

12-1-2016

Towards Moderate Teacher Tenure Reform in California: An Efficiency-Effectiveness Framework and the Legacy of Vergara

Stephen Chang

Follow this and additional works at: <http://scholarship.law.berkeley.edu/californialawreview>

 Part of the [Law Commons](#)

Recommended Citation

Stephen Chang, *Towards Moderate Teacher Tenure Reform in California: An Efficiency-Effectiveness Framework and the Legacy of Vergara*, 104 CAL. L. REV. 1503 (2016).

Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol104/iss6/4>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38NG34>.

This Comment is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Towards Moderate Teacher Tenure Reform in California: An Efficiency-Effectiveness Framework and the Legacy of *Vergara*

Stephen Chang*

This Note offers an efficiency-effectiveness framework for evaluating the success of school finance and teacher tenure court-ordered legislative reforms. In June 2014, Los Angeles Superior Court Judge Rolf Treu struck down California's teacher tenure laws as unconstitutional in the landmark case Vergara v. State. While the California Court of Appeal reversed the trial court's order and the California Supreme Court declined to review the decision, I argue that lessons from the Vergara case remain relevant to explain the complex relationship between the legislature and courts in teacher tenure and school finance reform. Political factors such as disunited political leadership and interest groups, lack of political priming, and inability to use a court-created policy window suggested that any hypothetical Vergara legislative remedy was likely to be a low-efficiency/no-effectiveness paradigm similar to the New York Campaign for Fiscal Equity, with such a remedy languishing in years of endless litigation. In contrast, a better path forward would have relied on a Williams model of high-efficiency/moderate-effectiveness to seek moderate reform and resolve the Vergara litigation through settlement. Consequently, even though the Vergara case has been resolved, the efficiency-effectiveness framework remains relevant as a method of analyzing the success of future California teacher tenure lawsuits as well as teacher tenure lawsuits in other states.

DOI: <http://dx.doi.org/10.15779/Z38NG34>.

Copyright © 2016 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

* J.D. 2016, University of California, Berkeley, School of Law. Advised by Professor Stephen D. Sugarman. Special thanks to Professors Kathryn Abrams, Derek Black, Saira Mohamed, and Stephen Sugarman for their feedback and encouragement. Thanks to Katie Dahlinghaus, Nicholas Johnson, Laura Lim, Daniel Martin, and Daniel Rios for their excellent edits and suggestions. The author also wishes to thank Lora Krsulich and Zachary Nguyen, Editors-in-Chief of the *California Law Review* and Maya Khan, Senior Notes Editor for their support and encouragement.

Introduction	1504
I. The <i>Vergara</i> Litigation.....	1507
A. School Finance Litigation: A Brief History.....	1508
B. The Litigation History of <i>Vergara</i>	1509
C. Reactions to and Criticism of the <i>Vergara</i> Trial Court Decision.....	1516
D. <i>Vergara</i> as Judicial Activism.....	1519
II. An <i>Efficiency-Effectiveness</i> Framework for Evaluating School Finance Court-Ordered Legislative Remedies	1522
A. The Efficiency-Effectiveness Framework	1522
B. High-Efficiency/High-Effectiveness in Kentucky: <i>Rose v.</i> <i>Council for Better Education</i>	1525
C. Low-Efficiency/Moderate-Effectiveness: New Jersey’s Thirty-Year <i>Robinson</i> and <i>Abbott</i> Litigations.....	1528
D. Low-Efficiency/No-Effectiveness: New York’s Campaign for Fiscal Equity and its “March of Folly”	1530
E. High-Efficiency/Low-Effectiveness: California’s <i>Reed</i> Settlement	1534
F. High-Efficiency/Moderate-Effectiveness: California’s <i>Williams</i> Settlement	1535
G. Conclusion: What Matters in the School Finance Remedies Process	1537
III. Predicting the Legacy of <i>Vergara</i>	1538
A. Political Factors Applied to the <i>Vergara</i> Case.....	1540
IV. Toward a <i>Williams</i> High-efficiency/Moderate-effectiveness Settlement.....	1544
A. Permanent Employment Statute.....	1546
B. Dismissal Statutes	1547
C. LIFO (Last-In-First-Out) Firing in an Economic Crisis	1548
D. The Legacy of <i>Vergara</i> : Reform by Initiative	1549
E. The Effect of Plaintiffs’ Loss on Appeal	1549
F. The Legacy of <i>Vergara</i> and the future of Teacher Tenure Reform.....	1550
Conclusion	1551

INTRODUCTION

You spend thousands of hours and millions of dollars litigating a case that is supposed to change the very future of education in your state. The judge finds that the constitutional violation you allege has deprived children of an equal educational opportunity. You’ve won the case, but the real battle is only just beginning.

The history of school finance litigation demonstrates that the political process formulating court-ordered legislative remedies is a critical factor influencing the ultimate impact of a given case. Sometimes these remedies are tremendously effective and accepted by all stakeholders without a fight. More likely, the remedy is so ineffective that another lawsuit is brought. The new lawsuit is appealed, another legislative remedy ordered, another lawsuit filed. A vicious cycle begins. Before you know it, a dozen years have passed with next to nothing (or little or nothing) in results to speak for your case other than an exceptionally long ping-pong match between the legislature, the courts, the executive, and other interest groups. This convoluted remedies process could have been one potential fate for the plaintiffs in the *Vergara* teacher tenure lawsuit where plaintiffs—even if successful on the merits—would have had to navigate a political minefield in the legislative remedies process that would likely lead to inefficient and ineffective reform.

This Note is the first to offer to the literature on school finance litigation an *efficiency-effectiveness* framework for evaluating the success of court-ordered legislative remedies. Further, this is the first work to apply such a framework to the ongoing new wave of *Vergara*-style teacher tenure litigation.

On June 10, 2014, California State Court Trial Judge Rolf Treu issued his long-awaited decision in *Vergara v. State*, effectively striking down five teacher tenure statutes that had long provided protections for grossly ineffective teachers as unconstitutional under the California Equal Protection Clause.¹ On April 4, 2016, the California Court of Appeal for the Second Appellate District reversed Judge Treu's decision.² In a close 4-3 vote, the California Supreme Court declined to hear the plaintiffs' petition for review, allowing the Court of Appeal's decision to stand.³

Plaintiffs, nine students from across California, brought suit alleging that the teacher tenure statutes in California denied them access to an equal opportunity for quality education because of their constant exposure to grossly ineffective teachers. The initial success of the *Vergara* suit spawned similar challenges to teacher tenure laws across the country.⁴

1. No. BC484642, 2014 WL 6478415, at *1-3 (Cal. Super. Ct. 2014).

2. *Vergara v. State*, 202 Cal. Rptr. 3d 262 (Ct. App. 2016). The court found that plaintiffs failed to establish that the challenged statutes violated equal protection primarily because they “did not show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students.” *Id.* at *268-69. This Note was originally written *before* the appellate court's decision was released in April 2016 and before the California Supreme Court's denial of plaintiff's petition for review. The effects of the successful appeal and the California Supreme Court's decision to decline review are discussed in Part IV below.

3. *Vergara v. State*, No. B258589, 2016 WL 4443590, at *17 (Cal. Ct. App. Aug. 22, 2016).

4. See, e.g., Mary Tillotson, *Anti-Tenure Lawsuit Filed in New York*, HEARTLAND INST. (Oct. 3, 2014), <https://www.heartland.org/news-opinion/news/anti-tenure-lawsuit-filed-in-new-york> [<https://perma.cc/MB99-G5QA>] (describing the Partnership for Educational Justice litigation in New York where six parents are using *Vergara* as a litigation model). The lawsuit is being led in part by former CNN Anchor Campbell Brown, who was recently featured on the Colbert Report promoting

This Note seeks to address three primary issues. First, I establish an *efficiency-effectiveness* framework drawn from case law and remedies processes in school finance. I argue that five distinct possibilities exist based on this framework. These are (1) *high-efficiency/high-effectiveness* (Kentucky's *Rose* litigation), (2) *low-efficiency/moderate-effectiveness* (New Jersey's *Robinson* and *Abbott*), (3) *low-efficiency/no-effectiveness* (New York's *Campaign for Fiscal Equity*), (4) *high-efficiency/low-effectiveness* (California's *Reed* settlement), and (5) *high-efficiency/moderate-effectiveness* (California's *Williams* settlement). Second, I apply this framework to a hypothetical *Vergara* victory and ultimately predict that political factors such as ineffective political priming, political leadership, and interest group influence suggested that even if plaintiffs had won on appeal, a *Vergara* remedy would likely have been a *low-efficiency/no-effectiveness* situation. Finally, I argue that in future teacher tenure cases in both California and nationwide that both plaintiffs and defendants must take notice of the inefficient and ineffective remedies likely to result and seek a settlement to promote a *high-efficiency/moderate-effectiveness* case similar to California's *Williams* settlement. I further argue that this can take place through either legislative reforms or initiative-based change.

In Part I, I provide a brief explanation of why teacher tenure law is so contentious and offer some critiques of the controversial *Vergara* trial court order. In Part II, I establish the *efficiency-effectiveness* framework by analyzing the long history of school finance remedies that preceded *Vergara*.⁵ I question why some cases such as *Rose v. Council for Better Education* in Kentucky resulted in highly efficient and highly effective legislature-driven changes in school funding, while other cases such as New York's *Campaign for Fiscal Equity* languished with few substantive results despite numerous litigation victories. I argue that political leadership and interest group politics are critical factors that can both positively and adversely influence the efficiency and effectiveness of a judicially compelled legislative remedy. In Part III, I apply these factors to a hypothetical *Vergara* victory arguing that they suggested that any *Vergara* court-ordered remedy would have languished as a *low-efficiency/no-effectiveness* example stuck in a cycle of endless litigation. Here, the modern phenomenon of the splintering Democratic Party is vital. In one wing, traditional pro-labor Democrats favor the status quo of quick tenure, strong dismissal rights for tenured teachers, and a Last-In-First-Out (LIFO) statute governing firing during an economic crisis. In contrast, what I will refer to in this Note as Reformer Democrats stand as strange bedfellows with the

the *Vergara*-like suit. *Campbell Brown*, COLBERT REP. (July 31, 2014), <http://thecolbertreport.cc.com/videos/2mpwlv/campbell-brown> [<https://perma.cc/XV4Y-W2FV>]; see also Emmanuel Felton, *Minnesota Faces a Vergara-Style Lawsuit on Teacher Job Protections*, EDUC. WEEK (Apr. 14, 2016), http://blogs.edweek.org/edweek/teacherbeat/2016/04/minnesota_vergaga_suit.html [<https://perma.cc/ZEM5-C4JV>].

5. I chose a very limited scope of cases out of the dozens of school finance cases filed across the country as specific examples of different legislative remedy outcomes.

conservatives who led the *Vergara* case in their desire to strike down quick tenure, weaken dismissal rights, and remove the LIFO statute.

In Part IV, I argue that the best solution in future teacher tenure and school finance lawsuits would be to seek a *Williams*-style *high-efficiency/moderate-effectiveness* solution since *Vergara* has opened a *policy window* ripe for a legislative response and that settlement of future cases through legislation is in the interests of all parties involved to avoid a cycle of costly litigation as in *Campaign for Fiscal Equity*. I offer potential moderate settlement remedies that can serve as a blueprint for future teacher tenure lawsuit settlements that fit within the *Williams high-efficiency/moderate-effectiveness* paradigm. Further, I argue that one additional avenue to pursue this goal is through the initiative system, by reviving a Schwarzenegger-era proposal to increase the teacher tenure evaluation period.

I.

THE VERGARA LITIGATION

Teacher tenure reform frequently promotes emotional and wildly divisive rhetoric.⁶ The plaintiffs in *Vergara* heavily emphasized the “vital role” that teachers play in public school education, taking for granted that “[t]he key determinant of educational effectiveness is teacher quality.”⁷ In contrast, the state and teacher unions consistently emphasized that the firing of “grossly ineffective” teachers was a narrow focus in comparison to the problems faced in the public education system at large.⁸ Simply put, the *Vergara* plaintiffs viewed teacher quality through tenure reform as an utmost priority in reform, while their opponents viewed larger systemic issues, such as school finance⁹ or teacher preparation, among others, as a better direction for the reform conversation.

Vergara was a challenge to five statutes in the California Education Code that govern teacher tenure in the state. The first, section 44929.21(b), which the court termed the “Permanent Employment Statute,”¹⁰ mandates that all certified

6. Compare Diane Ravitch, *Vergara Decision Is Latest Attempt to Blame Teachers and Weaken Public Education*, HUFFINGTON POST (June 11, 2014), http://www.huffingtonpost.com/diane-ravitch/vergara-teacher-tenure_b_5484237.html [https://perma.cc/2MB2-Z7JB] (construing *Vergara* to be a part of the “blame-shifting strategy of the privatization movement” against teachers), with Gloria Romero, *Students Stand up to the System, and Win*, ORANGE COUNTY REG. (June 13, 2014), <http://www.ocregister.com/articles/education-618215-teachers-california.html> [https://perma.cc/VDJ6-SRF5] (characterizing *Vergara* as “historic” and arguing vehemently against appeal to “deliver on the promise of education as the key to the American Dream”).

7. First Amended Complaint at 3, *Vergara v. State*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. 2014).

8. State Defendants’ Points and Authorities in Support of Motion for Summary Judgment at 11, *Vergara*, 2014 WL 6478415 (No. BC484642).

9. See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003); *Robles-Wong v. State*, No. RG10515768, 2011 WL 5902812 (Cal. Super. Ct. 2010).

10. *Vergara*, 2014 WL 6478415, at *2.

employees (teachers) in California be “reelected for the next succeeding school year” after employment for “two complete consecutive school years.”¹¹ Teachers must be notified “on or before March 15” of the second consecutive school year of employment of the district’s decision to “reelect or not reelect” the teacher for the next school year.¹² Second, sections 44934, 44938(b)(1)(2), and 44944 (the Dismissal Statutes)¹³ involve procedural protections such as the Notice of Intention to Dismiss,¹⁴ Notice of Unprofessional Conduct or Unsatisfactory Performance,¹⁵ and Dismissal Hearing Procedures.¹⁶ Finally, plaintiffs also challenged the “Last-In-First-Out (LIFO) Statute,” which requires seniority-based layoffs such that the newest teachers are fired before older teachers.¹⁷ Together, these statutes are referred to as the “Challenged Statutes.”

A. School Finance Litigation: A Brief History

It is prudent to briefly discuss the history of impact litigation influencing education reform in California to understand the context of Judge Treu’s trial court decision. In a sense, *Vergara* can be seen as a next-generation impact litigation suit following the guidance of cases such as *Brown v. Board of Education*, *Serrano v. Priest*, and *Butt v. California*.¹⁸ Further, *Vergara* follows in the footsteps of school finance case law, discussed in Part II.

In *Brown v. Board of Education*, Chief Justice Earl Warren held for a unanimous court that segregated education was a “denial of the equal protection of the laws.”¹⁹ The Court emphasized that education was “perhaps the most important function of state and local governments,” noting that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available on equal terms.”²⁰

Nonetheless, the Court did not expressly find a fundamental right to a public education in *Brown*. Indeed, in *San Antonio Independent School District v. Rodriguez*, the Court denied that education was a fundamental right triggering strict scrutiny analysis, requiring only that state action involving

11. CAL. EDUC. CODE § 44929.21(b).

12. *Id.*

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

14. EDUC. § 49934.

15. EDUC. § 44938(b)(1)–(2).

16. EDUC. § 44944; *Vergara*, 2014 WL 6478415, at *3.

17. EDUC. § 44955.

18. For an analytical framework tying *Vergara* and school quality litigation to the prior wave of school finance cases, see generally Nipun Kant, Teachers, School Spending, and Educational Achievement: Toward a New Wave of School Quality Litigation (2014), http://digitalcommons.law.yale.edu/student_papers/130 [https://perma.cc/SFK9-S7EU] (unpublished and written before the *Vergara* decision was issued).

19. 347 U.S. 483, 495 (1954).

20. *Id.* at 493.

education “bear some rational relationship to legitimate state purposes.”²¹ Thus, *Rodriguez* likely closed off federal equal protection as an avenue for effective education reform challenges based on a fundamental right to education.

In the landmark case *Serrano v. Priest* (*Serrano I*), the California Supreme Court held that education was a “fundamental interest,” basing its decision largely on the Fourteenth Amendment’s Equal Protection Clause.²² However, even after the United States Supreme Court’s decision in *Rodriguez*, the California Supreme Court in the subsequent *Serrano II* maintained the status of education as a fundamental interest based on the Equal Protection Clause of the California State Constitution.²³ Thus, under *Serrano II*, in California a challenge that a state statute violates the fundamental right of education triggers a “strict scrutiny” test requiring the state to prove that the “classification in question is necessary to achieve a compelling state interest.”²⁴

In 1992, the California Supreme Court held in *Butt v. State* that the premature closing of a school by six weeks was a violation of the “fundamental right to an effective public education” under the California Constitution’s Equal Protection Clause.²⁵ Thus, the case expanded the fundamental right to basic equality from the realm of school finance to the realm of school quality via instructional time.

Overall, *Brown*, *Serrano*, and *Butt* represent the potential of the California Constitution’s Equal Protection Clause to provide an equal opportunity for education for all students in the state. Next in line to these landmark cases should have been *Vergara*—the application of a long-standing strict scrutiny fundamental interest framework to teacher quality issues in the form of teacher tenure statutes.²⁶

B. The Litigation History of Vergara

The plaintiffs in *Vergara* were nine children located throughout California who alleged that the Challenged Statutes negatively impacted their education. The lead plaintiff, Beatriz Vergara, was then a thirteen-year-old public school student in the Los Angeles Unified School District (LAUSD).²⁷ She argued that

21. 411 U.S. 1, 40 (1973). *But see* MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 830 (2012) (questioning whether the *Rodriguez* Court left open the possibility that some minimally adequate level of education might constitute a “constitutionally protected interest”).

22. 487 P.2d 1241, 1258–59 (Cal. 1971). Note that *Serrano II* was decided before *Rodriguez*.

23. *Serrano v. Priest*, 557 P.2d 929, 958 (Cal. 1976) (“We therefore confirm that our decision in *Serrano I* was based not only on the equal protection provisions of the federal Constitution but also on such provisions of our state Constitution. . .”).

24. *See id.*

25. 842 P.2d 1240, 1244 (Cal. 1992).

26. However, a more cynical view may be that *Vergara* and the high-powered legal team co-opt the liberal legacy of these cases to pursue a right-wing agenda.

27. First Amended Complaint, *supra* note 7, at 5.

the Challenged Statutes had a “real and appreciably negative impact” on her right to education because she was “assigned to, and/or [was] at substantial risk of being assigned to, a grossly ineffective teacher who impede[d] her equal access to the opportunity to receive a meaningful education.”²⁸ The other plaintiffs were from districts throughout California, varied in age range from the elementary to high school grades, and were mostly from diverse backgrounds.²⁹

The *Vergara* litigation effort was led by the nonprofit organization Students Matter. David F. Welch, a Silicon Valley entrepreneur, founded Students Matter in 2011 to create “positive structural change in the California K-12 public education system.”³⁰ Welch is an electrical engineer and product of public schools that has invested millions into Students Matter. Large and often controversial institutions such as the Broad Foundation and the Walton Family Foundation have also funded Students Matter.³¹

The involvement of the high-priced law firm Gibson, Dunn & Crutcher (Gibson Dunn) and the highly respected litigators Ted Boutros and former Solicitor General Ted Olsen epitomize the high-profile, high-stakes nature of *Vergara*.³² In 2012, Gibson Dunn billed \$1.1 million to Students Matter.³³

28. *Id.*

29. *Id.* at 5–8 (noting that Beatriz’s sister Elizabeth was a fourteen-year-old from LAUSD; Brandon Debose was a sixteen-year-old from Oakland Unified School District; Clara Campbell was a seven-year-old from LAUSD; Kate Elliot was a fifteen-year-old in the Sequoia Union High School District; Herschel Liss was an eight-year-old from LAUSD; Julia Macias was a eleven-year-old from LAUSD; Daniella Martinez was a ten-year-old attending a public charter school in LAUSD who was “deterred from continuing to attend traditional public schools because of the substantial risk that she would be assigned to a grossly ineffective teacher”; and Raylene Monterozza was a fourteen-year-old in the Pasadena Unified School District). The plaintiffs featured prominently in the Students Matter outreach efforts and served as witnesses at trial. *See Meet the Plaintiffs*, STUDENTS MATTER, <http://studentsmatter.org/meet-the-plaintiffs> [<https://perma.cc/C3RX-4TX4>] (last visited July 24, 2016); *Fundamental Right to Education*, STUDENTS MATTER, <http://studentsmatter.org/wp-content/uploads/2013/02/Plaintiffs-composite.png> [<https://perma.cc/MXB7-M7G2>] (last visited July 24, 2016).

30. *Our Team, Founder*, STUDENTS MATTER, <http://studentsmatter.org/our-team/founder> [<https://perma.cc/2N7K-KDSX>] (last visited July 24, 2016); *see also* Heather Somerville, *Dave Welch, Silicon Valley Entrepreneur, Leads Court Fight Against Teacher Tenure Laws*, SAN JOSE MERCURY NEWS (June 11, 2014), http://www.mercurynews.com/business/ci_25943802/dave-welch-silicon-valley-entrepreneur-leads-fight-against [<https://perma.cc/X7X6-9SEU>].

31. *See* Somerville, *supra* note 30; Mark Palko, *Vergara vs. California: Are the Top 0.1% Buying Their Version of Education Reform?*, WASH. POST (June 23, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/06/23/vergara-vs-california-are-the-top-0-1-buying-their-version-of-education-reform> [<https://perma.cc/E4TV-CBGK>] (comparing the financing of the *Vergara* litigation to the Gates Foundation–led adoption of Common Core).

32. Ted Olson famously argued both the successful challenge to Proposition 8 in *Hollingsworth v. Perry* and for President Bush in *Bush v. Gore*. *See Theodore B. Olson*, GIBSON DUNN, <http://www.gibsondunn.com/lawyers/olson> [<https://perma.cc/7HHQ-ZXNM>] (last visited July 24, 2016).

33. *See* Somerville, *supra* note 30. Interestingly, due to the tremendous funding from Welch and Students Matter, this impact litigation case was a *for-profit* paid case for Gibson Dunn, not a pro bono effort.

Thus, the *Vergara* plaintiffs were chosen by a high-profile law firm, funded by a wealthy Silicon Valley entrepreneur. Such a strategy likely allowed for strong representation.

Plaintiffs named several defendants in the suit. The State of California was the first named defendant, followed by Governor Edmund G. Brown, State Superintendent of Public Instruction Tom Torlakson,³⁴ California Department of Education, State Board of Education, LAUSD, Oakland Unified School District, and Alum Rock Unified School District in San Jose.³⁵ On May 2, 2013, Judge Treu granted a Motion to Intervene for the California Teachers Association (CTA) and California Federation of Teachers (CFT), two of the largest teachers unions in the state.³⁶

The court found the Challenged Statutes violated the Equal Protection Clause of the California State Constitution.³⁷ This clause guaranteed that “[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.”³⁸ Relying on *Serrano I*, *Serrano II*, and *Butt*, Judge Treu found that the California Constitution is the “ultimate guarantor of a meaningful, basically equal educational opportunity” afforded to the students of the state.³⁹ Given that the Challenged Statutes posed a “real and appreciable impact”⁴⁰ on students’ fundamental right to equality of education, the court examined the statutes with “strict scrutiny.”⁴¹ Thus, the state and union intervenors had to “bear the burden of establishing not only that the State has a *compelling* interest which justifies the Challenged Statutes but that the distinctions drawn by the laws are *necessary* to further their purpose.”⁴² The court found that the Permanent Employment Statute, Dismissal Statutes, and LIFO Statute did not meet the high standard of strict scrutiny.

The court held the Permanent Employment Statute unconstitutional and enjoined its enforcement because defendants did not meet the burden of strict

34. His reelection as State Superintendent became a politicized referendum on the *Vergara* decision. *See infra* Part III.

35. First Amended Complaint, *supra* note 7, at 7–8.

36. Motion to Intervene at 2, *Vergara v. State*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. 2014).

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

38. CAL. CONST. art. I, § 7(a).

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

40. *Id.* at *4. This standard may be lower than the one in *Butt*. *See* Kevin Welner, *A Silver Lining in the Vergara Decision?*, WASH. POST (June 14, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/06/11/a-silver-lining-in-the-vergara-decision> [https://perma.cc/6TY3-JHGK] (arguing that Judge Treu is shifting from a standard of requiring plaintiffs to show “fundamentally below prevailing statewide standards” in *Butt* to need only show the law results in “real and appreciable impact” on students’ fundamental right to quality of education). Welner argues Judge Treu’s reliance on a weak evidentiary record shows “real and appreciable impact” is an easier standard to meet. *Id.*

41. *Vergara*, 2014 WL 6478415, at *4.

42. *Id.* (quoting *Serrano v. Priest*, 487 P.2d 1241, 1249 (Cal. 1971)) (internal quotation and alteration marks omitted).

scrutiny.⁴³ Judge Treu found that the March 15 deadline in the “two year” Permanent Employment Statute effectively eliminated two to three months from the two-year evaluation period.⁴⁴ He took particular issue with how the Permanent Employment Statute did not provide enough time to make an informed decision about tenure; decisions about tenure became “high stakes” evaluations that could deprive teachers of an opportunity to establish competency and students of an opportunity to be taught by competent teachers.⁴⁵ He found there was “no legally cognizable reason (let alone a **compelling** [sic] one)” to justify the disadvantages faced by students and teachers under the statute.⁴⁶

Similarly, Judge Treu found the Dismissal Statutes to be unconstitutional. Plaintiffs argued that the current Dismissal Statutes were too costly and time-consuming to get rid of “grossly ineffective teachers.”⁴⁷ The court relied on evidence that dismissal could take anywhere from two to ten years, at a cost of anywhere from \$50,000 to \$450,000 to close a single case.⁴⁸ Further, Judge Treu pointed out that classified staff (e.g., secretaries) had due process rights under *Skelly v. State Personnel Board*⁴⁹ that did not involve such costs. As a result, Judge Treu reaffirmed that teachers must be “afforded reasonable due process when their dismissals are sought,” but that the current system was “so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory.”⁵⁰

Finally, the court found the LIFO Statute to be unconstitutional under the California Equal Protection Clause. It pointed out that when layoffs based on seniority occurred, gifted junior teachers could be removed even while grossly ineffective teachers remained in the classroom, resulting in harm to the students.⁵¹ To Judge Treu, the state could only succeed in defending the LIFO statute if it could defend the de facto separation of students from competent teachers as a compelling interest.⁵²

Thus, Judge Treu found all of the Challenged Statutes to be unconstitutional. Most powerfully, he found that the effect of grossly ineffective teachers on students was tremendous, stating that “[t]he evidence is compelling. Indeed, it shocks the conscience.”⁵³ Judge Treu issued injunctions

43. *Id.* at *10; *see also* CAL. EDUC. CODE § 44929.21(b).

44. *Vergara*, 2014 WL 6478415, at *4.

45. *Id.* at *5.

46. *Id.*

47. *Id.*

48. *Id.*

49. 539 P.2d 774 (Cal. 1975).

50. *Vergara*, 2014 WL 6478415, at *6.

51. *Id.*

52. *See also infra* Part I.E (contrasting the result in *Vergara* declaring LIFO unconstitutional with the weak settlement obtained in the *Reed* settlement on similar grounds).

53. *Vergara*, 2014 WL 6478415, at *4.

enjoining enforcement of all five statutes.⁵⁴ However, the injunctions were stayed pending appellate review.⁵⁵

On April 4, 2016, the California Court of Appeal for the Second Appellate District reversed the trial court's decision.⁵⁶ Justice P.J. Boren's opinion concluded that plaintiffs had failed to show that the Challenged Statutes violated the Equal Protection Clause of the California Constitution because they did not show that the statutes "inevitably cause[d] a certain group of students to receive an education inferior to the education received by other students."⁵⁷ The court stressed that its job was "to determine whether the statutes are constitutional, not if they are 'a good idea.'"⁵⁸ Importantly, the court held that review was limited because plaintiffs brought a facial equal protection challenge to the statutes themselves, rather than the implementation of the statutes.⁵⁹

The California Court of Appeal analyzed the equal protection claim by looking at the supposed denial of equal protection against two classes of students: Group 1 (an "unlucky subset of students" within the population of students at large) and Group 2 ("poor and minority students").⁶⁰ The court found that Judge Treu erred because Group 1's "unlucky subset" was not an identifiable class of persons sufficient to maintain an equal protection claim because the group was not "identifiable by a shared trait other than the violation of a fundamental right."⁶¹ With regard to Group 2, the court declined to find that poor and minority students suffered disproportionate harm from being assigned to grossly ineffective teachers.⁶² The court emphasized that the Challenged Statutes did not instruct administrators on the assignment of teachers to specific schools.⁶³ The court left open the possibility that the Challenged Statutes could lead to a high number of grossly ineffective teachers in the educational system, but it emphasized that this possibility did not give rise to an equal protection violation because any constitutional infringement was the product of staffing decisions, not the Challenged Statutes.⁶⁴

The court reversed the judgment of the trial court and remanded with directions to enter judgment in favor of defendants on all causes of action.⁶⁵

54. *Id.* at *10, 13–14.

55. *Id.* at *16.

56. *Vergara v. State*, 202 Cal. Rptr. 3d 262, 269 (Ct. App. 2016).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 283.

61. *Id.* at 284.

62. *Id.* at 286.

63. *Id.* at 287.

64. *Id.* at 287–88.

65. *Id.* at 288.

Plaintiffs' lead counsel Ted Boutros appealed the ruling to the California Supreme Court.⁶⁶

On August 22, 2016, the California Supreme Court denied a petition to review the *Vergara* case.⁶⁷ In the close 4-3 vote, Justices Chin, Liu, and Cuéllar voted to grant the plaintiffs' petition to review.⁶⁸ In particular, Justices Liu and Cuéllar both prepared "lengthy, powerful dissenting opinions from the denial of review," a practice that the plaintiff's lawyer Boutros described as "extraordinary in California history."⁶⁹ Boutros further added that he hoped the "words of Justices Liu and Cuéllar will resonate across California and the nation, and hopefully help bring about the change we so desperately need."⁷⁰

Justice Liu argued that review of *Vergara* was warranted as an important question of law.⁷¹ In his view, the "nine schoolchildren who brought this action, along with the millions of children whose educational opportunities are affected everyday by the challenged statutes deserve[d] to have their claims heard by [California's] highest court."⁷²

Justice Liu agreed that there appeared to be significant problems with respect to plaintiffs' Group 2 (poor and minority students), as the record did not "include substantial evidence that the concentration of grossly ineffective teachers in poor and minority schools is caused by the challenged statutes as opposed to teacher preferences, administrative decisions, or collective bargaining agreements."⁷³ Nonetheless, Justice Liu felt that the Court of Appeal likely erred with respect to Group 1 (a subset of students who are disadvantaged because they receive a lesser education than students not

66. Kyle Stokes, *Vergara v California: Ruling That Would Have Ended State's Teacher Tenure Rejected on Appeal*, KPCC (Apr. 14, 2016), <http://www.scpr.org/news/2016/04/14/59624/appeals-court-overturms-lower-court-s-ruling-on-ca> [https://perma.cc/8USW-Z2XN] ("The Court of Appeal's decision," said the plaintiffs' lead counsel Ted Boutros [sic], 'mistakenly blames local school districts for the egregious constitutional violations students are suffering each and every day, but the mountain of evidence we put on at trial proved—beyond any reasonable dispute—that the irrational, arbitrary, and abominable laws at issue in this case shackle school districts and impose severe and irreparable harm on students.'").

67. *Vergara v. State*, No. B258589, 2016 WL 4443590, at *17 (Cal. Ct. App. Aug. 22, 2016).

68. *Id.*

69. *California Supreme Court Declines to Hear Vergara v. California Appeal*, STUDENTS MATTER (Aug. 22, 2016), http://studentsmatter.org/wp-content/uploads/2016/08/SM_Release_Vergara-CA-Supreme-Court-Petition-Denied_FINAL.pdf [https://perma.cc/UT8T-EKMT]. Justice Goodwin Liu was an education law professor at Berkeley Law, while Justice Mariano-Florentino Cuéllar was cochair of the Equity and Excellence Commission in 2011–2013 that focused on solutions for communities facing blighted systems that dealt with the "lowest-performing teachers, the most run-down facilities, and low academic expectations and opportunities." See Peter Schrag, *Odds Are Low State Supreme Court Will Intervene in Education Equity Cases*, EDSOURCE (Mar. 21, 2016), <http://edsources.org/2016/odds-are-low-state-supreme-court-will-intervene-in-education-equity-cases/562072> [https://perma.cc/FR83-YV9L].

70. *California Supreme Court Declines to Hear Vergara v. California Appeal*, *supra* note 69.

71. *Vergara*, 2016 WL 4443590, at *17 (Liu, J., dissenting).

72. *Id.*

73. *Id.* at 18.

assigned to grossly ineffective teachers).⁷⁴ While the Court of Appeal found that Group 1 was not an identifiable class of persons sufficient to bring an equal protection challenge, Justice Liu argued that the claim asserted by students in Group 1 was an instance of a cognizable equal protection claim alleging a deprivation of fundamental rights. Justice Liu credited that there was “considerable evidence in the record to support the trial court’s conclusion that the hiring and retention of a substantial number of grossly ineffective teachers” have an appreciable impact on the fundamental right to education enjoyed by California’s public school students.⁷⁵ Most powerfully, Justice Liu stated that “[a]s the state’s highest court, we owe the plaintiffs in this case, as well as schoolchildren throughout California, our transparent and reasoned judgment on whether the challenged statutes deprive a significant subset of students of their fundamental right to education” and thus violated Equal Protection.⁷⁶

Justice Cuéllar also dissented from the denial of review of plaintiffs’ petition. Like Justice Liu, Justice Cuéllar found the Court of Appeal’s reasoning faulty because the court did not apply strict scrutiny when a fundamental right was burdened.⁷⁷ Under his view, the decision of the Court of Appeal erected a “novel barrier” for all California litigants seeking to raise equal protection claims based on a fundamental right because the imposition of the burden of that right “at random” rather than on a discrete and identifiable group provided no relief under the California State Constitution.⁷⁸ Justice Cuéllar’s dissent expressed a clear discontent with the California Supreme Court’s unwillingness to take on the *Vergara* case. Justice Cuéllar argued not only that Beatriz Vergara and her fellow plaintiffs “deserved an answer from this court” but also that “it is even more difficult to allow the court’s decision to stay on the books without review in a case of enormous statewide importance.”⁷⁹

Further, Justice Cuéllar addressed the critical question of judicial activism, dedicating an entire paragraph to the separation of powers between the courts, executive, and legislature. He argued that while the court must “respect the role of the representative branches” in shaping education policy, the California Supreme Court was “best suited” to address the state constitutional jurisprudence issues present in the case.⁸⁰ He noted:

[E]ven in a world where we clarify our fundamental rights jurisprudence as this case requires—and address concerns associated within the Court of Appeal’s decision—considerable room would remain for the legislative and executive branches to decide how best to

74. *Id.*

75. *Id.* at 19.

76. *Id.* at 21.

77. *Id.* (Cuéllar, J., dissenting).

78. *Id.*

79. *Id.* at 22.

80. *Id.* at 23.

address the important balance between honoring the fundamental right to education and addressing other goals, such as retaining protections for public employees from arbitrary dismissal.⁸¹

This hypothetical world where the Supreme Court granted review and ruled favorably for the *Vergara* plaintiffs and the remedies formation process between the legislature, executive, and the courts that would have resulted from it is the focus of this Note.

In Part IV, I explore the hypothetical judicially ordered legislative remedies formation process that Justice Cuéllar discussed in his dissent. But first, I turn to initial reactions and discussions of judicial activism to better explain the American public's initial reaction to the successful *Vergara* trial court decision.

C. *Reactions to and Criticism of the Vergara Trial Court Decision*

Judge Treu's decision at the trial court level became front-page national news on June 10, 2014.⁸² The national media reaction to a lowly state trial court judge's opinion was particularly striking given that the "Tentative Decision" was not binding and would see nearly two years of appeals before the California Supreme Court denied review. The responses to the decision, both those praising and those sharply critical of the decision, reflected a deep political divide.

Those who praised the decision viewed it as a unique opportunity to coalesce around the difficult challenges in fighting the achievement gap.⁸³ Secretary of Education Arne Duncan issued an official statement viewing *Vergara* as a "mandate" to allow all students the opportunity to be taught by great teachers.⁸⁴ Former Chancellor of the District of Columbia Public Schools Michelle Rhee characterized the decision as a landmark in "civil rights," which stood as a "tribute to teachers," arguing that because "a great teacher is the most powerful factor inside a classroom in determining educational quality, equal access has got to mean access to great teachers."⁸⁵

81. *Id.* at 24.

82. See, e.g., Jennifer Medina, *Judge Rejects Teacher Tenure for California*, N.Y. TIMES (June 10, 2014), <http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html> [<https://perma.cc/MEY9-M28M>]; Michelle Rhee, Editorial, *California Tenure Ruling Is a Win for Teachers and Children*, WASH. POST (June 11, 2014), https://www.washingtonpost.com/opinions/michelle-rhee-california-tenure-ruling-is-a-win-for-teachers-and-children/2014/06/11/65bff4e6-f182-11e3-bf76-447a5df6411f_story.html [<https://perma.cc/BW4Q-EVDY>].

83. See generally MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS (2009), http://mckinseysociety.com/downloads/reports/Education/achievement_gap_report.pdf [<https://perma.cc/VXR8-NB8X>].

84. Arne Duncan, *Statement from U.S. Secretary of Education Arne Duncan Regarding the Decision in Vergara v. California*, U.S. DEP'T EDUC. (June 10, 2014), <http://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-regarding-decision-vergara-v-california> [<https://perma.cc/YZ7R-3U99>].

85. Rhee, *supra* note 82.

Others vehemently opposed the ruling in *Vergara*. Critiques against the *Vergara* trial decision tended to focus on (1) teacher tenure as a scapegoat issue in the larger education reform movement, (2) the brevity of Judge Treu's opinion, and (3) the questionable reliance and lack of evidentiary social science data in the opinion.

Critics of the *Vergara* trial decision often pointed to teacher tenure reform as a scapegoat problem in a myriad of more important issues in education reform. Berkeley Goldman School of Public Policy Professor Jesse Rothstein served as an expert witness in the *Vergara* trial for the plaintiffs. He argued that "eliminating tenure [would] do little to address the real barriers to effective teaching in impoverished schools, and may even make them worse."⁸⁶ Rothstein stated that firing teachers makes it harder to recruit new ones, that it may actually be better to grant tenure soon after the first year, and that freedom to fire teachers is only valuable when dismissal rates are higher than 40 percent; he thus concluded that attacking tenure in *Vergara* made for "good headlines," but "does little to close the achievement gap."⁸⁷ Similarly, the California Teachers Association in its post-*Vergara* press release vowed to appeal the "deeply flawed" decision because the suit focused on the wrong issue. CTA President Joshua Pechthalt stated that "[r]ather than provide resources or working to create positive environments for students and teachers, this suit asserts that taking away rights from teachers will somehow help students," and he continued to characterize the suit as "anti-public education, scapegoating teachers for problems originating in underfunding, poverty, and economic inequality."⁸⁸

Some critics focused on the brevity of Judge Treu's decision. This is a legitimate argument, especially given the wealth of social science data provided to make findings of fact. All told, the decision is a mere sixteen pages (with the sixteenth page stretching all of three sentences).⁸⁹ The pertinent analysis functionally striking down teacher tenure protection in California consisted only eight pages of analysis.⁹⁰ At a University of California Berkeley, Graduate School of Education event, the first critique presented by the panel emphasized Judge Treu's conciseness. Professor Katharine Strunk from University of Southern California's Rossier School of Education was "surprised by the brevity" of the "strongly-worded" decision that she stated

86. Jesse Rothstein, *Taking on Teacher Tenure Backfires: California Ruling on Teacher Tenure Is Not Whole Picture*, N.Y. TIMES (June 12, 2014), <http://www.nytimes.com/2014/06/13/opinion/california-ruling-on-teacher-tenure-is-not-whole-picture.html> [<https://perma.cc/K7HN-X9N8>].

87. *Id.*

88. Fred Glass, *California Educators and State of California to Appeal Judge's Ruling in Vergara v. State of California*, CAL. TCHR. ASS'N (June 10, 2014), <http://www.cta.org/en/About-CTA/News-Room/Press-Releases/2014/06/20140610.aspx> [<https://perma.cc/6NVV-HVVM>].

89. See generally *Vergara v. State*, No. BC484642, 2014 WL 6478415, at *1–16 (Cal. Super. Ct. 2014).

90. See *id.* at *8–14.

“whole-heartedly” adopted the plaintiffs’ argument.⁹¹ Professor William Koski from Stanford Law School was similarly “surprised that the decision was so short.”⁹²

The length of the decision matters because it reflects a third critique of the decision: the weak evidentiary basis of the opinion. Professor Koski was very surprised that there were not “extensive findings of fact,” arguing that a landmark decision usually has far more extensive evidence to show that kids are “actually being deprived.”⁹³ In particular, Judge Treu’s use of questionable statistics has been the subject of attack. In the opinion, he cited that nearly 2,750 to 8,250 grossly ineffective teachers existed in California. It turns out that this statistic was a made-up “guesstimate” by expert witness David Berliner who “pulled that [number] out of the air.”⁹⁴

Further, Diane Ravitch, an educational commentator, argued that Judge Treu adopted the “judicial version of No Child Left Behind” using fuzzy evidence to equate “low test scores” as being “caused by bad teachers.”⁹⁵ In particular, she questioned Judge Treu’s reliance on studies performed by Dr. Raj Chetty and Dr. Tom Kane that emphasize that “a single year in a classroom with a grossly ineffective teacher costs students \$1.4 million in lifetime earnings per classroom” and that students in LAUSD taught by the bottom 5 percent of teachers “lose 9.54 months of learning in a single year compared to students with average teachers.”⁹⁶ She argues that a fundamental critique of Chetty and Kane’s study is that they “blithely assume that those who are fired will be replaced by better teachers. How do they know that?”⁹⁷ Scholarly works similarly criticize the opinion, such as Derek Black’s *The Constitutional Challenge to Teacher Tenure*, which argues that while *Vergara* has presented a facially valid claim based on the school finance lawsuits, the plaintiffs did not do enough to properly show causation or reliance, and the claim should have failed under the facts presented.⁹⁸

91. Berkeley Graduate Sch. of Educ., *Vergara v. Calif.: Will It Make a Difference for Students (1 of 2)*, YOUTUBE (Nov. 7, 2014), https://www.youtube.com/watch?v=F3qIxp0UhC0&list=UU6zLcCg_xbYz3NStACUo3Uw%20-%20t=368 [<https://perma.cc/3K9U-ZPKJ>], at 5:10.

92. *Id.* at 6:40.

93. *Id.* at 7:00.

94. Jordan Weissmann, *Fuzzy Math: The Guesstimate that Struck Down California’s Teacher Tenure Laws*, SLATE (June 12, 2014), http://www.slate.com/articles/business/moneybox/2014/06/judge_strikes_down_california_s_teacher_tenure_laws_a_made_up_statistic.html [<https://perma.cc/LQT3-E2YF>].

95. Diane Ravitch, *What Was the Evidence in the Vergara Case? Who Wins? Who Loses?*, DIANE RAVITCH’S BLOG (June 11, 2014), <http://dianeravitch.net/2014/06/11/what-was-the-evidence-in-the-vergara-case-who-wins-who-loses> [<https://perma.cc/3DD4-ZTJD>].

96. Karen Weise, *One Year with a Bad Teacher Costs Each Student \$50,000 in Lifetime Earnings*, BUSINESSWEEK (June 12, 2014), <http://www.bloomberg.com/news/articles/2014-06-12/to-strip-teacher-tenure-judge-cites-the-economic-cost-of-bad-teaching> [<https://perma.cc/JVB2-3KTT>].

97. Ravitch, *supra* note 95.

98. Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75 (2016).

These critiques of *Vergara* are very legitimate.⁹⁹ While the argument that *Vergara* focuses the education reform debate on a narrow low-impact issue is more a question of policy, the impact of the brief decision and the validity of the social science evidence likely impacted the appeals process. Moreover, it is concerning that Judge Treu’s opinion does not include a more elaborate description of the studies used, especially given the vast swath of material the plaintiffs provided.¹⁰⁰

While the Court of Appeal ultimately rejected the plaintiffs’ novel constitutional theory, this Note assumes that other courts in the future could agree with the plaintiffs’ novel theory that teacher tenure can be unconstitutional. Thus, this Note assumes *arguendo* that constitutional remedies could result from future California cases attempting to retry the *Vergara* teacher tenure case before the Supreme Court to analyze the critical question of judicially ordered legislative remedies formation in education law. Further, judicially ordered legislative remedies could result from teacher tenure lawsuits that are still ongoing nationally in states such as Minnesota.¹⁰¹

D. *Vergara as Judicial Activism*

An underlying concern is whether or not Judge Treu should even have been making a decision on the validity of statutes properly passed by the legislature.¹⁰² His opinion evinces a familiar concern seen in *Brown* and countless other cases: judges can run away with the law, using the guise of “constitutionality” to achieve the implementation of a desired public policy.¹⁰³ I argue that while teacher reform is an issue best implemented by the

99. This is particularly true in light of the reversal on appellate review. *See generally* *Vergara v. State*, 202 Cal. Rptr. 3d 262 (Ct. App. 2016).

100. *See, e.g.*, Plaintiffs’ Closing Argument Presentation PowerPoint (Mar. 27, 2014), http://studentsmatter.org/wp-content/uploads/2014/06/SM_Plaintiffs-Closing-Argument-Presentation_03.27.14.pdf [<https://perma.cc/DB5K-LQHD>].

101. *See, e.g.*, *Minnesota’s Teacher Tenure Under Fire in Lawsuit*, FOX 9 (Apr. 14, 2016), <http://www.fox9.com/news/122540566-story> [<https://perma.cc/2NX7-Q7HX>] (alleging that the state’s three-year tenure law and LIFO provisions violated the fundamental right to a uniform and thorough education).

102. The appellate decision does not explicitly address judicial overreach but does emphasize that “[p]olicy judgments underlying a statute are left to the Legislature; the judiciary does not pass on the wisdom of legislation.” *Vergara*, 202 Cal. Rptr. 3d at 280–81 (citing *Estate of Horman*, 5 Cal. 3d 62, 77 (1971)).

103. Justice Cuéllar’s dissent from petition for review similarly discusses the correct balance between the courts, legislature, and executive branches in courting education policy. *See Vergara v. State*, No. B258589, 2016 WL 4443590, at *24 (Cal. Ct. App. Aug. 22, 2016) (Cuéllar, J., dissenting) (“In considering this case, we must respect the role of the representative branches of government and the public itself in shaping education policy. But our responsibility to honor the court’s proper constitutional role makes it important for us to review a case that merits our attention as it is for us to avoid a dispute beyond the court’s purview.”). Justice Cuéllar argued that even if the court had decided *Vergara* favorably, “considerable room” remained for the legislative and executive branches to decide the balance between the fundamental right to education and other concerns. *Id.*

legislature, Judge Treu's decision will likely have the legacy of sparking the necessary legislative change around tenure reform.

Judge Treu is evidently conscious of judicial overreach accusations in *Vergara*. He spends an extensive paragraph in the opinion to shield himself from such accusations:

This Court stresses **legal positions** intentionally. It is not unmindful of the current intense political debate over issues of education. However, its **duty and function** as dictated by the Constitution of the United States, the Constitution of the State of California and the Common Law, is to avoid considering the political aspects of the case and focus only on the legal ones. That this Court's decision will and should result in political discourse is beyond question but such consequence cannot and does not detract from its obligation to consider only the evidence and law in making its decision.

It is also not this Court's function to consider the wisdom of the Challenged Statutes.¹⁰⁴

Despite his conscious awareness of activism, his opinion is almost certainly in some sense "political."

Frameworks developed to analyze the role of the courts in the context of school finance impact litigation provide guidance in analyzing the teacher tenure judicial activism in *Vergara*.¹⁰⁵ Professor William Koski's earlier work, *The Politics of Judicial Decision-Making in Education Policy Reform Litigation*, identifies the importance of a critical factor—institutional cooperation—as a focus of courts in breaking judicial logjams.

Institutional cooperation is the most important political explanation for the judicial activism in *Vergara*. Here, Koski argued that state supreme courts provide "political cover" for willing elites to engage in educational finance reform in the face of political opposition. Courts may seek to "step in and break up the legislative log jam" and provide the "political cover" needed to permit willing policymakers to act. I argue that this is exactly what is going on in *Vergara*. Regardless of actual legal reasoning, Judge Treu's injunction on the Challenged Statutes and the catapulting of the issue into the national media result in opportunity for legislative reform.

First, it is vital to understand why a legislative logjam exists around teacher tenure reform. One powerful explanation is that union money simply will not permit legislative change.¹⁰⁶ The California Teachers Association has

104. *Vergara v. State*, No. BC484642, 2014 WL 6478415, at *2–3 (Cal. Super. Ct. 2014).

105. See, e.g., Julie K. Underwood, *School Finance Litigation: Legal Theories, Judicial Activism, and Social Neglect*, 20 J. EDUC. FIN. 143, 161 (1994) ("The courts now are becoming more active because the United States is not meeting the needs of an increasing number of children. . . . We can no longer afford judicial deference.").

106. See generally Joshua Cowen & Katharine O. Strunk, *How Do Teachers' Unions Influence Education Policy? What We Know and What We Need to Learn* (Educ. Pol'y Ctr., Mich. St. U., Working Paper No. 42, 2014).

every interest in protecting the lax tenure standards in the state and invests massively in lobbying efforts to protect against reform efforts in the legislature.¹⁰⁷ The California Teachers Association has spent more than \$290 million in total on candidates and causes since 2000.¹⁰⁸

Here, Judge Treu's role in *Vergara* "facilitates"¹⁰⁹ the solving of this legislative logjam. By issuing this decision, he serves a facilitating role, serving to induce institutional cooperation in the realm of teacher tenure reform. In the opinion's final paragraph, he provides a telling warning and suggestion to the legislature to get its act together and start making changes:

Alexander Hamilton wrote in Federalist Paper 78: "For I agree there is no liberty, if the power of judging be not separated from the legislative and executive powers." 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 Challenged Statutes. All this Court may do is apply constitutional principles of law to the Challenged Statutes as it has done here, and trust the legislature to fulfill its mandated duty to enact legislation on the issues herein discussed that passes constitutional muster, thus providing each child in this state with a basically equal opportunity to achieve a quality education.¹¹⁰

Interestingly enough, while Judge Treu purports to not "even advise" on how to replace the Challenged Statutes, he sprinkles not-so-subtle suggestions throughout the opinion, which I will analyze in Part IV.

Thus, Judge Treu's opinion is inevitably a work of exquisite judicial activism, which has the potential to promote institutional cooperation by furthering reforms previously impossible in the log-jammed legislature. In effect, his activism could have motivated the legislature to begin considering tangible and realistic changes to the teacher-tenure system, opening a *policy window* in which an effective legislative remedy for teacher tenure could still be crafted.

107. See, e.g., Romero, *supra* note 6 ("The decision underscores the power of the independent judiciary—and the legacy of children and their parents fighting for justice in courtrooms when they have been abandoned by political representatives paralyzed and submissive to the power of campaign money.").

108. Larry Sand, *The CTA's Dirty Little Secret*, CITY J. (Sept. 27 2013), <http://www.city-journal.org/html/cta%E2%80%99s-dirty-little-secret-11253.html> [https://perma.cc/PE33-CZQ3].

109. See William Koski, *The Politics of Judicial Decision-Making*, 55 HASTINGS L.J. 1077, 1103 n.96 (2004) (noting, based on a comment by Professor William Simon, that the judiciary may not be providing "cover" but acting as a "facilitator" to overcome a coordination problem among the elite).

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

II.

AN EFFICIENCY-EFFECTIVENESS FRAMEWORK FOR EVALUATING SCHOOL
FINANCE COURT-ORDERED LEGISLATIVE REMEDIES

The history of school finance litigation is commonly categorized by three waves of litigation. The first wave relied on the Equal Protection Clause of the U.S. Constitution to challenge disparities in per-pupil expenditures based on the local property tax and ended when the Supreme Court rejected this theory in *San Antonio Independent School District v. Rodriguez*.¹¹¹ The second wave, which included California's *Serrano* case, relied upon the equal protection provisions of state constitutions to focus on interdistrict spending inequities.¹¹² The first two waves represent equity cases, which attempted to equalize educational funding between school districts. The third wave began in 1989 and shifted the basis of litigation from state equal protection clauses to state constitutional provisions involving public elementary and secondary education.¹¹³ Most importantly, the third wave of litigation, such as *Rose v. Council for Better Education* in Kentucky, shifted the basis of the suits from equity to adequacy. Here, the constitutional violation was no longer based on unequal property tax expenditures across districts, but rather on the state government's failure to "ensure all public school children receive[d] an adequate education."¹¹⁴ Already, some have begun to categorize *Vergara* and its progeny teacher quality and tenure lawsuits as the fourth wave of education reform impact litigation.¹¹⁵

A. *The Efficiency-Effectiveness Framework*

This Note offers to the literature on school finance reform a new framework for evaluating the success of a court-ordered legislative remedy. The history of school finance reform shows that plaintiffs have often won the merits of their constitutional challenge to a school finance system, but that true change only came if court-ordered reform actually led to effective and stable legislative reform. Here, I propose that an *efficiency-effectiveness* framework provides an analytical lens to evaluate the success of court-ordered legislative changes.

111. Richard Briffault, *Adding Adequacy to Equity*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 25, 25 (Martin R. West & Paul E. Peterson eds., 1997).

112. *Id.*

113. See, e.g., 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, 239-42 (1990).

114. Briffault, *supra* note 111.

115. See, e.g., Kant, *supra* note 18; Note, *Education Policy Litigation as Devolution*, 128 HARV. L. REV. 929 (2015) ("Recently, plaintiffs in multiple states have advanced a new wave of education litigation, arguing that state laws regarding teacher tenure and dismissal should be struck down as inconsistent with state constitutional educational rights.").

Efficiency refers to the overall amount of time taken to reach a stable resolution to the school finance cases. I argue that a state's school finance litigation has high efficiency only if the court-ordered remedy is (1) quickly implemented within a few years as a legislative remedy as in Kentucky's *Rose* case or (2) resolved via settlement as in California's *Reed* and *Williams* cases. A case has low efficiency if the court-ordered remedy has languished through decades-long legal battles and multiple rounds of back-and-forth legislative formulations and court challenges as in the New York *Campaign for Fiscal Equity* and the New Jersey *Abbott v. Cahill* cases. As with all legal analysis, the categories of low, moderate, and high are rough guideposts that provide insight for future cases.

Effectiveness refers to the actual tangible result for plaintiffs in these cases (in terms of improvements to the education system or benefits obtained for plaintiffs). Here, the court in Kentucky's *Rose* case ordered the legislature to vastly reform the education system, resulting in the legislature passing the Kentucky Education Reform Act (KERA) within a year, which has "not only survived . . . [but] has had impressive results," moving the state from the bottom of national rankings to a middle-ranked state.¹¹⁶ Thus, Kentucky and its *Rose* case is a paramount example of high effectiveness. In direct contrast, cases such as New York's *Campaign for Fiscal Equity* show no effectiveness where a massive \$5.6 billion settlement ordered by a trial court judge has failed to materialize despite years of litigation, settlements, and other opportunities for reform.¹¹⁷ Cases like *Abbott* and *Williams* stand in between as areas of moderate effectiveness.

I argue that there are five major categories of cases in school finance that are defined by an *efficiency-effectiveness* framework. These are (1) *high-efficiency/high-effectiveness* (Kentucky's *Rose* litigation); (2) *low-efficiency/moderate-effectiveness*¹¹⁸ (New Jersey's *Robinson* and *Abbott*); (3) *low-efficiency/no-effectiveness*¹¹⁹ (New York's *Campaign for Fiscal Equity*);

116. Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 136, 156 (Helen F. Ladd et al. eds., 1999).

117. *Campaign for Fiscal Equity v. State*, No. 0111070/1070, 2005 WL 5643844, at *9 (N.Y. Sup. Ct. Feb. 14, 2005) (granting plaintiff's motion for an order to implement \$5.63 billion in additional operating funding for the New York City School District due to the city's violation of the Court of Appeals' prior mandates on school finance).

118. Texas's *Edgewood* saga may also fit into this category with a similar multiyear pathway to some level of gains. See generally Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991) (describing school finance reform as a "Russian novel: it's long, tedious, and everyone dies in the end").

119. Ohio's eleven-year battle in *Derolph v. State*, which ended with a change in judicial leadership through a contentious supreme court election that led to two new Republican justices, can be described as a *low-efficiency/no-effectiveness* case. See generally *Ohio Supreme Court Declares School Funding System Unconstitutional in Derolph IV*, ACCESS (Dec. 11, 2002), <http://www.schoolfunding.info/states/oh/12-11-02DeRolphIV.php3> [<https://perma.cc/8FAH-VMT6>].

(4) *high-efficiency/low effectiveness* (California's *Reed* settlement); and (5) *high-efficiency/moderate-effectiveness*¹²⁰ (California's *Williams* settlement).

The framework is summarized below:

Figure 1: The Efficiency-Effectiveness Framework

		<u>Effectiveness</u>		
		High	Moderate	Low
Efficiency	High	<i>Rose</i> (KY)	<i>Williams</i> (CA)	<i>Reed</i> (CA)
	Low		<i>Abbott and Robinson</i> (NJ)	<i>Campaign for Fiscal Equity</i> (NY)

Next, I argue that the determination of whether a given case is to be *high-efficiency/high-effectiveness* or *low-efficiency/no-effectiveness* depends on political factors that influence both the efficiency and effectiveness prongs of the legislature reform effort. For example, the effective use of a *policy window* created by a court's activist decision can lead to high effectiveness and high efficiency in the implementation of legislative reform, while ineffective use of that window negates both efficiency and effectiveness. Further, *political priming* points toward a greater likelihood of efficient reform, with all groups tending to be working in a single direction. Moreover, the importance of *political leadership* and its relationship with *interest groups* are outcome-determinative. Political leadership can shape both the willingness to reach a compromise or fight a given judicial decision. Interest groups can stall out efficiency by hindering a legislative remedy. They can also choose to continue fighting an already created legislative remedy, which would reduce the effectiveness of a given remedy's long-term stability.

For purposes of applying this analysis in future California teacher tenure/teacher quality cases and in national teacher tenure lawsuits, I look at the hypothetical world of what the legislative remedies process would have looked like if the California Supreme Court had allowed a plaintiff victory (as

120. Massachusetts's *McDuffy* case in 1993 can be similarly characterized as *high-efficiency/moderate-effectiveness* case. There, the Massachusetts Supreme Judicial Court found a school finance constitutional violation. Only three days later, the governor passed the Education Reform Act, which "dramatically revamped school funding, accountability, and administrability mechanisms" throughout the state. See generally Vivek Rao, *So Ordered? Scrutinizing the Massachusetts Judiciary's Role in the State's Sweeping Education Reform Plan* (Apr. 29, 2011), https://www.law.berkeley.edu/files/So_Ordered_Rao.pdf [<https://perma.cc/RKB3-2ZZ4>] (unpublished).

suggested by Justices Liu and Cuéllar).¹²¹ Thus, this Note evaluates where a *Vergara* remedy would have been on the *efficiency-effectiveness* spectrum. I argue that all political factors pointed toward *Vergara*'s ultimate remedy being more similar to New York's *Campaign for Fiscal Equity* as a *low-efficiency/no-effectiveness* remedy or even to New Jersey's *low-efficiency/moderate-effectiveness* situation. However, the plaintiffs' loss on appeal suggests that the situation quickly devolved to be more similar to *Reed*, such that *high-efficiency/low-effectiveness* would have existed. As such, the utility of my framework is to identify the futility of continued and wasteful teacher tenure litigation by encouraging both plaintiffs and defendants to settle their dispute through a *Williams*-esque compromise solution, which would have led to an optimal result of a *high-efficiency/moderate-effectiveness* paradigm. Since the *Rose*-esque *high-efficiency/high-effectiveness* ideal is unlikely to exist with *Vergara*, I argue that the best solution—in a hypothetical *Vergara* win and in future teacher tenure lawsuits nationwide—is to seek out a *Williams*-style settlement by influencing political leadership and interest groups to see the mutual benefits in moderate teacher tenure reform.

B. High-Efficiency/High-Effectiveness in Kentucky: Rose v. Council for Better Education

The 1989 Kentucky case, *Rose v. Council for Better Education*, was the first case in which courts mandated fiscal action to achieve an adequate education. The Kentucky Supreme Court determined that the “*entire system of common schools is unconstitutional*” and ordered the General Assembly, Kentucky’s legislature, to “re-create, re-establish a new system of common schools in the Commonwealth.”¹²² Compared to other judicially imposed remedies, *Rose* is particularly peculiar because of the highly detailed, descriptive remedy that the court chose to provide to the General Assembly.¹²³

121. When this Note was first written, this was not a hypothetical, as plaintiffs had won at the trial court level and were proceeding to defend their victory on appeal. This Note remains relevant if future teacher tenure cases are brought in California and for the myriad of teacher tenure cases being brought in other states such as New York and Minnesota. See *supra* note 4.

122. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 215 (Ky. 1989).

123. *Id.* at 212 (“We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.”).

In contrast to the New York *Campaign for Fiscal Equity* and New Jersey *Robinson and Abbott*, school finance sagas described in the next Section, the legislature in Kentucky was surprisingly amenable to the suggestions of the court. According to Frederick Hess, the “process of enacting the ruling was a smooth one” as a result of the support of political and civic elites.¹²⁴ The General Assembly created a Task Force on Education Reform, which proposed the Kentucky Education Reform Act (KERA) that was adopted in March 1990.¹²⁵ KERA emphasized significant reforms in finance, curriculum, and governance and included a corresponding sales tax increase to fund the bill, which resulted in an additional \$500 million pouring into Kentucky’s education system.¹²⁶ Commentators have praised the “impressive results” in Kentucky, which moved from the bottom of national rankings with its previously dismal education system to the middle of national rankings.¹²⁷ The executive director of the Prichard Committee for Academic Excellence (Prichard Committee), which had advocated for education reform in Kentucky said, “I doubt that any legislature in the country has responded so strongly and forthrightly to a supreme court decision.” This statement is especially illuminating compared to the endless litigation (*low efficiency*) stories of New York and New Jersey.¹²⁸

Rose is the paramount *high-efficiency/high-effectiveness* case. It is highly efficient because the legislative remedy was passed within a year of the court’s order and its legislative remedy, KERA, has proven to be relatively effective with few continued challenges to the state’s school finance system. As such, *Rose* and KERA are illuminative of several political factors that influence the efficiency and effectiveness of a judicially imposed remedy. *Rose* demonstrates the importance of (1) *political priming*, (2) the concept of a *policy window* opened by a court, (3) the importance of *interest groups*, and (4) bipartisan *political leadership*.

The case shows the effects of *priming* because elected officials were willing to take advantage of a *policy window* opened by the logjam breaking of the court.¹²⁹ Priming refers to how state officials were prepared for years to react to significant education reform. Kentucky’s education history was dismal and the discourse around the state’s education system constantly stressed its

124. Frederick M. Hess, *Adequacy Judgments and School Reform*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 159, 165 (Martin R. West & Paul E. Peterson eds., 2007).

125. *Id.*

126. Carr & Fuhrman, *supra* note 116, at 156.

127. *Id.*

128. Reagan Walker, *Lawmakers in Ky. Approve Landmark School-Reform Bill*, *EDUC. WEEK* (Apr. 4, 1990), <http://www.edweek.org/ew/articles/1990/04/04/09330031.h09.html> [https://perma.cc/TA9K-P47G].

129. See Hess, *supra* note 124, at 165 (“The rapidity and ease with which the state enacted KERA and raised taxes were rather remarkable and may suggest just how ‘primed’ elected officials were to take advantage of the policy window that the court opened.”).

bottom-ranked education system.¹³⁰ Public opinion polls at the time revealed that as much as 38 percent of Kentuckians viewed education as the state's greatest problem.¹³¹

Rose also shows a vital concept that a *policy window* can be created by judicial responses to legislative reform. Commentators such as Michael Paris were impressed by how Kentuckians with the KERA bill “sought to change everything at once—from teaching methods and what is taught, to how student achievement is defined and evaluated, to school governance at all levels, to the school finance system.”¹³² In short, *Rose* reveals that court-ordered remedies have the potential to open substantial policy windows that create a limited opportunity for the legislature to create massive systemic change. In turn, the effective use of the policy window leads to high efficiency and effectiveness in the judicially ordered remedy.

Additionally *Rose* highlights the importance of interest groups. In the 1980s, reformers created the Pritchard Committee that spearheaded two decades of reform. The Pritchard Committee, headed by prominent Kentuckian Edward Prichard, issued a report titled *A Path to a Larger Life: Creating Kentucky's Educational Future*, which called for dramatic education reform.¹³³ It is notable that the interests of the primary interest group, the Pritchard Committee, aligned completely with public opinion, the state leadership, and political will in general. The Pritchard Committee, which consisted of prominent business leaders, promoted the idea that education reform was necessary to bring economic development to Kentucky.¹³⁴ As such, interest group alignment with political leadership interests promotes efficient legislative solutions that have more long-term effectiveness.

Finally, *Rose* shows the importance of political leadership. Education reform in Kentucky was a primary political issue for much of the 1980s. In 1984, Governor Martha Layne Collins, a former teacher, pushed for significant reform.¹³⁵ Her successor, Wallace Wilkinson, also greatly emphasized education. However, both of these governors failed to get through the General Assembly's massive tax packages to fund their reforms.¹³⁶ Though KERA would cost \$430 million more than he had pledged in his winning campaign for governor, Wilkinson “took a great risk” by continuing to back KERA.¹³⁷

130. See Carr & Fuhrman, *supra* note 116, at 156.

131. Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–1995*, 26 LAW & SOC. INQUIRY 631, 649 (2001).

132. *Id.* at 666.

133. Hess, *supra* note 124, at 164.

134. Carr & Fuhrman, *supra* note 116, at 157.

135. *Id.* at 156 (“Governor Martha Collins was the first governor in Kentucky to talk almost exclusively about education. She argued that improved education would be the key to the future economic development of Kentucky and its survival in the global economy.”).

136. Hess, *supra* note 124, at 164; Carr & Fuhrman, *supra* note 116, at 157.

137. Carr & Fuhrman, *supra* note 116, at 157.

According to Professors Melissa C. Carr and Susan H. Fuhrman, KERA's status as "a quickly developed, expert-driven reform plan in response to a strong court mandate and that it had strong support from the governor and key legislative leaders" made quick passage in the legislature possible.¹³⁸

Consequently, *Rose* is an abnormality in school finance litigation as a highly efficient and highly effective remedy, and it stands in stark contrast to the legislative remedies that developed in New York and New Jersey.¹³⁹

C. *Low-Efficiency/Moderate-Effectiveness: New Jersey's Thirty-Year Robinson and Abbott Litigations*

In sharp contrast to the relative successes of *Rose* and legislative responses in Kentucky, school finance litigation in New Jersey has languished on for over thirty years of never-ending litigation.¹⁴⁰ In 1973 the Supreme Court of New Jersey in *Robinson v. Cahill* held that wealth-based variations in per-pupil expenditures across the state's districts deprived children in low-wealth communities of a "thorough and efficient" (T&E) education.¹⁴¹ The court found that the guarantee for T&E education required the state legislature "to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."¹⁴² Turning to remedies, the court—unlike in *Rose*—did not explicitly define a specific remedy, deferring to the legislature and merely noting that the remedy must be "prospective" and that the judiciary could not "unravel the fiscal skein."¹⁴³

The New Jersey legislature responded to *Robinson I* by passing the Public School Education Act of 1975 (the 1975 Act) which the court upheld as constitutional in *Robinson V*.¹⁴⁴ Unsatisfied with the results, in 1981 four New Jersey cities challenged the application of the new 1975 Act to their poor urban school districts in *Abbott v. Burke*.¹⁴⁵ In *Abbott II*, the court declared the 1975 Act unconstitutional as applied to the state's twenty-eight poorest urban

138. *Id.*

139. The litigation in Kentucky is not immune from criticism or further enforcement lawsuits. *See, e.g.*, Hess, *supra* note 124, at 168 (noting that despite the "exalted status" of *Rose*'s success, in 2005 plaintiffs began to pursue a new suit with education spending declining 47 percent between 1990 and 2000).

140. Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, in *COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN* 33, 63 (Eric A. Hanushek ed., 2006).

141. 303 A.2d 273, 295 (N.J. 1973).

142. *Id.*

143. *Id.* at 298.

144. Martha E. Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey*, 1 *EQUITY EDUC. & LAW* 1, 10 (2009). *See generally* *Abbott v. Burke*, 710 A.2d 450, 455–57 (N.J. 1998) (describing the history of school finance reform litigation in New Jersey from *Robinson* to *Abbott* from the 1970s to 1990s).

145. 495 A.2d 376 (N.J. 1985).

districts (known as *Abbott* districts) and ordered a remedy that new legislation be passed to ensure equality in funding between the *Abbott* districts and property-rich districts.¹⁴⁶ In response, the legislature enacted yet another law—the Quality Education Act of 1990 (QEA)—that was found unconstitutional as applied to the *Abbott* districts because of a failure to ensure parity of spending in *Abbott III*.¹⁴⁷ In response, the legislature, yet again, passed the Comprehensive Educational Improvement and Financing Act in 1996 which the Supreme Court of New Jersey found again unconstitutional in *Abbott IV*, calling for a remedial order addressing special education and facility needs for the *Abbott* district schools and emphasizing the “Success for All” model of school reform.¹⁴⁸ As of 2006, the *Abbott* case had been through “a dozen trips to the legislature”¹⁴⁹ but there have been arguably some successes in that New Jersey now spends more per student on education than any other state in the country.¹⁵⁰

Despite the recent successes in New Jersey of legitimately increasing school finance spending in the state’s highest need districts, the political story of New Jersey and its *Robinson I* and *Abbott* cases is one of tremendous failure and continuous litigation. Arguably, New Jersey shows the impact of a lack of effective and unified political leadership. After *Robinson I*, Democratic Governor Brendan Byrne proposed a package of remedies in the legislature, but was voted down by a legislature run by his own party.¹⁵¹ Only after the *Robinson V* decision in 1976, where the court enjoined legislative spending, did the legislature relent and finance his law with the state’s first income tax. Similarly, Democratic Governor Jim Florio faced even more significant troubles.¹⁵² Responding to the court’s decision in *Abbott*, Florio proposed the QEA, calling for a major overhaul of New Jersey’s funding system that would provide basic per-pupil funding of \$6,835 and additional funding for the *Abbott* “special needs” districts.¹⁵³ Here, the importance of interest groups was also very important as the New Jersey Education Association (NJEA), the teacher’s union for the state, vehemently opposed enactment of the QEA and its corresponding \$1.3 billion in tax increases during the middle of a recession.¹⁵⁴ They vehemently opposed the bill because it threatened the practice of having the state cover the costs of the teacher pension fund and Social Security, which often allowed districts to be generous with retirement benefits.¹⁵⁵ NJEA was

146. *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

147. *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994).

148. *Abbott v. Burke*, 748 A.2d 82, 88 (N.J. 2000).

149. Lindseth, *supra* note 140, at 63.

150. *Id.* See generally Goertz & Weiss, *supra* note 144, at 36 (describing how *Abbott* districts now have funding to provide services on par with their wealthy district peers).

151. Hess, *supra* note 124, at 169.

152. *Id.* at 169–70.

153. *Id.* at 170; Lindseth, *supra* note 140, at 63.

154. See Hess, *supra* note 124, at 170.

155. *Id.*

the largest political donor in the state and lashed out to fight against the bill.¹⁵⁶ In the resulting second Quality Education Act adopted in March 1991, NJEA won the fight against shifting teacher pension costs to districts and that portion was withdrawn. Nonetheless, Republicans won a veto proof majority and an anti-tax Republican Christine Whitman was elected.¹⁵⁷ In short, a Democratic governor was thwarted by union special interest defiance to his plan and a resulting political leader came into the picture.¹⁵⁸

David Sciarra, executive director of the Education Law Center that guided the *Abbott* cases, has called the New Jersey litigation a “ridiculous dance” between the governor, the legislature, the department of education, the Education Law Center, and the courts.¹⁵⁹ In short, *Abbott* is an example of a *low efficiency* resolution to a school finance dilemma, stretched over two landmark cases, both which were litigated far too many times. Additionally, they were challenged and defended by interest groups and political leadership that lacked a unified desire to compromise in their implementation of court-imposed legislative reform. Nonetheless, *Abbott* should be viewed as at least a moderate success for *effectiveness*, given that thirty years of litigation have indeed increased state spending by 336 percent (\$3.6 billion) in inflation adjusted 2007 dollars.¹⁶⁰

D. Low-Efficiency/No-Effectiveness: New York’s Campaign for Fiscal Equity and its “March of Folly”

New York’s *Campaign for Fiscal Equity* has followed a similar path to New Jersey, though it has been far less effective in its twenty-year litigation path. Looking at the metric of financial gains, New York’s *Campaign for Fiscal Equity* should have stood as the paramount example of the potential of school finance litigation. On February 14, 2005, state supreme court justice Leland DeGrasse awarded the city a staggering \$5.6 billion more per year for the New York education system’s budget, an increase of 43 percent over the city’s then \$12.9 billion school budget.¹⁶¹ Many have criticized the wasteful litigation as both inefficient and ineffective. Writing in 2005, Sol Stern criticized that “[t]hirteen years and more than \$50 million in court costs and lawyers’ fees later, *Campaign for Fiscal Equity (Campaign) v. New York* is still

156. *Id.* at 170.

157. *Id.* at 171.

158. *See id.* at 169–71.

159. Dana E. Sullivan, *Court Still Rides Herd on Abbott Plan*, 33 N.J. LAW. 14 (2005).

160. *See generally* Goertz & Weiss, *supra* note 144, at 1. *But see* Lindseth, *supra* note 140, at 62–63 (arguing that New Jersey now spends more per student on education than any other state in the country due to *Abbott* and *Robinson*, but that “[s]ubstantial spending increases in the past on K-12 education have had little or no effect on improving student performance”).

161. Joe Williams, *The Non-Implementation of New York’s Adequacy Judgment*, in SCHOOL MONEY TRIALS 195, 197 (Martin R. West & Paul E. Peterson eds., 2007) (stating that the successful implementation of DeGrasse’s order would have raised per-pupil spending to more than \$18,000 per year, one of the highest rates in the nation).

being vigorously litigated.”¹⁶² Despite the early successes, the recent Great Recession may have been the final nail-in-the-coffin for *Campaign* as any hope for implementation of the \$5.6 billion stalled out in the economic downturn.¹⁶³ While a settlement was reached between *Campaign* and the Albany legislature in 2007 for \$5.5 billion, little has been distributed in the years since, with many dubbing *Campaign* an explicit failure.¹⁶⁴

The history of the *Campaign* is illustrative of political factors that impact the overall efficiency and effectiveness of legislative and executive response to a judicial order. During the 1992 school year Robert Jackson, a member of the Community School Board 6 in Manhattan, became frustrated that the political process could not alleviate conditions in the city’s failing public schools.¹⁶⁵ He sought to sue for more resources and asked for the help of lawyer Michael Rebell who had litigated *Jose P.*, a major special education case.¹⁶⁶ At first, the *Campaign* was probably a long shot as *Levittown Union Free School District v. Nyquist* was thought to have struck down the possibility of judicial intervention in school finance in New York.¹⁶⁷ The Court of Appeals in *Levittown* had held that school finance was properly the realm of the legislature and not the courts.¹⁶⁸

Rebell filed the *Campaign* suit against the state in June 1993, arguing that *Levittown* had left open the possibility of a judicial remedy if there had been a “gross and glaring inadequacy” in the school finance system.¹⁶⁹ Judge DeGrasse allowed the heart of the complaint—that the state violated the New York Constitution’s education article by not providing adequate funds—to stand.¹⁷⁰ The appellate court reversed,¹⁷¹ but the Court of Appeals¹⁷² reversed and brought the case back to Judge DeGrasse for trial after the two-year appeals process.

162. Sol Stern, *Campaign for Fiscal Equity v. New York: The March of Folly*, in *COURTING FAILURE: HOW SCHOOL FINANCE TRIALS EXPLOIT JUDGES’ GOOD INTENTIONS AND HARM OUR CHILDREN* 1, 1 (Eric A. Hanushek ed., 2006).

163. See generally MARINA MARCOU-O’MALLEY, *BILLIONS BEHIND: NEW YORK STATE CONTINUES TO VIOLATE STUDENTS’ CONSTITUTIONAL RIGHTS* (2014) (describing continued cuts to education in spite of a successful 2007 *Campaign for Fiscal Equity* decision from the New York Court of Appeals and governor and legislature commitment to settle the case for \$5.5 billion in new aid); *The Campaign for Fiscal Equity*, ALLIANCE FOR QUALITY EDUC., <http://www.aqeny.org/campaigns/campaign-for-fiscal-equity> [<https://perma.cc/PF2E-2M2W>] (“But then in 2009 as a result of the fiscal crisis school aid was frozen. Then over the following two years the state enacted over \$2.7 billion in cuts, including over \$2.1 billion in classroom cuts, in effect reversing CFE.”).

164. MARINA MARCOU-O’MALLEY, *BILLIONS BEHIND: NEW YORK STATE CONTINUES TO VIOLATE STUDENTS’ CONSTITUTIONAL RIGHTS* (2014).

165. Stern, *supra* note 162, at 3.

166. *Id.* at 3–4.

167. *Id.* at 5.

168. 439 N.E.2d 359, 370 (N.Y. 1982).

169. *Id.* at 369; Stern, *supra* note 162, at 9.

170. *Campaign for Fiscal Equity, Inc. v. State*, 616 N.Y.S.2d 851, 855 (Sup. Ct. 1994).

171. *Campaign for Fiscal Equity, Inc. v. State*, 619 N.Y.S.2d 699 (App. Div. 1994).

172. *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995).

Sol Stern argues that politics played a critical role at this stage in the litigation when George Pataki, a moderate and sometimes conservative Republican, defeated Democratic Governor Mario Cuomo. He argues that the broad coalition behind the *Campaign* was the natural ally of Governor Cuomo's liberal base and might have settled the case, but Pataki, who was supported by upstate Republicans, expected the governor to fight what was perceived as an "end run around the political process" that would force tax hikes for a "hopelessly dysfunctional" big city education system.¹⁷³ Sol also points to the presence of Attorney General Dennis Vacco, another upstate Republican who was charged with defending against *Campaign*.¹⁷⁴ During pre-trial discovery, which took four years, Democrat Eliot Spitzer defeated Vacco in an upset victory.

Another important factor in the case's history was that Rebell secured the services of Simpson, Thacher, and Bartlett (Simpson Thacher), a major white shoe law firm. The firm's managing partner Richard Beattie was a past president of the New York City Board of Education and offered the firm's tremendous resources to aide in *Campaign* over the next eight years, Simpson Thacher's partners and associates put in 33,000 hours on the case, with lower-level summer associates and paralegals adding 23,000 hours.¹⁷⁵

Campaign in many ways became its own powerful interest group. *Campaign* had an annual budget of \$3 million and was underwritten by major national organizations.¹⁷⁶ Between 1999 and 2003, *Campaign* took in \$7.4 million from organizations such as the Ford Foundation, the Bill and Melinda Gates Foundation, and the Rockefeller Foundation.¹⁷⁷ Importantly, major political organizations, including the United Federation for Teachers, collaborated with *Campaign*.¹⁷⁸

The amount of the remedy quickly became a subject of political debate after Judge DeGrasse found a violation of the New York education clause. Consultants played out a process of "equal parts science and voodoo"¹⁷⁹ to perform a "costing out" analysis. This analysis would determine the additional funding needed by the New York City Schools to provide the requisite "sound basic education."¹⁸⁰ Governor Pataki submitted a Standard & Poor's analysis using a "successful schools" model to conclude that a "sound basic education" could be met for about \$3 billion.¹⁸¹ During this debate in 2004, Mayor Michael Bloomberg and Chancellor Joel Klein testified that they needed an

173. See Stern, *supra* note 162, at 13.

174. *Id.* at 13–14.

175. *Id.* at 14.

176. *Id.* at 16.

177. Williams, *supra* note 161, at 201.

178. Stern, *supra* note 162, at 16.

179. Williams, *supra* note 161, at 203.

180. *Id.*

181. Stern, *supra* note 162, at 27.

additional \$5.4 billion in funding.¹⁸² A panel of special referees in the case ultimately found that it would take \$5.6 billion in state aid per year to lead to an “adequate” education.¹⁸³ In what Sol Stern terms the “March of Folly,” the legislature was paralyzed and unable to deal with the court’s order to provide \$5.6 billion in extra funding.¹⁸⁴ In 2015, the plaintiffs had continued to bring lawsuits alleging the lack of enforcement of *Campaign*’s promise for further funding, with at least two lawsuits and millions spent by the state and plaintiffs for these continued litigation battles.¹⁸⁵

The most important political lesson from New York’s “March of Folly” may simply be that the remedies process in education reform litigation is a tremendous waste of legal, judicial, and legislative resources if the political process is not successfully navigated. Nonetheless, the case highlights that remedies are the most important aspects of a school finance reform case as even a case successful on the merits can fail in the implementation by the legislative and executive branches. Twenty years after the case was first conceived and despite the thousands of hours logged by lawyers and millions of dollars spent on studies, litigation, etc., the *Campaign*’s promise for financial success has simply not been met. One can safely characterize the experience of the *Campaign* as a hard-fought litigation strategy that was ultimately a *low efficiency* method to obtain basically *no effectiveness* as a result.

In a sense, one may take away from the New York and New Jersey stories that the best resolution to school finance may be a settlement in the early stages of a successful litigation, which may save millions of dollars in litigation costs and ultimately push forward reforms that have a legitimate chance of benefitting the children these reforms are intended to reach. Instead of reaching a settlement in 2007 that evaporated during the recession, an earlier settlement is likely an effective solution that increases litigation *efficiency* while maximizing the potential for a beneficial effect on the state.

182. *Id.* at 27–28.

183. *Id.* at 21, 25.

184. *Id.* at 25–26; *see also* Williams, *supra* note 161, at 202–03 (describing competing “costing out” analyses about the amount it would take to deliver a “sound basic education” in New York’s schools and the ultimate referee decision to go with \$5.3 billion).

185. *See* Jessica Bakeman, *State Spending \$1.7M to Fight School Funding Challenge*, POLITICO (Mar. 23, 2015), <http://www.politico.com/states/new-york/albany/story/2015/03/state-spending-17-m-to-fight-school-funding-challenge-020671> [<https://perma.cc/QAC2-AN4E>] (describing how Governor Cuomo is spending \$1.7 million to defend against the latest iteration of *Campaign*). *See generally* Amended Complaint, *New Yorkers for Students’ Educational Rights (NYSER) v. State*, No. 650450 (N.Y. Sup. Ct. 2014).

E. High-Efficiency/Low-Effectiveness: California's Reed Settlement

In May 2010, the American Civil Liberties Union (ACLU) filed *Reed v. California*.¹⁸⁶ Plaintiffs alleged violations of the California Constitution's guarantee of equal access to the public education system as a result of the Reduction-in-Force (RIF) provision's requirement of a Last-In-First-Out (LIFO) system of teacher removal during budget crises.¹⁸⁷ During the recent economic crisis, the plaintiff schools "lost half to two-thirds" of their teachers, which again occurred during the 2010–2011 school year.¹⁸⁸ Plaintiff schools, which serve high concentrations of low-income students, have the highest concentration of new teachers and faced a disproportionate burden under RIF.¹⁸⁹ The ACLU sought injunctive relief to stop further RIF layoffs and a declaration of a violation under the California Constitution.

On October 6, 2010, the ACLU reached a proposed settlement with the Los Angeles Unified School District (LAUSD) Board of Education allowing for "target schools" in the bottom twenty-fifth percentile of the Academic Performance Index (API) score to be protected from LIFO style layoffs, which would protect up to forty-five schools each year from layoffs.¹⁹⁰ The district court approved the settlement. But the teacher's union, United Teachers Los Angeles (UTLA), filed an appeal challenging the court's approval of the settlement.¹⁹¹ UTLA was successful in its appeal, with the appellate court holding that the settlement was illegal to impose on teachers.¹⁹² In the end, the ACLU settled with UTLA and LAUSD reaching what the ACLU termed a "historic" settlement guaranteeing thirty-seven schools additional funding to hire assistant principals, expand professional development, and grant bonuses to principals. The settlement also required the LAUSD to invest more than \$25 million. However, the settlement has been criticized as ineffective, because it omits any resolution regarding the Reduction-in-Force or LIFO provisions.¹⁹³

186. Third Amended Complaint for Injunctive and Declaratory Relief, *Reed v. State*, No. BC432420 (Cal. Super. Ct. May 4, 2010).

187. *Id.*

188. *Id.* at 1.

189. *Id.* at 3–4.

190. *Historic Settlement in Teacher Layoff Case*, ACLU (Oct. 6, 2012), <https://www.aclusocal.org/historic-settlement-in-teacher-layoff-case> [<https://perma.cc/6G7E-JFSB>].

191. Opening Brief of Appellant United Teachers Los Angeles, *Reed*, No. B230817 (Cal. Ct. App. 2011).

192. *Reed v. United Teachers Los Angeles*, 145 Cal. Rptr. 3d 454 (Ct. App. 2012) (finding that union's due process right to a hearing on the merits was violated and that failure to sign consent decree precluded enforcement of that decree against the union); see also Stephen Ceasar, *L.A. Unified Settlement Bypassing Seniority-Based Layoffs Nullified*, L.A. TIMES (Aug. 11, 2012), <http://articles.latimes.com/2012/aug/11/local/la-me-laUSD-layoffs-20120811> [<https://perma.cc/8ER3-63XN>].

193. See, e.g., Larry Sand, *UTLA, LAUSD, and ACLU Fiddle While Children Don't Learn*, UNION WATCH (Apr. 15, 2014), <http://unionwatch.org/utla-laUSD-and-aclu-fiddle-while-children-dont-learn> [<https://perma.cc/4R7Q-R2BB>] (arguing that the "landmark" settlement is actually a weak settlement given the omission to even discuss "seniority" or the LIFO system). Sand also argued that

Arguably, *Reed* should be seen as a *high efficiency/low effectiveness* case that the plaintiffs in future teacher tenure *Vergara*-style lawsuits must seek to avoid. Here, *Reed* shows the potential of what happens when leverage is lost by ineffectively utilizing the *policy window* created by a favorable judicial decision. The first *Reed* settlement accomplished the desired protections for some forty-five schools, while the second and actual *Reed* settlement neglected to even comment on the issues of seniority, RIF, and LIFO, which the case was about. Therefore, while *Reed* was very efficient in that the settlement consistently resolved the issues between the parties, the result here shows low effectiveness in the original desired impact to massively change the way LIFO statutes are raised. It is telling that Judge Treu ruled LIFO as unconstitutional as a primary issue in *Vergara*. This ruling may have been a judicial response to the ineffectiveness of this case. Moreover, *Reed* shows the power of interest groups to nullify the effectiveness of a decision. Here, the ACLU had already resolved its conflict with a willing LAUSD to limit the RIF for certain schools (mostly in Antonio Villaraigosa's Partnership Schools). Nonetheless, UTLA continued to fight the lawsuit, resulting in a far less effective outcome.

F. High-Efficiency/Moderate-Effectiveness: California's Williams Settlement

In August 2000, Mark Rosenbaum—on behalf of the ACLU, Public Advocates, and other public interest organizations—brought suit against California alleging a deprivation of “basic educational opportunities” in *Williams v. California*.¹⁹⁴ There, the plaintiffs alleged that the poorest schools lacked “bare essentials,” including “trained teachers, necessary educational supplies, classrooms, even seats in classrooms, and facilities that meet basic health and safety standards,” along with a lack of books, functioning toilets, rodent-less campuses, air conditioning, and other facilities-related issues.¹⁹⁵

Political leadership played a defining role in the *Williams* Settlement. Initially, Democrat Governor Gray Davis vowed to defend the state against the suit, spending \$13 million in legal fees as of April 2003, which included the hiring of outside legal counsel O'Melveny & Myers.¹⁹⁶ Davis filed a countersuit against several districts, arguing that the state had already increased funding for textbooks, teacher training, and school construction and that the

Vergara was the only hope to lead to meaningful reform for the LIFO system, an acute prediction given Judge Treu's ruling of LIFO as unconstitutional in the case. *Id.*

194. First Amended Complaint for Injunctive and Declaratory Relief at 6, *Williams v. State*, No. 312236 (Cal. Super. Ct. Aug. 14, 2000).

195. *Id.*

196. Jonathan D. Glater, *Fight over California Schools Raises New Issue of Priorities*, N.Y. TIMES (Apr. 18, 2003), <http://www.nytimes.com/2003/04/18/us/fight-over-california-schools-raises-new-issue-of-priorities.html> [https://perma.cc/CE4H-5TAH].

onus was on local districts to implement adequate school conditions.¹⁹⁷ Here, a change in *political leadership* was critical to the outcome of the case. California voters removed Davis on October 7, 2003, replacing the Democrat with Republican movie star Arnold Schwarzenegger.¹⁹⁸ Governor Schwarzenegger pledged to settle the *Williams* case, saying it was a “shame that we as a state have neglected the inner-city schools. . . . It’s terrible. It never should have happened.”¹⁹⁹ The *Williams* Settlement established new standards and accountability mechanisms and took steps to ensure that all California public school students have textbooks and safe, clean, and functional schools. To achieve these goals, California provided approximately \$1 billion in funding. For the lowest performing schools, California allocated \$800 million for emergency repairs, with those districts receiving \$25 million in the first year of implementation.²⁰⁰ Unlike the *Campaign* Settlement in New York, which surreptitiously went unimplemented during the 2008 recession, studies have found that California has remained at least somewhat committed to the *Williams* Settlement to ensure that schools, at the very least, have sufficient textbooks and functional buildings.²⁰¹ However, the *Williams* Settlement, like any political action, has been criticized for not fully implementing its lofty promises.²⁰²

Consequently, *Williams* is best characterized as a *high-efficiency/moderate-effectiveness* legislative remedy. It is *highly efficient* because unlike the other cases, *Williams* was settled on the eve of trial, such that the court did not even have a chance to gauge the merits of the *Williams* constitutional deprivation argument. Settlements arguably are *highly efficient* if they resolve the conflict without future litigation efforts. Here, the settlement occurred as a direct result of a change in political leadership, with Schwarzenegger making a political calculation to end the case to focus more on

197. Ed Mendel, *A World of Difference*, SAN DIEGO UNION-TRIB. (Feb. 9, 2003), http://legacy.sandiegouniontribune.com/news/education/20030209-9999_1n9edfund.html [<https://perma.cc/L5QH-3KKV>].

198. Michael Finnegan, *Gov. Davis Is Recalled; Schwarzenegger Wins*, L.A. TIMES (Oct. 8 2003), <http://articles.latimes.com/2003/oct/08/local/me-recall8> [<https://perma.cc/MGK3-BAMZ>].

199. Joetta L. Sack, *Settlement of School Equity Case Caught up in Calif. Budget Battle*, EDUC. WEEK (July 14, 2004), <http://www.edweek.org/ew/articles/2004/07/14/42calif.h23.html> [<https://perma.cc/7NGX-PSGN>].

200. *Williams v. California*, PUB. ADVOC., <http://www.publicadvocates.org/williams-v-california> [<https://perma.cc/F7ZW-S4AH>] (last visited Feb. 28, 2016).

201. See generally SALLY CHUNG, *WILLIAMS V. CALIFORNIA: LESSONS FROM NINE YEARS OF IMPLEMENTATION* (Sept. 29, 2013), <https://www.aclusocal.org/cases/williams-v-california/nineyears> [<https://perma.cc/42XR-8ASS>] (finding that although much has changed since early years of *Williams* implementation, the *Williams* settlement has remained a “steadfast constant, maintaining a foundation of opportunity during a time of fiscal crisis”).

202. See, e.g., *California Reneges on 8-year-old School Funding Settlement Agreement*, ACCESS NETWORK, <http://schoolfunding.info/2012/07/california-reneges-on-8-year-old-school-funding-settlement-agreement> [<https://perma.cc/S54K-6BQ4>] (last visited Feb. 28, 2016) (arguing that the state has failed to pay even half of the \$800 million in Emergency Funds promised in the *Williams* Settlement, perpetuating “slum conditions” throughout the state).

his own agenda. Further, interest group support has not exceptionally frustrated the implementation process, with the *Williams* Settlement remaining a guiding principle, even in the recent Local Control Funding Formula.²⁰³ While some cases have continued to challenge California's school finance system in recent years,²⁰⁴ it seems that the substantial monetary gains and continued implementation of *Williams* indicates at least *moderate effectiveness*. Thus, *Williams* is a paramount example of what is possible when political leadership is willing to compromise to create a legislative remedy settlement that takes into account mutual interests from opposing sides of the political spectrum.

G. Conclusion: What Matters in the School Finance Remedies Process

The history of school finance offers several political factors that are determinative of the level of the *efficiency-effectiveness* of a judicially ordered legislative remedy.

Rose in Kentucky and its corresponding KERA was a *high-efficiency/high-effectiveness* case where Kentucky's school finance spending increased vastly from its prior bottom-rung status. Next, New Jersey's *Robinson* litigation presented a small semblance of arguable success as *low-efficiency/moderate-effectiveness* cases, despite having stretched over the course of thirty years. New York's *Campaign* represents a *low-efficiency/no-effectiveness* case that can only be described as a failure of the remedies process. Despite the successful judicial action, the hard-earned \$5.6 billion increase per year has languished in the legislature in the ten years since the victory. In contrast, after losing leverage under appeal, *Reed* represents a *high-efficiency/low-effectiveness* settlement. California's *Williams* case offers a clear example of a *high-efficiency/moderate-effectiveness* settlement. Thus, the critical question is what factors determine the efficiency and effectiveness of the remedy in these cases.

Kentucky was successful because of the confluence of the aforementioned political factors. First, as exists in all of these cases, a *policy window* opened up when the court, in an exercise of judicial activism, ruled unconstitutional the state's school finance systems. Next, Kentucky was different because its leaders were politically primed for reform for years. Its politicians had a strong consensus that education as a primary issue, particularly because of Kentucky's bottom-ranked performance relative to other states. Further, Kentucky shows that when political leadership is consistently unified and interest groups such as the Pritchard Committee are consistently on board, then successful legislative responses to judicially ordered remedies seem more likely. These factors led to both high-efficiency and high-effectiveness.

203. See, e.g., CHUNG, *supra* note 201, at 6.

204. See, e.g., *Robles-Wong v. State*, No. RG10515768, 2011 WL 5902812 (Cal. Super. Ct. 2010).

In contrast, New Jersey and New York show the failure to take advantage of an activist court's policy window. New Jersey shows how ineffective political leadership and union opposition can shut down the process. New York shows the tremendous extent to which resources can be wasted for little substantive gains, along with the complicated nature of politics and interest groups. *Reed* similarly shows how interest groups can decrease the effectiveness of a remedy, especially in light of losing an appeal.

III.

PREDICTING THE LEGACY OF *VERGARA*

The school finance cases demonstrate that even if a *Vergara*-style teacher tenure case were to be successful in the California Supreme Court, its true test would be in the implementation of the court-ordered legislative remedy.²⁰⁵

Below, I analyze the legacy of *Vergara* through the lens of three possibilities. First, my analysis discusses what could have been if the California Supreme Court had granted plaintiffs' petition for review, voted to reverse the Court of Appeal, and restored the trial court's order. In his dissent from denial of the petition for review, Justice Cuéllar discusses the hypothetical where "even in a world where we clarify our fundamental rights jurisprudence as this requires—and address concerns associated with the Court of Appeal's decision—considerable room would remain for the legislative and executive branches" to decide the education policy issues inherent with teacher tenure.²⁰⁶ Thus, this Note continues this analysis by looking at what the court-ordered legislative remedies process might have looked like under a hypothetical *Vergara* victory.

This analysis remains relevant for two primary reasons. First, there is always the possibility that another case styled after the *Vergara* lawsuit could be brought seeking to retry the claims in front of the California Supreme Court. Indeed, when Justice Cuéllar says that it is "even more difficult to allow the [Court of Appeal's] decision to stay on the books without review in a case of enormous statewide importance" he is arguably inviting plaintiffs to bring teacher tenure and teacher quality cases back to the California Supreme Court.²⁰⁷ Indeed, *Vergara* plaintiffs' counsel Theodore Boutrous viewed the

205. I recognize that significant differences exist in the remedies process between the remedy in a school finance case (more money) and the remedy in a teacher tenure case (substantive changes to the law). Nonetheless, it seems likely that a cycle of endless litigation could equally result from a dance between the legislature, executive, courts, and interest groups about what the proper remedy to correct the constitutional violation in a teacher tenure case might be. Similar political factors are at play that could lead to a similar remedy.

206. *Vergara v. State*, No. B258589, 2016 WL 4443590, at *24 (Cal. Ct. App. Aug 22, 2016) (Cuéllar, J., dissenting).

207. *Id.* at 22. In the related *Robles-Wong* school finance case, where the California Supreme Court denied review on the same day as *Vergara*, commentators felt that Justice Liu was hoping that there would be "another lawsuit asserting students' right to adequate school funding, and that next time, one more justice will switch sides and agree to hear the case." John Fensterwald, *Dissenting*

Justices Liu and Cuéllar dissents as a “launching pad” for future lawsuits in both federal and state courts.²⁰⁸

Second, *Vergara* teacher tenure lawsuits based on the *Vergara* theory are ongoing in both New York and Minnesota.²⁰⁹ The Partnership for Educational Justice, a separate education advocacy group from Students Matter, is planning to launch a third teacher tenure lawsuit later in 2016 in a state “yet to be named.”²¹⁰ Marc Porter Magee, founder of education advocacy group 50CAN, has stated that more legal actions to end tenure were likely in the wake of *Vergara*.²¹¹ Therefore, the *efficiency-effectiveness* framework is relevant for both future teacher tenure cases that might arise in California as well as the national teacher tenure cases.

I argue that the political factors identified in past school finance cases indicate that any remedy would most likely have been a *low-efficiency/no-effectiveness* case similar to New York’s *Campaign*. In the alternative, *Vergara* could have been most similar to a New Jersey-esque case of *low-efficiency/moderate-effectiveness*. Applying the political factors to *Vergara*, it seems likely that a judicial order to the California legislature to reform teacher tenure would have resulted in an endless ping-pong battle of litigation and legislative formulation between the courts and legislature, thereby creating low efficiency. Further, it seems likely that such a remedy would have resulted in little to no effectiveness if the solutions are crafted after too much compromise or do too little to make a meaningful impact.

The seemingly simple factors of political leadership, priming, utilization of policy windows created by the courts, and interest groups greatly affect *Vergara*’s potential for efficiency and effectiveness. Applying the factors to the novel situation of *Vergara*, it seems at least likely that significant political

Judge Awaits Second Chance to Corral a Majority on School Funding Lawsuit, EDSOURCE (Aug. 31 2016), <https://edsource.org/2016/justice-liu-awaits-second-chance-to-coral-a-majority-on-school-funding-robles-wong-california-supreme-court/568827> [<https://perma.cc/MY2W-M2UJ>]. A similar argument could be made that Justices Liu and Cuéllar could be awaiting a second *Vergara*-type decision to make a final, reasoned ruling on teacher tenure litigation in California.

208. Howard Blume and Joy Resmovits, *In a Major Win for Teachers Unions, California Supreme Court Lets Teacher Tenure Ruling Stand*, L.A. TIMES (Aug. 23 2016), <http://www.latimes.com/local/education/la-me-edu-ca-supreme-court-lets-teacher-tenure-survive-20160819-snap-story.html> [<https://perma.cc/TLZ7-EE6T>]. Boutrous has already attempted to use the Liu dissent to jumpstart a new lawsuit in Connecticut (*Martinez v. Malloy*) to establish a federal fundamental right to education, a concept rejected by the court in the 1973 *Rodriguez* case. See Theodore J. Boutrous, Jr. & Joshua S. Lipshutz, *Poor Children Need a New Brown v. Board of Education*, WALL ST. J. (Aug. 28, 2016), <http://www.wsj.com/articles/poor-children-need-a-new-brown-v-board-of-education-1472421024> [<https://perma.cc/72NX-KFQ9>].

209. Alex Dobuzinskis, *California Legal Setback Fails to Discourage Tenure Opponents*, REUTERS (Aug. 28, 2016), <http://www.reuters.com/article/us-usa-teachers-tenure-idUSKCN1130BZ> [<https://perma.cc/QMM4-ZZMN>].

210. *Id.*

211. *Id.*

divides would have fostered further wasteful litigation, even if the case were to have been successful on the merits.

Finally, the best solution for all parties in *Vergara* should have been to seek a *Williams high-efficiency/moderate-effectiveness* solution through settlement to save on the tremendous costs of inefficient litigation, while reaping the substantive benefits that can result from even moderate attempts at tenure reform. Thus, the ideal solution for future teacher tenure lawsuits is to settle these cases by seeking out preemptive a legislative or initiative-based reform to take advantage of the *policy window* opened by beneficial decisions like Judge Treu's opinion in *Vergara*. By doing so, the court's decision will hopefully empower the breaking of the current legislative logjam, while avoiding the pitfalls of the endless litigation in the *Campaign*.

A. *Political Factors Applied to the Vergara Case*

First, Judge Treu's *Vergara* decision opened a momentary policy window that had and continues to have the potential to lead to lasting change in the area. Numerous commentators have highlighted that *Vergara* has at least temporarily sprung teacher tenure to the forefront of education reform.²¹² Secretary of Education Arne Duncan noted that *Vergara* presented an opportunity to "move[] from the courtroom toward a collaborative process in California that is fair, thoughtful, practical and swift. Every state, every school district needs to have that kind of conversation."²¹³ While criticizing the constitutional underpinnings of the *Vergara* decision, Professor Linda Darling-Hammond noted that the decision was an "opportunity to open up this kind of conversation."²¹⁴ Professor Koski characterized that a benefit of the decision was at least to have a "conversation at the public dialogue level" despite the lack of a substantive policy dialogue on the issue.²¹⁵ Nonetheless, as seen in previous school finance cases, the mere existence of a policy window means nothing if other factors involved in a possible political remedy are not in alignment. Political leadership and interest groups need to have a high degree of alignment to have a higher chance of success as happened in *Rose*.

Political leadership has been a critical factor in determining the ultimate efficiency and effectiveness of a court-ordered remedy. In Kentucky, Governors Martha Layne Collins and Wallace Wilkinson campaigned heavily on the issue of education reform, providing the priming needed for the

212. See, e.g., Duncan, *supra* note 84 ("Today's court decision is a mandate to fix these problems. . . . This decision presents an opportunity for a progressive state with a tradition of innovation to build a new framework for the teaching profession that protects students' rights to equal educational opportunities.").

213. *Id.*

214. *Vergara v. Calif.: Will It Make a Difference for Students (1 of 2)*, *supra* note 91, at 1:00:15.

215. *Id.* at 1:01:42.

Kentucky legislature to effectively pass KERA despite its high cost.²¹⁶ In contrast, in both New Jersey and New York, political shifts from Democratic to Republican control consistently reshaped the school finance litigation remedies process. For example, in New Jersey, Democratic Governor Jim Florio sought to implement the bold QEA bill in 1990, but was quickly replaced by anti-tax Republican Christine Whitman.²¹⁷ More powerfully, in New York, the constant dance between Democrats, like Cuomo and Spitzer, whose interests aligned with *Campaign*, and the introduction of ardent anti-tax Republican Pataki, likely stalled any opportunity for a political settlement. Further, *Williams* shows that the political leadership factor need not depend on the supposed predispositions of the leader's political party. Gray Davis was a Democrat, who by all accounts should have supported furthering the interests of making sure schools had enough chairs and books, among other necessities, to be functional. However, it was Schwarzenegger, a Republican, who performed an about-face and was willing to engage in reform.²¹⁸ One can speculate as to his motives. Perhaps he sought to focus his agenda on less contentious issues; perhaps he viewed *Williams* as a politically infeasible and costly fight. But the point is that a change in political leadership can severely impact the feasibility of an efficient and effective compromise solution.

The politics of *Vergara* and teacher tenure reform are far more complicated than a simple Democratic-Republican binary and reflect deep divisions that would likely imperil any judicially ordered legislative remedy. *Vergara* was particularly intriguing because many liberals painted it as a conservative effort to quash the rights of unions and teachers.²¹⁹ Meanwhile, what I term a *Democratic Divide* has emerged, splitting the traditionally unified party between those who support the traditional teacher unions and tenure (Traditional Democrats) and those who believe in pursuing what some would term the "corporate" education reform agenda (Reformer Democrats).²²⁰

This *Democratic Divide* is likely to create a dearth of political leadership that would have likely doomed any chance of a successful court-ordered

216. Carr & Fuhrman, *supra* note 116, at 156–57 (“Governor Martha Collins was the first governor in Kentucky to talk almost exclusively about education. She argued that improved education would be the key to the future economic development of Kentucky and its survival in the global economy.”).

217. See Hess, *supra* note 124, at 169–70.

218. See Duke Helfand & Cara Mia DiMassa, *State, ACLU Settle Suit on Education*, L.A. TIMES (Aug. 11, 2004), <http://articles.latimes.com/2004/aug/11/local/me-williams11> [<https://perma.cc/YBB2-4KFW>].

219. See, e.g., *About This Case, VERGARA TRIAL*, <http://www.vergaratrial.com/who> [<https://perma.cc/TMT7-FBZ7>] (last visited Feb. 28, 2016) (describing the involvement of the solicitor general under “George W. Bush,” Hedge Funds, etc.).

220. See, e.g., Steven Greenhut, *Vergara Decision Emboldens State GOP*, SAN DIEGO UNION-TRIB. (Mar. 9, 2015), <http://www.sandiegouniontribune.com/news/2015/mar/09/republicans-sacramento-vergara-education-reform> [<https://perma.cc/6Z26-TTG>] (noting the “growing divide within the party”).

resolution to *Vergara*. On one side, Governor Jerry Brown and Attorney General Kamala Harris²²¹ stood ready with the teacher unions to appeal the *Vergara* decision to the California Supreme Court.²²² On the other side, Reformer Democrats viewed the *Vergara* decision quite positively, much to the ire of Traditional Democrats in their own party. While the Traditional Democrats slammed the *Vergara* decision,²²³ Secretary of Education Duncan (and arguably through him President Obama), former chief of the District of Columbia Public Schools Michelle Rhee, and the Center for American Progress issued statements largely in support of the decision.²²⁴ Intriguingly, it was two staunchly liberal Democratic appointees, Justices Goodwin Liu and Mariano Cuéllar who stood up for the plaintiffs in *Vergara* with strongly worded dissents.²²⁵ Many of the Republican appointees on the court voted not to hear the case.²²⁶

The 2014 State Superintendent of Public Instruction race served as a critical litmus test for *Vergara*'s viability and illustrates the increasing importance of the *Democratic Divide*.²²⁷ The traditional Democratic base, including teachers unions, special interest groups, firefighters, and pro-labor groups, backed incumbent Tom Torlakson.²²⁸ Many millionaires including Laurene Powell Jobs and celebrity mayors like Kevin Johnson and Antonio Villaraigosa backed his challenger, Marshall Tuck. The race was seen as vitally important because “the heart of the Democratic Party [was] up for grabs,

221. She is the “Prohibitive Favorite” for the state’s next U.S. Senate seat. See Michael Finnegan & Patrick McGreevy, *Kamala Harris the “Prohibitive Favorite” for Senate, Which Has Drawbacks*, L.A. TIMES (Feb. 25, 2015), <http://www.latimes.com/local/politics/la-me-pol-senate-villaraigosa-20150226-story.html> [<https://perma.cc/9VGP-2VZ6>].

222. See, e.g., Howard Blume, *Gov. Brown Appeals Ruling that Struck Down Teacher Job Protections*, L.A. TIMES (Aug. 30, 2014), <http://www.latimes.com/local/lanow/la-me-ln-governor-appeals-vergara-20140829-story.html> [<https://perma.cc/WG2D-BLBB>].

223. See, e.g., Rothstein, *supra* note 86 (“Attacking tenure as a protection racket for ineffective teachers makes for good headlines. But it does little to close the achievement gap, and risks compounding the problem.”).

224. Valerie Strauss, *Why Many Democrats Have Turned Against Teachers Unions*, WASH. POST (July 5, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/07/05/why-many-democrats-turned-against-teachers-unions> [<https://perma.cc/P4LD-4KLR>].

225. *Vergara v. State*, No. B258589, 2016 WL 4443590, at *17 (Cal. Ct. App. Aug. 22, 2016).

226. *California Supreme Court Declines to Hear Vergara v. California Appeal*, STUDENTS MATTER (Aug. 22, 2016), http://studentsmatter.org/wp-content/uploads/2016/08/SM_Release_Vergara-CA-Supreme-Court-Petition-Denied_FINAL.pdf [<https://perma.cc/XL3Z-YSEV>].

227. See, e.g., Sherry Bebitch & Douglas Jeffe, *The Most Expensive Political Contest in California Is for an Office Nobody’s Heard of*, REUTERS (Nov. 3, 2014), <http://blogs.reuters.com/great-debate/2014/11/03/the-most-expensive-political-contest-in-california-is-for-an-office-nobodys-heard-of> [<https://perma.cc/VU6W-N8L6>]. The state’s teachers’ unions spent millions supporting the Democratic incumbent Tom Torlakson. Fellow Democrat Marshall Tuck, a former charter school executive, was backed by the “reform coalition” including civil rights organizations, parents’ groups, and groups in Silicon Valley.

228. Matt Fleming, *Tuck Versus Torlakson for State Superintendent Is a Struggle for Democrats’ Hearts*, L.A. WEEKLY (Oct. 15, 2014), <http://www.laweekly.com/news/tuck-versus-torlakson-for-state-superintendent-is-a-struggle-for-democrats-hearts-5146173> [<https://perma.cc/G7XL-FVE5>].

making this a bit of a big deal.”²²⁹ Torlakson initiated the *Vergara* appeal and vowed to continue the fight, while Tuck would have dropped the *Vergara* appeal in favor of substantive tenure reforms. In many ways, the usually low-key superintendent race quickly became a referendum on *Vergara* with an astonishing \$20 million in outside funding spent on the race. Tuck used *Vergara* “like a bludgeon,” seeking to convince voters to get behind the decision.²³⁰ The ultimate result was somewhat close with Torlakson winning with 53 percent of the vote and Tuck with 47 percent.²³¹

Thus, current politics show far more division amongst the political leadership and indicate a likelihood that a court-ordered *Vergara* remedy would have been more similar to the New York and New Jersey situations of political instability, rather than Kentucky’s unified stand for education reform. Here, it seems unlikely that Jerry Brown would have performed an about-face on his *Vergara* position. However, *Williams* does show that a future leader of California could quickly settle such a situation if political motivations are present. As will be seen, conflict between political leadership motivations and those of major interest groups complicates court-ordered remedies and decreases both the efficiency and effectiveness of possible reforms.

Secondly, the importance of interest groups seems to also affect the success of a court-ordered remedy. For example, Kentucky’s Pritchard Committee worked hard to prime the Kentucky legislature for the relatively successful KERA remedy. In contrast, in New Jersey, the New Jersey Education Association (NJEA) actively sought to crumble Governor Florio’s attempts to pass the QEA bill because of its opposition to the way retirement costs would be allocated. Similarly, in New York, the juggernaut that was the *Campaign* with its multimillion dollar budgets and white shoe law firm support resulted in ultimately zero substantive change to the school finance system. Thus, one hypothesis might be that when interest groups conflict heavily with political leadership changes (as in New York with the change from Cuomo to Pataki and to Giuliani), a court-ordered remedy could be effectively nullified by the political realities of the situation.

The *Vergara* case acutely exemplifies the impact of a battleground of interest groups likely to create a standstill even greater than in New Jersey or New York. Similar to the NJEA’s opposition to the QEA (which actually did meet most of its members’ interests in that school funding would increase), the California Teachers Association and California Federation of Teachers have served as the critical intervenors in the case, vehemently opposing *Vergara* as a

229. *Id.*

230. Alexei Koseff, *Torlakson Declares Victory over Tuck for California Schools Chief*, SACRAMENTO BEE (Nov. 4, 2014), <http://www.sacbee.com/news/politics-government/election/article3569082.html> [<https://perma.cc/W2QB-DTLS>].

231. *Id.*

challenge to the rights of teachers.²³² Meanwhile, Students Matter, the nonprofit spearheading support for the lawsuit, is serving a modern-day Pritchard Committee or *Campaign* role in leading the charge against teacher tenure. Unlike in Kentucky, where there were shared policy goals between interest groups and political leadership, in California, the Traditional Democrats and teacher unions have vigorously criticized Students Matter for its ties to large Silicon Valley money, conservative law firms and litigators (Gibson, Dunn & Crutcher and Ted Olsen), and its hedge fund base.²³³ Notably and in contrast to the Pritchard Committee's successful shepherding of KERA through the Kentucky legislature, any *Vergara* remedy would likely have been on a New York *low-efficiency/no-effectiveness* pathway because Students Matter was on a collision path with further litigation in direct conflict with the teacher unions.

Thus, even if *Vergara* had resulted in a court ordered remedy, the political factors that have mattered in past school finance cases show a likelihood of low-efficiency endless litigation and ineffective legislative reform. As such, plaintiffs and defendants in *Vergara* should have had incentives to follow a *Williams high-efficiency/moderate-effectiveness* model by seeking moderate tenure reform through settlement.

I have argued that a lack of unity in political leadership, exacerbated by a *Democratic Divide*, and conflicts between interest groups would likely have lead to a New York-style cycle of endless litigation even if *Vergara* were successful on the merits. Thus, the proper solution in future teacher tenure cases is to seek the same solution that the plaintiffs eventually sought in New York: attempt to extrajudicially solve the tenure issue through moderate, compromise reforms. By doing so, both the plaintiffs in Students Matter and the defendant state of California and its respective teacher unions could actually and effectively take advantage of the ever-narrowing policy window on the issue. I argue that, as a matter of policy, such a settlement could occur through (1) legislative change compelled by the pressure of the *Vergara* decision or (2) reviving a statewide initiative around teacher tenure reform. However, I also note in Part IV.E the effect of plaintiffs' loss on appeal, which would have construed the case to be more similar to *Reed* than *Williams*.

IV.

TOWARD A *WILLIAMS* HIGH-EFFICIENCY/MODERATE-EFFECTIVENESS SETTLEMENT

The immediate aftermath of the *Vergara* trial court decision created a policy window for compromise legislative reform. Already, some legislative

232. See, e.g., *Your Professional Rights Are on Trial*, CAL. TCHR. ASS'N (Dec. 2013), <http://www.cta.org/Professional-Development/Publications/2013/12/December-2013-January-2014/Vergara.aspx> [<https://perma.cc/6AAV-NJXQ>].

233. See generally *About This Case*, *supra* note 219.

changes have either been passed or are pending based on the momentum from the *Vergara* litigation. Arguably, implementing a legislative settlement would have been the best strategy and avoids the pitfalls of the *Campaign* and its twenty-year litigation story. It is my hope that *Vergara* will not be a missed opportunity for substantive change to a broken system.²³⁴ As former superintendent Gary Bloom stated in response to a *Time* cover criticizing “Rotten Apple” teachers, “It is too bad that it has taken a court challenge to shake this tree, but I am thankful that the tree has been shaken.”²³⁵ Similarly, Secretary of Education Arne Duncan stated that *Vergara* “presents an opportunity for a progressive State with a tradition of innovation to build a new framework for the teaching profession My hope is that today’s decision moves from the courtroom toward a collaborative process in California that is fair, thoughtful, practical and swift.”²³⁶

In future teacher tenure cases, plaintiffs must convince defendants of their mutual incentives to settle. First, one of the most convincing reasons to settle would be to save on substantial court costs for both sides, especially in light of the millions of dollars and tens of thousands of legal billable hours spent on *Campaign* with no efficient result to show for it.²³⁷ Notably, as a result of the *Vergara* case, Gibson, Dunn & Crutcher was awarded \$390,000 in attorneys’ fees from the state for only the first trial-court phase of the case, a fact that underscores both the tremendous costs of potentially ineffective litigation for plaintiffs and the potential for forced attorneys’ fees for the state.²³⁸ Further, a low-efficiency, drawn-out litigation battle benefits neither the plaintiffs who seek changes to tenure, nor defendants who may want to promote other aspects of California’s education agenda like the new Local Control Funding Formula or Common Core, but are bogged down by their defense in *Vergara*. In addition, defendants may have an interest in settling to avoid a landmark California Supreme Court decision (especially given the pro-plaintiff leanings of both Justices Liu and Cuéllar). Most importantly, there remains a moral public policy objection to California’s teacher tenure laws where state leaders should be morally compelled to recognize the tremendous problems created by the state’s broken tenure system.²³⁹ Defendants and plaintiffs alike share a

234. The recent appellate decision and the California Supreme Court’s refusal to hear the case makes me think that it will be such a missed significant opportunity.

235. Gary Bloom, *Former California Superintendent Responds to TIME’s Cover*, *TIME* (Oct. 27, 2014), <http://time.com/3541399/superintendent-to-times-cover> [<https://perma.cc/A2UX-K5K5>].

236. Duncan, *supra* note 84.

237. See Stern, *supra* note 162, at 14 (describing the tremendous 33,000 hours of pro bono services of Simpson Thacher, on the case over eight years, an excessive amount of time).

238. See Daniel Siegal, *Gibson Dunn Attys Win Costs in Calif. Teacher Tenure Row*, *LAW 360* (Feb. 2, 2015), <http://www.law360.com/articles/784950/calif-teacher-tenure-laws-saved-by-appeal> [<https://perma.cc/8RHB-9YYF>].

239. See *Vergara v. State*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. 2014) (describing the tremendous harms that come from California’s system of tenure). *But see, e.g.*, Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 *HOFSTRA LAB. & EMP. L.J.* 489

mutual interest in ensuring that California's teacher tenure laws are able to achieve at least moderate reforms in line with similar reforms recently made throughout the country.

An effective legislative reform must address the three main challenged areas in *Vergara* that were found unconstitutional by the trial court. These are (1) the Permanent Employee Statute or the length of teacher tenure; (2) the Dismissal Statutes; and (3) the LIFO system. The easiest and most realistic possibility for success in future cases would be for Reformer Democrats to ally with Republicans, which would hopefully compel the pressure needed to force moderate changes by Traditional Democrats and preemptively resolve the teacher tenure issues.

A. *Permanent Employment Statute*

Reform of the Permanent Employment Statute will likely require a change in time period for teacher tenure. California's two-year system was particularly egregious to the trial court because "32 states have a three year period, and nine states have four or five." Only five "outlier" states have a period of two years or less. Four states have no tenure at all.²⁴⁰ On February 27, 2015, Republican Assembly member Rocky Chavez introduced Assembly Bill (AB) 1248, seeking to reform California Education Code section 44929.21 and impose a three-year minimum for teachers to acquire tenure that is contingent on achieving three consecutive "effective" ratings.²⁴¹ Teachers with existing tenure could lose their tenured status with two consecutive "ineffective" ratings.²⁴² In June 2016, Assemblywoman Susan Bonilla (D-Concord), introduced a similar bill AB 934 that attempted to lengthen the tenure provisions from eighteen months to three years.²⁴³ The bill failed to move beyond the Education Committee, obtaining only two out of the nine votes.²⁴⁴

(2013) (describing the arguments for maintaining tenure systems and misconceptions about tenure in public opinion).

240. *Vergara*, 2014 WL 6478415, at *5.

241. AB 1248, 2015–2016 Leg., Reg. Sess. (Cal. 2015). AB 1248 was rejected by the state Education Committee. U-T San Diego, *State Panel Blocks Teacher Evaluation, Tenure Bills*, SAN DIEGO UNION-TRIB. (Apr. 30, 2015), <http://www.sandiegouniontribune.com/news/2015/apr/30/state-panel-blocks-teacher-evaluation-tenure-bills> [<https://perma.cc/35BV-Z8BL>].

242. U-T San Diego, *supra* note 241.

243. *California Legislature Fights Education Reform the State Needs*, S.F. CHRON. (June 26, 2016), <http://www.sfchronicle.com/opinion/editorials/article/California-Legislature-fights-education-reform-8325996.php> [<https://perma.cc/L5XK-34QB>].

244. John Fensterwald, *Bill Extending Teacher Probation Dies in Committee*, EDSOURCE (June 29, 2016), <https://edsources.org/2016/bill-extending-teacher-probation-fails-to-move-forward/566428> [<https://perma.cc/T2KS-YN2K>]. Assemblywoman Bonilla lamented the failure of her bill stating that, "It is frustrating when two opposing sides are not only unwilling to compromise, but are vehemently reluctant to work together to achieve the mutual goal of providing a high quality education for all California students." *Id.* The failure of AB 934 illustrates many of the issues described in this Note, including the unique power held by special interest groups and the inability of the legislature to pass substantive education reform without the impetus of a court-ordered remedy.

These proposals to extend teacher tenure probation periods were consistent with developments nationwide. For example, Governor Andrew Cuomo's recent April 2015 initiative has forced an increase in the New York tenure statute from three years to a four-year probationary period contingent on receiving scores of "effective" for three or more years.²⁴⁵ Other states such as Tennessee and New Hampshire have similarly followed suit increasing pre-tenure probationary periods from three to five years.²⁴⁶ Thus, the national reforms serve as a guidepost pointing to an increase from two years to perhaps three or four year tenure period as an effective, moderate reform in the state. While these attempts at probationary period reform have already been shot down, there remains hope—despite the loss in *Vergara*—that such plans could serve as a blueprint for a moderate teacher tenure settlement in the future to achieve a *Williams high-efficiency/moderate-effectiveness* situation in future teacher tenure cases.²⁴⁷

B. Dismissal Statutes

Governor Jerry Brown has already passed and signed the first direct legislative response to *Vergara*.²⁴⁸ AB 215, passed on June 25, 2014, fast tracks the firing of teachers accused of the most "egregious misconduct" such as sex offenses, controlled substances, and child abuse.²⁴⁹ While this bill is a result of *Vergara*, it is a limited attempt at reform that does not address the larger issue of grossly ineffective teachers who do not commit egregious misconduct. Nonetheless, AB 215 serves as an example of a bill directly compelled by the pressure stemming from *Vergara*.

The Dismissal Statutes may possibly be the least politically feasible change between the three primary areas. The post-*Vergara* March 2015 Republican reform package, "Claim the Future: Strengthening the Middle Class," provided for substantive reforms in teacher tenure length (AB 1248) and teacher evaluation (AB 1078). The reform package also allowed for the Repeal of LIFO (AB 1044).²⁵⁰ Given the emboldening of the state Republicans

245. See Stephen Sawchuk, *N.Y. Budget Accord Seeks to Tighten Rules on Teacher Quality*, EDUC. WEEK (Apr. 15, 2015), <http://www.edweek.org/ew/articles/2015/04/15/ny-budget-accord-seeks-to-tighten-rules.html> [https://perma.cc/9PEM-ZHNY].

246. McNeal, *supra* note 239 (describing similar tenure efforts in Nevada, Tennessee, and New Hampshire).

247. See Jeremy B. White, *Democrats Kill Republican Bills on Teacher Tenure, Firing*, SACRAMENTO BEE (Apr. 29, 2015), <http://www.sacbee.com/news/politics-government/capitol-alert/article19903074.html> [https://perma.cc/VQ9K-QNM6].

248. See AB 215, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

249. *Id.*; see also Sarah Ferris, *California Bill Would Fast-Track Firings for Teachers Accused of Misconduct*, WASH. POST (June 18, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/06/18/california-bill-would-fast-track-firings-for-teachers-accused-of-misconduct> [https://perma.cc/UTG2-JFP6].

250. CAL. ASSEMBLY REPUBLICAN CAUCUS, CLAIM THE FUTURE: STRENGTHENING THE MIDDLE CLASS (Mar. 4, 2015), <https://www.assemblygop.com/sites/default/files/>

post-*Vergara*, it is intriguing that they did not seek, in their reform package, to even touch the Dismissal Statutes that affect currently ineffective teachers. Instead, they opted instead to focus on areas of lower-hanging fruit that are out-of-line with norms of other states like the probationary tenure period and LIFO.²⁵¹ Perhaps extensive changes to the due process and dismissal procedures would have been too politically risky given the already tense climate post-*Vergara*.

C. *LIFO (Last-In-First-Out) Firing in an Economic Crisis*

Judge Treu also provided not-so-subtle suggestions to the legislature on what to do with the LIFO statute. Twenty states provide that seniority need be only one—not the only—factor in consideration when layoffs occur.²⁵² Eighteen states and the District of Columbia leave layoffs entirely to district discretion. Two states do not consider seniority at all. Another ten states follow California’s model and consider only seniority. Thus, the existing layoff procedures for teachers in other states suggest that reform of the LIFO statute is entirely feasible and should draw on the models created in the other states.

AB 1044, introduced by Assemblywoman Catharine Baker, a moderate Bay Area Republican, sought to overturn the existing RIF laws requiring termination by seniority.²⁵³ The bill would overturn the existing LIFO statute and “permit a school district to deviate from using the evaluation rating of certificated employees as a significant factor in determining the order of dismissal of certificated employees if the school district demonstrates specified conditions” (though it would only apply after existing collective bargaining agreements expired).²⁵⁴ Arguably, this bill can be seen as legislating *Vergara* and is an example of the potential reform that needs to happen to avoid the waste, cost, and inefficiency of a drawn-out litigation cycle in future teacher tenure cases.

districts/assemblygop.com/files/Great-Schools-4-CA-White-Paper.pdf [https://perma.cc/DQN5-EWMM]. “Democrats” in the assembly as of April 2015 have already shut down these bills. See, e.g., White, *supra* note 247 (“killing” teacher tenure (AB 1248) and LIFO Repeal (AB 1044), while relegating the Teacher Evaluation Bill to “interim study,” effectively stalling its implementation).

251. See Greenhut, *supra* note 220.

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

253. See AB 1044, 2015–2016 Leg. Reg. Sess. (Cal. 2015). In 2016, California Assembly Member Susan Bonilla attempted to craft a compromise bill to resolve the teacher tenure issue. However, that bill, titled AB 934, was amended to keep in place the LIFO system. The bill, even in this form, was defeated in the state Senate Education Committee, drawing opposition from both the powerful teachers unions and education reformers. Sarah Favot, *Teacher Tenure Bill Defeated in Committee*, LA SCH. REP. (June 29, 2016), <http://laschoolreport.com/teacher-tenure-bill-defeated-in-committee> [https://perma.cc/2HY5-QAVT].

254. AB 1044.

D. *The Legacy of Vergara: Reform by Initiative*

One final method of accomplishing reform might be to go directly to the people and utilize California's historic initiative system to avoid the pitfalls of politics in the legislative system. As such, a high-minded settlement opportunity might be simply to let the voters decide on these issues and effectively and efficiently render a conclusion to the *Vergara* litigation.

Direct precedent exists for tenure reform through the initiative process, though it was unsuccessful. In 2005, Governor Schwarzenegger introduced Proposition 74 seeking to increase the probationary time for teacher tenure from two to five years.²⁵⁵ The proposition also pushed to allow administrators to fire teachers who receive "ineffective" evaluations without a ninety-day grace period for improvement or a comprehensive appeals process. Opposed by the CTA and other unions that at the time were providing millions of dollars in advertising spending,²⁵⁶ the measure was defeated by a 55.2 percent No vote to a 44.8 percent Yes vote.²⁵⁷

I argue that a revived Proposition 74 (perhaps in a more moderate capacity) could have been an effective compromise solution to the *Vergara* case and one that is much more likely to succeed today than in 2005. A recent poll by the University of Southern California's Dornsife College of Letters, Arts and Sciences, and the *Los Angeles Times* shows that 38 percent of respondents think that teacher tenure should not be granted at all and that more than one-third believe only in teacher tenure being granted only after a probationary period of four to ten years.²⁵⁸ Combined with the relatively close election results in the nonpresidential election year in 2014 for the state superintendent, these results show that California voters are inching at least toward a stronger desire for teacher tenure reform.

E. *The Effect of Plaintiffs' Loss on Appeal*

Much of the hope for a *Williams*-type settlement was contingent on a plaintiff victory on appeal to the California Supreme Court. However, with the April 4, 2016 appellate reversal of *Vergara*, settlement leverage swung in the defendants' favor. Consequently, the appellate reversal suggested that any possibility of settlement was trending toward a *Reed*-type situation at best

255. *Proposition 74: Public School Teachers, Waiting Period for Permanent Status. Dismissal. Initiative.*, CAL. VOTER FOUND. (July 6, 2005), <http://www.calvoter.org/voter/elections/2005/special/props/prop74.html> [<https://perma.cc/U5MQ-9M6H>].

256. Michael Janofsky, *In California, a Fierce Battle Is Joined over Teachers*, N.Y. TIMES (Oct. 20, 2005), <http://www.nytimes.com/2005/10/20/us/in-california-a-fierce-battle-is-joined-over-teachers.html> [<https://perma.cc/B9FN-EH4T>].

257. Election Results, *Proposition 74*, INST. GOVERNMENTAL STUD. BERKELEY, <https://igs.berkeley.edu/library/elections/proposition-74> [<https://perma.cc/M5XG-YUXJ>].

258. Caroline Porter, *Poll: California Residents Support Performance Metrics over Teacher Tenure*, WALL ST. J. (Apr. 12, 2015), <http://www.wsj.com/articles/poll-california-residents-support-job-performance-over-teacher-tenure-1428884268> [<https://perma.cc/5DV9-F7FE>].

(before the supreme court refused to grant review). *Reed* suggests that plaintiffs' loss on appeal strongly devastates any leverage to compel a *Williams high-efficiency/moderate-effectiveness* settlement. Notably, while *Reed* and *Williams* share a high efficiency status as settlements reached within a few years of litigation, the plaintiffs in *Reed* did not obtain their original goal of a LIFO injunction, settling instead for marginal school finance improvements and professional development budgets—essentially a low-effectiveness solution. Plaintiffs' loss on appeal, like in *Reed* where UTLA was able to overturn the ACLU's prior successful settlement with LAUSD critically hurt a chance at meaningful moderate reform. Thus, plaintiffs in future teacher tenure cases should be wary of accepting a *Reed*-type settlement after a loss on appeal because its stature as a *high-efficiency/low-effectiveness* solution would have a limited systemic impact on education reform.

F. *The Legacy of Vergara and the future of Teacher Tenure Reform*

Arguably, despite the denial of the petition for review of *Vergara* in the California Supreme Court, there may still be a policy window created by the trial court's initial order that can still result in moderate reform. For example, Marshall Tuck, who failed in his candidacy for state superintendent, stated that *Vergara* had created momentum for moderate reform in the California legislature.²⁵⁹ Further after the denial of review, the *Los Angeles Times* editorial board issued a vehement editorial titled "Now that the *Vergara* case is over let's reform teacher tenure laws," arguing that while the Supreme Court made the right call that the Challenged Statutes were not unconstitutional, the state's tenure laws were still problematic and required legislative change.²⁶⁰ The *Los Angeles Times* editorial board stated that California's teacher tenure laws did "tend to protect the worst teachers at the expense of students" and that the legislature was too "obliging to the desires of the teachers unions" to reform these flawed laws.²⁶¹

The post-*Vergara* world suggests several possibilities. First, legislative change may, but most likely will not, occur merely because of the policy window created by the *Vergara* case. It is unlikely because teachers unions continue to hold disproportionate power in Sacramento where they remain one of the state's most powerful lobbying groups.²⁶² Second, future teacher tenure cases may be brought in California that may actually succeed to a judicially ordered remedy before the California Supreme Court. Third, teacher tenure

259. Sarah Favot, *With Vergara's Demise, Heat's on California Legislature to Take up Teacher Tenure*, L.A. SCHOOL REPORT (Aug. 23, 2016), <http://laschoolreport.com/with-vergaras-death-heats-on-california-legislature-to-take-up-teacher-tenure> [https://perma.cc/2RZK-WRM8].

260. Editorial Board, *Now that the Vergara Case Is over, Let's Reform Teacher Tenure Laws*, L.A. TIMES (Aug. 24, 2016), <http://www.latimes.com/opinion/editorials/la-ed-teacher-tenure-ruling-20160823-snap-story.html> [https://perma.cc/75U2-WK92].

261. *Id.*

262. Favot, *supra* note 259.

lawsuits are still active nationwide in New York, Minnesota, and likely will be filed in other states. Plaintiffs in these future teacher tenure cases must take note of the lessons of school finance reform that even a victory at a state's highest court is not a final victory. Plaintiffs in these future teacher tenure cases must also evaluate the efficiency and effectiveness of future judicially ordered legislative remedies to optimize the best possible outcome for their cause.

CONCLUSION

Overall, the *Vergara* trial court decision opened a brief policy window where the best solution would have been for plaintiffs and defendants to create a *Williams* situation of *high-efficiency/moderate-effectiveness* reform. The history of school finance teaches that an absence of unified political leadership with the respective interest groups and a lack of *political priming* on an issue can result in *low-efficiency/no-effectiveness* thirty-year litigation battles that achieve little to no substantive results. Instead of legislative success as in Kentucky's *Rose* and its legislative response through KERA, this Note argues that even a successful *Vergara* litigation would likely only have lead to an inefficient cycle of drawn out litigation similar to *Abbott* and the *Campaign*. This Note argues that despite difficulties, both sides of this issue would have benefitted from seeking moderate extrajudicial reforms to settle the *Vergara* case and achieve the substantive desired results, without years of pointless litigation and the resulting millions of dollars in litigation costs and fatigue. Nonetheless, a unique policy window has been crafted where future California and national teacher tenure cases could be brought on a similar theory to *Vergara*. In those cases, I hope that the legislative response to judicially ordered remedies can be both an effective and efficient reform that greatly benefits the children of California.

