
THE MISGUIDED APPEAL OF A MINIMALLY ADEQUATE EDUCATION

Although few state constitutions explicitly guarantee an education of some minimum quality, a number of state courts have interpreted generic language in their constitutions as providing such a right.¹ What constitutes a “minimally adequate education” and what role courts should play in determining the contours of minimum adequacy continue to be matters of considerable disagreement.² Principles of institutional competency and separation of powers counsel in favor of judicial restraint,³ especially given the politically accountable branches’ traditional stewardship of public education.⁴ At the same time, the judiciary’s primary function is, of course, to interpret and give meaning to the law, including constitutional provisions.⁵

This debate is hardly new.⁶ Yet it has taken on an added wrinkle in recent years, as individuals and organizations have increasingly turned to constitutional litigation to press matters of substantive education policy.⁷ Although the theory of a minimally adequate education initially emerged in the context of school funding,⁸ it has since been extended to challenge policies ranging from teacher tenure⁹ to restrictions

¹ See, e.g., *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 227 (Conn. 2010); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212–13 (Ky. 1989); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995).

² Compare, e.g., Editorial, *A Holistic Ruling on Broken Schools*, N.Y. TIMES (Sept. 12, 2016), <http://www.nytimes.com/2016/09/12/opinion/a-holistic-ruling-on-broken-schools.html> [<https://perma.cc/T9CE-HG8F>], with, e.g., Noah Feldman, *A Connecticut Judge Reaches Too Far*, BLOOMBERG VIEW (Sept. 8, 2016, 2:27 PM), <https://www.bloomberg.com/view/articles/2016-09-08/a-connecticut-judge-reaches-too-far> [<http://perma.cc/45FS-E9Q9>].

³ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43 (1973).

⁴ See, e.g., ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS* 100 (2009).

⁵ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁶ See, e.g., William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923, 930–31 (2011) (reviewing HANUSHEK & LINDSETH, *supra* note 4, and MICHAEL A. REBELL, *COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* (2009)) (noting the longstanding “white-hot debate over ‘judicial activism’ in educational policymaking and practice,” *id.* at 930).

⁷ See Andrew J. Rotherham, *The Classroom in the Courtroom*, U.S. NEWS & WORLD REP. (Apr. 22, 2016, 11:30 AM), <http://www.usnews.com/opinion/articles/2016-04-22/why-to-expect-more-education-reform-lawsuits-after-friedrichs-and-vergara> [<http://perma.cc/AM29-9KUM>] (discussing a wave of “new suits . . . not only about fundamental rights but also about sorting out complicated and hotly debated policy questions”).

⁸ See HANUSHEK & LINDSETH, *supra* note 4, at 107–17.

⁹ See, e.g., *Wright Plaintiffs’ Amended Complaint for Declaratory and Injunctive Relief* at 23, *Dauids v. State*, No. 101105-2014 (N.Y. Sup. Ct. Nov. 13, 2014); *Verified Amended Complaint* at 15–16, *Dauids v. State*, No. 101105/14 (N.Y. Sup. Ct. July 24, 2014).

on charter school expansion¹⁰ — marking, perhaps, a new “wave” of education litigation.¹¹

Some have hailed these suits as potential “game-changer[s]” in the fight for equal educational opportunity.¹² However, there is reason to think that such enthusiasm is misplaced. This Note argues that the obvious appeal of a more expansive right to a minimally adequate education is outweighed by its capacity to short-circuit a wider range of executive and legislative policy choices. And though the recognition and enforcement of such a right may clear a new pathway for systemic change in public education, it does so with too blunt of an instrument for the careful calibration that effective school reform requires.

Proceeding in five parts, this Note begins by charting the federal and state constitutional theories that have historically undergirded education-reform suits. After Part II examines recent adequacy suits in California, New York, and Connecticut, Part III revisits the considerations that have long animated concerns about judicial intervention in matters of substantive education policy, and discusses how such concerns are only more pressing in the broader contexts to which adequacy is now being applied. Part IV then explores how the California Supreme Court’s implicit refusal to recognize the right to a minimally adequate education contemplates an appropriately narrow role for courts in public education. Part V concludes by noting that aggressive judicial intervention in education may actually make schools worse.

I. CONSTITUTIONAL THEORIES IN EDUCATION LITIGATION

Modern constitutional litigation regarding matters of education policy has tended to rely on one of three legal theories. The first theory — that federal equal protection principles require states to treat schools equally across districts¹³ — was largely abandoned after the

¹⁰ See Class Action Complaint at 2, *Doe v. Peyser*, No. 15-2788-F (Mass. Super. Ct. Sept. 15, 2015).

¹¹ As will be discussed further in Part I, scholars have identified three “waves” of education litigation marked by different legal theories: (1) equal protection under the Federal Constitution, (2) equal protection under state constitutions, and (3) minimal educational adequacy under state constitutions. See, e.g., John Dinan, *School Finance Litigation: The Third Wave Recedes, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION* 96, 96–98 (Joshua M. Dunn & Martin R. West eds., 2009); Richard Briffault, *Adding Adequacy to Equity: The Evolving Legal Theory of School Finance Reform* 1 (Columbia Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 06-111, 2006), <http://ssrn.com/abstract=906145> [<http://perma.cc/BL46-DLUP>].

¹² Herb Rosenthal & Jim Finley, *Historic CCJEF v. Rell Decision a Game-Changer*, CONN. TOWN & CITY, Oct. 2016, at 12; see also Mark Pazniokas & Keith M. Phaneuf, *Judge Strikes Down State Education Aid Choices as ‘Irrational,’* CONN. MIRROR (Sept. 7, 2016), <http://ctmirror.org/2016/09/07/judge-strikes-down-state-education-aid-choices-as-irrational> [<http://perma.cc/UFJ3-WZUZ>].

¹³ See HANUSHEK & LINDSETH, *supra* note 4, at 88–89; Briffault, *supra* note 11, at 1.

Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.¹⁴ There, the Court rejected an equal protection challenge to Texas's school-finance system brought by Mexican American parents whose children attended schools in districts with relatively low property tax bases.¹⁵ This wealth gap translated into starkly disparate school funding: on one end of the spectrum, the Edgewood Independent School District (composed of 90% Mexican American and 6% black students) spent \$356 per pupil, whereas the Alamo Heights Independent School District (composed of 18% Mexican American and less than 1% black students) spent \$594 per pupil.¹⁶

Despite acknowledging "the grave significance of education both to the individual and to our society,"¹⁷ the Court held that education was not a fundamental right for the purposes of equal protection.¹⁸ Specifically, the Court rejected the plaintiffs' theory that "education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote."¹⁹ In so doing, the Court concluded that the state's funding scheme did "not operate to the peculiar disadvantage of any suspect class," but rather "against a large, diverse, and amorphous class,"²⁰ and that "the individual rights to speak and to vote . . . are not values to be implemented by judicial intrusion into otherwise legitimate state activities."²¹ The Court also observed, as a general matter, that it may not be appropriate for it to intervene, as the Justices "lack[ed] . . . specialized knowledge and experience" to decide "persistent and difficult questions of educational policy."²²

Around the same time, a second theory, grounded in state constitutions, began to emerge.²³ Unlike the Federal Constitution,²⁴ the constitutions of all fifty states contain some reference to the state's obligation to provide an education to its citizens.²⁵ Thus, rather than trying to

¹⁴ 411 U.S. 1 (1973).

¹⁵ *See id.* at 4-6.

¹⁶ *See id.* at 12-13.

¹⁷ *Id.* at 30 (quoting *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1971)).

¹⁸ *See id.* at 37. Earlier in its opinion, the Court declined to find that wealth — or, perhaps more appropriately, the lack thereof — constituted a suspect classification. *See id.* at 28.

¹⁹ *Id.* at 35.

²⁰ *Id.* at 28.

²¹ *Id.* at 36.

²² *Id.* at 42; *see also id.* ("Education . . . presents a myriad of 'intractable economic, social, and even philosophical problems.'" (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970))).

²³ *See HANUSHEK & LINDSETH, supra* note 4, at 90-95; Briffault, *supra* note 11, at 1.

²⁴ *See, e.g., Rodriguez*, 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.")

²⁵ Some state constitutions refer generally to the state's obligation to provide, for example, "free common schools" or "free public schools." *See* CONN. CONST. art. VIII, § 1; IDAHO

bootstrap a constitutional right to education to, for example, the First Amendment or the fundamental right to vote, this theory draws upon explicit state constitutional language regarding education to suggest that education independently constitutes a fundamental interest subject to equal protection. Proponents of this approach secured favorable rulings in suits challenging school-finance schemes in California, Connecticut, West Virginia, and elsewhere.²⁶

More recently, litigants have turned to a third theory²⁷: that state constitutional provisions establish the right not simply to an education, but rather to an education of some minimum quality.²⁸ That is, litigants have argued that there must be some level short of declining to provide for education altogether at which a state fails to fulfill its constitutional obligation.²⁹ Thus, this approach requires courts to “decide what level of education is required under . . . state constitutions, whether the state provides such an education, and, if not, what needs to be done to remedy the situation.”³⁰ Suits arising under this theory have also tended to involve challenges to state systems for school funding, and nearly all of the state supreme courts that have reached the merits of such claims have determined that “the current level of resources that the states are providing has been . . . deficient.”³¹

CONST. art. IX, § 1; MICH. CONST. art. VIII, § 2; MISS. CONST. art. 8, § 201; MO. CONST. art. IX, § 1(a); N.Y. CONST. art. XI, § 1; OKLA. CONST. art. I, § 5; *id.* art. XIII, § 1; TENN. CONST. art. XI, § 12. Other constitutions refer to a “uniform system” of schools that may further have to be “general” or “thorough.” See COLO. CONST. art. IX, § 2; IND. CONST. art. 8, § 1; MINN. CONST. art. XIII, § 1; NEV. CONST. art. XI, § 2; N.M. CONST. art. XII, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; S.D. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; WYO. CONST. art. 7, § 1. Still other constitutions discuss an “efficient system” of schools that may also have to be “general” or “thorough.” See DEL. CONST. art. X, § 1; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.J. CONST. art. VIII, § IV; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; W. VA. CONST. art. XII, § 1. In contrast, Georgia’s constitution refers to an “adequate public education,” GA. CONST. art. VIII, § 1, while several other constitutions refer to “quality” or even “high quality,” see FLA. CONST. art. IX, § 1; ILL. CONST. art. X, § 1; MONT. CONST. art. X, § 1(3); OR. CONST. art. VIII, § 8; VA. CONST. art. VIII, §§ 1–2.

²⁶ See, e.g., *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1977); *Horton v. Meskill*, 376 A.2d 359, 373–74 (Conn. 1977); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979).

²⁷ See HANUSHEK & LINDSETH, *supra* note 4, at 91–95 (discussing how problems with equity-based litigation led to a shift toward adequacy-based suits).

²⁸ Some commentators have located a similar right in provisions of the U.S. Constitution. See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006); cf. Erwin Chemerinsky, *Remedying Separate and Unequal: Is It Possible to Create Equal Educational Opportunity?*, in THE ENDURING LEGACY OF RODRIGUEZ 249, 258–59 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015).

²⁹ See, e.g., *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 227 (Conn. 2010); *Montoy v. State*, 62 P.3d 228, 235 (Kan. 2003); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212–13 (Ky. 1989); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995).

³⁰ HANUSHEK & LINDSETH, *supra* note 4, at 95.

³¹ See REBELL, *supra* note 6, at 22.

II. BROADENING THE SCOPE OF MINIMUM ADEQUACY: THE “FOURTH WAVE” OF EDUCATION LITIGATION?

Although theories sounding in equity and adequacy may overlap in substantial part — adequacy suits often discuss school quality in terms of equity, and vice versa³² — it is clear that litigants have increasingly argued that there is some minimum bar of educational quality that schools are not achieving.³³ In recent years, this principle has been expanded beyond the context of school funding to encompass broader and more involved matters of education policy. Couched uniquely in terms of individual student rights, these suits nonetheless spin a familiar narrative³⁴ of incompetence and intransigence on the parts of those tasked with running our nation’s public schools.³⁵ Although the advent of this trend may strike some early proponents of the adequacy theory as “misguided,”³⁶ it should hardly have come as a surprise: the ill-defined notion of a minimally adequate education naturally invites such far-reaching legal challenges.

A. Vergara v. State

In *Vergara v. State*,³⁷ a group of nine plaintiffs — backed by the

³² See Briffault, *supra* note 11, at 5 (“Not only is proof of inadequacy often grounded on evidence of inequality, but the judicial definition of adequacy often incorporates equality concerns.”). Litigants also bring claims sounding in both equal protection and adequacy. See, e.g., *Abbott v. Burke*, 575 A.2d 359, 410 (N.J. 1990) (concluding that the remedy for a violation of the state constitutional right to a thorough and efficient education “substantially mitigates plaintiffs’ equal protection claim”).

³³ See REBELL, *supra* note 6, at 17–18.

³⁴ This narrative is familiar insofar as it echoes a common refrain of the current “education reform” movement. See, e.g., Joel Klein et al., *How to Fix Our Schools: A Manifesto* by Joel Klein, Michelle Rhee and Other Education Leaders, WASH. POST (Oct. 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/07/AR2010100705078.html> [<http://perma.cc/69MB-ZRAQ>] (“[R]ight now, across the country, kids are stuck in failing schools, just waiting for us to do something.”); see also MEGAN E. TOMPKINS-STANGE, POLICY PATRONS: PHILANTHROPY, EDUCATION REFORM, AND THE POLITICS OF INFLUENCE 121 (2016) (“Now, [education philanthropy] suffers from an underlying feeling that people aren’t trying. . . . [Foundation officers think] ‘The real problem is stupidity!’” (alterations in original)); *id.* (noting characterizations of “teachers, nonprofit leaders, or administrators as lazy and ill equipped with the appropriate expertise that would enable them to ‘just solve the problem’”).

³⁵ See Third Amended Complaint for Injunctive and Declaratory Relief at 3, *Reed v. State*, No. BC432420 (Cal. Super. Ct. May 4, 2010); Plaintiffs’ Corrected Third Amended Complaint at 3, *Conn. Coal. for Justice in Educ. Funding v. Rell*, No. X07-HHD-CV-145037565-S (Conn. Super. Ct. Sept. 7, 2016); *Wright* Plaintiffs’ Amended Complaint for Declaratory and Injunctive Relief, *supra* note 9, at 3; Verified Amended Complaint, *supra* note 9, at 15–16.

³⁶ Michael Rebell, *Why the Anti-Tenure Lawsuit Will Fail*, N.Y. DAILY NEWS (July 7, 2014, 4:30 AM), <http://www.nydailynews.com/opinion/anti-tenure-lawsuit-fail-article-1.1854286> [<http://perma.cc/S2BG-MUWP>].

³⁷ 209 Cal. Rptr. 3d 532 (Cal. Ct. App. Apr. 14, 2016), *review denied* (Cal. Aug. 22, 2016).

nonprofit organization Students Matter³⁸ — challenged California state laws governing teacher tenure, dismissal, and layoffs.³⁹ Though the plaintiffs' claims sounded in equal protection, the gravamen of their complaint was that the laws "prevent[ed] California's schools from providing an effective education to all of their students as guaranteed by the California Constitution."⁴⁰ In other words, the suit "state[d] a claim that the teacher tenure and dismissal statutes, to the extent they lead to the hiring and retention of grossly ineffective teachers, violate students' fundamental right to education."⁴¹

Specifically, the plaintiffs contended that the statutes caused "a certain number of grossly ineffective teachers" to "obtain permanent employment within the California public school system, and retain employment despite their grossly ineffective performance," thereby imposing "a real and appreciably negative impact" on students' education.⁴² The plaintiffs further argued that students of color and students from low-income backgrounds disproportionately bore the brunt of such "grossly ineffective" teachers.⁴³ Accordingly, the plaintiffs urged the court to apply strict scrutiny to the challenged statutes.⁴⁴ Agreeing that strict scrutiny was warranted,⁴⁵ the trial court determined that the statutes could not survive such stringent review.⁴⁶

A unanimous panel of the court of appeal reversed.⁴⁷ Starting with plaintiffs' contention that "an 'unlucky subset' of the general student population [of California] . . . is denied the fundamental right to basic educational equality" on account of being "assigned to grossly ineffective teachers," the court determined that this argument stumbled out of the gate.⁴⁸ "In equal protection analysis," the court reasoned, "the threshold question is whether the legislation under attack somehow

³⁸ Vergara v. California, STUDENTS MATTER, <http://studentsmatter.org/case/vergara> [<http://perma.cc/S2FV-Z9Q7>].

³⁹ First Amended Complaint for Declaratory and Injunctive Relief at 3, 22–26, Vergara v. State, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014).

⁴⁰ See *id.* at 2.

⁴¹ See Vergara, 209 Cal. Rptr. 3d at 563 (Liu, J., dissenting from denial of review).

⁴² First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 39, at 20.

⁴³ See *id.* at 21–22.

⁴⁴ See *id.* at 22–25. The California Supreme Court has previously recognized that wealth is a suspect classification under the California constitution. See, e.g., Serrano v. Priest, 487 P.2d 1241, 1252–54 (Cal. 1971).

⁴⁵ Vergara, 2014 WL 6478415, at *4. Drawing on two studies seeking to measure the costs to students of a "year in a classroom with a grossly ineffective teacher," the court described the "[e]vidence . . . elicited in this trial of the specific effect of grossly ineffective teachers on students" as "compelling" and "shock[ing to] the conscience." *Id.*

⁴⁶ See *id.* at *4–7.

⁴⁷ See Vergara v. State, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App. Apr. 14, 2016), *review denied* (Cal. Aug. 22, 2016).

⁴⁸ See *id.* at 553.

discriminates against an identifiable class of persons.”⁴⁹ And, the court maintained, allegedly being denied the same fundamental right cannot supply the unifying characteristic by which to identify a class.⁵⁰

Next, the court turned to plaintiffs’ argument that “poor and minority students . . . suffered disproportionate harm from being assigned to grossly ineffective teachers.”⁵¹ Having earlier noted that the plaintiffs challenged the statutes on their face rather than as they were applied,⁵² the court emphasized that the plaintiffs therefore had the burden of “demonstrat[ing] that the [statutes’] provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions.”⁵³ And the evidence presented at trial, the court concluded, failed to carry the plaintiffs’ burden: rather, the record showed that “administrative decisions (in conjunction with other factors)” — rather than the statutes themselves — ultimately “determine where teachers are assigned throughout a district.”⁵⁴

B. Davids v. State

Shortly after the *Vergara* plaintiffs prevailed in the trial court, the newly formed Partnership for Educational Justice⁵⁵ announced plans to file an analogous suit in New York.⁵⁶ Unlike in California, however, New York’s highest court had previously determined that the New York constitution guaranteed all students a “sound basic education.”⁵⁷ Accordingly, the suit — which would later be consolidated with a simi-

⁴⁹ *Id.* (quoting *Altadena Library Dist. v. Bloodgood*, 237 Cal. Rptr. 649, 652 (Cal. Ct. App. 1987)).

⁵⁰ *See id.* (dismissing such a premise as “circular”).

⁵¹ *Id.* at 554.

⁵² *See id.* at 550–51. As the court explained, “[a] facial challenge to the constitutional validity of a statute . . . considers only the text of the measure itself, not its application to the particular circumstances of an individual,” whereas “an ‘as applied’ constitutional challenge seeks ‘relief from a specific application of a facially valid statute or ordinance,’ or an injunction against future application of the statute or ordinance in the manner in which it has previously been applied.” *Id.* (quoting *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1152 (Cal. 1995)).

⁵³ *See id.* at 551 (quoting *Arcadia Unified Sch. Dist. v. State Dep’t of Educ.*, 825 P.2d 438, 448 (Cal. 1992)).

⁵⁴ *Id.* at 556. The California Supreme Court denied review of the court of appeal’s decision, along with two other actions challenging the state’s system of school funding as a violation of the California constitution. For discussion of the latter actions, see *infra* Part IV, pp. 1475–77.

⁵⁵ The Partnership for Educational Justice is a nonprofit organization founded by former cable-news anchor Campbell Brown. *See Board of Directors*, PARTNERSHIP FOR EDUC. JUST., <http://edjustice.org/about/board-directors-advisory-board> [<http://perma.cc/V2N9-BSHX>].

⁵⁶ *See* Leslie Brody, *New York State Challenge Planned on Teacher Tenure Law*, WALL STREET J. (June 23, 2014, 11:00 PM), <http://www.wsj.com/articles/new-york-state-challenge-planned-on-teacher-tenure-law-1403578853> [<https://perma.cc/TWE7-RFY6>]; *see also* Complaint for Declaratory and Injunctive Relief, *Wright v. State*, No. Aoo641/2014 (N.Y. Sup. Ct. July 28, 2014).

⁵⁷ *See* *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995).

lar suit under the caption *Dauids v. State*⁵⁸ — explicitly claimed that New York laws governing teacher tenure, discipline, and seniority-based layoffs violated this right.⁵⁹

Professor Michael Rebell, who litigated the landmark Campaign for Fiscal Equity suits that led to the recognition of the right to a “sound basic education” in New York, objected to the “parallel” drawn between his suits and the tenure suits as “misguided.”⁶⁰ He suggested that the Campaign for Fiscal Equity suits may have constituted an “exception” to the judiciary’s traditional “respect for the separation of powers and the importance of courts avoiding ‘intrusion on the primary domain of another branch of government.’”⁶¹ Rebell further argued that there was a lack of “clear evidence that eliminating tenure and seniority layoffs will result in a more effective teaching corps or more equal access to quality teaching.”⁶²

Nevertheless, as of the turn of the year, *Dauids* has survived two motions to dismiss,⁶³ and will proceed to trial pending an ongoing appeal of the trial court’s orders denying the motions.⁶⁴ In its ruling on the first motion, the trial court had determined that the plaintiffs’ allegations, if true, were “sufficient to make out a prima facie case of constitutional dimension connecting the retention of ineffective teachers to the low performance levels exhibited by New York students.”⁶⁵ The court had further concluded that the matter was justiciable insofar as “a declaratory judgment action is well suited to . . . interpret and safeguard constitutional rights and review the acts of the other branches of government, not for the purpose of making policy decisions, but to preserve the constitutional rights of its citizenry.”⁶⁶

⁵⁸ *Meet the Parent Plaintiffs of Wright v. New York, PARTNERSHIP FOR EDUC. JUST.*, <http://edjustice.org/projects/new-york-lawsuit> [<http://perma.cc/D2XB-X3D2>].

⁵⁹ See Complaint for Declaratory and Injunctive Relief, *supra* note 56, at 3.

⁶⁰ See Rebell, *supra* note 36.

⁶¹ *Id.* (quoting Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 58 (N.Y. 2006)). Rebell noted that on the same day that the New York Court of Appeals issued a favorable ruling in *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003), the court also “made clear that they were not willing to extend the protections of the concept of ‘sound basic education’ to other types of alleged discrimination.” *Id.* Rebell appears to have been referring to *Paynter v. State*, 797 N.E.2d 1225 (N.Y. 2003). There, the New York Court of Appeals concluded that the claim that “practices and policies . . . have resulted in high concentrations of racial minorities and poverty in . . . [a] school district, leading to abysmal student performance” was not actionable under the education clause of the New York constitution. *Id.* at 1226–27.

⁶² Rebell, *supra* note 36. Rebell also noted that “the tenure laws in California are markedly different from those in New York and most other states.” *Id.*

⁶³ See Decision & Order at 4, *Dauids v. State*, No. 101105/14 (N.Y. Sup. Ct. Oct. 22, 2015); Decision & Order at 16, *Dauids*, No. 101105/14 (N.Y. Sup. Ct. Mar. 20, 2015) [hereinafter Denial of First Motion to Dismiss].

⁶⁴ See, e.g., Notice of Appeal, *Dauids*, No. 101105/14 (N.Y. Sup. Ct. Dec. 7, 2015).

⁶⁵ Denial of First Motion to Dismiss, *supra* note 63, at 15.

⁶⁶ *Id.* (citing *Campaign for Fiscal Equity*, 801 N.E.2d at 349).

C. Connecticut Coalition for Justice in Education Funding v. Rell

In late 2005, the Connecticut Coalition for Justice in Education Funding (CCJEF) filed suit against the state of Connecticut for allegedly “failing to maintain an educational system that provides children with suitable and substantially equal educational opportunities.”⁶⁷ The CCJEF — whose members include “municipalities, local boards of education, statewide professional education associations and unions, other Connecticut nonprofit pro-education advocacy organizations, parents and grandparents, public school students aged 18 or older, and other Connecticut taxpayers”⁶⁸ — argued on behalf of itself and several named plaintiffs that the state was obligated to provide such opportunities pursuant to article eight, section 1 of the Connecticut constitution.⁶⁹ A plurality of the Connecticut Supreme Court agreed, holding that the provision guarantees “educational standards and resources suitable to participate in democratic institutions, and to prepare them to attain productive employment and otherwise to contribute to the state’s economy, or to progress on to higher education.”⁷⁰

In September 2016, pursuant to the plurality’s directive to “determine as a question of fact whether the state’s educational resources and standards have in fact provided the public school students in this case with constitutionally suitable educational opportunities,”⁷¹ a Connecticut Superior Court concluded that its task was to determine whether “the state’s educational resources or core components are . . . rationally, substantially, or verifiably connected to creating educational opportunities for children.”⁷² Proceeding under that standard, the court held that “Connecticut is defaulting on its constitutional duty to provide adequate public school opportunities because it has no rational, substantial and verifiable plan to distribute money for education aid and school construction.”⁷³ Notably, however, the court did not stop there: it also struck down as unconstitutional the state’s standards for high school graduation;⁷⁴ elementary school promotion;⁷⁵

⁶⁷ See Plaintiffs’ Amended Complaint at 3, *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010) (No. 18032).

⁶⁸ *About CCJEF*, CONN. COALITION FOR JUST. EDUC. FUNDING, <http://ccjef.org/about-ccjef> [<http://perma.cc/ZTN6-RMC7>].

⁶⁹ See Plaintiffs’ Amended Complaint, *supra* note 67, at 17.

⁷⁰ *Conn. Coal. for Justice in Educ. Funding*, 990 A.2d at 212.

⁷¹ *Id.* at 256.

⁷² *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, No. X07-HHD-CV-145037565-S, 2016 WL 4922730, at *6 (Conn. Super. Ct. Sep. 7, 2016).

⁷³ *Id.* at *17.

⁷⁴ See *id.* at *17–21; see also *id.* at *33 (calling upon the state to “end[] the abuses that in some places have nearly destroyed the meaning of high school graduation”).

⁷⁵ See *id.* at *21–23.

teacher evaluation and compensation;⁷⁶ and special education identification, intervention, and funding.⁷⁷ The court then gave the state 180 days in which to “submit proposed reforms consistent with [its] opinion,”⁷⁸ though the state has since appealed the decision.⁷⁹

III. THE UNIQUE PROBLEM OF ADJUDICATING ADEQUACY

Suits such as *Vergara*, *Dauids*, and *CCJEF* mark a growing trend of advocates pursuing education reforms in courts rather than in legislatures or administrative offices. This trend shows little sign of abating: Since filing its lawsuit in New York, the Partnership for Educational Justice has also backed legal challenges to teacher tenure in Minnesota⁸⁰ and New Jersey.⁸¹ Charter school advocates in Massachusetts recently sought, albeit unsuccessfully, to strike down caps on charter school funding and the number of charter schools as violations of the state constitutional right to an adequate education.⁸² And Students Matter — seizing on *Rodriguez*’s suggestion that an “absolute denial of educational opportunities” may give rise to a federal constitutional violation,⁸³ as well as the Supreme Court’s discussion of fundamental rights in cases such as *Washington v. Glucksberg*⁸⁴ and *Obergefell v. Hodges*⁸⁵ — has challenged Connecticut laws governing

⁷⁶ See *id.* at *23–27; see also *id.* at *33 (requiring the state to “link the terms of educators’ jobs with things known to promote better schools”).

⁷⁷ See *id.* at *27–32; see also *id.* at *33 (demanding that the state “end arbitrary spending on special education that has delivered too little help to some and . . . useless services to others”).

⁷⁸ *Id.* at *33.

⁷⁹ See *Conn. Coal. for Justice in Educ. Funding*, No. X07-HHD-CV-145037565-S, *appeal docketed*, No. 19768 (Conn. Sept. 23, 2016).

⁸⁰ See First Amended Complaint, *Forslund v. State*, No. 62-CV-16-2161 (Minn. Dist. Ct. May 2, 2016). Though the complaint has been dismissed, see Findings of Fact, Conclusion of Law, Order for Judgment at 2, *Forslund*, No. 62-CV-16-2161 (Minn. Dist. Ct. Oct. 26, 2016), the Partnership for Educational Justice has vowed to appeal, see Ralia Polechronis, *PEJ Statement in Response to the Granting of Motions to Dismiss Forslund v. Minnesota by the Ramsey County Court*, PARTNERSHIP FOR EDUC. JUST. (Oct. 26, 2016), <http://edjustice.org/pej-statement-response-granting-motions-dismiss-forslund-v-minnesota-ramsey-county-court> [<http://perma.cc/6HYW-XY89>].

⁸¹ See Complaint for Declaratory and Injunctive Relief, *H.G. v. Harrington*, No. MER-L-2170-16 (N.J. Super. Ct. Nov. 1, 2016).

⁸² See Memorandum of Decision and Order on Defendants’ Motion to Dismiss at 1–2, *Doe v. Peyser*, No. 2015-2788-F (Mass. Super. Ct. Oct. 4, 2016). A 2016 ballot measure seeking to lift the charter school cap also failed. See David Scharfenberg, *Mass. Voters Reject Ballot Question on Charter Schools*, BOS. GLOBE (Nov. 8, 2016), <https://www.bostonglobe.com/metro/2016/11/08/charter/v340A3vMI8dRABDsFc4JuM/story.html> [<https://perma.cc/57AH-32DT>].

⁸³ See Complaint at 52, *Martinez v. Molloy*, No. 3:16-cv-01439 (D. Conn. Aug. 23, 2016) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973)).

⁸⁴ See *id.* at 52–53 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

⁸⁵ See *id.* at 53–54 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–602 (2015)).

magnet schools, charter schools, and school choice as “knowing[] depriv[ations]” of a *federal* right to a minimally adequate education.⁸⁶

There is an obvious appeal to the idea that a robust constitutional right to education — one that guarantees a minimally adequate education — may provide a solution to the seemingly intractable puzzle of school reform.⁸⁷ Nevertheless, the rise of adequacy litigation involving more substantive matters of education policy affirms that this appeal is misguided. As courts and commentators have long observed,⁸⁸ not only is the judiciary poorly prepared to assess the merits of competing education policies, but it also lacks the democratic legitimacy and structural authority to address the difficult political questions that educational-adequacy litigation tends to raise.⁸⁹ While one of these concerns standing alone might not justify judicial abdication in such matters, the unique confluence of these factors as they pertain to public education — coupled with the degree to which education litigation increasingly turns on complex, nonlegal, and policy-oriented questions — counsels, perhaps now more than ever, in favor of judicial restraint.

A. Institutional Competency

As an initial matter, adequacy suits inevitably require courts to define “adequacy.”⁹⁰ This is no easy task for policymakers and academic experts, much less for judges.⁹¹ Nevertheless, a number of courts throughout the country have sought to give content to the term. For example, the New York Court of Appeals has defined “sound basic education” as “consist[ing] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury,”⁹² and as providing “the opportunity for a meaningful high school education,

⁸⁶ See *id.* at 4–5, 59, 63.

⁸⁷ Of course, it bears mentioning that a “minimally adequate” education is not necessarily an “excellent” or even a “good” education.

⁸⁸ See, e.g., *Rodriguez*, 411 U.S. at 42–43; *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996); HANUSHEK & LINDSETH, *supra* note 4, at 97–103, 118–44.

⁸⁹ One commentator has argued that suits like *Vergara* seek only to “devolve” education policymaking down to the local level, see Note, *Education Policy Litigation as Devolution*, 128 HARV. L. REV. 929, 941–42 (2015), thereby “mitigat[ing] the traditional prudential concerns for the separation of powers . . . and judicial competence,” *id.* at 944. However, this Note maintains that the very act of striking down statutes like those at issue in *Vergara* necessarily involves the exercise of policymaking discretion of a nonjudicial character.

⁹⁰ See, e.g., *Campaign for Quality Educ. v. State*, 209 Cal. Rptr. 3d 888, 911 (Cal. Ct. App. 2016) (Pollak, J., dissenting) (“The contention that the current system fails to satisfy a constitutional mandate necessarily supposes a standard by which to define a minimally acceptable quality of education.”), *review denied* (Cal. Aug. 22, 2016).

⁹¹ See *id.* at 911 (noting “[t]he inherent difficulty of articulating such a standard, and the absence of such an articulation within the language of . . . state constitutions”).

⁹² *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995).

one which prepares them to function productively as civic participants.”⁹³ The Supreme Court of Kentucky has defined “adequate education” in even more specific and yet still ambiguous terms:

[A]n 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.⁹⁴

These vague standards — which do not explain what it means “to function in a complex and rapidly changing civilization” or “to appreciate [one’s] cultural and historical heritage” — reflect the judicial branch’s inherent limitations in defining and enforcing a particular quality of education. At best, all that courts have been able to articulate is “a standard that is general and requires intensive factual analysis to apply.”⁹⁵

Yet civil trial courts are generally not equipped to engage in such searching analysis of education policies and practices.⁹⁶ Unlike, for example, administrative agencies, courts do not possess inherent advantages that would allow them to be more skillful arbiters of education policy than other government actors.⁹⁷ This lack of expertise helps to explain in part why statutes such as the Individuals with Disabilities Education Act contain an administrative exhaustion requirement.⁹⁸ And while some courts have suggested that their decisions in

⁹³ *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 332 (N.Y. 2003).

⁹⁴ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989). For the court’s further — and similarly indeterminate — summary of “[t]he essential, and minimal, characteristics of an ‘efficient’ system of common schools,” see *id.* at 212–13.

⁹⁵ See *Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 911 (Pollak, J., dissenting); see also *id.* at 911–14 (collecting additional cases).

⁹⁶ Cf. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404–10 (1942) (offering examples of the Supreme Court’s reliance on facts outside of the record and discussing the relative competence of administrative agencies in assessing legislative facts).

⁹⁷ Of course, this Note presumes that agencies will tend to be staffed and led by individuals with some degree of expertise in the relevant policy area.

⁹⁸ See *Crocker v. Tenn. Secondary Sch. Athletic Ass’n*, 873 F.2d 933, 935 (6th Cir. 1989) (“The policies underlying this exhaustion requirement are both sound and important. . . . Federal

such cases can be fairly and sufficiently guided by their “conscience,”⁹⁹ or simply by what is “rationally, substantially, or verifiably connected to creating educational opportunities for children,”¹⁰⁰ the reality is that the nuts and bolts of teaching and learning do not easily lend themselves to obvious right answers. Even if we agree, let’s say, “that competent teachers are a critical, if not the most important, component of success of a child’s in-school educational experience,”¹⁰¹ decades of research and centuries of experience have yet to produce a consensus on how to measure competency.¹⁰² Thus, “any single measure of ‘teacher quality’ may not capture the specific characteristics of teachers that produce student achievement gains.”¹⁰³ It also matters, of course, how we define “achievement” and which “outcomes” we value — additional questions open to considerable debate.¹⁰⁴

Yet, adequacy-based challenges necessarily require courts to choose certain measures and metrics over others. This reality was borne out

courts — generalists with no expertise in the educational needs of handicapped students — are given the benefit of expert factfinding by a state agency devoted to this very purpose.”)

⁹⁹ See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at *4 (Cal. Super. Ct. Aug. 27, 2014).

¹⁰⁰ See *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, No. X07-HHD-CV-145037565-S, 2016 WL 4922730, at *11 (Conn. Super. Ct. Sept. 7, 2016).

¹⁰¹ *Vergara*, 2014 WL 6478415, at *4.

¹⁰² Though “there is a solid consensus that teaching affects student outcomes, there is little agreement on which specific teacher characteristics are related to student outcomes.” William S. Koski, *Bridging the Teacher Quality Gap: Notes from California on the Potential and Pitfalls of Litigating Teacher Quality*, in *THE ENDURING LEGACY OF RODRIGUEZ*, *supra* note 28, at 143, 149. Certainly, “[s]ome evidence suggests that teachers’ experience levels (at least after the first few years of teaching), general academic and verbal abilities, educational attainment, and certification status are related to student outcomes. But nearly all of these findings are contested by other studies.” *Id.* at 149–50 (footnotes omitted).

¹⁰³ *Id.* at 150.

¹⁰⁴ Consider the Obama Administration’s recent retreat from standardized testing. *Compare*, e.g., *Race to the Top Fund*, 74 Fed. Reg. 59,688, 59,735 (Nov. 18, 2009) (to be codified at 34 C.F.R. subtitle B, ch. II) (“We understand . . . [the] concerns about the overemphasis of standardized testing, but believe that educators need good information about what students know and can do so that they can guide their students’ learning, and adjust and differentiate their instruction appropriately.”), and Kate Zernike, *Obama Administration Calls for Limits on Testing in Schools*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/obama-administration-calls-for-limits-on-testing-in-schools.html> [<https://perma.cc/B39S-6DAN>] (noting how “the Obama administration pushed testing as an incentive for states to win more federal money in the Race for the Top program”), *with*, e.g., *Standards and Assessments*, 34 C.F.R. §§ 200.1–10 (2016), Press Release, U.S. Dep’t of Educ., *Fact Sheet: Testing Action Plan* (Oct. 24, 2015), <http://www.ed.gov/news/press-releases/fact-sheet-testing-action-plan> [<http://perma.cc/2UP4-4LQF>] (acknowledging that the Obama Administration “bears some of the responsibility” for “unnecessary testing and not enough clarity of purpose applied to the task of assessing students, consuming too much instructional time and creating undue stress for educators and students”), and *The White House*, FACEBOOK (Oct. 24, 2015, 12:00 PM), <https://www.facebook.com/WhiteHouse/videos/10153858451374238> [<http://perma.cc/8BYM-76ED>] (discussing “smarter ways to measure our kids’ progress in school”).

by the trial court's decision in *Vergara*.¹⁰⁵ There, in a threadbare, sixteen-page opinion,¹⁰⁶ the court relied in significant part on a "massive study" showing that "a single year in a classroom with a grossly ineffective teacher costs students \$1.4 million in lifetime earnings per classroom."¹⁰⁷ The findings of that study, however, are far from conclusive, and in fact have been squarely disputed.¹⁰⁸ The court next cited testimony indicating that "students in [Los Angeles Unified School District] who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers."¹⁰⁹ Yet this testimony similarly relied on research that scholars have called into question.¹¹⁰ Finally, the court found that "there are a significant number of grossly ineffective teachers currently active in California classrooms."¹¹¹ Here, the court, relying on the state's expert who testified that "1-3% of teachers in California are grossly ineffective," extrapolated to California's 275,000 teachers to find that the "number of grossly ineffective teachers ranges from 2,750 to 8,250."¹¹² However, that same expert later explained in a post-trial interview that his figure was just a "guesstimate" and that he had "never used the words 'grossly ineffective.'"¹¹³ Even so, despite the sharply contested nature of the evidence presented at trial, the court determined that the evidence was so "compelling" that it warranted application of strict scrutiny to the challenged statutes.¹¹⁴

¹⁰⁵ Again, although the suit alleged violations of the plaintiffs' right to equal protection under the California constitution, this Note treats it as a challenge rooted in the theory of minimal educational adequacy. See *supra* p. 1463.

¹⁰⁶ One commentator observed that "[t]he court's . . . reasoning was thin to the point of being emaciated." Noah Feldman, *California's Weak Case Against Teacher Tenure*, BLOOMBERG VIEW (June 11, 2014, 11:33 AM), <https://www.bloomberg.com/view/articles/2014-06-11/california-s-weak-case-against-teacher-tenure> [http://perma.cc/4NJB-98HR]; accord Koski, *supra* note 102, at 160 (describing the *Vergara* opinion as "surprisingly slim").

¹⁰⁷ *Vergara v. State*, No. BC484642, 2014 WL 6478415, at *4 (Cal. Super. Ct. Aug. 27, 2014).

¹⁰⁸ See MOSHE ADLER, NAT'L EDUC. POLICY CTR., REVIEW OF *MEASURING THE IMPACTS OF TEACHERS* (2014), http://nepc.colorado.edu/files/ttr-chetty-teachimpacts_o.pdf [http://perma.cc/9GVZ-J3SH]; MOSHE ADLER, NAT'L EDUC. POLICY CTR., RESPONSE OF MOSHE ADLER TO THE AUTHORS' REPLY (2014), <http://nepc.colorado.edu/files/nepc-ttr-fole-adler-response.pdf> [http://perma.cc/8HFV-DPK9]. But see RAJ CHETTY ET AL., RESPONSE TO ADLER (2014) REVIEW OF "MEASURING THE IMPACTS OF TEACHERS" (2014), http://nepc.colorado.edu/files/adler_response.pdf [http://perma.cc/EMM6-PMHF].

¹⁰⁹ *Vergara*, 2014 WL 6478415, at *4.

¹¹⁰ See, e.g., JESSE ROTHSTEIN & WILLIAM J. MATHIS, NAT'L EDUC. POLICY CTR., REVIEW OF TWO CULMINATING REPORTS FROM THE MET PROJECT (2013), <http://nepc.colorado.edu/thinktank/review-MET-final-2013> [http://perma.cc/32H4-XZD7].

¹¹¹ *Vergara*, 2014 WL 6478415, at *4.

¹¹² *Id.*

¹¹³ Jordan Weissmann, *Fuzzy Math*, SLATE (June 12, 2014, 1:07 PM), http://www.slate.com/articles/business/moneybox/2014/06/judge_strikes_down_california_s_teacher_tenure_laws_a_made_up_statistic.html [http://perma.cc/4TWL-MB7H].

¹¹⁴ See *Vergara*, 2014 WL 6478415, at *4.

To be sure, factfinders routinely weigh witness credibility, parse through conflicting pieces of evidence, and ultimately decide matters touching upon unfamiliar and complicated topics. Yet courts have also long recognized the unique character of disputes involving public education: “the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion,”¹¹⁵ and not heavy-handed judicial intervention. Nevertheless, the increasingly aggressive approach to vindicating state constitutional rights to education has led more and more to courts weighing in conclusively on matters with no easy conclusions.¹¹⁶

B. Democratic Accountability

The inherent difficulty of defining what precisely constitutes a minimally adequate education suggests that this task should be left to democratically elected officials and their appointed policymakers. This is not a novel proposition: courts routinely defer to the politically accountable branches when faced with difficult policy questions, not only because the judiciary is ill-suited to answer such questions, but also because the selection of one policy preference over another tends to demand the voice of the electorate.¹¹⁷ Though courts should not, of course, shirk their duty to uphold constitutional rights — especially when the rights of minority groups are at stake¹¹⁸ — it is well settled that courts should tread lightly when asked to exercise “nonjudicial discretion” or otherwise “express[] lack of the respect due coordinate branches of government.”¹¹⁹

Yet the judicial recognition of the right to a minimally adequate education facilitates, if not expressly contemplates, an impermissibly

¹¹⁵ *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996); see also, e.g., *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 793 (R.I. 2014) (noting that “imposing [the court’s] judgment over that of the Legislature in order to determine whether a particular policy benefits public education” would be “impermissible”).

¹¹⁶ See, e.g., *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, No. X07-HHD-CV14-5037565-S, 2016 WL 4922730, at *25 (Conn. Super. Ct. Sept. 7, 2016) (“Better teachers aren’t made by teachers earning better degrees or by long years on the job.”).

¹¹⁷ See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices.”); *Comm. for Educ. Rights*, 672 N.E.2d at 1191 (“To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals . . .”). Some scholars suggest that concerns regarding democratic legitimacy may be less pronounced in the state courts, though others contest this point. Compare REBELL, *supra* note 6, at 46–48, with HANUSHEK & LINDSETH, *supra* note 4, at 98.

¹¹⁸ Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹¹⁹ Cf. *Baker v. Carr*, 369 U.S. 186, 217 (1962). This is not to say that courts should explicitly apply the political question doctrine to educational adequacy suits. Rather, the same principles that animate the political question doctrine should be persuasive to courts facing such suits.

expansive role for courts in substantive policymaking.¹²⁰ Although courts have rightly waded into legislative waters to invalidate overtly invidious state action,¹²¹ the burst of *Vergara* copycat suits¹²² suggests that minimal educational adequacy is a principle of inherently unlimited scope and dimension. Rather than providing a pathway for traditionally marginalized students to rectify deficiencies in their education, the right to a minimally adequate education is more likely to provide a legislative shortcut for those who have the means to bring such complex litigation. It thereby risks advancing the political agenda of a few rather than fostering a democratic consensus derived, at least in theory, from the policy preferences of many citizens.

Concerns for democratic decisionmaking may be particularly pronounced in the context of public education, where various nongovernmental actors wield sizable influence. Indeed, Professor Megan Tompkins-Stange notes that “[d]uring the past ten years, foundation involvement in policy has become highly visible, . . . to a degree not seen since the 1960s.”¹²³ This uptick in private-sector involvement in public education has been characterized not only by the seductive notion that there is a plainly right way to educate, but also by a concerted effort “to avoid the often dysfunctional political dynamics of government bureaucracies to advance desired policy targets more quickly and efficiently”¹²⁴ — thus “elevating the preferences of private interests with few structured accountability mechanisms.”¹²⁵

¹²⁰ See Koski, *supra* note 102, at 161 (“If . . . statutory education and employment policies can cause the denial of the fundamental right to an education, what other legislative policies could be placed in the crosshairs of litigation or demanded as constitutional remedies? Universal, high-quality preschool? Standards-based testing?”).

¹²¹ See, e.g., *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 731–32 (N.J. 1975) (striking down a zoning provision that was “candid[ly] . . . intended to result and has resulted in economic discrimination and exclusion,” *id.* at 718).

¹²² See Complaint for Declaratory and Injunctive Relief, *supra* note 81; First Amended Complaint, *supra* note 80; Complaint for Declaratory and Injunctive Relief, *supra* note 56; Verified Amended Complaint, *supra* note 9.

¹²³ TOMPKINS-STANGE, *supra* note 34, at 113.

¹²⁴ *Id.* at 114.

¹²⁵ *Id.* at 6. Of course, foundations are not the only “private interests” to wield considerable influence in the sphere of public education. After all, it is no secret that “teacher unions are . . . influential players in state education reform debates.” Michael Hartney & Patrick Flavin, *From the Schoolhouse to the Statehouse: Teacher Union Political Activism and U.S. State Education Reform Policy*, 11 ST. POL. & POL’Y Q. 251, 259 (2011). However, this Note is primarily concerned with the manner by which education policy is crafted through litigation, rather than through democratic elections or (less democratic) lobbying. And though unions occasionally intervene on behalf of adequacy plaintiffs, see, e.g., Complaint in Intervention, *Robles-Wong v. State*, No. RG10515768 (Cal. Super. Ct. Nov. 3, 2011), *aff’d* 209 Cal. Rptr. 3d 888 (Cal. Ct. App. Apr. 20, 2016), they more commonly find themselves on the defendants’ side of the caption, see, e.g., Notice of Motion and Motion to Intervene; Memorandum of Points and Authorities in Support, *Vergara v. State*, No. BC484642 (Cal. Super. Ct. Aug. 27, 2014), *aff’d* 209 Cal. Rptr. 3d 532 (Cal. Ct. App. Apr. 14, 2016); Notice of Motion to Intervene on Short Notice, *H.G. v. Harrington*,

The teacher tenure lawsuits aptly illustrate this concern. Although the complaint in *Vergara* was ostensibly filed by its nine named plaintiffs, the suit was initiated “[w]ith the help of Students Matter,”¹²⁶ a nonprofit organization that seeks to “promote[] access to quality public education through impact litigation, communications and advocacy.”¹²⁷ Notably, however, Students Matter neither was founded nor is led by community leaders, education experts, or even the parents of public school students. Rather, the organization is helmed by a technology executive with limited experience — much less expertise — in public education.¹²⁸ Similarly, the *Davids* lawsuit was backed by the Partnership for Educational Justice, which, like Students Matter, appears to have been formed for the sole purpose of launching such suits.¹²⁹

Of course, foundations, nonprofit organizations, and other nongovernmental actors have meaningful roles to play in education reform.¹³⁰ However, these roles should be checked, rather than amplified, by the judicial process, so that private actors do not supplant democratically elected legislators.

IV. A RETURN TO EQUITY?

That the new “wave” of educational adequacy litigation has renewed concerns about judicial intervention in public education is not to say that state constitutional rights to education should be rendered meaningless, or that state courts should abandon their responsibility to enforce such rights. Though it grew to be disfavored by both litigants and courts, the principle of equity — rather than adequacy — may provide a more prudent, yet still viable means of vindicating education rights in the courts.

The California Supreme Court appears to have endorsed such an equity-based approach. Notably, on the same day that it denied review of the court of appeal’s decision in *Vergara*,¹³¹ the court also declined

No. MER-L-2170-16 (N.J. Super. Ct. Nov. 15, 2016); Notice of Motion to Intervene, Wright v. State, No. A00641/2014 (N.Y. Sup. Ct. Aug. 28, 2014).

¹²⁶ *Vergara v. California*, *supra* note 38.

¹²⁷ *About Us*, STUDENTS MATTER, <http://studentsmatter.org/about> [<http://perma.cc/HYW5-8W6H>].

¹²⁸ See *Founder*, STUDENTS MATTER, <http://studentsmatter.org/our-team/founder> [<http://perma.cc/265S-UN32>]; Heather Somerville, *Dave Welch, Silicon Valley Entrepreneur, Leads Court Fight Against Teacher Tenure Laws*, SAN JOSE MERCURY NEWS (Aug. 12, 2016, 7:33 AM), <http://www.mercurynews.com/2014/06/11/dave-welch-silicon-valley-entrepreneur-leads-court-fight-against-teacher-tenure-laws> [<http://perma.cc/C8CD-4GZF>].

¹²⁹ See Brody, *supra* note 56.

¹³⁰ See TOMPKINS-STANGE, *supra* note 34, at 128 (“[F]oundations have been credited with sparking major ‘wins’ in policy, from the civil rights movement to health-care reform — often through providing capital and producing political will that the state cannot.”).

¹³¹ See *Vergara v. State*, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App. 2016), *review denied* (Cal. Aug. 22, 2016).

to review the dismissal of two separate actions challenging the state's system of school funding as a violation of sections 1 and 5 of article IX of the California constitution.¹³² The plaintiffs in those actions — consolidated as *Campaign for Quality Education v. State* — had alleged that the provisions “provide for a judicially-enforceable right to an education of ‘some quality’ for all public school children, and, alternatively, that the Legislature is currently violating its constitutional obligations to ‘provide for’ and ‘keep up and support’ the ‘system of common schools’ by its current educational financing system.”¹³³

However, the court of appeal “[found] no support for finding implied constitutional rights to an education of ‘some quality’ for public school children or a minimum level of expenditures for education.”¹³⁴ Citing settled principles of constitutional interpretation,¹³⁵ the court argued that while “there can be no doubt that the fundamental right to a public school education is firmly rooted in California law,”¹³⁶ there was no “textual support for the inchoate right to a quality education.”¹³⁷ The court also declined “to infer the existence of a constitutional right,”¹³⁸ finding that California’s constitutional education provisions “declare ‘great principles and fundamental truths’ but do not mandate the Legislature to act in a particular manner regarding what precise laws shall be made to implement these principles and truths.”¹³⁹ And, as to the plaintiffs’ alternative argument that the California legislature’s allocation of funds for K-12 public education does not comply with article IX, the court concluded that the plaintiffs had failed to show that sections 1 and 5 “restrict legislative discretion in allocating funds for the education of public school children.”¹⁴⁰

¹³² See *Campaign for Quality Educ. v. State*, 209 Cal. Rptr. 3d 888, 902 (Cal. Ct. App. 2016), review denied (Cal. Aug. 22, 2016). Section 1 of the constitution provides: “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.” CAL. CONST. art. IX, § 1. Section 5 provides that “[t]he Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.” *Id.* § 5.

¹³³ *Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 892.

¹³⁴ *Id.*

¹³⁵ See *id.* at 893–94.

¹³⁶ *Id.* at 895.

¹³⁷ *Id.* at 897.

¹³⁸ *Id.*

¹³⁹ *Id.* at 898 (quoting *Ward v. Flood*, 48 Cal. 36, 55 (1874)).

¹⁴⁰ *Id.* at 899–900. In a concurring opinion, Justice Siggins suggested, inter alia, that an action alleging that the state has failed to meet its obligation to provide California students with “the opportunity to obtain a meaningful education and to learn the academic content standards” should arise from the “standards articulated in state statutes,” not the state constitution. *Id.* at 904 (Siggins, J., concurring). In dissent, Justice Pollak lamented his “colleagues’ decision to align California with those few state courts that have declined to accept the responsibility to enforce the

In declining to review the lower courts' decisions in *Campaign for Quality Education* and *Vergara*, the California Supreme Court signaled its unwillingness to read an implicit right to a minimally adequate education into its state constitution. The court thereby avoided the problem of recognizing a substantive right and yet refusing or being unable to enforce it. Though the court's approach marks a departure from the decisions of other state supreme courts finding such a right,¹⁴¹ it reflects an appropriately narrow view of the judiciary's capacity and legitimacy to decide the sorts of questions raised in those cases.

Moreover, the fact that the right to education in California is circumscribed does not mean that it is devoid of content. Having long ago recognized that education is a fundamental right under the California constitution,¹⁴² the California Supreme Court's recent decisions have not foreclosed challenges to egregious violations of this right. Under established principles of equal protection law, it may still be argued that state action causes a suspect class to "suffer[] disproportionate harm"¹⁴³ or "denie[s] the fundamental right to basic educational equality" to "a sufficiently identifiable group."¹⁴⁴ Accordingly, despite suggestions to the contrary,¹⁴⁵ the court's equal protection jurisprudence still allows for successful challenges where some state action necessarily provides a starkly different educational experience to, for

right of every child to an adequate education." *See id.* at 906 (Pollak, J., dissenting). Though establishing such a right "necessarily supposes a standard by which to define a minimally acceptable quality of education," Justice Pollak nevertheless insisted that "[t]he inherent difficulty of articulating such a standard, and the absence of such an articulation within the language of the state constitutions" should not have deterred the court from doing so. *Id.* at 911.

¹⁴¹ *See id.* at 924 (Liu, J., dissenting from denial of review) (noting that the court of appeal's holdings "reflect the minority view among the more than 30 state high court opinions addressing similar issues under their state constitutions").

¹⁴² *See id.* at 895 (Court of Appeal's opinion) (citing *Ward*, 48 Cal. at 50).

¹⁴³ *Vergara v. State*, 209 Cal. Rptr. 3d 532, 554 (Cal. Ct. App. 2016), *review denied* (Cal. Aug. 22, 2016).

¹⁴⁴ *Id.* at 553.

¹⁴⁵ In their dissents from the court's denial of review in *Vergara*, both Justice Liu and Justice Cuéllar suggested that the court of appeal "likely erred" in requiring that equal protection claimants share "some pertinent common characteristic other than the fact that they are assertedly harmed by a statute." *See id.* at 560 (Liu, J., dissenting from denial of review) (quoting *id.* at 561 (Court of Appeal's opinion)); *id.* at 564–65 (Cuéllar, J., dissenting from denial of review). In their view, *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), and *Butt v. State*, 842 P.2d 1240 (Cal. 1992), stand for the proposition that students whose constitutional rights to education are adversely affected by state action may form an ascertainable class for the purposes of equal protection. *See Vergara*, 209 Cal. Rptr. 3d at 559–62 (Liu, J., dissenting from denial of review); *id.* at 564–65 (Cuéllar, J., dissenting from denial of review). However, "every equal protection case based on the infringement of a fundamental right has involved a class identified by some characteristic other than asserted harm." *Id.* at 554 (Court of Appeal's opinion). For example, in *Butt* and *Serrano*, the affected groups were identifiable "on a geographical basis." *Butt*, 842 P.2d at 1249 (quoting *Serrano*, 487 P.2d at 1261).

example, a particular suspect class,¹⁴⁶ or to students in a particular school district,¹⁴⁷ than it does to others.¹⁴⁸ Notably, these sorts of equity-based challenges do not require courts to create their own standards of educational adequacy, insofar as courts need consider only the alleged disparities between the proffered comparators.

To be sure, California's equal protection jurisprudence lends itself more readily to as-applied challenges to local decisions, as opposed to facial challenges to legislative decisions such as the claims advanced in *Vergara*. This, it seems, is by design: the California constitution, like the constitutions of many other states, "leave[s] the difficult and policy-laden questions associated with educational adequacy and funding to the legislative branch."¹⁴⁹ Allowing for frequent wholesale challenges to the legislature's determinations regarding these questions would seem to fly in the face of such plainly afforded legislative deference. Hence, the California Supreme Court's narrower approach contemplates litigation as a last resort, rather than the default.

V. CONCLUSION

It is as doubtful today as it was in 1954 that children "may reasonably be expected to succeed in life if [they are] denied the opportunity of an education."¹⁵⁰ So long as "[a] good education . . . remains out of reach for many who need it the most,"¹⁵¹ advocates will continue to seek new ways of improving our public schools. And rightfully so. The problem, however, lies in the prevailing ethos of the present era of "education reform," which suggests that the problems that have persistently plagued public education lend themselves to obvious solutions that, apparently, have yet to be implemented for a perceived unwillingness to depart from the status quo.¹⁵² Often molded on the most famous example of judicial intervention in public education,¹⁵³ ade-

¹⁴⁶ See *Serrano*, 487 P.2d at 1250.

¹⁴⁷ See *Butt*, 842 P.2d at 1243.

¹⁴⁸ Likewise, other state constitutions appear to leave room for litigants to challenge clear educational inequities. See, e.g., *Sheff v. O'Neill*, 678 A.2d 1267, 1286 (Conn. 1996) (determining that a challenge to persistent racial segregation in Hartford public schools could be decided on the ground that such segregation violated Connecticut's constitutional guarantee of equal educational opportunity, rather than on minimal adequacy grounds).

¹⁴⁹ *Campaign for Quality Educ. v. State*, 209 Cal. Rptr. 3d 888, 892 (Cal. Ct. App. 2016), review denied (Cal. Aug. 22, 2016); cf. *Hall v. City of Taft*, 302 P.2d 574, 576 (Cal. 1956) (finding that the "establishment, regulation and operation [of public schools] are covered by the Constitution and the state Legislature is given comprehensive powers in relation thereto").

¹⁵⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁵¹ James E. Ryan, *Foreword*, in *THE ENDURING LEGACY OF RODRIGUEZ*, *supra* note 28, at ix, x.

¹⁵² See sources cited *supra* note 34.

¹⁵³ See, e.g., First Amended Complaint at 2 n.1, *Forslund v. State*, No. 62-CV-16-2161 (Minn. Dist. Ct. May 2, 2016) (citing *Brown*, 347 U.S. at 493). Unfortunately, even the fundamental

quacy suits presume that judicial enforcement of a robust constitutional right to education will flip the proverbial switch.

The far less romantic and yet more accurate reality is that improving schools is not merely a proposition of political will. After all, courts may be able to make it easier to fire teachers, but they cannot do anything to ensure that there is a cadre of “effective” teachers waiting to take their places.¹⁵⁴ Schools face complex and comprehensive problems — many of which are not of their own making — that require similarly complex and comprehensive solutions.¹⁵⁵ That these solutions may not yet exist does not mean that they are for judges to discover, much less to promulgate.

And, unlike in the limited context of school funding — where success in the courts means, at worst, a continuance of the status quo — there is the potential that excessive and more expansive constitutional litigation may actually make schools *worse*. As discussed throughout this Note, recent education suits have tended to focus on the role that teachers play in ensuring students’ academic success. The significance of this role is not in dispute. However, to the extent that such suits have sought to place blame for the perceived failures of our public education system solely upon teachers, there is reason to think that such an approach might be more harmful than helpful. U.S. teachers already report levels of daily stress that rank teaching among the most

promise of *Brown* — desegregated schools — has yet to be fully realized. See generally GARY ORFIELD ET AL., CIVIL RIGHTS PROJECT, *BROWN AT 62: SCHOOL SEGREGATION BY RACE, POVERTY AND STATE* (2016), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state/Brown-at-62-final-corrected-2.pdf> [<http://perma.cc/G84G-RSKU>].

¹⁵⁴ See LEIB SUTCHER ET AL., LEARNING POLICY INST., A COMING CRISIS IN TEACHING? TEACHER SUPPLY, DEMAND, AND SHORTAGES IN THE U.S. 1 (2016), https://learningpolicyinstitute.org/sites/default/files/product-files/A_Coming_Crisis_in_Teaching_REPORT.pdf [<http://perma.cc/ZL3D-N69X>] (“[A]nnual teacher shortages could increase to as much as 112,000 teachers by 2018.”); see also, e.g., Koski, *supra* note 102, at 162 (describing as “unlikely” Vergara’s “underlying . . . assum[ption] that there is a ready bullpen of would-be teachers who want to teach in low-performing classrooms filled with economically disadvantaged and/or [English Language Learning students]”); Scott Lemieux, *Why the California Tenure Decision Is Wrong and Will Hurt Disadvantaged Students*, AM. PROSPECT (June 12, 2014), <http://prospect.org/article/why-california-tenure-decision-wrong-and-will-hurt-disadvantaged-students> [<http://perma.cc/446E-WM2X>] (“[The court] simply assumes, not only without evidence but in the face of logic and reason, that there is a group of highly skilled teachers waiting to fill the least desirable teaching jobs in the California school system, despite the fact that these jobs aren’t particularly remunerative . . .”).

¹⁵⁵ See, e.g., Richard D. Kahlenberg, *Tenure Is Not the Problem*, SLATE (June 13, 2014, 10:59 AM), http://www.slate.com/articles/life/education/2014/06/vergara_v_california_the_court_s_decision_to_gut_teacher_tenure_will_not.html [<http://perma.cc/P7GN-J8AH>] (arguing that the trial court’s decision in *Vergara* — though hailed as “‘another big victory’ for students of color, in the tradition of *Brown v. Board of Education*” — in fact distracts “from the real source of inequality identified in *Brown* itself: the segregation of our public schools”).

stressful professions,¹⁵⁶ and recent reports suggest that this stress is being further aggravated by the “[i]ncreased use of high-stakes testing,” “[f]ear of job loss,” “[l]ack of participation in decision-making,” “[n]egative portrayal of teachers and school employees in the media,” and “[a]doption of new initiatives without proper training or professional development.”¹⁵⁸ Not only may increased teacher stress raise the stress levels of students,¹⁵⁹ but it may also lead to increased rates of teacher turnover¹⁶⁰ and otherwise discourage others from joining the profession — thereby exacerbating the country’s worsening teacher-shortage problem.¹⁶¹

Of course, this is not to say that schools cannot do better, or that litigation has no place in the larger project of school reform. The California Supreme Court’s narrow conception of the constitutional right to education appropriately balances concerns about institutional competency and separation of powers against concerns about addressing potential constitutional violations. To be sure, a narrow constitutional right to education contemplates a correspondingly limited role for courts in adjudicating such a right. Though this approach may be discomfiting to some,¹⁶² it is guided by a deep respect for both the tremendous challenges facing public schools, and the sustained, democratic work that facing those challenges requires.¹⁶³

¹⁵⁶ See GALLUP, INC., STATE OF AMERICA’S SCHOOLS: THE PATH TO WINNING AGAIN IN EDUCATION 24 (2014), <http://www.gallup.com/file/services/178769/Gallup%20Report%20--%20State%20Of%20Americas%20Schools.pdf> [<http://perma.cc/9DST-85E8>].

¹⁵⁷ MARK GREENBERG ET AL., PA. STATE UNIV., TEACHER STRESS AND HEALTH: EFFECTS ON TEACHERS, STUDENTS, AND SCHOOLS 5 (2016), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2016/rwjf430428 [<http://perma.cc/89TT-FYJL>].

¹⁵⁸ AM. FED’N TEACHERS & BADASS TEACHERS ASS’N, QUALITY OF WORKLIFE SURVEY 4 (2015), <http://www.aft.org/sites/default/files/worklifesurveyresults2015.pdf> [<http://perma.cc/RZK8-8GKX>].

¹⁵⁹ See Eva Oberle & Kimberly A. Schonert-Reichl, *Stress Contagion in the Classroom? The Link Between Classroom Teacher Burnout and Morning Cortisol in Elementary School Students*, 159 SOC. SCI. & MED. 30, 35 (2016) (“As expected, we found that after adjusting for differences in cortisol levels due to age, gender, and time of awaking, higher morning cortisol levels in students could be significantly predicted from higher burnout levels in classroom teachers.”).

¹⁶⁰ See GREENBERG ET AL., *supra* note 157, at 7.

¹⁶¹ See sources cited *supra* note 154.

¹⁶² See, e.g., Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 927–28 (Cal. Ct. App. 2016), *review denied* (Cal. Aug. 22, 2016) (Liu, J., dissenting from denial of review); *id.* at 929–30 (Cuéllar, J., dissenting from denial of review); REBELL, *supra* note 6, at 6; Chemerinsky, *supra* note 28, at 258–59; Geoffrey R. Stone, Opinion, *Are Detroit’s Most Terrible Schools Unconstitutional?*, N.Y. TIMES (Oct. 21, 2016), <http://www.nytimes.com/2016/10/21/opinion/are-detroit-s-most-terrible-schools-unconstitutional.html> [<https://perma.cc/3PDJ-G5PR>].

¹⁶³ For one informed commentator’s view on how to “improv[e] both the teaching profession and, consequentially, the quality of our schools,” see DANA GOLDSTEIN, THE TEACHER WARS 263–74 (2014).