quite possible that courts outside of California may view VAM-based evidence more skeptically than the *Vergara* court did.

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value a teacher adds to student achievement, see DOUGLAS N. HARRIS, VALUE-ADDED MEASURES IN EDUCATION: WHAT EVERY EDUCATOR NEEDS TO KNOW (2011).

195 Vergara v. State, No. BC484642, 2014 WL 6478415, at *4 (Cal. Super. Ct. Aug. 27, 2014) (extrapolating from expert's testimony that one to three percent of teachers in California are grossly ineffective).

196 *See, e.g.*, Curtis Krueger et al., *VAM, the New Teacher Evaluation System, Stirs Concern, Confusion*, TAMPA BAY TIMES (Oct. 19, 2012, 6:47 PM), http://www.tampabay.com/news/education/k12/vam-the-new-teacher-evaluation-system-stirs-concern-confusion/1257409.

197 *See* David C. Berliner, *Exogenous Variables and Value-Added Assessments: A Fatal Flaw*, 116 TEACHERS COLL. REC. (2014), http://www.tcrecord.org/Content.asp?ContentId=17293 (concluding that value-added assessments are not now and may never be reliable enough to use in evaluating teachers); Diane Ravitch, *Why VAM Is a Sham*, DIANE RAVITCH'S BLOG (Oct. 1, 2013), http://dianeravitch.net/2013/10/01/why-vam-is-a-sham; *see also* AM. STATISTICAL ASS'N, ASA STATEMENT ON USING VALUE-ADDED MODELS FOR EDUCATIONAL ASSESSMENT (2014), https://www.amstat.org/policy/pdfs/ASA_VAM_Statement.pdf. The statement says in relevant part:

> The American Statistical Association (ASA) makes the following recommendations regarding the use of VAMs: . . .
>
> - Estimates from VAMs should always be accompanied by measures of precision and a discussion of the assumptions and possible limitations of the model. These limitations are particularly relevant if VAMs are used for high-stakes purposes.
>   - VAMs are generally based on standardized test scores, and do not directly measure potential teacher contributions toward other student outcomes.
>   - VAMs typically measure correlation, not causation: Effects—positive or negative—attributed to a teacher may actually be caused by other factors that are not captured in the model.

Id. at 1–2.

198 Teachers have filed three of these lawsuits in Florida, Tennessee, and New York. *See* Motoko Rich, *Florida: Teachers Sue Over Evaluation System*, N.Y. TIMES, Apr. 17, 2013, at A17, http://www.nytimes.com/2013/04/17/education/florida-teachers-sue-over-evaluation-system.html (quoting the president of the Florida Education Association explaining how the Florida lawsuit "highlights the absurdity of the current evaluation system"); Stephen Sawchuk, *Tenn. Teachers' Union Takes Evaluation Fight Into the Courtroom: Lawsuit Calls System Arbitrary, Flawed*, EDUC. WK. (Mar. 28, 2014), http://www.edweek.org/ew/articles/2014/03/28/27tennessee.h33.html; Valerie Strauss, *High-Achieving Teacher Sues State Over Evaluation Labeling Her 'Ineffective,'* WASH. POST: ANSWER SHEET (Oct. 31, 2014), http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/10/31/high-achieving-teacher-sues-

B. *Plaintiffs in Teacher Tenure Lawsuits Will Lose on the Merits*

Because the legal reasoning in teacher tenure lawsuits is analogous to the legal reasoning in school finance cases,[199] the success of teacher tenure lawsuits in state courts on the merits will generally track the success of school finance lawsuits.[200] School finance lawsuits have been met with mixed success. Plaintiffs in equity cases[201] initially enjoyed success during the mid-1970s with a burst of pro-plaintiff decisions.[202] However, the pace of success slowed considerably in the following decade: by 1988, fifteen state supreme courts had denied relief to plaintiffs.[203] The pendulum swung back again in plaintiffs' favor

state-over-evaluation-labeling-her-ineffective (quoting a lawsuit's allegations that the New York State Growth Measure "actually punishes excellence in education through a statistical black box which no rational educator or fact finder could see as fair, accurate or reliable").

199 *See* Vergara v. State, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014) (applying reasoning from school finance cases to teacher tenure case); Verified Amended Complaint, *supra* note 143 (applying reasoning from school finance cases to teacher tenure case).

200 This Note only evaluates the likelihood of success of teacher tenure lawsuits in *state* courts, not federal courts. Plaintiffs largely abandoned bringing federal education lawsuits after the Supreme Court in *Rodriguez* foreclosed the use of federal courts in school finance litigation. *See* discussion *supra* Part II. Although the Supreme Court has held that a state policy has violated its citizens' Fourteenth Amendment equal protection rights, it has done so using only a rational basis standard. *See* Plyler v. Doe, 457 U.S. 202 (1982) (holding that a Texas statute which withholds from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment). There could potentially be a challenge to teacher tenure laws based on the federal equal protection clause of the Fourteenth Amendment, but those potential challenges are not the subject of this Note. Some scholars have argued that, considering recent developments in legislation and common law, there should be a federally recognized fundamental right to education. *See* Ken Gormley, *Education as a Fundamental Right: Building a New Paradigm*, 2 F. ON PUB. POL'Y 207, 219 (2006), http://forumonpublicpolicy.com/vol2no2.edlaw/gormley.pdf; Michael Salerno, Note, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 509–10 (2007); Brooke Wilkins, Note & Comment, *Should Public Education Be a Federal Fundamental Right?*, 2005 BYU EDUC. & L.J. 261, 288 (explaining that it is possible to argue for a federal fundamental right to education).

201 *See supra* notes 81–91 and accompanying text.

202 *See* Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218 (Timothy Ready et al. eds., 2002), http://www.schoolfunding.info/resource_center/research/adequacychapter.pdf. The states in which plaintiffs prevailed were Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Wyoming. DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); *Serrano II*, 557 P.2d 929, 929 (Cal. 1976) (in bank); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (en banc); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980).

203 *See* Rebell, *supra* note 202, at 218. The states where plaintiffs lost were Arizona, Colorado, Georgia, Idaho, Illinois, Maryland, Michigan, Montana, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, and South Carolina. Shofstall v. Hollins, 515 P.2d 590

beginning in 1989, when plaintiffs in equity cases prevailed in eighteen of twenty-eight of the major decisions of the highest state courts.[204]

The outcome of school finance litigation frequently turned on whether the state in which the lawsuit was brought recognized education as a fundamental right. This distinction matters because fundamental rights are afforded greater constitutional protection in both federal and state courts.[205] Generally, plaintiffs succeeded in states that accepted education as a fundamental right and therefore applied strict scrutiny to the financing schemes.[206] Plaintiffs prevailed in several states: Arkansas,[207] California,[208] Connecticut,[209] New Jersey,[210]

(Ariz. 1973) (in banc); Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Blase v. State, 302 N.E.2d 46 (Ill. 1973); Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758 (Md. 1983); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); State *ex rel.* Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); Bd. of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Britt v. N.C. State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App. 1987), *appeal denied*, 361 S.E.2d 71 (N.C. 1987); Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987); Olsen v. State, 554 P.2d 139 (Or. 1976); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland Cty. v. Campbell, 364 S.E.2d 470 (S.C. 1988).

204 *See* Rebell, *supra* note 202, at 218. Some of the eighteen states in which plaintiffs prevailed are Alabama, Arizona, Arkansas, Idaho, Kansas, Kentucky, Massachusetts, Missouri, Montana, New Hampshire, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Vermont, and Wyoming. Op. of the Justices, 624 So. 2d 107 (Ala. 1993); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) (in banc); Tucker v. Lake View Sch. Dist. No. 25, 917 S.W.2d 530 (Ark. 1996); Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993), *modified sub. nom.*, Idaho Schs. for Equal Educ. Opportunity v. State, 976 P.2d 913 (Idaho 1998); Mock v. State, No. 91-CV-1009 (Shawnee Cty. Dist. Ct. Oct. 14, 1991) (leading to settlement from a preliminary trial court decision); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Comm. for Educ. Equal. v. State, 878 S.W.2d 446 (Mo. 1994) (en banc) (dismissing appeal); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995); Leandro v. State, 488 S.E.2d 249 (N.C. 1997); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Brigham v. State, 692 A.2d 384 (Vt. 1997); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995). *See also* Lake View Sch. Dist. No. 25 v. Huckabee, 10 S.W.3d 892 (Ark. 2000) (holding that pending appeal claims from prior case mooted by enactment of new funding statute).

205 For information on fundamental rights generally, see Wilkins, *supra* note 200, at 265. The relevant provision of the Fourteenth Amendment is "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. A court can find a fundamental right explicitly (enumerated natural rights like the right to vote) or implicitly from the Constitution. For a court to find an implicit fundamental right, it can use either: (1) an historical approach, analyzing the tradition and history of the right; or (2) the importance of the right to the individual. Wilkins, *supra* note 200.

206 *See* Bauries, *supra* note 66, at 705; Buszin, *supra* note 61, at 1620; *see, e.g.*, *Horton*, 376 A.2d at 374 (finding a fundamental right to education); *Pauley*, 255 S.E.2d at 878 (finding a fundamental right to education).

207 *DuPree*, 651 S.W.2d at 95.

Washington,[211] West Virginia,[212] and Wyoming.[213] However, school finance reform plaintiffs generally failed in states that rejected education as a fundamental right.[214] The majority of states refused to recognize education as a fundamental right, and therefore the majority of states upheld school financing schemes.[215] The courts in states that upheld school financing schemes were concerned that imposing a constitutional requirement for equal funding in education could lead to calls for a constitutional requirement for general government funding.[216]

Based on school finance cases, even if teacher tenure lawsuits pass any justiciability challenges posed, it is unlikely that they will succeed on the merits in most states. Because California recognizes education as a fundamental right, the *Vergara* court applied strict scrutiny to evaluate whether the challenged statutes violated the state constitution's equal protection clause. Plaintiffs in teacher tenure lawsuits will likely win on the merits in states where plaintiffs in school finance lawsuits won on the merits, particularly in states like California that recognize education as a fundamental right.[217] Michelle Rhee, the founder of StudentsFirst, cites "litigation strategy" in determining which states are ripe for a challenge.[218] In each of the states in which commentators think plaintiffs might bring teacher tenure lawsuits—Minnesota,[219] Connecticut,[220] New Jersey,[221] and Tennessee[222]—the highest court of each state has declared

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208 *Serrano II*, 557 P.2d 929, 952–53 (Cal. 1976) (in bank).

209 *Horton*, 376 A.2d at 374–75.

210 Robinson v. Cahill, 303 A.2d 273, 296–97 (N.J. 1973).

211 Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 104 (Wash. 1978) (en banc).

212 Pauley v. Kelly, 255 S.E.2d 859, 883–84 (W. Va. 1979).

213 Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 335–36 (Wyo. 1980).

214 *See, e.g.*, Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1019–22 (Colo. 1982) (en banc) (holding that the school financing system was constitutionally permissible); Thompson v. Engelking, 537 P.2d 635, 645–46 (Idaho 1975) (holding that the school financing system did not violate Idaho constitutional requirement of uniform system of public schools or equal protection of law); Buszin, *supra* note 61, at 1620.

215 Conant, *supra* note 87, at 484.

216 Buszin, *supra* note 61, at 1620.

217 *Id.*

218 Sanchez, *supra* note 158.

219 *See* Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993) (holding that the Minnesota Constitution creates a fundamental right to a "general and uniform system of education" and requiring the state to provide sufficient funding to ensure that each student receives an adequate education).

220 *See* Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) (finding a fundamental right to education).

221 The New Jersey Supreme Court used its constitutional education provision to invalidate its state school financing system on three separate occasions over the past three decades. *See* Abbott v. Burke, 643 A.2d 575 (N.J. 1994); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

or suggested that education is a fundamental right under the state constitution, or has invalidated teacher tenure legislation.[223] Because the recognition of education as a fundamental right triggers strict scrutiny, it is unlikely that the state could demonstrate that its teacher tenure and dismissal laws are narrowly tailored to achieve a compelling state interest.[224] The same held true for the school finance reform cases during the earlier waves,[225] and the same will likely hold true for the teacher tenure reform cases.

However, in states that do not recognize education as a fundamental right, teacher tenure lawsuits will likely fail on the merits. Many states do not recognize education as a fundamental right.[226] There, plaintiffs must instead challenge the statutes as violating the state constitution's education clause, subject only to rational basis review. The courts of many states have declined to extend the scope of their state constitution's education clauses beyond school financing in litigation.[227] This will prove to be a high hurdle for plaintiffs to overcome.

Furthermore, teacher quality lawsuits will likely fail on the merits because such cases turn on the specific facts and statutes in the case, and *Vergara* is a factual outlier. Judge Treu emphasized that California's teacher tenure and dismissal system was unique.[228] For example,

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222 Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 151 (Tenn. 1993) (finding no rational basis for school finance system, even without deciding whether right to public education is fundamental).

223 Gormley, *supra* note 200, at 219 n.63.

224 Dietz, *supra* note 80, at 1196 n.22. In an equal protection analysis, courts invoke two tiers of scrutiny: rational relation and strict scrutiny. Normally, a court uses rational relation scrutiny, under which the government need only show a rational relation between the law and a legitimate government interest. However, a court will use a strict scrutiny standard if a fundamental right is at stake, or the challenged law discriminates against a suspect class. Under strict scrutiny, the government must show the law is necessary, and narrowly tailored, to achieve a compelling governmental interest. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-2 to -6 (2d ed. 1988).

225 The following states applied strict scrutiny to the legislature's school financing schemes, and struck down those schemes as unconstitutional: Connecticut (*Horton*, 376 A.2d at 374–75); West Virginia (*Pauley v. Kelly*, 255 S.E.2d 859, 883–84 (W. Va. 1979)); Wyoming (*Washakie County School District No. One v. Herschler*, 606 P.2d 310, 335–36 (Wyo. 1980)).

226 New York, where *Davids* is pending, is one such state. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982) ("The circumstance that public education is unquestionably high on the list of priorities of governmental concern and responsibility . . . does not automatically entitle it to classification as a 'fundamental constitutional right' triggering a higher standard of judicial review for purposes of equal protection analysis.").

227 *See, e.g.*, Paynter v. State, 797 N.E.2d 1225 (N.Y. 2003) (holding that New York State had no responsibility to change demographic composition of student bodies).

228 Vergara v. State, No. BC484642, 2014 WL 6478415, at *5 (Cal. Super. Ct. Aug. 27, 2014) ("California is one of only five outlier states with a period [before offering tenure] of two years or less."); *Id.* at *5 ("[A]dministrators believe it to be 'impossible' to dismiss a tenured teacher under the current system. . . . LAUSD alone had 350 grossly ineffective teachers it wished to dismiss at the time of trial regarding whom the dismissal process had not yet been initiated.");

teachers in California receive notice of their tenure decisions in March of their second year in the classroom, earlier than teachers in forty-one other states.[229] Under California's backwards approach to granting teacher tenure, teachers are given tenure before they are credentialed.[230] Even the defendants' experts in *Vergara* agreed that a period of three to five years, rather than two years (and less than two years in practice) would be a better time frame in which to decide whether to grant tenure to a particular teacher.[231] Furthermore, California is unusual in that it maintains a strict LIFO dismissal policy.[232] Most other states—which have looser LIFO policies, longer periods before making tenure decisions, and less arduous dismissal procedures—will likely deliver different outcomes from *Vergara*.

C. *Courts Cannot Remedy Violations in Teacher Tenure Lawsuits*

Even if plaintiffs succeed on the merits in teacher tenure lawsuits, courts will face a similar problem to the one they faced in school finance litigation—they cannot redress plaintiffs' injury with a meaningful remedy. Courts prefer to fix constitutional problems through simple and manageable remedies, but the remedies for school finance cases proved complicated and unmanageable.[233] School finance differs from the reapportionment cases like *Baker*, where the Court could enter the political thicket because the remedy for such cases was simple: one person, one vote.[234] In school finance litigation, however, the remedial task of equalizing tax resources was complex.[235] Remedying school financing schemes involved intergovernmental management regarding spending amounts and recapture from the wealthiest districts.[236] The judicial reluctance of state courts to actively formulate remedies for school financing violations has left plaintiffs without a meaningful remedy.[237]

Id. at *7 ("[O]nly 10 states, including California, provide that seniority is the sole factor, or one that must be considered [when layoffs occur]."). For an explanation of California's teacher tenure system as being a "dysfunctional outlier," see Watts, *supra* note 139.

229 *See Vergara*, 2014 WL 6478415, at *4–5; Watts, *supra* note 139.

230 *See Vergara*, 2014 WL 6478415, at *4; Watts, *supra* note 139.

231 *See Vergara*, 2014 WL 6478415, at *5.

232 *Id.* at *7; Watts, *supra* note 139.

233 William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 732 (1992); *see* Baker v. Carr, 369 U.S. 186, 217 (1962).

234 Clune, *supra* note 233.

235 *Id.*; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

236 Clune, *supra* note 233.

237 Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1073 (1991).

At the remedial stage of school finance litigation, the trend in both equity and adequacy cases was a judicial veto of a financing scheme followed by a legislative remedy.[238] In equity cases, the remedy was equalizing tax bases or per pupil spending.[239] In adequacy cases, the remedy shifted to ensuring that an adequate education is provided to all children.[240]

Even in adequacy cases, state courts faced difficulty in implementing their own school finance reform decrees.[241] Once courts found that school financing schemes constituted educational inadequacy, they were uncertain in how far they could push their state legislatures in adopting a remedy.[242] In striking down school financing schemes, courts have typically ordered declaratory (not injunctive, prospective, or coercive) relief, and ordered the state legislature to design and implement a new policy within broad court-established guidelines.[243] For example, the *Serrano* and *Robinson* courts held back in the remedial phase of the school finance litigation, and deferred to the state legislatures to craft an appropriate remedy.[244] The *Robinson* court approved the first proposed legislative remedy on its face, despite strident objections to it.[245] And the *Serrano II* court never reviewed the constitutionality of the second proposed legislative remedy, despite strong criticisms by Serrano's lawyers.[246] In the nineteen school finance cases where a state supreme court delivered favorable rulings for plaintiffs, the courts granted declaratory relief and ordered the legislature to craft a remedial scheme.[247]

Similarly, courts in teacher tenure lawsuits are constrained in the remedies—and, by extension, the impact—they can have, because design of the remedies rests with the legislatures. Although courts generally can be imaginative and creative in shaping remedies, courts in teacher tenure lawsuits are more limited. For example, the judge in *Vergara*, like the judges in most school finance cases, merely enjoined

238 William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1241 (2003).

239 Richard Briffault, *Adding Adequacy to Equity: The Evolving Legal Theory of School Finance Reform* 2 (Columbia Univ. Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 06-111, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=906145.

240 *Id.*

241 Koski, *supra* note 238, at 1190.

242 Briffault, *supra* note 239, at 3–4.

243 Koski, *supra* note 238, at 1190.

244 *Id.* at 1241.

245 *Id.* at 1240–41 (explaining that the *Robinson* court deferred to the legislative remedy proposed over objections).

246 *Id.* at 1241.

247 *Id.*

the enforcement of the challenged statutes and deferred to the state legislature to craft the remedy.[248]

Moreover, the inherently political nature of crafting remedial teacher tenure and dismissal statutes might also lead some state courts to dismiss teacher tenure cases as a nonjusticiable political question.[249] The defendants in *Davids* raised this issue in their motion to dismiss: they argue that the alleged constitutional violation is not justiciable and cannot be redressed by the court.[250] According to the defendants' memorandum of law, the court would not be able to effectively redress the violation without either (i) making teachers in the state subject to an endless probationary period, or (ii) supervising every local school district and administrator in the state.[251] In issuing decisions in school finance reform lawsuits, state courts had to enforce judgments involving budgetary allocations as the judicially prescribed remedy.[252] However, this remedial problem might be mitigated in teacher tenure lawsuits, since courts would feel more comfortable enforcing judgments that involved dismissing teachers than in allocating state funds.[253] In states such as New York, the proper politically accountable authorities—particularly members of the New York City Department of Education—are working to resolve the issues that existing teacher tenure and dismissal systems present.[254]

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248 The court explained:

> Under California's separation of powers framework, it is not the function of this Court to dictate or even to advise the legislature as to how to replace the [c]hallenged [s]tatutes. All this Court may do is apply constitutional principles of law to the [c]hallenged [s]tatutes as it has done here, and trust the legislature to fulfill its mandated duty to enact legislation . . . .

Vergara v. State, No. BC484642, 2014 WL 6478415, at *7 (Cal. Super. Ct. Aug. 27, 2014).

249 For a description of the argument for upholding the political question doctrine because a constitutional provision is susceptible to electoral enforcement, even if it is not judicially enforceable, see Jonathan R. Siegel, *Political Questions and Political Remedies* 1–2 (George Washington Univ. Pub. Law & Legal Theory, Working Paper No. 93, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=527264.

250 Memorandum of Law in Support of United Federation of Teacher's Motion to Dismiss, *supra* note 148, at 30.

251 *Id.* at 31.

252 *See generally* Koski, *supra* note 238.

253 See Note, *Education Policy Litigation as Devolution*, 128 HARV. L. REV. 929, 941–43 (2015) (arguing that the policy-devolution of teacher tenure cases like *Vergara* mitigates prudential concerns).

254 The NYCDOE recently enacted two sets of teacher tenure reforms in 2009 and 2012, which have both significantly reduced the proportion of eligible teachers receiving tenure. *See* Susanna Loeb et al., *Performance Screens for School Improvement: The Case of Teacher Tenure Reform in New York City*, 44 EDUC. RESEARCHER 199 (2015) (concluding that recent reforms have increased voluntary attrition of less effective teachers in New York City); Al Baker, *In Policy Shift, Fewer Teachers Are Given Tenure*, N.Y. TIMES, Aug. 18, 2012, at A1, http://www.nytimes.com/2012/08/18/nyregion/nearly-half-of-new-york-city-teachers-are-denied-tenure-

D. *Even if Teacher Tenure Lawsuits Succeed, They Will Not Improve Student Achievement*

Even if teacher quality lawsuits are justiciable, successful on the merits, and produce a meaningful remedy, they will not significantly improve student achievement. By and large, several decades of education reform litigation have not resulted in improved educational outcomes for American students. Teacher tenure litigation will face the same fate. The attention devoted to teacher tenure lawsuits is misdirected: for all of the resources that the parties expend litigating these lawsuits, and the time the general public spends debating them, there are many other critical education reforms that education reformers could and should pursue.

Teacher tenure and teacher quality are important, but not the sole factors that influence student achievement.[255] Even the prominently-featured research in plaintiffs' evidence in *Vergara* acknowledges that the long-term effects that teachers have on students is fairly modest.[256] Some economists think that teacher tenure has little effect overall on student achievement.[257] Many other considerations matter, including poverty, school funding, class size, early childhood education, and school discipline.[258] Particularly with efforts to close the achievement gap, education reformers cannot improve educational outcomes without

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in-2012.html (analyzing impact of recent reform efforts on percentage of eligible teachers receiving tenure).

255 Christina Pazzanese, *Targeting Teacher Tenure*, HARV. GAZETTE (Aug. 18, 2014), http://news.harvard.edu/gazette/story/2014/08/targeting-teacher-tenure (quoting Professor Thomas Kane's explanation that differences in teacher effectiveness "explain only a small share of the total difference in performance between high-income and low-income students").

256 RAJ CHETTY ET AL., THE LONG-TERM IMPACTS OF TEACHERS: TEACHER VALUE-ADDED AND STUDENT OUTCOMES IN ADULTHOOD: NBER WORKING PAPER NO. 17699, at 39 (2011), http://obs.rc.fas.harvard.edu/chetty/value_added.pdf (finding that a one standard deviation increase in teacher value add only "increases earnings at age 28 by $182"); *see also* Dana Goldstein, *The Most Important Figure in School Reform We Never Talk About: It's the Principal*, SLATE (Sept. 1, 2014, 11:34 PM), http://www.slate.com/articles/life/education/2014/09/principals_matter_and_teacher_tenure_lawsuits_are_a_sideshow_that_won_t.html ("What gets less attention, though, is how modest [the] effect [of high-quality teachers] really is . . . .").

257 *See, e.g.*, Max Ehrenfreund, *Teacher Tenure Has Little to Do with Student Achievement, Economist Says*, WASH. POST: WONKBLOG (Sept. 10, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/09/10/teacher-tenure-has-little-to-do-with-student-achievement-economist-says.

258 *See* DAVID C. BERLINER, ARIZ. STATE UNIV. & UNIV. OF COLO., POVERTY AND POTENTIAL: OUT-OF-SCHOOL FACTORS AND SCHOOL SUCCESS 1 (2009), http://files.eric.ed.gov/fulltext/ED507359.pdf (arguing that out-of-school factors related to poverty are the major cause of achievement gaps experienced by students in low-income communities); Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417, 419 (2005).

also addressing out-of-school factors that negatively affect large numbers of low-income and minority students.[259]

CONCLUSION

Poor student achievement in public education is an undoubtedly persistent and troubling problem in the United States.[260] And there is evidence that the existing teacher tenure laws in many states do not ensure that the most effective teachers are in the classroom. In the past, education reformers have achieved some success in improving educational achievement through litigating educational equality and adequacy lawsuits in federal and state court. In many ways, the plaintiffs' success in *Vergara* is simply an extension of education reformers' previous successes.

Yet this new wave of teacher tenure lawsuits will almost certainly be unsuccessful in its ultimate goal of improving student achievement. This Note argues that education reformers should not generally use *Vergara* as a model from which to effect meaningful educational reform for several reasons. First, teacher tenure lawsuits present separation of powers and nonjusticiable political question concerns because of the politicized nature of teacher tenure, the commitment of education to the legislative branch in state constitutions, and the lack of judicially manageable standards for evaluating teacher effectiveness. Second, teacher tenure lawsuits will likely fail on the merits in states that do not recognize education as a fundamental right, and in states in which the teacher tenure and dismissal statutes differ significantly from those in California. Third, even if plaintiffs win on the merits, courts will not be able to enforce their judgments or craft meaningful remedies. Finally, even assuming that state courts can redress the problems caused by teacher tenure and dismissal statutes, the overall impact of these lawsuits will be limited because of the myriad other factors that influence student achievement, which are outside the scope of teacher tenure laws. Accordingly, education reformers, even those seeking to reform teacher tenure laws, should focus on these other factors, or seek tenure reform through the political process.

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259 *See* BERLINER, *supra* note 258, at 1 for a discussion of common out-of-school factors that affect the learning opportunities of poor children: "(1) [L]ow birth-weight and non-genetic prenatal influences on children; (2) inadequate medical, dental, and vision care, often a result of inadequate or no medical insurance; (3) food insecurity; (4) environmental pollutants; (5) family relations and family stress; and (6) neighborhood characteristics."

260 *See supra* Part I.