EDUCATION POLICY LITIGATION AS DEVOLUTION

Every state's constitution provides some form of education guarantee,[1] and the Supreme Court has held that the federal Constitution affords protection against certain educational deprivations.[2] But advocates have struggled to vindicate these rights in the courts, which have been wary of protracted litigation against complicated bureaucracies run by democratically accountable officials. In the sixty years since *Brown v. Board of Education*,[3] state and federal courts have heard challenges to education systems in two primary waves of litigation: over racial segregation and school funding. Courts hearing these cases have spoken in expansive terms on the nature of educational rights, but they have been reluctant to venture into the weeds of education policy, citing concerns about the separation of powers, local control, and judicial competence.

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. Most prominently, in *Vergara v. State*,[4] a California trial court recently ruled that several California state laws regulating teacher employment violated the state constitution's equal protection clause[5] and guarantee of "a system of common schools."[6] Similar litigation has followed in New York,[7] and advocates plan suits in additional states.[8]

The remedy sought in this new wave of litigation differs from that of past waves. Unlike desegregation litigation, these cases do not seek to police education policy all the way down to the district level. And unlike state-funding litigation, these cases do not seek to control a

---

[1] *See* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 955 (2014) (tracing history of state constitutional education clauses); Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 321–25 (2011) (surveying those clauses).

[2] *See* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954).

[3] 347 U.S. 483.

[4] No. BC484642 (Cal. Super. Ct. Aug. 27, 2014). This opinion was announced in preliminary form on June 10, 2014. Vergara v. State, No. BC484642 (Cal. Super. Ct. tentative decision June 10, 2014).

[5] CAL. CONST. art. I, § 7(a).

[6] *Id.* art. IX, § 5.

[7] Complaint for Declaratory & Injunctive Relief, Wright v. State, No. A00641/2014 (N.Y. Sup. Ct. July 28, 2014); Verified Amended Complaint, Davids v. State, No. 101105/2014 (N.Y. Sup. Ct. July 24, 2014).

[8] Motoko Rich, *Celebrated Trial Lawyer to Head Group Challenging Teacher Tenure*, N.Y. TIMES (Aug. 3, 2014), http://www.nytimes.com/2014/08/04/us/celebrated-trial-lawyer-david-boies-to-head-group-challenging-teacher-tenure.html [http://perma.cc/C89U-NEMQ] (describing a "legal strategy in which [a group led in part by trial lawyer David Boies] organizes parents and students to bring lawsuits against states with strong tenure and seniority protections").

uniquely state-level function. Instead, plaintiffs ask the courts to declare that a state cannot regulate local decisionmaking in a certain way; in effect, they seek to devolve a policy issue to the district level. In the absence of state-level statutes governing teacher tenure and dismissal, districts would have a freer hand in exercising their authority as employers; they could craft teacher workforce policies and practices tailored to the needs of their district.

This Note argues that this new wave of litigation, with its policy-devolution remedy, mitigates many of the concerns that plagued education litigation in the past. Compared to their approach to previous waves, courts should be less wary of litigation seeking to affirm state constitutional educational rights when, by intervening, they would devolve a policy question to a lower-level democratically accountable entity.

This Note does not address the merits question of what evidence courts should deem sufficient to find a state law contrary to the right to an education, or whether tenure laws meet such a bar; this Note is not about teacher tenure. It focuses instead on the question that operates separately from that substantive determination: whether prudential concerns that historically have impeded judicial vindication of educational rights counsel against reaching the merits in this new wave. In so doing, it offers both an argument to the judiciary that this wave's approach mitigates the traditional prudential concerns and a broader argument that this form of litigation is not illimitably antidemocratic.

Part I outlines the two primary waves of education litigation, finding that as each wave led courts into the details of education policy, the courts withdrew, citing concerns about the separation of powers, local control, and judicial competence. Part II examines *Vergara*, arguing that this new wave, by seeking to devolve policy questions from states to districts, mitigates these concerns. Part III traces state and federal court decisions regarding local control to argue that despite the common formulation that substate entities are no more than "convenient agencies" of state governments, school districts are a judicially plausible and normatively desirable locus for devolution. Part IV applies this analysis to hypothetical challenges to state education statutes beyond the currently disputed state laws around teacher tenure and dismissal. Part V concludes.

I. JUDICIAL CONCERNS IN PAST EDUCATION LITIGATION

Over the last sixty years, litigation seeking to vindicate educational rights has proceeded in two primary waves. First, federal court litigation has sought to effectuate *Brown*'s holding that schools may not segregate by race; over the latter half of the twentieth century, this liti-

gation expanded into the minutiae of district-level policies before being hemmed in by the Supreme Court.[9] Second, state and federal court litigation has sought to vindicate educational rights by asking that courts order increased funding for high-poverty schools; this litigation has been grounded in the federal Equal Protection Clause, its state equivalents, and state constitutional education guarantees.

This Part surveys each wave, finding that both have won victories but stumbled against three interrelated categories of judicial concern.

First, state and federal courts have frequently declined to rule on the merits of lawsuits against state education systems on separation of powers grounds. These courts have reasoned that in a democratic society, decisions about education policy and state budgeting are properly left to political actors who are elected based on their positions on public policy matters.[10] This concern is grounded in a belief that courts should be wary of intruding on the traditional authority of the political branches to balance policy imperatives.

Second, courts hearing education litigation have been troubled by concerns for local control. State courts have been reluctant to take decisionmaking authority away from districts, and federal courts have been reluctant to centralize decisionmaking at the federal level at the expense of states and districts.[11] While this concern is distinct from the separation of powers concern discussed above, it shares a desire to let more democratically accountable political actors (whether at the state or local level) balance policy imperatives.

Third, courts have expressed concerns that the judiciary simply lacks the necessary expertise to manage education policy competently. This concern is closely linked with the previous two categories: the greater competence of state legislatures and school districts to manage school systems is often cited as an argument in favor of judicial abdication. But it also reflects a different category of concern. Even if concerns for democratic accountability and the proper role of each branch were absent, courts might simply be wary of policy-design tasks for which they lack the institutional capacity.

In both desegregation and funding litigation, early court victories have often led to judicial retreat as these three concerns ("traditional prudential concerns") grew as cases stretched over years and decades.

---

[9] *See* Missouri v. Jenkins, 515 U.S. 70 (1995) (allowing only remedies directly related to segregation); Milliken v. Bradley, 418 U.S. 717 (1974) (restricting remedies to district boundaries).

[10] While many state court judges are elected, they are less likely to be elected based on their articulated positions on a policy area such as education. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 731–39 (1995).

[11] *See* Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231 (1998) (noting state courts tend to prioritize local control over educational rights).

A. Desegregation Litigation

The first major wave of education litigation began with *Brown*, as federal courts sought to vindicate *Brown*'s desegregation mandate. In the decades after the decision, the Court reaffirmed and expanded *Brown*. But over time, the Court reined district courts back from wading too deep into the details of local education policymaking, citing the traditional prudential concerns.

1. 1954–55: Brown *Decisions*. — *Brown I* and *Brown II*,[12] two decisions issued a year apart, followed a sequence that would prove common in education litigation: the first decision announced a right, and the second turned to remedies. While the prohibition of school segregation has become one of the most cherished principles of American law, the question of how courts should properly vindicate this right has proved far thornier.

In *Brown I*, the Court declared in unqualified and now-famous terms that "[s]eparate educational facilities are inherently unequal."[13] Turning to remedies, the Court noted that "because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity."[14] Showing a concern for the roles of both the executive branch and local decisionmakers, the Court ordered reargument and invited the participation of federal and state attorneys general.[15]

Brown II, which ruled on remedies, clarified the scope of *Brown I*: "All provisions of federal, state, or local law requiring or permitting such discrimination must yield" to *Brown I*'s holding that public school segregation is unconstitutional.[16] *Brown* did not merely prohibit *statewide* segregation laws, but *any* level of government segregating public schools. This was hardly a doctrinal novelty, but it would commit the federal courts to policing at the school district level.

But in an early example of the Court's concern for local control, *Brown II* did not establish uniform timelines across all then-segregated districts. Conceding that implementation of *Brown I*'s holding "may require solution of varied local school problems" and that "[s]chool authorities have the primary responsibility for . . . solving these problems," *Brown II* remanded the cases to the federal district courts that originally heard them.[17] The Court noted that local factors might delay implementation of the decision, including "the physical condition of the school plant, the school transportation system, personnel, revision

---

[12] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

[13] *Brown I*, 347 U.S. 483, 495 (1954).

[14] *Id.*

[15] *Id.* at 495–96.

[16] *Brown II*, 349 U.S. at 298.

[17] *Id.* at 299.

of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations."[18] In words that would ring through the ages with less clarity than *Brown I*'s declaration that separate is inherently unequal, *Brown II* directed district courts to move "with all deliberate speed."[19]

2. 1955–73: Expanding Brown. — For the next twenty years, the Court held firm and even expanded *Brown* against local opposition. The Court rebuffed state and local attempts to delay implementation,[20] held that a county could not close its public schools to avoid desegregation,[21] found the mere creation of a school choice plan to be insufficient where it did not actually result in desegregated schools,[22] and approved a district court's order of busing within a school district.[23] During this period, the Court approved an expanding menu of remedies to respond to local resistance and demographic trends that hampered court-ordered desegregation.

3. 1974–95: Curtailing Brown. — In the 1970s, the Supreme Court grew wary of judicial control of school districts and began to order a retreat grounded in the traditional prudential concerns.

In *Milliken v. Bradley*,[24] the Court overruled a district court order reassigning students across district lines, reasoning that local control of schools is a deeply rooted tradition, and that district lines could not be cast aside as mere administrative conveniences.[25] "No single tradition in public education," the Court argued, "is more deeply rooted than local control . . . ; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[26] In response to desegregation efforts, many white families had moved outside of urban districts.[27] After *Milliken*, these students were out of direct reach of the courts, which faced the daunting task of desegregating majority-minority school districts.

In *Missouri v. Jenkins*,[28] the Court rejected a district court's ordering of salary increases for teachers, magnet school funding, reduced

---

[18] *Id.* at 300–01.

[19] *Id.* at 301.

[20] Cooper v. Aaron, 358 U.S. 1 (1958).

[21] Griffin v. Cnty. Sch. Bd., 377 U.S. 218 (1964).

[22] Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968).

[23] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[24] 418 U.S. 717 (1974).

[25] *Id.* at 741.

[26] *Id.* at 741–42.

[27] *See, e.g.*, Haifeng Zhang, *School Desegregation and White Flight Revisited: A Spatial Analysis from a Metropolitan Perspective*, 32 URB. GEOGRAPHY 1208 (2011).

[28] 515 U.S. 70 (1995).

class sizes, and other policies that went beyond the underlying history of segregation.[29] As in *Milliken*, the Court emphasized the importance of local control, and also raised separation of powers concerns: "[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system . . . ."[30]

Justice Thomas concurred, criticizing the Court's past jurisprudence as having "trampled upon principles of federalism and the separation of powers"[31] and running the risk of "inject[ing] the judiciary into the day-to-day management of institutions and local policies — a function that lies outside of our Article III competence."[32]

With *Milliken* and *Jenkins* having thoroughly circumscribed the remedies available in desegregation suits on grounds of the traditional prudential concerns, the viability of the desegregation suit as a vehicle for significant change in American education waned, leaving advocates in search of other litigation theories.

B. School-Funding Litigation

Parallel to the desegregation litigation, and picking up urgency as that litigation reached its senescence, advocates began to pursue a separate form of education litigation: seeking court orders directing more generous state funding for high-poverty districts. These cases were grounded in several constitutional theories, including the federal Equal Protection Clause, state equal protection clauses, and state education clauses. Like the *Brown* wave, this litigation won significant victories but sputtered against the traditional prudential concerns. And by targeting a uniquely state-level function, advocates pitted courts against legislatures in standoffs that raised these concerns all the more.

1. Federal School-Funding Litigation. — First, advocates sued states for more generous funding under the federal Equal Protection Clause, arguing that the principles of *Brown* required equity in funding for districts. These efforts were short-lived, quickly running up against the traditional prudential concerns for the separation of powers, local control, and judicial competence.

Federal educational equity litigation achieved its greatest victory in *Serrano v. Priest*,[33] when the California Supreme Court held that poverty was a suspect class under the federal Equal Protection Clause[34] and that

---

[29] *Id.* at 100.
[30] *Id.* at 99 (citation omitted).
[31] *Id.* at 114 (Thomas, J., concurring).
[32] *Id.* at 135.
[33] 487 P.2d 1241 (Cal. 1971).
[34] *Id.* at 1251–55.

education was a fundamental interest.[35] This case gave hope to advocates that significant educational improvements could be achieved through Equal Protection Clause litigation. That hope was fleeting.

Two years later, in *San Antonio Independent School District v. Rodriguez*,[36] the U.S. Supreme Court rejected the federal constitutional theories advanced by the plaintiffs.[37] The Court held that low-income school districts (or residents thereof) are too "large, diverse, and amorphous" a class to merit strict scrutiny.[38] Noting its fear of "assuming a legislative role . . . for which the Court lacks both authority and competence," the Court further held that education is not a fundamental right under the federal Constitution.[39]

In assessing whether Texas's school finance system had a rational basis, the Court identified the interest in local control of education: "[The Texas system] permits and encourages a large measure of participation in and control of each district's schools at the local level."[40] A dissenting Justice Marshall embraced these same pro–local control terms: "I do not question that local control of public education, as an abstract matter, constitutes a very substantial state interest."[41] He questioned only whether the Court properly vindicated this interest.[42]

Relatedly, the Court worried about its own competence in adjudicating education policy questions. "In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."[43]

In upholding Texas's financing system, the Court marked the end of efforts to use the federal Constitution to direct education financing.

2. State School-Funding Litigation. — Advocates next turned to equal protection clauses in state constitutions, fortified by state constitutional education clauses — explicit education language absent from the federal Constitution.[44] Such challenges were successful in achieving court orders to modify state funding formulas in Arkansas, Cali-

---

[35] *Id.* at 1255–59.
[36] 411 U.S. 1 (1973).
[37] *Id.* at 6.
[38] *Id.* at 28.
[39] *Id.* at 31.
[40] *Id.* at 49.
[41] *Id.* at 126 (Marshall, J., dissenting).
[42] *Id.* at 127–28.
[43] *Id.* at 42 (majority opinion).
[44] William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1198–99 (1996).

fornia, Connecticut, New Jersey, West Virginia, and Wyoming, but were rejected in the majority of states.[45]

In recent decades, advocates have changed their constitutional argument, shifting from a right to funding equity toward a right to funding *adequacy*.[46] Although this approach has achieved victories, it has similarly run up against the traditional prudential concerns. These concerns have emerged in two relevant patterns.

First, many state courts have refused either to hear these challenges or to rule on the merits, deferring to state legislatures on separation of powers grounds.[47] Courts in at least nine states have held adequacy challenges nonjusticiable, embracing some variation of the argument that "decisions regarding the content, quality, level, and appropriate funding of K–12 education . . . properly belong to the legislative and executive branches."[48] In assessing whether education litigation presents a nonjusticiable political question, state courts have often looked to the Supreme Court's decision in *Baker v. Carr*,[49] which articulated a six-factor test that included whether the (in that case federal) Constitution textually commits the issue to another branch and whether there is a "lack of judicially discoverable and manageable standards" for adjudicating the question presented.[50]

Many state courts have ruled that state constitutional guarantees do not provide such manageable standards for decision. In Rhode Island, for example, the state supreme court held that it was the duty of the state legislature, not the court, to define the substance of the state's constitutional right to education; lacking a definition from the state legislature, the court held that it was powerless to enforce the right.[51]

In a paradoxical twist on this deferential approach, the Texas Supreme Court's efforts to vindicate educational rights without dictating quasi-legislative standards resulted in years of back-and-forth between the court and the legislature. In 1989, the court ordered "substantially" equal funding for low-income districts,[52] leaving the details to the legislature. In subsequent years, the court would twice reject legislative attempts at compliance; one state senator expressed his desire to "surrender" to the court, but lamented that "the justices would not tell him where to turn himself in."[53] Six years later, when the court al-

---

[45] *Id.* at 1199–200.

[46] *Id.* at 1201–02.

[47] *Id.* at 1204–07. Dietz has characterized such cases as "[t]he Deferential Approach." *Id.* at 1204.

[48] ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES 96 (2009).

[49] 369 U.S. 186 (1962); *see also* HANUSHEK & LINDSETH, *supra* note 48, at 101.

[50] *Baker*, 369 U.S. at 217.

[51] City of Pawtucket v. Sundlun, 662 A.2d 40, 63 (R.I. 1995).

[52] Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391, 397 (Tex. 1989).

[53] Dietz, *supra* note 44, at 1206–07.

lowed a revised finance scheme to stand, it cautioned that this judgment "should not be interpreted as a signal that the school finance crisis in Texas has ended."[54] One commentator compared the saga to a Russian novel: "long, tedious, and everyone dies in the end."[55]

Second, at the other end of the deference spectrum, state courts dictating specific policies to their legislatures have found themselves living Russian novels of their own. In 1972, the New Jersey Supreme Court struck down the state's school financing system, directing an increase in funding for low-income districts to the level of the state's highest spending districts.[56] For decades, the state supreme court and legislature traded foot-dragging, injunctions, and legislation, with the legislature chafing against the court's efforts to direct the spending of billions of dollars and plaintiffs continuing to seek additional funding.[57] In 2011, this litigation made its most recent trip to the state supreme court, which reminded the state that "[l]ike anyone else, the State is not free to walk away from judicial orders enforcing constitutional obligations."[58] The court below began its opinion with another literary allusion: "And so, once again, unto the breach."[59]

Plaintiffs in state education adequacy cases won over seventy-five percent of early cases,[60] but in recent years state courts have grown warier of adjudicating cases and more deferential to legislatures.[61] This reluctance has been grounded in concern for the separation of powers and judicial competence, with courts wary of "interminable litigation, ever-growing demands from plaintiffs, and tension-fraught showdowns between the judiciary and legislatures."[62] As state adequacy litigation has moved from seeking declarations from the judiciary that funding is inadequate to asking courts to order the legislature to make specific funding allocations, these concerns have grown.[63]

II. JUDICIAL MICROMANAGEMENT V. POLICY DEVOLUTION

Both the post-*Brown* desegregation litigation and the state funding litigation that followed suffered from a common problem: the courts

---

[54] Edgewood Indep. Sch. Dist. v. Meno (*Edgewood IV*), 917 S.W.2d 717, 725 (Tex. 1995).

[55] Dietz, *supra* note 44, at 1207 (quoting Mark G. Yudof, *School Finance Reform in Texas: The* Edgewood *Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991)) (internal quotation marks omitted).

[56] Robinson v. Cahill, 287 A.2d 187 (N.J. 1972).

[57] HANUSHEK & LINDSETH, *supra* note 48, at 109–11; Dietz, *supra* note 44, at 1207–09.

[58] Abbott *ex rel.* Abbott v. Burke (*Abbott XXI*), 20 A.3d 1018, 1024 (N.J. 2011).

[59] Abbott *ex rel.* Abbott v. Burke, No. M-1293 (N.J. Super. Ct. Mar. 22, 2011) (paraphrasing WILLIAM SHAKESPEARE, HENRY THE FIFTH act 3, sc. 1).

[60] Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 85 (2010).

[61] *Id.* at 85–86; HANUSHEK & LINDSETH, *supra* note 48, at 105–06.

[62] Simon-Kerr & Sturm, *supra* note 60, at 88.

[63] *Id.* at 89.

were troubled by the antidemocratic nature of dictating education policy and funding decisions from the bench, and retreated from that role. Recently, advocates have sued state education agencies under a new theory: plaintiffs have sought to strike down state laws that they argue are contrary to the state constitutional educational guarantees. This is a new form of litigation seeking a new form of remedy, and these early cases are the seeds of what may ultimately stand as a third wave of education litigation.

As this Part will argue, this form of remedy may evade the concerns that troubled past education litigation because plaintiffs do not ask the courts to dictate teacher tenure and dismissal policies to states and districts. Instead, plaintiffs seek to devolve contested policy issues from states to districts; they would have the courts strike down state statutes, leaving districts with greater discretion until or unless the state legislature crafts compliant laws. This litigation thus mitigates many of the traditional prudential concerns cited by the courts in the latter phases of past waves of education litigation.

It is too soon to tell whether this litigation will amount to a genuine new wave of education reform litigation, or whether it will be shorter-lived. But as this Part will argue, the form of remedy may allow this litigation to evade the concerns that plagued its predecessors.

A. Devolution in Theory and Practice

The concept of "devolution" of policymaking discretion — a government granting control over a policy area to a lower-level entity — has been well developed in scholarship and employed at various levels of government. Professor Peter Schuck identifies the "pressure to devolve power from the center to the periphery" as a "nearly universal phenomenon in contemporary society" that may be driven by "efficiency goals, concerns about protecting liberty, or communitarian ideals."[64] Devolution has been employed as a policy tool in a range of areas, Schuck notes, including "environmental regulation, welfare policy, torts, and individual rights."[65] Devolution advocates often argue that devolving power will allow lower-level entities to "construct a set of social policies to reflect their residents' unique preferences."[66] While most commonly discussed in the federal-state context, Schuck outlines the possibilities for devolution in the state-local, public-private, and international-national contexts as well.[67]

---

[64] Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, YALE L. & POL'Y REV., Symposium Issue 1996, at 1, 5.

[65] *Id.* at 3.

[66] Helen Hershkoff, Essay, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403, 1428 (1999).

[67] *See* Schuck, *supra* note 64.

For example, the 1996 reforms to the Aid to Families with Dependent Children[68] program devolved significant control over federal welfare programs to states to manage with greater discretion.[69] Scholars have also identified the rise of charter schools as an example of states devolving education policymaking control below districts, to the school or charter management organization level.[70]

For our purposes, we will discuss states having devolved authority to a school district when a state statute limiting district discretion (in the *Vergara* context, discretion over the retention and dismissal of teachers) is removed, leaving districts with greater control over their workforce policies. While devolution is often employed by higher-level governments through legislative or executive action, in this context devolution would occur as a result of a state court order invalidating laws created by the political branches.

B. Background on the Vergara *Litigation*

The most prominent and extensively litigated case in this new wave is *Vergara*, in which the California Superior Court held that certain state laws violated the state constitution's equal protection and education clauses.[71] Specifically, the court ruled against several "Challenged Statutes": California's Permanent Employment Statute[72] (requiring districts to grant permanent employment status — commonly known as "tenure" — to teachers within two years), Dismissal Statutes[73] (establishing a process districts must follow to dismiss a teacher), and the Last-In First-Out Statute[74] (requiring districts to lay off teachers by reverse order of seniority).

Vergara enjoined enforcement of these challenged statutes. Citing *Brown*, *Serrano*, and another state court case for the proposition that "unconstitutional laws and policies would not be permitted to compromise a student's fundamental right to equality of the educational experience,"[75] the court found that "on the evidence presented at trial, Plaintiffs have proven, by a preponderance of the evidence, that the Challenged Statutes impose a real and appreciable impact on students' fundamental right to equality of education and that they impose a disproportionate burden on poor and minority students."[76]

---

[68] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

[69] Schuck, *supra* note 64, at 7.

[70] *Id.* at 8.

[71] No. BC484642, slip op. at 3 (Cal. Super. Ct. Aug. 27, 2014).

[72] CAL. EDUC. CODE § 44929.21(b) (West 2014).

[73] *Id.* §§ 44934, 44938(b)(1)–(2), 44944.

[74] *Id.* § 44955.

[75] *Vergara*, No. BC484642, slip op. at 2.

[76] *Id.*, slip op. at 8 (emphasis omitted).

Turning to remedies, the court spoke to its role vis-à-vis the legislature: "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 . . . that passes constitutional muster."[77] The court did not order the state to pass any particular law, nor did it order districts to adopt any policies in the absence of compliant state legislation. It ruled only that the continued enforcement of these state-level laws would violate the state constitution.

Spurred by the *Vergara* decision, advocates have begun suing or preparing to sue other states to strike down similar laws.

C. How the Vergara *Wave Is Different*

1. Unavoidability of Prudential Concerns in Past Waves. — In desegregation and funding cases, the traditional prudential concerns were largely inevitable: enforcing desegregation orders required courts to police district-level decisionmaking, and enforcing funding equity orders required courts to police a uniquely state function.

In the desegregation context, the Supreme Court's *Brown I* holding that segregated schools violate the Equal Protection Clause applied equally to "[a]ll provisions of federal, state, or local law."[78] This holding committed the federal courts not only to prohibiting every state from establishing state-level segregative policies, but also to policing the far murkier world of school district decisionmaking, starting a line of cases that would lead to the judicial micromanagement rejected in *Jenkins*. This was not, of course, an error; holding otherwise would have left *Brown*'s holding inert from the outset. But as the ensuing cases have demonstrated, enforcing a prohibition that applies to districts has forced courts into a level of policy minutiae with which they are uncomfortable, as they must intrude on the traditional authority of the legislature (raising separation of powers concerns), take decisionmaking authority away from school districts (raising local control concerns), and wade into complicated policy disputes without the benefit of sufficient expertise (raising judicial competence concerns).

The state funding context poses a similar dilemma, but for different reasons. States provide approximately forty-five percent of education funding,[79] and by its very nature state funding can only be provided by the state. When courts hearing challenges to state funding formulas intervene, their ability to act is constrained by the reality that state funding must be distributed on a regular basis. No party would seek

---

[77] *Id.*, slip op. at 15.

[78] *Brown II*, 349 U.S. 294, 298 (1955) (applying holding of *Brown I*).

[79] *See* NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC SCHOOL REVENUE SOURCES 2 (2013), http://nces.ed.gov/programs/coe/pdf/coe_cma.pdf [http://perma.cc/T8WF-W7NA].

simply to order the state out of the business of providing school funding, as this would be catastrophic for district budgets. The result has often been that state legislatures and courts are left in a back-and-forth in which neither is able to reach a satisfactory endgame: like two boxers locked in embrace after too many rounds, each is too exhausted to end the matter on his own but unable simply to vacate the ring. This raises separation of powers concerns because state budgeting and taxation are classically political decisions reserved to the political branches, and it raises judicial competence concerns because courts have little expertise in state budgeting and education finance.

In both the desegregation and school funding contexts, courts are forced to speak to the minutiae of education policy or state budgeting in order to vindicate educational rights. This dynamic has inevitably raised the traditional prudential concerns, concerns that — especially in the later stages of each wave — have prevented effective judicial vindication of these rights.

2. Policy-Devolution Remedy's Mitigation of Prudential Concerns. — In this respect, *Vergara* and its follow-on litigation take a fundamentally different approach to remedies: rather than seeking declarations that both states and districts must follow, or that speak to a role that only the state can play, this litigation seeks to strike down state laws that regulate a function districts are capable of performing on their own — namely, decisionmaking as an employer. In effect, this litigation seeks to devolve a disputed issue of education policy from the states to school districts when a state law governing that policy issue is found to be inconsistent with the state's constitutional education guarantee.

Neither the Superior Court nor the *Vergara* plaintiffs presented the form of relief in these terms, but the plaintiffs spoke to the benefits that districts and students would reap from enjoining enforcement of the state law. The *Vergara* plaintiffs' brief, in terms uncharacteristically modest for educational rights litigation, cast its remedy as a "small change,"[80] asking the court to "declare the Challenged [state-level] Statutes unconstitutional on their face and as-applied and to permanently enjoin their enforcement."[81] "In the absence of this statutory scheme," the plaintiffs argued, "school administrators would have the ability to make employment and dismissal decisions . . . [and] could decline to offer permanent employment to a teacher unless and until they have determined that the teacher's performance merits such an offer."[82] District decisionmaking, of course, would not be left entirely unfettered; as public employees, teachers would still receive Due Pro-

[80] *See* Complaint for Declaratory & Injunctive Relief at 2, *Vergara* (No. BC484642).
[81] *Id.* at 5.
[82] *Id.* at 11.

cess Clause protections.[83] But compared to state education clauses, Due Process Clause enforcement is an area of law where state and federal courts have shown far less reluctance to establish clear standards and to police state- and district-level policies.

In a simplistic model of how this litigation would play out, a district court would enjoin enforcement of a law, and districts would have discretion over the area previously regulated by that law. In California, rather than granting teachers permanent employment status within two years, districts could exercise discretion over whether to retain teachers; rather than follow state-mandated steps for dismissing teachers, they could follow their own Due Process Clause–compliant approaches; and rather than lay off teachers in reverse order of seniority, they could develop their own prioritization processes. Districts could, by policy or contract, adopt employment terms similar to those previously imposed at the state level, or they could provide different terms.

Of course, the likely result of a court order enjoining enforcement of the Challenged Statutes would not simply be full state withdrawal from a policy area. States would likely seek to pass substitute compliant statutes. The *Vergara* Superior Court decision seemed to expect this outcome, explaining that it fell to the legislature to pass new legislation that would comply with the state constitution.[84] Were a state to respond to a *Vergara*-type ruling by immediately passing statutes that survived judicial scrutiny, the consequences would play out largely as an interaction between the state courts and the legislature.

But two other outcomes are possible. First, the state legislature might be unable or unwilling to pass any replacement statute. In that case, the policy area formerly governed by the challenged statutes would be devolved to school districts. Second, the state legislature might pass a statute that again failed judicial scrutiny. This would be different from the judiciary-legislature standoffs that arose in funding litigation for two reasons. In the interim, the court's enjoining of the statutes could take full effect, devolving the issue to districts, because unlike in the funding context, the removal of the state's role would not have a fiscally calamitous effect. Additionally, in contrast to the dynamic that led one Texas legislator to complain that he couldn't "surrender" to the court because "the justices would not tell him where to turn himself in,"[85] state legislators would know exactly how to relent: withdrawing from the policy area and devolving the disputed policy question to districts.

In either case, the judiciary need not reach an endgame where it is forced either to dictate the minutiae of education policy or to defer to

---

[83] *Id.* at 15; *see* Skelly v. State Pers. Bd., 539 P.2d 774, 787–89 (Cal. 1975).

[84] *Vergara*, No. BC484642, slip op. at 15.

[85] Dietz, *supra* note 44, at 1206–07.

the state. Instead, it can draw a clear line as to what a state may not do, knowing that district decisionmaking rather than judicial micromanagement will be the policy-formulation backstop. There is no guarantee that districts will universally enact policies that *better* vindicate the state constitutional education guarantee. But by intervening in this manner, courts can at least ensure that state-level statutes are not an obstacle to the vindication of this right.

D. Why Courts Needn't Follow Up with District-Level Orders

But if a court finds that a particular state-level policy violates state constitutional protections, might plaintiffs later follow up seeking similar orders at the district level? For example, assuming *Vergara* is upheld, might plaintiffs sue the City of Los Angeles if it adopts teacher workforce practices similar to those that had previously been required by state law? If so, these cases would begin to resemble the desegregation cases, in which the need to enforce constitutional protections down to the district level left courts running up against the traditional prudential concerns. Three independent but compatible arguments may allow the courts to avoid this concern.

First, while the Equal Protection Clause applies equally to "[a]ll provisions of federal, state, or local law,"[86] state courts need not read the less developed — and entirely distinct — realm of state education clauses in the same manner. Unlike the broad language of the Fourteenth Amendment ("[n]o state"[87]), which applies both to state-level government and to substate entities, many state education clauses speak to one specific state entity: the legislature. For example, California's constitution provides that "[t]he *Legislature* shall provide for a system of common schools."[88] Courts could read such constitutional language as commanding them to police the actions of state legislatures but giving them no authority over state subdivisions whose educational obligations are not constitutionally specified.

Second, in *Romer v. Evans*,[89] the Supreme Court struck down a state constitutional amendment restricting localities from establishing laws protecting homosexuals from discrimination.[90] In considering whether this state-level restriction on localities violated the Equal Protection Clause, the Court gave significant weight to the fact that creating a state-level prohibition made it uniquely difficult for homosexuals to vindicate their rights: "[Homosexuals] can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to

---

[86] *Brown II*, 349 U.S. 294, 298 (1955).
[87] U.S. CONST. amend. XIV, § 1.
[88] CAL. CONST. art. IX, § 5 (emphasis added).
[89] 517 U.S. 620 (1996).
[90] *Id.* at 631, 635–36.

amend the State Constitution . . . . This is so no matter how local or discrete the harm, no matter how public and widespread the injury."[91] The *Romer* majority did not require that either the state or localities affirmatively *protect* homosexuals from discrimination; it merely ruled that creating a state-level policy inconsistent with a constitutional protection creates a uniquely unconstitutional harm.[92]

Analogously, plaintiffs challenging state-level education laws may plausibly argue that these laws pose a unique degree of harm to their state constitutional right to an education. Citizens who are harmed, or whose children are harmed, by state-level education laws cannot petition their school boards to change local teacher workforce policies. Instead, they must seek state-level change — a more daunting prospect.

Finally, in the law of preemption, at least one state's supreme court has recognized that certain noncodified decisionmaking may not be policed with as much scrutiny as a statute effecting the same policy goals would. In *People v. Chicago Magnet Wire Corp.*,[93] Illinois law enforcement authorities charged a company with conspiracy to commit aggravated battery for exposing employees to dangerous substances in the workplace.[94] State workplace safety laws are generally preempted by the federal Occupational Safety and Health Act[95] (OSHA). But Illinois hadn't passed an overlapping statute — it instead exercised its prosecutorial discretion to apply criminal law in the employment-safety context.[96] The Illinois Supreme Court ruled that OSHA did not preempt a generally applicable criminal law, even when prosecutors enforced the law to further a policy interest generally preempted by federal law.[97] This ruling left local prosecutors free to use prosecutorial discretion to focus on workplace safety violations.

Analogously, state courts may allow districts to exercise discretion over personnel decisionmaking, even if districts use that discretion to further policies that would, if enacted statutorily, be unlikely to survive judicial scrutiny. For this argument to be successful, of course, districts could not codify such a policy.

In summary, the form of remedy sought by this new wave of litigation mitigates the traditional prudential concerns for the separation of powers, local control, and judicial competence by leaving the design of replacement policies to school districts rather than courts. State courts needn't wade into district-level policymaking because of the textual

---

[91] *Id.* at 631.
[92] *See id.*
[93] 534 N.E.2d 962 (Ill. 1989).
[94] *Id.* at 963.
[95] 29 U.S.C. §§ 651–678 (2012).
[96] *Chi. Magnet Wire Corp.*, 534 N.E.2d at 965–66.
[97] *Id.* at 966.

features of state education clauses and because of persuasive precedents that offer analogous justification for treating state statutes differently from local policy or practice.

III. DISTRICT AS AN APPROPRIATE LOCUS FOR DEVOLUTION

Generally, policy devolution is discussed in the federalism context, as devolving policy control from the federal government to dually sovereign state governments.[98] The notion of devolving policy choices from states to substate entities is less common, though not unprecedented.[99] This Part discusses the general role of substate entities in our constitutional system and argues that although localities are generally regarded by relevant cases and literature as "convenient agencies" of state governments — enjoying no separate sovereignty of their own — several cases suggest judicial sympathy to district-level control of education, making the school district a judicially plausible locus for devolution. Further, this Part argues that district-level devolution of policy discretion can be a normatively desirable outcome.

A. General Rule: Localities as "Convenient Agencies"

The general tendency in American law is to defer entirely to the authority of state governments to regulate the affairs — indeed, even the very existence — of substate entities such as cities. In *Hunter v. City of Pittsburgh*,[100] the Supreme Court affirmed the right of the state of Pennsylvania to consolidate the cities of Pittsburgh and Allegheny, even over the objections of a majority of Allegheny residents.[101] The Court ruled that localities enjoy no federal constitutional protection from their states: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."[102]

Similarly, state courts have often ruled that localities enjoy no sovereign powers of their own, but only those powers delegated to them by their state legislatures. In *City of New York v. State*,[103] the New York Court of Appeals held, as a matter of New York law, that cities could not sue their state absent statutory authorizations, constitutional violations, or other narrowly defined exceptions.[104] And state courts

---

[98] *See, e.g.*, Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351 (2000).

[99] *See, e.g.*, Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

[100] 207 U.S. 161 (1907).

[101] *See id.* at 174–75.

[102] *Id.* at 178.

[103] 655 N.E.2d 649 (N.Y. 1995).

[104] *Id.* at 652.

have narrowly circumscribed the authority of localities to (among other powers) go beyond explicit statutory authorization,[105] reinterpret state laws,[106] and create causes of action.[107]

B. District as a Judicially Plausible Locus for Devolution

Despite these doctrinal headwinds, the school district is a judicially plausible locus for devolving policy discretion. The Supreme Court has held that school districts have a claim, grounded in tradition, to control over education distinct from the state, and that the democratically elected status of school district leadership merits judicial respect.

As detailed in Part I, courts have recognized the uniquely local nature of education and the special legitimacy that local educational authorities have over it.[108] Even outside the desegregation and school-funding contexts, the Court has recognized that school districts have a special claim to control over education. In *Martinez v. Bynum*,[109] the Supreme Court upheld the right of public school districts, pursuant to state legislation, to exclude state residents living in other districts.[110] After first affirming the state's right to create residence requirements,[111] the Court noted that "[t]here is a further, independent justification for local residence requirements in the public-school context"[112] — the "deeply rooted" tradition of local control over schools.[113]

Further, school districts are led by elected officials accountable to their communities, usually in the form of a local school board. As the Supreme Court explained in *Milliken*, "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'"[114] Concerns for the separation of powers and local control are both grounded in concern for democratic

---

105 Oleson v. Town of Hurley, 691 N.W.2d 324, 329 (S.D. 2004) (narrowly construing town's authorization to operate bar).

106 Arlington Cnty. v. White, 528 S.E.2d 706, 713–14 (Va. 2000) (rejecting county's interpretation of "dependent" as including domestic partners).

107 McCrory Corp. v. Fowler, 570 A.2d 834, 840 (Md. 1990) (rejecting county's employment discrimination cause of action).

108 Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. LAW. 977, 1011 (2011) ("[T]he Court's most well known and emotionally charged localism rhetoric has arisen in defense of the independence of school districts, which are units of local government with few and narrowly circumscribed powers . . . ." (footnote omitted)).

109 461 U.S. 321 (1983).

110 *See id.* at 322–23, 333.

111 *Id.* at 328–29.

112 *Id.* at 329.

113 *Id.* (quoting Milliken v. Bradley, 418 U.S. 717, 741 (1974)).

114 *Milliken*, 418 U.S. at 742 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).

accountability, a concern that is mitigated by devolution to a democratically accountable school district.

C. District as a Normatively Desirable Locus for Devolution

Many of the same arguments for judicial plausibility can also support the normative desirability of devolution to districts. While past waves of education litigation were subject to fears that judicial education policymaking was antidemocratic, *Vergara*-type litigation may promote democracy by placing contested education policy issues closer to the citizenry. As now-Judge David Barron has argued about city government more broadly, the city is in many ways a more vibrant locus for democratic life than the state is, enjoying an energy and legitimacy independent of its state.[115]

Further, international comparisons of education governance have found that compared to peer nations that excel on international tests, the United States tends to fracture education policymaking authority amongst levels of government, impeding the ability of policymakers at any level to implement a coherent agenda.[116] While this Note does not advocate complete devolution of state education policymaking authority to districts, this litigation could at least allow districts not to carry out state-prescribed policies that are clearly contrary to state constitutional education guarantees.

IV. DEVOLUTION LITIGATION AND OTHER STATE-LEVEL POLICIES

The foregoing analysis, mirroring *Vergara* and its brethren, has focused on challenges to state statutes regulating teacher employment policies. But this model of litigation — suing a state to enjoin enforcement of a state-level statute that restricts district-level decisionmaking — could be applied to other policies. This Part considers the implications of this Note's devolution framework for hypothetical challenges to other contested state education laws. It does not attempt an exhaustive overview of education policy disputes, but instead selects a few issues that illustrate how this model may be extended. As noted at the outset, this Note does not examine the merits question of which state-level statutes do and do not infringe the right to education — it considers only how the framework articulated here might apply to other laws. Under the policy-devolution framework articulated in this

---

115 *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 491 (1999).

116 *See* ORG. FOR ECON. CO-OPERATION & DEV., STRONG PERFORMERS AND SUCCESSFUL REFORMERS IN EDUCATION 250–51 (2011), http://www.oecd.org/pisa/46623978.pdf [http://perma.cc/T3D5-PDE6].

Note, courts should be more receptive to challenges to state statutes that regulate functions that school districts can carry out on their own. Such laws would, if found contrary to a state's constitutional education guarantee, be hospitable to devolution.

A. State Class-Size Laws

Many state statutes set maximum class sizes by grade.[117] Such class-size reduction requirements have fervent advocates and opponents, both of whom cite research in their favor.[118] Such laws represent classic examples of the sorts of law that, if found by a court to be contrary to the state constitutional education guarantee, could be devolved to districts. Districts would be left with a freer hand, and could choose either to keep class sizes at levels consistent with the enjoined state statute or to experiment with different approaches.

B. State Charter-School Laws

All but eight states have laws that allow the creation of charter schools outside the traditional district process.[119] Generally, these laws allow a charter school "authorizer" to grant a charter to a school that will operate under a management structure different from that of a traditional public school, generally subject to a cap on the number of such schools that may be created. Authorizers may be school districts themselves, or may be a state agency, nonprofit organization, or college or university.[120] Like class-size regulations, these laws are a subject of controversy, with proponents and opponents citing research suggesting that state laws establishing such school chartering routes do or do not

---

[117] *State Policy Report Card 2014: Promote Staffing and Programmatic Flexibility*, STUDENTSFIRST, http://reportcard.studentsfirst.org/policy/spend_wisely_govern_well/spend_taxpayer_resources_wisely_to_improve_outcomes_for_students/promote_staffing_and_programmatic_flexibility/state_by_state (last visited Nov. 23, 2014) [http://perma.cc/4CYL-CG3D].

[118] *Compare* Alan B. Krueger, *Experimental Estimates of Education Production Functions*, 114 Q.J. ECON. 497, 528 (1999) (finding significant positive effect of smaller classes), *with* Grover J. "Russ" Whitehurst & Matthew M. Chingos, *Class Size: What Research Says and What It Means for State Policy*, BROOKINGS 9–13 (May 11, 2011), http://www.brookings.edu/~/media/research/files/papers/2011/5/11%20class%20size%20whitehurst%20chingos/0511_class_size_whitehurst_chingos.pdf [http://perma.cc/F5V5-28CL] (surveying research and concluding that "[t]he costs and benefits of class-size mandates need to be carefully weighed against all of the alternatives when difficult budget and program decisions must be made," *id.* at 13).

[119] *The Last Eight States Without Charter Laws*, *in* CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES (2013), https://www.edreform.com/wp-content/uploads/2013/01/CharterLaws2013-Last-8-States.pdf [http://perma.cc/Q4BK-3CWL].

[120] *Policy Recommendation: Statewide Alternative Authorizers*, NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, http://www.qualitycharters.org/assets/files/images/stories/pdfs/policy/Statewide_Authorizers_Updated%20111313.pdf (last visited Nov. 23, 2014) [http://perma.cc/BNY9-NZQ7].

further educational rights.[121] Challenges from plaintiffs on both sides of the debate are conceivable.

First, charter school opponents might sue to enjoin the state's charter school law, effectively revoking the authority of authorizers to grant new charters and restoring districts to their traditional role in the creation and oversight of all public schools. Such a suit would be consistent with the policy-devolution framework articulated here, as districts are capable of creating and overseeing public schools on their own without the state stepping in to create alternate pathways.

Second, proponents of charter schools might bring suits seeking to strike down the cap on the number of charter schools that may be created in a state. Depending on the entity whose chartering authority is expanded by the removal of such a cap, such a challenge might be less consistent with the policy-devolution framework. When charter school laws create authorizers that are not school districts (for example, universities or nonprofits), they reduce local control by creating avenues for the creation and management of public schools outside the traditional democratically accountable school-district structure; removing caps would further reduce district control. A suit challenging charter caps may thus face the traditional prudential concern for local control.

C. State Teacher-Evaluation Laws and Complications of the Federal Role

The foregoing analysis has not yet noted an important player in education policy: the federal government. Despite the American tradition of local control over education, the federal government plays a significant role in governing American schools — a role that complicates the devolution analysis in ways that are beyond the scope of this Note. By way of illustration, in recent years the federal government has conditioned federal funding or waivers of certain federal requirements on states passing statutes regulating teacher evaluation.[122] In

---

[121] *Compare National Charter School Study 2013*, CENTER FOR RES. ON EDUC. OUTCOMES 3 (2013), http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf [http://perma.cc/9SBM-5B9Y] ("[C]harter schools now advance the learning gains of their students' [sic] more than traditional public schools in reading. . . . [Gains in] math . . . [are] now comparable to the learning gains in traditional public schools."), *with* Philip Gleason et al., *The Evaluation of Charter School Impacts*, U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. EVALUATION & REGIONAL ASSISTANCE 1 (2010), http://ies.ed.gov/ncee/pubs/20104029/pdf/20104030.pdf [http://perma.cc/PT9S-GFDX] ("On average, charter middle schools that hold lotteries are neither more nor less successful than traditional public schools in improving student achievement . . . .").

[122] *See, e.g.*, U.S. DEP'T OF EDUC., ESEA FLEXIBILITY 3 (2012), http://www.ed.gov/esea/flexibility/documents/esea-flexibility-acc.doc [http://perma.cc/95SQ-4BZ6] (conditioning waiver of No Child Left Behind requirements on new teacher evaluation systems); Race to the Top Fund, 74 Fed. Reg. 59,688, 59,803 (Nov. 18, 2009) (to be codified at 34 C.F.R. Subtitle B, Chapter II) (identifying new teacher evaluation systems as selection criterion for major competitive grant); *see also* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265,

response, many states have passed state-level statutes directing how districts must evaluate their teachers to comply with federal conditions.[123] These laws have been controversial,[124] but opponents of the laws might have difficulty suing to enjoin their enforcement. As a result of the federal funding tied to these state-level statutes, a lawsuit challenging state regulation of district teacher evaluation might not track the foregoing analysis of tenure laws. Rather than surgically devolving a policy question to districts, courts might be wary of injecting themselves into a complicated federal-state-local scheme in which intervention might endanger federal funding, raising many of the same concerns that emerged in the funding litigation.

V. CONCLUSION

In the sixty years since *Brown*, advocates have sought to vindicate educational rights in state and federal courts under a variety of legal theories. While this litigation has achieved enormous successes, it has struggled in its later stages as courts raised concerns for the separation of powers, local control, and judicial competence to shy away from wading into the minutiae of education policy. The *Vergara* wave of litigation offers a new approach to vindicating state constitutional educational rights, one which may avoid the traps that have plagued desegregation and school-funding suits.

This approach also addresses a concern held outside the judiciary. Many education commentators argued in the wake of the *Vergara* decision that, regardless of the policy considerations, they were uneasy with the courts refereeing the political fight over teacher tenure.[125] This analysis does not entirely quiet such concerns — this litigation does ask courts to evaluate state laws against constitutional guarantees. But it does not make courts the ultimate policymaker, instead devolving policy questions to districts. Such an approach may better balance the need to vindicate state constitutional rights with respect for the proper roles of each branch and level of government.

279–81 (2013) (discussing authority under which the Secretary of Education has imposed alternative new conditions on federal education funding).

123 *See, e.g.*, *General Assembly Passes "First to the Top" Legislation*, THECHATTANOOGAN.COM (Jan. 20, 2010), http://www.chattanoogan.com/2010/1/20/167175/General-Assembly-Passes-First-To-The.aspx [http://perma.cc/W66W-QFF6] (noting that then-Governor Phil Bredesen had urged passage of the law, which included new teacher evaluation requirements, "so that Tennessee could fairly compete for the . . . Race to the Top program").

124 Simone Pathe & Jaywon Choe, *A Brief Overview of Teacher Evaluation Controversies*, PBS NEWSHOUR (Feb. 4, 2013, 11:25 AM), http://www.pbs.org/newshour/rundown/teacher-evaluation-controversies [http://perma.cc/6836-QLQY].

125 *See, e.g.*, Rick Hess, *My Take on the* Vergara *Verdict*, EDUC. WEEK (June 11, 2014, 8:15 AM) http://blogs.edweek.org/edweek/rick_hess_straight_up/2014/06/my_take_on_the_vergara_verdict.html [http://perma.cc/UXD3-J3LM].