

Spring 2014

Teachers, School Spending, and Educational Achievement: Toward A New Wave of School Quality Litigation

Nipun Kant

Yale Law School, nipun.kant@yale.edu

Follow this and additional works at: http://digitalcommons.law.yale.edu/student_papers

Recommended Citation

Kant, Nipun, "Teachers, School Spending, and Educational Achievement: Toward A New Wave of School Quality Litigation" (2014). *Student Scholarship Papers*. Paper 130.

http://digitalcommons.law.yale.edu/student_papers/130

This Article is brought to you for free and open access by the Yale Law School Student Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Student Scholarship Papers by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Teachers, School Spending, and Educational Achievement: Toward A New Wave of School Quality Litigation

Abstract:

Over the past half century, school quality litigation has focused overwhelmingly on state-level school finance systems. Though this has thankfully increased funding in public schools, student achievement has not increased by equal proportions. Amidst this context, new research over the past decade has illustrated the dramatic effects of individual teachers on student learning. This Article draws on such research to argue that a new brand of litigation challenging the inequitable or inadequate distribution of teacher quality may be viable. It examines the legal rationale of school finance decisions, putting forward a novel classification system according to the extent to which they create a viable opportunity for litigation targeting teacher quality. In making this argument, the Article also offers a broader critique of the manner in which courts use social science evidence for judicial fact-finding. Last, the Article evaluates a recent case that has received national news coverage, *Vergara v. California*, as a case study for how my theory of litigation may work in practice.

Introduction

In 1971, the California Supreme Court famously declared the state's method of financing public schools unconstitutional on the basis that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"¹

This decision triggered a bevy of similar lawsuits in both federal and state courts across the country. Today, courts in nearly every state have scrutinized the constitutionality of school finance systems. In part due to such decisions, per-pupil education expenditures have quintupled since 1960, even after accounting for inflation.²

Though these extraordinary spending increases have provided students, teachers, and schools with resources which to learn effectively, few would claim that student achievement has improved by similar proportions. To the contrary, student performance in America is stagnant.

California fourth-graders scored nine points below the national average on the 2011 reading

¹ *Serrano v. Priest*, 5 Cal.3d 584 (1971).

² Mark G. Yudof, Betsy Levin, Rachel Moran, James E. Ryan, Kristi L. Bowman, *Educational Policy and the Law*, 5th edition, 2011, at 806.

exam administered by the National Assessment of Educational Progress.³ Less than half of students in high-poverty areas across the country graduate from high school. Of high school graduates, 60% are potentially unprepared for college and at risk of struggling in first-year college courses.⁴ And even students who can succeed in such courses fall far short on international benchmarks. For instance, according to the government's own studies, a "student scoring at the 50th percentile in mathematics in the U.S. would be at about the 25th percentile (or below) in 12 nations."⁵

Amidst dramatic increases in school spending and persistently stagnant achievement, new research has indicated that quality teachers improve student achievement far more than do smaller class sizes or increased school spending. Drawing on this research, a new suit in California, *Vergara v. California*, alleges that teacher tenure laws place onerous burdens on administrators attempting to remove poorly-performing teachers and are therefore unconstitutional under the state's equal protection clause. Notably, this suit marks a fundamental shift away from school finance litigation by requesting an entirely different and novel form of relief. This lawsuit, though ambitious, is far from frivolous: it has survived multiple motions to dismiss, is being advanced by acclaimed litigator Theodore Boutrous, and is currently in trial in district court.

This article analyzes this litigation and its significance in four parts. Part I surveys education policy trends and links them to current student achievement levels. It evaluates past reform measures that have focused primarily on increasing education funding, and concludes that

³ NAEP Data Explorer, <http://nces.ed.gov/nationsreportcard/naepdata/>.

⁴ ACT Newsroom, *60 Percent of 2012 High School Graduates At Risk of Not Succeeding in College and Career*, August 22, 2012, <http://www.act.org/newsroom/releases/view.php?lang=english&p=2402>.

⁵ Pascal D. Forgione, *The Release of U.S. Report on Grade 12 Results From the Third International Mathematics and Science Study*, National Center for Education Statistics, February 24, 1998, <http://nces.ed.gov/pressrelease/timssrelease.asp>.

such measures have failed to give all students access to an equal quality education. By contrast, this Part argues that a vast new literature—still rarely discussed in legal academia—illustrates that teacher quality drives educational achievement more than any other in-school factor. The second Part analyzes the legal underpinnings of historical school finance cases. It concludes that far from centering their rulings around financial equity, courts ruling in favor of plaintiffs have established a substantive right to a more *general* equal educational opportunity in many states. This suggests that it is entirely plausible for courts to order relief that does not center on increased school funding. On this basis, Part III evaluates the viability of a new form of school quality litigation that targets inequitable teacher quality rather than inequitable school funding. This Part offers a new taxonomy of school finance litigation on the basis of whether rulings acknowledge, or rely on the assumption, that teacher quality drives student learning. Because of the wide gulf between the rationale behind school finance court rulings and current research on education policy, the Part also argues that courts should consider adopting new standards for assessing the validity and relevance of social science research in judicial fact-finding. Part IV discusses the *Vergara* suit as a case study of how my proposed litigation operates in practice. This section identifies the grounds on which the case may turn, but highlight that regardless of its outcome, it may constitute merely the first in a new wave of school quality litigation focused on teacher tenure statutes.

Overview of Educational Policy and Achievement Levels

A comprehensive survey of education policy in the United States is far beyond the scope of this article. However, the *Vergara* case can only be fully understood in the context of much broader, and already well-documented, shifts in education initiatives since *Brown v. Board of*

Education. This section briefly analyzes these shifts and relates them to the performance of American students today.

Trends and Trajectories in Education Policy

Following the end of de jure segregation, elected officials and the public focused more intensively on improving our public schools, in part due to several high-profile news stories. For instance, “the launching of *Sputnik* in 1957 dramatically raised awareness among the American public that U.S. leadership in science was threatened.”⁶ Likewise, several decades later, “the publication of a 1983 government report entitled *A Nation at Risk* . . . sparked the period of public concern regarding education that continues unabated to this day.”⁷ This report, called “apocalyptic”⁸ by some, found that “23 million American adults were functionally illiterate”⁹ and starkly warned that “[i]f an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war.”¹⁰

Education reform—through courts, statehouses, and legislatures—has “first and foremost” responded to this purportedly dire state of student performance “by substantially increasing spending on schools.”¹¹ Even after adjusting for inflation, “total expenditures per pupil have more than quintupled since 1950.”¹² On average, American schools spent \$10,694 per student during the 2008-09 year, with states allocating a full fourth of their total spending to K-

⁶ Eric A. Hanushek and Alfred A. Lindseth, *Schoolhouses, Courthouses, and Statehouses*. (Princeton University Press, 2009).

⁷ *Id.*, at 44.

⁸ Stacy T. Khadaroo, ‘*A Nation at Risk*’: How much of ‘apocalyptic’ education report still applies?, *Christian Science Monitor*, April 26, 2013, <http://www.csmonitor.com/USA/Education/2013/0426/A-Nation-at-Risk-How-much-of-apocalyptic-education-report-still-applies>.

⁹ Edward Graham, ‘*A Nation at Risk*’ Turns 30: Where Did It Take Us?, *NEA Today*, April 25, 2013, <http://neatoday.org/2013/04/25/a-nation-at-risk-turns-30-where-did-it-take-us/>.

¹⁰ Hanushek and Lindseth, *supra* note 6, at 44.

¹¹ Hanushek and Lindseth, *supra* note 6, at 45.

¹² Yudof *et al*, *supra* note 2, at 806.

12 education.¹³ Put in context, in a study of over seventy countries, the Program for International Student Assessment (PISA) recently found that the United States “spend[s] more per student than any nation . . . except Luxembourg.”¹⁴ Furthermore, certain states and districts spend even more than this high national average.¹⁵ For instance, during the 2011-12 school year, New Jersey’s public schools spent \$18,047 per student, its largest district, Newark, spent \$23,160, and “six districts spent more than \$30,000 per student.”¹⁶ Notably, these increases have been driven in part by expansive school finance litigation, discussed further, *infra* at 14-16.

School districts and legislators have primarily directed this increased funding in three main areas. First, policymakers have dramatically lowered class sizes. Average class sizes fell from 26 in 1960 to 15.4 in 2009.¹⁷ This has been driven both by voluntary changes and by at least twenty-four state statutes that require or incentivize class size limits in public schools.¹⁸ These changes are costly. One study has found that today, a one-student reduction in average class size would require adding “more than 225,000 additional classrooms” and “cost over \$12 billion a year in aggregate.”¹⁹

Legislators have also directed increased funding to higher teacher salaries. The percent of teachers with at least a master’s degree increased from 23.5% in 1960 to 56.8% in 2000, while the median teacher had three more years of teaching experience in 2000 than he or she did in

¹³ <http://www.cbpp.org/cms/?fa=view&id=2783>

¹⁴ U.S. Department of Education, *International Education Rankings Suggest Reform Can Lift U.S.*, Homeroom: Official Blog of the U.S. Department of Education, December 8, 2010, <http://www.ed.gov/blog/2010/12/international-education-rankings-suggest-reform-can-lift-u-s/>.

¹⁵ Note that there continue to be several low-spending states. For instance, Utah spent \$6,212 in the 2011-12 year. However, low-spending states typically have lower cost of living, meaning that school districts likely enjoy greater value for their money.

¹⁶ Colleen O’Dea, *Interactive Map: Per-Pupil School Spending*, NJ Spotlight, April 12, 2013, <http://www.njspotlight.com/stories/13/04/11/mapping-school-spending/>.

¹⁷ Hanushek and Lindseth, *supra* note 6, at 47.

¹⁸ Matthew Chingos and Grover Russ Whitehurst, *Class Size: What Research Says and What it Means for State Policy*, Brookings Institution, May 11, 2011. http://www.brookings.edu/research/papers/2011/05/11-class-size-whitehurst-chingos#_ftn3

¹⁹ *Id.*

1960.²⁰ Because teacher salaries are nearly ubiquitously a function of education and experience levels, teacher salaries have thus seen increases over the past four decades, with rates of change surpassing rates of inflation.²¹

A third change has been the creation of “a multiplicity of special personnel and programs,” especially for students with disabilities.²² These changes were in part spurred by the 1975 passage of the Individuals with Disabilities Act (IDEA), which required “a series of diagnostics, counseling activities, and services to be provided for disabled students.”²³ Though spending for students with disabilities has not increased dramatically on a per-pupil basis, a “quickly expanding population of students with disabilities” has meant that “special education spending has increased at a much faster rate than general elementary and secondary education spending.”²⁴

Levels of Educational Attainment

The above analysis, though admittedly incomplete, serves to highlight one dramatic change—namely, a dramatic increase in school expenditures to fund a variety of initiatives—that has dominated education policy over the past half century. Yet in spite of these changes, many educational advocates argue—just as they did in *A Nation at Risk* thirty years ago—that the performance of American students has stagnated and fallen “behind [that of] their international

²⁰ *Id.*

²¹ National Center for Education Statistics. *Estimated average annual salary of teachers in public elementary and secondary schools, by state: Selected years, 1969-70 through 2012-13*. http://nces.ed.gov/programs/digest/d13/tables/dt13_211.60.asp

²² Hanushek and Lindseth, *supra* note 6, at 47.

²³ Eric Hanushek, John Kain, and Steven Rivkin, *Does Special Education Raise Academic Achievement for Students with Disabilities?*, NBER Working Paper No. 6690, August 1998, at 4. <http://www.nber.org/papers/w6690>

²⁴ New America Foundation, *Individuals with Disabilities Education Act- Cost Impact on Local School Districts*, July 2013, <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-cost-impact-local-school-districts>

rivals.”²⁵ Indeed, studies have found that American students perform significantly worse on international assessments than their peers in a number of other countries, including nations that spend less per-pupil on education and are less developed more generally. For instance, a 2009 study by Harvard University’s Program on Education Policy and Governance showed that “U.S. students ranked 25th among 34 countries in math and science” performance.²⁶ In addition to troublingly laggard absolute national achievement levels, the performance of international students appears to be improving at a faster rate. A recent study, for instance, found that foreign students “in Latvia, Chile, and Brazil are making gains in academics three times faster than American students.”²⁷ This has led some commentators to alarmingly argue that “our education system can’t compete with the rest of the world.”²⁸

Setting aside the performance of American students relative to their international peers, particular states, districts, schools, and subgroups of students within one school perform at levels far lower than even our low national averages. For instance, Louisiana fourth-grade students performed a full ten points lower on the 2011 National Assessment for Educational Progress reading test than the nationwide average.²⁹ Likewise, though roughly 40% of high school students who take the SAT exam nationwide score at college-ready levels (as defined by Collegeboard), rates of college-readiness are orders of magnitude lower in particular districts. For instance, a recent state report on the Camden, New Jersey school system stated that “over the past six years, a total of just fifty-five students in Camden have scored at college-ready levels [on

²⁵ ADW News, *1 in 4 Americans Completing High School Late, American Students Falling Behind*, Real Times Media, April 25, 2013, <http://www.realtimesmedia.com/index.php/atlanta/2036-1-in-4-students-finish-high-school-late-american-students-falling-behind-report>.

²⁶ Huffington Post, *U.S. Students Still Lag Behind Foreign Peers, Schools Make Little Progress In Improving Achievement*, July 23, 2012, http://www.huffingtonpost.com/2012/07/23/us-students-still-lag-beh_n_1695516.html.

²⁷ *Id.*

²⁸ Huffington Post, *Best Education in the World: Finland, South Korea Top Country Rankings, U.S. Rated Average*, November 27, 2012, http://www.huffingtonpost.com/2012/11/27/best-education-in-the-wor_n_2199795.html

²⁹ *NAEP Data Explorer*, <http://nces.ed.gov/nationsreportcard/naepdata/>.

the SAT], out of 1,536 test-takers and 2,851 students in the senior class during this time period.”³⁰ Perhaps even more disturbing, in one Camden school, “a total of 235 Special Education and 101 Limited English Proficient students have been eligible to take the [state’s end-of-year assessment] over the past three years. Collectively, these students have had a proficiency rate of just 3.9% over this time period.”³¹ According to the state’s report, this is the case even as “the district spends around \$5,000 more per pupil than the already high state average”³² and “99.3% of the teachers were meeting the district’s criteria for acceptable performance.”³³

Modern-Day Educational Policy Proposals: Backed by Research?

The above analysis has demonstrated that we have devoted significant expenditures to our schools and that performance levels—both nationwide and for certain regions and populations—have largely been disappointing. Despite these trends, education policy remains a contentious, highly politicized field with large differences between proposed reforms. On one side, large groups of advocates—including teacher’s unions, politicians, and parents—argue that our education system continues to be underfunded and overcrowded. “Many schools,” these critics contend, “do not have the resources to adequately facilitate [student] achievement.”³⁴ “Falling ceiling tiles, leaking roofs, and moldy walls are just a few of [sic] health and safety issues in thousands of . . . crumbling schools,”³⁵ while “overcrowding problems have plagued

³⁰ N.J. Dep’t of Educ., *Camden City Public Schools: In-Depth QSAC Evaluation*, August 2012, at 15, <http://www.njspotlight.com/assets/12/0809/2158>.

³¹ *Id.*, at 12.

³² Michael Symons, *Camden schools takeover gets OK*, Courier Post, June 6, 2013, <http://www.courierpostonline.com/article/20130606/NEWS01/306060022/Camden-schools-takeover-gets-OK>

³³ N.J. Dep’t of Educ., *supra* note 30, at 16.

³⁴ Michael Sorrell and Gerald Britt, *Confront poverty or Dallas schools are stuck in place*, Dallas Morning News, May 28, 2013, <http://www.dallasnews.com/opinion/latest-columns/20130528-michael-sorrell-and-gerald-britt-confront-poverty-or-dallas-schools-are-stuck-in-place.ece>.

³⁵ National Education Association, *Crumbling schools don’t provide strong foundation for America’s students*, December 9, 2011, <http://www.nea.org/home/49988.htm>.

public schools . . . over the years.”³⁶ Though these critics sometimes acknowledge that nationwide educational expenditures have increased, they convincingly argue that certain school systems, often located in urban or lower-income communities, continue to be neglected or underfunded.³⁷

By contrast, a growing and relatively new group of education advocates have offered a fundamentally different theory of school improvement by suggesting structural reforms rather than resource reallocations. This perspective—and consequently, this article—focuses predominantly on improving teaching quality in classrooms. In addition, these advocates propose quantifying school performance, holding schools “accountable” for purportedly poor achievement levels, and allowing students to choose between a variety of public, charter, and private schools. Notably, decades of school finance litigation and the recent *Vergara* lawsuit parallel these chasms in education policy. School finance litigation (discussed further, *infra* at 14-16) has played a key role in driving sizable increases in education expenditures, all while the new *Vergara* lawsuit targets, for the first time, poor teacher quality rather than insufficient educational resources.

To better understand this litigation and its effects, this section analyzes a large body of research focused on what most effectively improves student performance. It concludes that high-quality teachers matter more than any other in-school factor in driving educational achievement.

Testing requirements mandated by *No Child Left Behind* and the development of complex longitudinal data systems throughout the country have given researchers new and extensive data

³⁶ Baltimore Sun, *No school in Harford should be overcrowded*, June 6, 2013, <http://www.baltimoresun.com/news/maryland/harford/belair/ph-ag-edit-crowded-0607-20130606,0,4545888.story>.

³⁷ See, e.g., Josh Fatzick, *Teplitz, school superintendents blast Gov. Corbett for underfunding urban schools*, The Patriot-News, June 12, 2013, http://www.pennlive.com/midstate/index.ssf/2013/06/teplitz_school_superintendents.html (quoting a superintendent arguing that “in our urban districts, unfortunately, because of the funding, many of our students are on the verge of being left behind.”).

on student achievement and teacher characteristics. States now have the ability to track how specific students perform on standardized tests across years, while also matching such students to the specific teachers who taught them. This has allowed researchers to compute the effects of teachers on the improvement or “growth” in student performance, while controlling for a variety of demographic factors and a student’s initial or “baseline” performance. These individual teacher effects are often called “value-added” scores because they compute the added effect of a teacher, over and above other factors that affect student performance.

Perhaps the most extensive research using this methodology comes from a recent study of 2.5 million students in one school district over twenty years, with data linking their achievement levels, teachers, parental characteristics, and adult outcomes.³⁸ The results were startling because they showed that “improvements in teacher quality significantly reduce the probability of having a child while being a teenager, increase the quality of the neighborhood in which the student lives . . . in adulthood, and raise participation rates in 401(k) retirement savings plans.”³⁹ The study found that “replacing a teacher whose [value-added] is in the bottom 5% with an average teacher would increase the present value of students’ lifetime income by more than \$250,000 for the average class- room in our sample.”⁴⁰ National newspapers have characterized this study as illustrating that teachers have “wide-ranging, lasting”, “enormous”, “profound”, and “striking” effects on student outcomes.⁴¹

³⁸ Raj Chetty, John N. Friedman, and Jonah Rockoff, *Measuring the Impact of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, NBER Working Paper 19424, 2014. The research on teacher and administrator quality has also been reinforced by simple common sense. Intuitively, reducing a classroom’s size may yield little benefits to students if teachers are unable to (or neglect to) change their teaching style and techniques accordingly. Indeed, authors have argued that students are “much better off with a great teacher in a big class . . . than with a poor teacher in a small class.” Nicholas Kristof, *Your comments on my education column*, N.Y. Times, February 14, 2009, <http://kristof.blogs.nytimes.com/2009/02/14/your-comments-on-my-education-column-3/>.

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 4.

⁴¹ Annie Lowrey, *Big Study Links Good Teachers to Lasting Gain*, N.Y. Times, January 6, 2012, <http://www.nytimes.com/2012/01/06/education/big-study-links-good-teachers-to-lasting-gain.html?pagewanted=all>.

A number of other studies have reached similar conclusions,⁴² and offered a number of key insights into the characteristics of highly effective teachers. First, teaching effectiveness is only weakly correlated with teacher experience, and teachers typically stop improving after five years in the classroom.⁴³ Second, teacher certification requirements, which typically include a content exam and master's level education, are not significantly correlated with teaching effectiveness.⁴⁴ This is notable in light of the significant resources states have spent to attract better educated, more experienced teachers. Third, the quality of teaching has surprisingly gone down over the past half-century, due both to expanding access to higher-paying alternative careers and extensive increases in teacher quantity brought about by class size reduction.⁴⁵

Though we have strong evidence on the powerful effects of teachers on student performance, statutes and common practice often make it very difficult for schools and districts to discipline ones who are ineffective in classrooms. For instance, a recent fifty-state survey found that 37% of states neglect to either require regular teacher evaluations or take into account

⁴² See, e.g., Jonah Rockoff, *The Impact of Individual Teachers on Student Achievement: New Estimates from Panel Data*, 94 *American Economic Review*, no.2, 2004 (finding “large and statistically significant differences among teachers” that substantially impacted both the reading and math performance of New Jersey students); Karthik Muralidharan and Venkatesh Sundararaman, *Teacher Performance Pay: Experimental Evidence from India*, 119 *Journal of Political Economy*, no.1: 39-77, 2011 (finding that merit pay for teachers substantially improved student performance in India).

⁴³ Doug Staiger and Jonah Rockoff, *Searching for Effective Teachers with Imperfect Information*, 24 *Journal of Economic Perspectives*, no.3: 97–118, 2011, at 1, 6 (finding that research “has produced remarkably consistent estimates of the heterogeneity in teacher impact in different sites” even while using “a wide range of [statistical] specifications,” and that a teacher’s effectiveness does not change substantially after their “first year or two”)

⁴⁴ Thomas Kane, Jonah Rockoff, and Doug Staiger, *Teacher Quality and Alternative Teacher Certification*, NBER Conference Paper, 2005, at 1 (finding that teacher certification “does little to boost the human capital of teachers”); Joshua D. Angrist and Jonathan Guryan, *Teacher Testing, Teacher Education, and Teacher Characteristics*, 94 *American Economic Review*, no.2, 2004, at 246 (finding that state teacher certification has not “raised the quality of new and inexperienced teachers”).

⁴⁵ Caroline Hoxby and Andrew Leigh, *Pulled Away or Pushed Out? Explaining the Decline of Teacher Aptitude in the United States*, 94 *American Economic Review* no.2, 2004 (finding that teacher quality has declined substantially since 1960 due both to lower pay in the profession and the expansion of better-paying alternative careers); Darius Lakdawalla, *The Declining Quality of Teachers*, National Bureau of Economic Research Working Paper No. 8263, 2001, at 1 (finding that schools have increased “teacher quantity” while the “relative skill of teachers” has declined); Sean Corcoran, William N. Evans, and Robert Schwab, *Changing Labor Market Opportunities for Women and the Quality of Teachers 1957-2000*, 94 *American Economic Review* no.2, 2004 (finding a “detectable decline” in the quality of new female teachers between 1964-2000).

student “growth” in determining teacher effectiveness—making it very difficult to identify low-performing teachers. Even when principals and administrators can objectively identify such teachers, their removal is practically impossible due to a myriad number of statutes. Nearly all states grant some sort of property right (e.g., tenure) in teachers’ employment, and 72% of states fail to require taking into account teacher performance in doing so. 22% of states require teacher seniority to be the key driver of layoffs and other personnel decisions, even as this measure is not correlated with teacher performance. And 59% of states allow or require the “forced placement” of teachers, whereby a school district can force a principal to accept and hire unwanted, ineffective teachers.⁴⁶

In the few cases where districts attempt to surpass these barriers to remove low-performing teachers, they encounter years of legal procedures and six-figure legal expenses. The Los Angeles Times recently reviewed every case “in the last 15 years in which a tenured employee was fired by a California school district and formally contested the decision.” It concluded that “[b]uilding a case for dismissal is so time-consuming, costly and draining for principals and administrators that many say they don’t make the effort except in the most egregious cases.”⁴⁷

The strong, consistent research on the effects of individual teachers stands in contrast to the largely inconclusive research on class size reduction and funding increases—policies that have been pursued with vigor over the past half-century. Though the claim that students learn more in smaller class sizes is compelling on the basis of common intuition and public relations, it is not unequivocally supported by decades of research on the subject. For instance, there have been hundreds of published studies on the effects of small class sizes on student learning.

⁴⁶ Students First, *State Policy Report Card 2013*, 2013, <http://reportcard.studentsfirst.org/>.

⁴⁷ Jason Song, *Firing teachers can be a costly and tortuous task*, L.A. Times, May 3, 2009, <http://articles.latimes.com/2009/may/03/local/me-teachers3>.

According to a seminal meta-survey of one hundred and forty-seven such studies, just as many found a positive relationship between small class size and student achievement as did a null or even negative relationship. Thus, this survey concluded that “there appears to be no strong or systematic relationship between school expenditures and student performance.”⁴⁸

Though later studies have found that class size reduction appears to improve achievement in very early grades (e.g., kindergarten) and for higher ability students,⁴⁹ a significant literature generally concludes that lower class sizes (and resource enhancements more generally) yield few effects that are both consistently positive and statistically significant.⁵⁰ For instance, a 1996 California law gave to school districts an additional \$1,000 in state funds for “every student in the earliest grades whose classes had 20 or fewer students.”⁵¹ The program has “cost the state some \$25 billion in direct funding from Sacramento since its inception,” but a 2002 study of it stated that “the relationship between smaller class sizes and student achievement was ‘inconclusive.’”⁵² To the extent that smaller classes have a beneficial effect, researchers have

⁴⁸ Eric A. Hanushek, *The Economics of Schooling*, 49 *Journal of Economic Literature*, no.3, 1986, at 1162.

⁴⁹ See, e.g., Weili Ding and Steven Lehrer, *Estimating Treatment Effects from Contaminated Multi-Period Education Experiments: The Dynamic Impacts of Class Size Reductions*, 92 *Review of Economics and Statistics*, no.1, 2010, (finding a positive effect of small class sizes only in kindergarten and first grade); Weili Ding and Steven Lehrer, *Class Size and Student Achievement: Experimental Estimates of Who Benefits and Who Loses from Reductions*, 19 *Education Economics*, no.3, 2011, at 229 (finding that class size reduction benefits higher ability students but that more broadly, “there are no significant effects in reducing class size from 22 to 15 in any subject area.”).

⁵⁰ See, e.g., Julian R. Betts, *Is There a Link Between School Inputs and Earnings? Fresh Scrutiny of an Old Literature*, in Gary Burtless, ed., *Does Money Matter? The Effect of School Resources on Student Achievement and Adult Success*. (Washington, DC: Brookings Institution Press, 1996), at 1 (finding that studies showing no significant effect of class size reduction are more robust because they “examine resources at the school actually attended,” rather than mere “average school inputs by state”; Caroline Hoxby, *The Effect of Class Size on Student Achievement: New Evidence from Natural Population Variation*, 115 *Quarterly Journal of Economics*, no.4, 2000 (finding, in a study of 649 elementary schools, that idiosyncratic variations in class size had no statistically significant effect on student achievement).

⁵¹ Jennifer Medina, *Class Size in New York City Schools Rises, but the Impact is Debated*, N.Y. Times, February 21, 2009, <http://www.nytimes.com/2009/02/22/education/22class.html>.

⁵² Louis Freedberg, *Class size reduction program continues to unravel*, EdSource, May 31, 2012, <http://edsources.org/2012/class-size-reduction-program-continues-to-unravel/8730#.UyNqO1FdUb8>

computed that “the effects of a costly ten student reduction in class size are smaller than the benefit of moving one standard deviation up the teacher quality distribution.”⁵³

To be sure, the above analysis only provides a cursory overview of the major research on education policy over the past quarter century. Yet it shows that research demonstrates that increasing resources or lowering class sizes improves student achievement less than does ensuring that quality teachers are in front of every classroom.

School Finance Cases: History and Rationale

The mounting evidence that increased school resources—allocated toward class size reduction and other policies—have limited effects on student performance raises a fundamental question: why has an extensive litigation regime been developed to remedy inequitable or inadequate school funding allocations? And, given the significant effect—both in absolute terms and relative to school funding increases—of teacher quality on student achievement, to what extent can litigation be used to challenge teacher tenure statutes that prevent school districts from removing low value-add teachers? This section provides an overview of school finance litigation, with a focus on the legal rationale used to justify it. Scholars generally perceive school finance litigation as having three ‘waves,’ corresponding to specific litigation tactics being used.

A Brief History of School Finance Litigation

The first (and short-lived) school finance litigation wave alleged that school finance systems of certain states violated the federal Equal Protection Clause. The work of John Coons played an important role in bringing about this litigation. In his book, *Private Wealth and Public Education*, Coons argued that Supreme Court precedent suggested that public education quality

⁵³ Steven G. Rivkin, Eric A. Hanushek, and John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 *Econometrica*, no. 2, 2005, at 417.

should not vary based on inter-district wealth.⁵⁴ Coons and his colleagues pointed to cases—such as one that required indigent criminal defendants access to a free lawyer and trial transcript—that appeared to establish poverty as a suspect classification that enjoyed more rigorous protections under the Equal Protection Clause. In addition, even if courts rejected the notion that wealth was a suspect classification, Coons believed that the United States Constitution enshrined education as a fundamental right and that inequitable state school finance systems were unconstitutional on this basis.

Yet the Court soon rejected the claim that the federal constitution offered any protection against school finance systems that produced inequitable funding allocations. In *San Antonio v. Rodriguez*, Justice Powell argued both that poverty was not a suspect class that enjoys strict scrutiny, and that education was not a fundamental right under the federal constitution. Thus, the Court analyzed Texas’s school finance system merely under a “rational basis” standard, finding it legitimately related to the government interest of assuring a “[l]arge measure of participation in and control of each district’s schools at the local level.”⁵⁵ The Court has continued to decline ruling education a fundamental right in later decisions as well.⁵⁶

With reform at the federal level effectively foreclosed, litigants turned increasingly to state-level reform in a second “wave” of reform, aimed again at purportedly inequitable state school financing systems. Commonly referred to as “equity” suits, litigants “emphasiz[ed] claims that the state must ensure *equality in spending* across school districts.”⁵⁷ In making their case,

⁵⁴ Yudof *et al*, *supra* note 2, at 803.

⁵⁵ *San Antonio v. Rodriguez*, 411 U.S. 1 (1973), at 47-49.

⁵⁶ See e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that a Texas statute that withheld funds from school districts that educated undocumented children unconstitutional, but declining to apply strict scrutiny).

⁵⁷ Anna Lukemeyer, *Courts as Policymakers: School Finance Reform Litigation*, (LFB Scholarly Publishing, 2003), at 19 (emphasis original). See also Eric A. Hanushek and Alfred A. Lindseth, *Schoolhouses, Courthouses, and Statehouses*. (Princeton University Press, 2009), at 90 (stating that litigants “argued that the education funding ‘pie’ should be divided more equally among state’s school districts.”); William E. Thro, *Judicial Analysis During the*

litigants used the equal protection⁵⁸ and, less often, education clauses that typically exist in state constitutions. This wave “lasted from 1973 to 1989, but yielded relatively few victories for reformers.”⁵⁹

The third, and what many consider to be current, wave of school finance litigation differs from the previous two because suits are brought under fundamentally different premises. Rather than advocate for equity in school funding, these suits “focus[] on the state’s claimed obligation to provide an *adequate education or an opportunity for adequate education* to children in all districts,” and then advocate for a level of funding necessary to reach this adequate level.⁶⁰ In other words, these suits emphasize “differences in the quality of education delivered, rather . . . the resources available to the districts.”⁶¹ In addition to advocating for school finance reform on different grounds, these suits have also been more successful. Challengers have won roughly half of all cases filed against school finance systems, and have successfully drawn on both the equal protection or education clauses of state constitutions. Yet the inconclusive evidence on the impact of school finance reform on student achievement demands a more in-depth understanding of the legal rationale underscoring successful decisions.

Why Focus on Money?

Though every state constitution (apart from Mississippi’s) requires the government to maintain a public education system, few, if any, explicitly enshrine any equality of funding. The relevant constitutional clauses instead require the legislature to provide for a “thorough and efficient” education or, in stronger cases, “make ample provision for the education of all

Third Wave of School Finance Litigation: The Massachusetts Decision as a Model, 35 B.C.L.Rev. 597, at 603 (1994), (arguing that the relief requested by litigants during this period was “equality of expenditures.”

⁵⁸ For a discussion of the equal protection clauses in state constitutions, see Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*. 48 Vanderbilt L.Rev. 101 (1995).

⁵⁹ Lukemeyer, *supra* note 57, at 19.

⁶⁰ Lukemeyer, *supra* note 57, at 19.

⁶¹ 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).

children.”⁶² What, then, explains why the past half-century of school litigation has been focused on school funding?

In short, state courts have interpreted constitutional clauses to guarantee a broad, substantive right to some form of quality education and then required additional expenditures as a *means* for the state to meet this constitutional obligation. Even though the suits discussed above “were brought explicitly as challenges to . . . state[] school finance structure[s],” courts ruling that the state constitution “imposed some enforceable duty on the state overwhelmingly defined that duty in terms of a substantive object (resources or outcomes) rather than dollars.”⁶³ For instance, in a major lawsuit challenging Tennessee’s school finance system, the court stated that “[t]he essential issues in this case are quality and equality of education. The issue is not, as insisted by defendants and interveners, equality of funding.”⁶⁴

This sentiment is not unique to the Tennessee Supreme Court. “Few, if any, courts even arguably defined the object of their state’s constitutional duty primary as spending,” whether such duties were based on the state’s equal protection or education clauses.⁶⁵ Instead, a “common theme”⁶⁶ among courts is to obligate the state to offer the “pedagogical services and resources . . . [that] are adequate to provide children with the opportunity to obtain . . . essential skills” such as “basic literacy, calculating, and verbal skills.”⁶⁷ Further, courts often used “explicit and emphatic” language in holding that the constitution protected equality of educational resources or outcomes, not merely that of funding.⁶⁸

⁶² More specifically, the education clauses of state constitutions are traditionally divided into four broad categories, first identified in Gershon M. Ratner, *A New Legal Duty For Urban Public Schools: Effective Education In Basic Skills*, 63 *Tex.L.Rev.* 777 (1985).

⁶³ Lukemeyer, *supra* note 57, at 54.

⁶⁴ *Tennessee Small School Systems v. McWherter I*, 851 S.W.2d 139 (1993), at 156.

⁶⁵ Lukemeyer, *supra* note 57, at 54.

⁶⁶ *Id.*, at 57.

⁶⁷ *Campaign for Fiscal Equity, Inc. v. State of New York*, 631 N.Y.S.2d 565 (1995), at 570.

⁶⁸ Lukemeyer, *supra* note 57, at 54.

The fact that courts defined states' constitutional obligations as providing equality in educational resources or outcomes means that they have necessarily found a causal relationship between such resources or outcomes and school spending, even in spite of research that may suggest otherwise. Indeed, in a 2003 comprehensive study of 47 opinions in 38 school finance cases in 31 states, one expert found that "a positive finding of a relationship between expenditures and educational opportunity was necessary . . . to ensure a plaintiff's victory" in every case.⁶⁹ To establish this positive finding, courts relied on expert opinions about what constituted adequacy of education, simple comparisons between richer and poorer districts and school resources and services, common sense notions of what improves schools, and the fact that "both parents and legislators behaved as if money mattered."⁷⁰

To summarize, from a constitutional perspective, courts could easily have required a remedy other than greater education funding. Instead, they have created a new class of state constitutional rights—namely, the right to equitable or adequate school funding—based on the belief that more money leads to improved student performance. This affirmative obligation that courts have placed on states overlooks the fact that teacher quality dramatically affects student outcomes.

Toward a New Wave of School Quality Litigation

The history of and rationale behind school finance litigation discussed above has at least two significant implications for this article. First, because our understanding of the factors that most affect student achievement have fundamentally shifted over the past two decades, litigants

⁶⁹ Lukemeyer, *supra* note 57, at 123. *See also* John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perceptive*, 19 *Journal of Educational Finance*, no. 2 (1993); James E. Ryan, Sheff, Segregation, and School Finance Litigation, 74 *N.Y.U. L.Rev.* 529, at 539, 553 (arguing that "[s]chool finance litigation, of course, is based on the assumption that money does matter," but that constitutional "educational rights can encompass more than just funding").

⁷⁰ Lukemeyer, *supra* note 57, at 119-120.

would do well to consider bringing school quality suits against the state with increased teacher quality, not additional school funding, as the petition for relief. Second, the fact that the vast majority of courts have assumed a causal impact of school funding on student achievement, in spite of persistently growing research to the contrary, suggests that they must reconsider how they use social science evidence in judicial findings-of-fact more broadly. This section addresses each of these implications in turn.

Claims Targeting Teacher Quality

Because teacher quality plays a dramatic role in determining student outcomes, litigants have substantial grounds on which to argue that states fail to meet their constitutional obligations to students by not ensuring that they receive instruction from quality teachers. This subsection discusses the types of viable claims and the types of states in which these claims can be brought, and then discusses one recent article that offers a somewhat similar proposal of school quality litigation.

Types of Claims

There are at least three broad types of legal claims that litigants can make to address disparate or inadequate teacher quality. First, suits can allege an unequal distribution of teachers between schools or school districts. Such inter-district comparisons have formed the bedrock of school finance cases over the past half-century, suggesting they may be effective with courts. Not only can claims of inter-district disparities rely on state education clauses, but they can also rely on equal protection clauses and thereby create a second path to the application of strict scrutiny. Indeed, experts agree that “[n]umerous studies have documented the tendency for the most qualified teachers to gravitate toward schools that serve relatively well-off [and white]

children, even though salaries are often no higher in such schools.”⁷¹ To the extent that racial disparities in students’ access to effective teachers exist, litigants can allege a violation of state equal protection clauses, encouraging the courts to apply intermediate or strict scrutiny.

Second, suits can target an unequal distribution of teachers *within* a given school or school district. The highly granular data on student performance and corresponding teacher quality now allows for *intra*-district comparisons of teacher quality. Indeed, recent studies find that teacher quality varies significantly within individual schools.⁷² A third type of claim alleges inadequacy of teacher quality, putting aside any equity-based claims. These suits would comport with a school finance doctrine that has moved steadily toward adequacy rather than equity based claims over the past several decades.

These claims can request a form of relief with varying levels of specificity. In the simplest case, a litigant can simply seek a declaratory judgment that students are constitutionally entitled to reasonably effective teachers. This judgment would grant substantial deference to the state regarding the specific means by which it provides for this entitlement. A more ambitious claim would demand an injunction that prevents students from being educated by grossly ineffective teachers. This type of claim may politicize the case, but still allow the court to grant substantial deference to state and district authorities to determine specifically how to ensure that ineffective teachers do not remain in the classroom. The third and most ambitious claim is to

⁷¹ Charles Clotfelter, Elizabeth Glennie, Helen Ladd, and Jacob Vigdor, *Would Higher Salaries Keep Teachers in High-Poverty Schools? Evidence from a Policy Intervention in North Carolina*, NBER Working Paper No. 12285, June 2006 (citing Lankford, Hamilton, Susanna Loeb, and James Wyckoff, *Teacher Sorting and the Plight of Urban Schools: A Descriptive Analysis*, Educational Evaluation and Policy Analysis 24, 2002; Scafidi, Benjamin, David Sjoquist, and Todd R. Stinebrickner, *The Impact of Wages and School Characteristics on Teacher Mobility and Retention*, Unpublished paper, 2002; Hanushek, Eric A., John F. Kain, and Steven G. Rivkin, *Why Public Schools Lose Teachers*, 39 *Journal of Human Resources*; Reed, Deborah, Kim S. Rueben, and Elisa Barbour, *Retention of New Teachers in California* (X: Public Policy Institute of California, 2006), Retrieved 4/14/06 from www.ppic.org/content/pubs/R_206DRR.pdf)

⁷² See, e.g., Steven G. Rivkin, Eric A. Hanushek, and John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 *Econometrica* no. 2 (2005).

target statutes, such as teacher tenure laws, that prevent straightforward removal of ineffective teachers.

Types of States: A Taxonomy of the Viability of Targeting Teacher Quality

For obvious reasons, the viability of the claims discussed above will be contingent on students' rights as established in each state's school finance case law. A fifty-state analysis of court-ordered reforms based on these rights is beyond the scope of this article—and already extensively discussed in other works.⁷³ However, this section surveys seminal school funding litigation in a sample of nineteen states and classifies these decisions into five rank-ordered tiers denoting the viability of my proposed line of litigation.

Perhaps the most viable states⁷⁴ are those in which courts have acknowledged that teacher quality has important effects on student learning and then used the claim that funding levels affect teacher quality to strike down state finance systems. For instance, the Connecticut Supreme Court in *Horton v. Meskill* held that “[t]he criteria for evaluating the ‘quality of education’ in a town include . . . training, experience and background of teaching staff”, and that “[i]n most cases, the optimal version of these criteria is achieved by higher per pupil operating expenditures.”⁷⁵ Here, the Court suggests that greater per-pupil expenditures are *sufficient* to bring about the “optimal” level of teaching quality. Suits under my proposal would agree with the Court’s premise that teaching quality affects student learning, but disagree with the argument that per-pupil expenditures *ensure* high levels of teaching quality. Instead, these suits would

⁷³ See, e.g., Lukemeyer, *supra* note 57.

⁷⁴ Other cases that I group in this first category include *Seattle School District No. 1 v. State*, 585 P.2d 71, 76, 95 (holding that “[t]he effective teaching and opportunities for learning these essential skills make up the Minimum of the education that is constitutionally required” and that “there can be compliance with the State's mandatory duty only if there are sufficient funds derived through dependable and regular tax sources to permit school districts to carry out a basic program of education.”); *Pauley v. Kelly*, 162 W.Va. 672, 726 (discussing educational history in which “the best teachers were in the wealthy districts”); *Serrano v. Priest*, 5 Cal.3d 584, 601 at fn. 16 (holding that the “defendants' own evidence verifies that the comparative per pupil (expenditures) do refer to actual educational advantages in the high-cost schools, especially with respect to the caliber of the teaching staff”).

⁷⁵ *Horton v. Meskill* (1997), 376 A.2d 359, 368.

point to either the persistent existence of disparate teacher quality, or the existence of statutes that prevent school districts from removing ineffective teachers from the classroom.

A second set of cases⁷⁶ strikes down school financing systems in part because of their assumed premise that disparate funding affects teacher quantity or retention. Courts in this category acknowledge that teacher instruction significantly affects student outcomes, state that smaller class sizes affect teacher instruction, and strike down school finance systems at least partly using this rationale. Here too, suits under my theory may be feasible. The necessary assumption of arguing that smaller class sizes affect student learning is that *teachers* affect student learning. A suit under my proposal would agree with this implicit assumption, point to extensive research on the effects of teachers on student learning—over and above class size—and demand relief on this basis.

A third set of cases⁷⁷ explicitly acknowledges that in-school factors such as teacher quality affect student learning, but expresses concern about the measurement of such factors and therefore makes a narrow ruling pertaining to only school finance systems. For instance, in New Jersey’s historic *Robinson v. Cahill* case, the Court stated that “[A] multitude of other factors [besides the amount of spending] play a vital role in the educational result—to name a few . . . variation in availability of qualified teachers in different areas, effectiveness in teaching methods and evaluation thereof.”⁷⁸ Just the following year in a subsequent round of finance litigation, the Court held that “[w]e deal with the problem in [terms of dollar input per pupil] because dollar

⁷⁶ See, e.g., *Rose v. Council for Better Education*, 790 S.W.2d 186, 197 (“Student-teacher ratios are higher in the poorer districts”); *Tennessee Small School Systems v. McWherter* (1993), 851 S.W.2d 139, 144 (“Plaintiffs’ [less wealthy] districts fail in their efforts to retain teachers”). Georgia’s highest court has made similar statements, though has refused to strike down the state’s school finance system. See *McDaniel v. Thomas* (1981), 285 S.E.2d 156, 160-161 (“Wealthy school districts are financially capable of hiring more teachers than poor districts and thus have a lower student-teacher ratio”).

⁷⁷ Apart from New Jersey, courts in several other states develop a similar line of reasoning. See, e.g., *Washakie County School Dist. No. One v. Herschler*, 606 P.2d 310, 334 (“[w]hile we would agree that there are factors other than money involved in imparting education, those factors are not easy of measurement and comparison”).

⁷⁸ *Robinson v. Cahill* (1975), 351 A.2d 713, 717 at fn. 3.

input is plainly relevant and because we have been shown no other viable *criterion* for *measuring* compliance with the constitutional mandate.”⁷⁹ Though this was a legitimate line of reasoning when *Robinson* was decided nearly forty years ago, it is not in the modern age with today’s much richer data on student and teacher performance. In these states, suits would highlight the objective and rigorous measurements of teacher quality that exist today, and the significant disparities in teacher quality that violate students’ fundamental right to education developed in case law.

A fourth set of cases⁸⁰ rule on school finance systems without discussing funding’s affects on teachers or teachers’ effects on students. Rather, these cases evaluate school finance systems on other grounds, for instance by holding that the quality of physical facilities is lower in lower-funded school districts. For this reason, these cases pose greater ambiguity as to the viability of suits targeting teacher tenure statutes. Though relevant courts may find newfound evidence on teacher effects compelling, they may also adopt a more narrow interpretation of the relevant state constitutional provisions that is consistent with their past rulings.

A fifth set of cases⁸¹ rule on school finance systems by showing substantial deference to the legislative and executive branches. For instance, the Massachusetts Supreme Court in *McDuffy v. Secretary of Executive Office of Educ.* mentions low teaching quality as part of reason why it strikes down the state’s system of education, but holds that “we leave it to the

⁷⁹ *Robinson v. Cahill* (1976), 355 A.2d 129, 180 (emphasis added).

⁸⁰ Cases I reviewed that fall into this category include *Edgewood Independent School Dist. v. Meno*, 917 S.W.2d 717; *Roosevelt Elementary School Dist. No. 66 v. Bishop*, 179 Ariz. 233; *Claremont School Dist. v. Governor*, 142 N.H. 462; *Coalition for Equitable School Funding, Inc. v. State*, 311 Or. 300; and *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573.

⁸¹ Apart from the *McDuffy* case discussed in this paragraph, other states’ cases that fall into this category include *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1018 (“courts are ill-suited to determine what equal educational opportunity is, especially since fundamental disagreement exists concerning the extent to which there is a demonstrable correlation between educational expenditures and the quality of education”); *Kukor v. Grover*, 148 Wis.2d 469, 510 (“demands [for additional resources] cannot be remedied by claims of constitutional discrepancies, but rather must be made to the legislature and, perhaps, also to the community.”).

magistrates and the Legislatures to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today.”⁸² The large amount of deference this decision provides to legislatures, combined with the highly politicized nature of policies regarding teacher quality, raises some doubts as to whether my brand of school quality litigation would be justiciable here. On the other hand, the increasing consensus around teacher quality as the most important in-school factor in driving student learning may alleviate some of the reluctance that courts previously had to strike down legislative policy decisions as unconstitutional violations of relevant state clauses.

The above analysis illustrates that state-level school finance decisions are highly heterogeneous. Yet it underscores that school quality litigation targeting low teacher quality may be viable in a number of states—especially when prior cases have acknowledged or even relied on the importance of teacher quality or quantity in assessing the validity of school finance systems. Just as “medical malpractice, emotional distress, and mass toxic tort cases did not always enjoy wide acceptance,”⁸³ so too has cutting-edge research demanded a new inquiry into what best provides for the equal educational opportunity typically guaranteed by state constitutions and related case law. Some courts may be willing to acknowledge that times have changed, and that our understanding of what drives student progress has become more sophisticated. Because many courts have merely envisioned school funding as a means by which states can satisfy a broader, more substantive constitutional obligation to students, they can reasonably order equal quality instruction on the same grounds.

Putting aside the five classifications of school finance cases described above, it is worth noting that courts in several other states have already prescribed input-based school reforms

⁸² *McDuffy v. Secretary of Executive Office of Educ.*, 415 Mass. 545, 619.

⁸³ Ethan Hutt and Aaron Tang, *The New Education Malpractice Litigation*, 99 *Virg.L.Rev.*, No. 3, (2013).

apart from school finance. For instance, several courts have required equalized teacher salaries,⁸⁴ “the implementation of standards-based accountability systems, class size reduction programs, whole school reforms, and free preschool programs” in order for the state to fulfill its constitutional obligations.⁸⁵ In contrast to these extremely specific, intrusive reforms, one potential relief requested under my theory merely asks judges to establish that students are entitled to quality instruction, leaving it to the state to determine which policies best ensure this protection. This offers further evidence that suits targeting disparate or inadequate teacher quality would not, in many cases, be an unwarranted overextension of judicial power, given past precedent.

Relatedly, and more broadly, state supreme courts will lose legitimacy the longer they continue to rule in favor of plaintiffs in current school finance cases without acknowledging the powerful effect of teachers on student learning. Such litigation is still ongoing in a number of states, and some courts continue to order more money be spent on public schools.⁸⁶ The increasing publication—and resulting publicity—of rigorous studies demonstrating the powerful effects of teachers on student achievement puts greater scrutiny on present-day decisions that order the state to spend greater amounts of money on schools without addressing teacher quality. Such rulings increasingly constitute legal activism rather than legal realism because they—whether willfully or not—ignore, disregard, or discredit modern education policy research.

One caveat to the above analysis that defendants in my brand of litigation may offer is that though quality teachers dramatically affect student outcomes, teacher effectiveness is most

⁸⁴ *Tennessee Small School Systems v. McWherter*, *supra* note 64, at 734. Through the Campbell rulings, the Wyoming Supreme Court has also mandated minimum teacher salaries.

⁸⁵ For a discussion of courts’ mandates of “specific reform strategies”, see Benjamin M. Superfine, *New Directions in School Funding and Governance: Moving From Politics to Evidence*, 98 Ky. L.J. 653, at 667 (2010).

⁸⁶ For instance, two years ago New Jersey’s Supreme Court ordered “\$500 million to the state’s poorest districts” in the latest iteration of the *Abbott v. Burke* litigation. Christopher Baxer, *Christie: N.J. Supreme Court’s Abbott Decision is the latest ‘invoice’ from an overzealous branch*, *Star Ledger*, May 24, 2011, http://www.nj.com/news/index.ssf/2011/05/christie_supreme_court_abbott.html.

readily measured *ex post* using student achievement data and classroom observations. This makes the input of teacher quality fundamentally different than the input of per-pupil school expenditures, which can be identified *ex ante*. However, this argument should not turn cases of my brand of litigation. Though the measurement of teacher quality is undoubtedly complicated, the fact that it is measured *ex post* should not relieve states from any constitutional obligation to ensure that only quality teachers teach students.

Recent Research Highlights Increasing Focus on Teachers

Although scholarship⁸⁷ continues to advocate for additional school finance litigation—in spite of substantial academic evidence questioning its effectiveness— my theory of school quality litigation is consistent with some recent work. An article by Jared Buszin has recently addressed the possibility of advocating for equity or adequacy in “skill-based education inputs such as teachers.”⁸⁸ Specifically, this article analyzes *Reed v. California*, a recent lawsuit that alleged that extraordinarily and unusually high rates of teacher layoffs were a violation of students’ constitutional rights to equality of educational opportunity. The *Reed* suit, according to the article, “led to a landmark settlement” in which the Los Angeles school district agreed not to “fire teachers at the targeted schools as part of any budget-based layoffs for the 2010-2011 school year.”⁸⁹ This agreement thus constituted a change to the local application of California’s “last-in, first-out” (LIFO) policy, which generally requires districts to layoff the least experienced teachers first during a reduction in force. The article argues that “Reed-like suits, challenging local policies that cause an unequal or inadequate distribution of skill-based

⁸⁷ See, e.g., Lauren N. Gillespie, *The Fourth Wave of Education Finance Litigation: Pursuing A Federal Right to an Adequate Education*, 95 *Corn.L.Rev.* 989 (2010).

⁸⁸ Jared S. Buszin, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 *Emory L.J.* 1613 (2013), at 1616.

⁸⁹ Buszin, *supra* note 88, at 1643.

education inputs, should be cognizable in states other than California” and argues that number of other states would “likely overturn” such policies.⁹⁰

Though the article constitutes the first to buck legal academia’s advocacy of school finance litigation, its rationale has several shortcomings. First, after an appeal by the district’s teacher union, an appellate court overturned the *Reed* settlement and remanded the case to the trial court for an adjudication on the merits. The Buszin article cites this successful appeal in a footnote, but offers no discussion of how the appeal affects its argument. Second, even assuming that the original *Reed* settlement will ultimately stand, the circumstances surrounding the case were exceedingly rare. In *Reed*, budget cuts had forced the Los Angeles school district to conduct a widespread reduction in force governed by LIFO statutes. Because a handful of schools had a disproportionate share of such new teachers, they bore the brunt of the layoffs, to the point where more than seventy percent of teachers in one school lost their jobs. Though tragic, these circumstances are far from common in non-recessionary periods, raising doubt as to whether a less extreme set of circumstances would lead courts to order similar relief.

Third, the Buszin article is too expansive in the types of states that it argues will strike down disparities in skill-based inputs caused by factors like teacher turnover. The article argues that “[c]ourts in states that struck down school finance systems as violative of state equal protection guarantees would likely overturn policies, like LIFO, that lead to an inequitable distribution of skill-based education inputs” and that “*Reed*-like challenges would also likely be cognizable in states that have struck down school finance systems under their education clauses.” However, whether or not states strike down the application of LIFO and similar statutes does not turn on the constitutional clause that formed the basis of their school finance decisions. Instead, this question turns on the specific contextual language—such as whether states discuss teacher

⁹⁰ Buszin, *supra* note 88, at 1644-45.

quality or quantity as part of their decisions, acknowledge that other factors besides school funding affect student outcomes, or express concern about encroaching on the legislature—that is used in such decisions. The fact that courts show high levels of heterogeneity in use of this language suggests the analysis of whether innovative school quality litigation is viable cannot be made with broad strokes.

Putting aside these shortcomings, however, the Buszin article aptly offers the *local* application of statutes like LIFO as a potential target for school quality litigation. Though its proposal is less ambitious than the brand of litigation under my theory, the article underscores that more and more authors are exploring how innovative litigation can operate in a new education policy landscape that focuses increasingly on teachers.⁹¹

Research and Constitutional Decision-Making: Time for Clearer Rules?

The fact that courts have incorrectly linked increased school spending to student achievement—overlooking, misunderstanding, or even ignoring research suggesting the contrary—also demands a more in-depth analysis of how courts use social science research more generally. The Supreme Court’s use of social science evidence is generally traced back to *Brown v. Board of Education*.⁹² In what is sometimes described as the “notorious”⁹³ footnote 11, the

⁹¹ As an additional example, see Hutt and Tang, *supra* note 83, which argues for the viability of tort cases based on individual teacher malpractice.

⁹² Note, however, that authors trace the Court’s use of social *perspectives* and beliefs, though not based on qualitative or quantitative evidence, much further back than *Brown*. See, e.g., Alan J. Tomkins and Kevin Ourslandt, *Social and Social Scientific Perspectives in Judicial Interpretations of the Constitution: A Historical View and an Overview*, 15 *Law and Human Behavior*, no. 2, 1991 (arguing that the Court’s opinions in *Dred Scott* and *Plessy* reflected generally-held social assumptions of the time). In addition, courts have long used social science evidence in determining the validity of regulations or their application. See generally, Sheila Jasanoff and Dorothy Nelkin, *Science, Technology, and the Limits of Judicial Competence*, 214 *Science*, no. 4526, 1981, at 1211. For instance, a suit against a hospital for its refusal to perform in-vitro fertilization focuses on “scientific considerations” such as “the doctors’ level of expertise” and “whether temperature charts reliably forecast[] ovulation times.” Likewise, one particular challenge to the Consumer Product Safety Commission’s regulation on firecrackers focused on “whether the safety record of firecrackers justified the regulation.” See Howard T. Markey, *Jurisprudence or “Juriscience”?*, 25 *Wm. & Mary L. Rev.* 525, 1984, 530.

⁹³ David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 *U. Pa. L. Rev.* 541, 1991, 565.

Court cites a number of empirical studies to support the contention that de jure segregation “generates a feeling of inferiority as to [the] status [of African-American students] in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁹⁴ On the basis of these supposedly inherent effects, the Court ruled de jure segregation unconstitutional under the equal protection clause. Numerous authors have criticized this footnote, questioning the validity of the studies cited or their interpretation by the Court.⁹⁵

Courts have used (or misused) social science evidence in a wide range of cases since *Brown*. One author, surveying this use, concluded that the Supreme Court has, at various points, “conform[ed] its conclusions to the available findings,” “misappl[ied] the findings in framing its conclusions,” “misunder[stood] or ignor[ed] valid empirical research,” or “dismiss[ed] the importance” of research for its conclusions.⁹⁶ Courts’ misuse or disregard of social science evidence in school finance cases is thus not a rarity, but instead, in line with how even the Supreme Court makes determinations of fact. This misuse is all the more concerning because school finance cases interpret the meaning of a specific, *positive* right codified in state constitutions.

Though the Court has misused social science research in the past, it continues to demand it today. Last year, for instance, the Court in *Fisher v. University of Texas* remanded the high-profile affirmative action case to a lower court in order to determine whether any “workable race-neutral alternatives would produce the educational benefits of diversity” in higher education.⁹⁷ Because this determination is a factual inquiry, the relevant briefs will cite actual

⁹⁴ *Brown v. Board of Education*, 347 U.S. 483 (1954), at 494.

⁹⁵ Some studies have argued that the citation of studies in *Brown* did not turn the case in opposition of de jure segregation. Nevertheless, the general point of this paragraph is that social science evidence has often played a role—sometimes decisively, sometimes not—in determining what constitutional rights we have.

⁹⁶ David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. Pa. L. Rev. 541, at 550.

⁹⁷ *Fisher v. University of Texas at Austin*, 570 U.S. ____ (2013), at 11.

research on the topic, meaning that the Court is “essentially embracing [an] empirical approach to racial preferences.”⁹⁸ Likewise, the following day, the Court in *Shelby County, Alabama v. Holder* held that Congress was free to re-identify the states subject to the Voting Rights Act’s preclearance provisions “in light of current [voting] conditions.”⁹⁹ The assessment of current voting conditions is invariably a factual undertaking in which current research plays a substantial role.

The increasing amount of published research and courts’ continued use (or misuse) of it makes it all the more important for courts to interpret social science research in the right ways—especially when they create affirmative constitutional rights. Though a full analysis of courts’ fact-finding process is beyond the scope of this article, a wide range of literature has established several generally accepted principles of high-quality social science research. For instance, research findings should be robust to different empirical specifications, suggest a causal effect rather than merely a correlation, and have economic rather than statistical significance.¹⁰⁰ As the era of “big data” creates new and much more expansive datasets with which social and policy questions can be tested, research findings (both valid and questionable) will become even more prevalent. It may thus be time for the Supreme Court or state courts to adopt standards for assessing the validity and relevance of social science research, just as they have set forth standards of both review and of proof in a wide variety of settings. Clear standards in this area will make litigation results more accurate, consistent, and predictable, and help ensure that the constitutional rights courts create have a strong foundation of valid factual conclusions.

⁹⁸ Richard Sander, *Commentary on Fisher: A Classic Kennedy compromise*, SCOTUSblog, June 24, 2013, <http://www.scotusblog.com/2013/06/commentary-on-fisher-a-classic-kennedy-compromise/>

⁹⁹ *Shelby County, Alabama v. Holder*, 570 U.S. ____ (2013), at 20.

¹⁰⁰ For a general discussion of appropriate causal inference in policy analysis, see Daniel E. Ho, Kosuke Imai, Gary King and Elizabeth A. Stuart, *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 *Political Analysis* no. 199, 2007, <http://www.law.stanford.edu/publications/matching-as-nonparametric-preprocessing-for-reducing-model-dependence-in-parametric-causal-inference>.

New Litigation in California

The above analysis has demonstrated that teacher quality matters far more than educational spending in improving students' learning and that a new class of litigation alleging the unconstitutionality of inequitable teacher quality distribution may be viable. This section analyzes a new lawsuit in California that may be the first in this new class. In *Vergara v. California*, a team of litigators led by Theodore Boutrous is arguing that a set of California statutes in effect prohibit districts from removing grossly ineffective teachers, thereby violating the state's fundamental right to education guaranteed in case law. Below, I analyze this litigation's goals, legal rationale, and viability going forward.

Goals

The *Vergara* suit is aimed directly at invalidating five statutes, alleging they violate the constitutional rights of California students.¹⁰¹ Specifically, these statutes award permanent employee status (e.g., tenure) to teachers employed for a certain period of time, commonly eighteen months or two years,¹⁰² prescribe a specific (and extremely lengthy) process by which principals may press dismissal charges against teachers,¹⁰³ and require districts to remove employees in order of reverse seniority when layoffs are required.¹⁰⁴ According to the lawsuit, together, these statutes “confer permanent employment on California teachers, effectively prevent the removal of grossly ineffective teachers from the classroom, and in economic downturns, require layoffs of more competent teachers.”¹⁰⁵

¹⁰¹ First Amended Complaint at 3, *Vergara v. California*, Superior Court, County of Los Angeles, (No. BC484642) (2012).

¹⁰² California Education Code section 44934 (the “Written Charges Statute”).

¹⁰³ Encompasses three challenged educational statutes: California Education Code section 44934 (the “Written Charges Statute”), section 44938 (the “Correct and Cure Statute”), and section 44944 (the “Dismissal Hearing Statute”).

¹⁰⁴ California Education Code section 44955 (the “LIFO Statute”).

¹⁰⁵ First Amended Complaint at 3, *Vergara v. California*, Superior Court, County of Los Angeles, (No. BC484642) (2012).

Legal Rationale

The legal rationale for the *Vergara* suit stems largely from the California Supreme Court's decision in *Serrano v. Priest*. This decision formed the basis for the Court to strike down the state's school finance system, and articulated a fundamental right to education in doing so. In two separate decisions, the California Supreme Court stated that because "education is the lifeline of both the individual and society" and serves the "distinctive and priceless function" of "the bright hope for entry of the poor and oppressed into the mainstream of American society," California students must have access to "substantially equal opportunities for learning."¹⁰⁶ Laws that inflict a "real and appreciate impact" on the fundamental right to education are thus unconstitutional.¹⁰⁷

The *Vergara* suit alleges that the challenged statutes force teacher employment and dismissal decisions "to be made primarily or exclusively on grounds *other* than students' need for effective teachers." Thus, these statutes perpetuate "the employment within the school system of a number of grossly ineffective teachers who do not serve students' needs and who, in fact, have a real and appreciably negative impact on students' education." For this reason, "these laws infringe upon California students' fundamental right to education."¹⁰⁸

In addition to an alleged violation of California's fundamental right to education, the suit also alleges that the challenged statutes also have varying effects by students' race and wealth, both suspect classes under California law. According to the suit, "[G]rossly ineffective teachers are disproportionately assigned to schools serving predominantly minority and economically

¹⁰⁶ *Serrano v. Priest*, 18 Cal.3d 728 (1976), at 747-748.

¹⁰⁷ *Serrano v. Priest*, 5 Cal.3d 584 (1971), at 605, 608-609.

¹⁰⁸ First Amended Complaint at 3-4, *Vergara v. California*, Superior Court, County of Los Angeles, (No. BC484642) (2012)

disadvantaged students.” Therefore, these statutes “make the quality of education . . . a function of race and/or the wealth of a child’s parents and neighbors.”¹⁰⁹

Evaluating the Case’s Viability

The *Vergara* case has been in trial in district court since January 2014. The key issue for the court to decide, of course, is whether the challenged statutes go so far as to constitute a violation of students’ fundamental right to education. To do so under California case law, statutes must have a “real and appreciable impact on, or a significant interference with, the exercise” of the fundamental right in question.¹¹⁰ The case’s outcome will thus be shaped by how case law has interpreted this requirement in the past.

According to the plaintiffs, courts have previously ruled that “anything beyond an incidental effect will be considered a real and appreciate impact on, or significant interference with, the exercise of the fundamental right.”¹¹¹ Under this logic, the challenged teacher tenure laws do not have to be “the *only* cause—or even the ‘but for’ cause—of the infringement” of students’ fundamental right to education.¹¹² To support this claim, the plaintiffs cite several cases in which courts applied mere rational basis review, and consequently found statutes constitutional, because the relevant laws had “only minimal, if any, effect[s] on the fundamental right.”

Yet the fact that certain laws escaped strict scrutiny because they had minimal effects on a fundamental right does not mean that a law having *anything* more than minimal effects has a “real and appreciable” impact on a fundamental right. Indeed, intuitively (and as suggested by

¹⁰⁹ *Id.*, at 5.

¹¹⁰ *Fair Political Pracs. Com. vs. Super Ct. of L.A. County*, 25 Cal.3d 33 (1979), at 47.

¹¹¹ *Opposition to Demurrers of the State Defendants* at 13, *Vergara v. California*, Superior Court, County of Los Angeles, (No. BC484642) (2012) (internal quotation marks omitted).

¹¹² *Id.*, at 14.

case law), there appears to be a middle ground between laws having ‘minimal’ effects and laws having ‘appreciable’ effects.

Thus, it may be harder than the plaintiffs admit to show that the challenged statutes have a “real and appreciable” impact on students’ fundamental right to educational opportunity. They must first show a strong causal link between the challenged statutes and the failure to remove ineffective teachers. They must then tie this failure to a violation of students’ fundamental right to education. The defense will likely argue that these multiple layers of allegations are too tenuous for a court to accept. For instance, the defense’s testimony at trial has highlighted the fact that ineffective teachers can be—and in fact, have been—removed from the classroom even with the challenged statutes in place. On the other hand, the plaintiff’s testimony at trial has highlighted a number of examples when grossly ineffective teachers were kept in the classroom at least in part because of onerous teacher tenure protections. Likewise, the defense could argue that the absence of the statutes does not guarantee that principals will remove all ineffective teachers. For instance, a recent study investigated teacher retention after a 2004 change “dramatically reduced the costs of firing a probationary teacher” in the Chicago public school system. The study found that “30-40 . . . schools did not dismiss *any* teachers” after this change, possibly due to principals’ reluctance to ‘rock the boat.’¹¹³ On the other hand, plaintiffs can make a strong case that the mere possibility that ineffective teachers may remain in the classroom even in the absence of the challenged statutes has little bearing on whether or not the statutes themselves are constitutional.

The next several months will determine whether the plaintiffs can successfully show either that the fundamental right to education guarantees students effective teachers or that the challenged statutes have a “real and appreciable” effect on such a guarantee. Putting aside these

¹¹³ Brian A. Jacob, *Do Principals Fire the Worst Teachers?*, NBER Working Paper 15715 (2010), at 20.

current ambiguities, a ruling in favor of the plaintiffs would significantly influence future litigation. The California Supreme Court has acknowledged that “the Constitution does not prohibit all disparities in educational quality or service. . . . the experience offered by [the] vast and diverse public school system undoubtedly differs to a considerable degree among districts.”¹¹⁴ For a court to rule in favor of the plaintiffs in spite of this acknowledgement may open the door to a substantial range of related litigation. Plaintiffs could plausibly challenge teacher recruitment policies, salary schemes, or anything else that arguably affects a district’s ability to exit ineffective teachers from the system. Likewise, a parent could plausibly sue any school that fails to fire an ineffective teacher, alleging that this failure has a real and appreciable impact on a student’s education.

The legal obstacles to *Vergara*’s success are substantial. Yet school finance litigation at its outset was boundary-breaking in its own way. Though its rationale has now become commonplace, decisions like *Serrano v. Priest* that guaranteed students the right to equal or adequate education funding substantially extended the boundaries of what constituted valid legal reasoning. The notion that effective teachers are crucial for children’s success, and that onerous tenure laws often prohibit, in practice, the removal of ineffective teachers, is becoming more accepted by the public. As public opinion shifts, courts are better able, or perhaps more prone, to set new precedent that matches such changes. Further, the fact that Theodore Boutrous and his prestigious law firm (Gibson, Dunn & Crutcher LLP) agreed to litigate the case suggests they are at least somewhat confident in their ability to craft a persuasive legal argument. Indeed, the organization funding the case describes itself as a “*national* non-profit organization dedicated to

¹¹⁴ *Butt v. State of California*, 4 Cal.4th. 668 (1992), at 686.

sponsoring impact litigation” that promotes access to quality teachers, and describes *Vergara* as merely “the *first* case sponsored by Students Matter.”¹¹⁵

Whether or not *Vergara* itself is successful, the case is therefore potentially only the beginning of a new wave of school quality litigation that cites our far more sophisticated understanding of what improves student achievement to push states to ensure that quality teachers are in every classroom. The fact that a number of states’ own school finance doctrines comport with the notion that teacher quality is essential to education, and the substantial number of statutes that constitute real obstacles to the removal of poorly performing teachers, suggest that litigants have a wide range of both legal arguments to advance and states in which to advance them.

Conclusion

This article has argued that education policy and related school quality litigation has focused on the wrong goal: school funding increases instead of teacher quality improvements. It is thus not entirely surprising that American academic achievement, both nationwide and for specific populations, has stagnated behind quickly-improving international peers. Given this context, I have made three broad points. First, a new brand of litigation that uses the underlying constitutional rights of students developed in school finance case law to establish a right to quality instruction may be viable. I have offered a taxonomy of a sample of school finance decisions, concluding that such litigation is especially viable in states that have developed a school finance litigation regime partly by assuming the important impact that teachers have on student learning. Second, the judicial system’s continued demand for social science evidence, combined with its repeated misinterpretation of it, give increased importance to setting standards for evaluating the accuracy and legitimacy of research evidence used in judicial fact-finding.

¹¹⁵ See <http://studentsmatter.org/>; emphasis added.

Third, the *Vergara* suit may turn on whether the court believes teacher tenure statutes have a “real and appreciable” impact on the fundamental right to education guaranteed in the California Constitution. However, regardless of its outcomes, the case may mark just the first in a new wave of school quality litigation that asks courts to update case law to reflect a modern understanding of what drives student learning.