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## SILVER LININGS CASEBOOK: HOW *VERGARA*'S BACKERS MAY LOSE BY WINNING

Kevin G. Welner\*

Thirty years ago, the social issues roiling in the United States were not much different than today. Voters rallied around issues of God, gays, and guns, with school prayer among the most highly charged topics.<sup>1</sup> President Reagan called for a constitutional amendment to permit voluntary prayer in public schools.<sup>2</sup> Although that was unsuccessful, Reagan encouraged Congress to pass the Equal Access Act of 1984, which was promoted by Christian Right groups like the Moral Majority.<sup>3</sup>

The Equal Access Act made it “. . . unlawful for any public secondary school . . . to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech . . . .”<sup>4</sup> The law’s clear goal was to protect religious student meetings and prayer groups.<sup>5</sup> In truth, the courts had already made clear that religion-focused student groups must be given equal access. Thus, as applied to the stated aim of the law, the Equal Access Act was largely superfluous.

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<sup>1</sup> This dates back to the Supreme Court’s 1962 decision in *Engel v. Vitale*, striking down a New York law providing for a voluntary and nondenominational, but official, school prayer. 370 U.S. 421, 430–31 (1962). The issue then resurfaced in 1982 when the Fifth Circuit, in *Lubbock Civil Liberties Union v. Lubbock Independent School District*, held that prayers read aloud over a school’s public address system and Bible readings led by public school teachers both violated the Establishment Clause. 669 F.2d 1038, 1046 (5th Cir. 1982).

<sup>2</sup> Ronald Reagan, *Radio Address to the Nation on Prayer in Schools*, AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=39565> (last visited Mar. 3, 2015).

<sup>3</sup> Cris Mayo, *Obscene Associations: Gay-Straight Alliances, the Equal Access Act, and Abstinence Only Policy*. SEXUALITY RES. AND SOC. POL’Y, 5(2), 45, 48–49 (2008).

<sup>4</sup> Equal Access Act of 1984, 20 U.S.C. § 4071 (1984).

<sup>5</sup> Mayo, *supra* note 3, at 48.

Gay-straight alliances (“GSAs”), however, were suffering a great deal of discrimination and exclusion—and that’s where the law has had its true impact. Since 1984, the Equal Access Act has been applied primarily to ensure access to GSAs.<sup>6</sup> In fact, given the important role that GSAs have played over the past two decades in promoting equal rights, the passage of the Equal Access Act by the Religious Right stands as an ironic watershed event in advancing the social and legal status of the LGBTQ community – progress that has led to the recent wave of marriage-equality rulings.

The lesson here is that promoting a legal strategy to achieve one set of ends can open the door for very different uses—an eventuality that this Article explores in a distinctly different setting: that of teacher job protections and education rights litigation. In their eagerness to take on teacher job protections, the plaintiffs in *Vergara v. State of California*<sup>7</sup> and follow-up litigation in New York<sup>8</sup> may be inviting litigation with very different goals for school policy and reform.

Education policy discussions have long been grounded in a broad agreement that high-quality teachers are among the most important resources schools can provide to their students.<sup>9</sup> But the past decade has seen dramatic movement in these discussions, illustrated in part by the rhetorical and policy shift from “highly qualified” to “highly effective.”<sup>10</sup> Particularly relevant here is the fact that the

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<sup>6</sup> See, e.g., *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (CD Cal. 2000).

<sup>7</sup> Trial Ct. Order at 1, *Vergara v. State*, No. BC484642, 2014 WL 6478415 (Cal. Super. Aug. 27, 2014).

<sup>8</sup> See Diane C. Lore, *Staten Island judge rules New York teacher tenure lawsuit can proceed to trial*, SI LIVE (Mar. 12, 2015 6:26 PM), [http://www.silive.com/news/index.ssf/2015/03/staten\\_island\\_judge\\_rules\\_new.html](http://www.silive.com/news/index.ssf/2015/03/staten_island_judge_rules_new.html); see also Angela Dickens, *Students First Blog, Vergara’s Effects Ripple Out to New York State*, (Jul. 31, 2014), <https://studentsfirst.org/blogs/entry/vergaras-effects-ripple-out-to-new-york-state>.

<sup>9</sup> See NATIONAL COMMISSION ON TEACHING AND AMERICA’S FUTURE, *What Matters Most: Teaching for America’s Future* (Carnegie Corp. of New York, N.Y. & Rockefeller Foundation, New York, N.Y., Sept. 1996).

<sup>10</sup> The No Child Left Behind Act (NCLB) used the term “highly qualified teacher” in provisions mandating that all teachers must have at least a bachelor’s degree and full state certification, and demonstrate knowledge of the subject matter they teach. 34

overarching shift toward performance standards has included teacher-quality discussions. Also at play has been the simultaneous push for deregulation<sup>11</sup> and, I would argue, de-professionalization<sup>12</sup> of teaching. These forces came together recently in the *Vergara* litigation in California, which is currently on appeal.<sup>13</sup>

The combined policy push for deregulation, de-professionalization and performance measures concerning teacher effectiveness has prompted movement toward an “easy entry, easy

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CFR § 200.56 (2008). In 2002, the US Department of Education issued regulations that classified teachers-in-training as “highly qualified” under these NCLB provisions, thus allowing teachers who enter the classroom through alternative certification programs, such as Teach for America, to qualify. *Id.* These regulations were found to violate NCLB, however, in *Renee v. Duncan*, 623 F.3d 787 (9th Cir. 2010). Congress has responded with a series of continuing resolutions (via, e.g., P.L. 111-242 in 2010 and P.L. 112-175 in 2012), modifying NCLB to allow these alternatively certified teachers to fit under the “highly qualified teacher” provisions. The Continuing Appropriations And Surface Transportation Extensions Act, P.L. No.111-322, §163, 124 Stat. 3521 (2010); Continuing Appropriations Resolution, Pub.L. No. 112-175, §145, 126 Stat. 1322 (2012). Meanwhile, through its “Race to the Top” and NCLB “Flexibility Waiver” policies, the Obama Administration has promoted student growth as integral to considering whether teachers are “highly effective.” *See, e.g.*, Letter From Arne Duncan, Secretary of Education, to Chief State School Officials (Sept. 23, 2011), available at <http://www2.ed.gov/policy/gen/guid/secletter/110923.html>. *See also* U.S. Dept. of Educ., *Race to the Top Scoring Rubric Appendix B: Scoring Rubric* (2010), <http://www2.ed.gov/programs/racetothetop/scoringrubric.pdf>). These policies represent a shift from a professional model of preparation for teaching to a model that attempts to determine qualifications based on a measure of performance.

<sup>11</sup> Welner, K. G., *Free-Market Think Tanks and the Marketing of Education Policy*, in PUBLIC EDUCATION UNDER SIEGE 67, 67 (Michael B. Katz & Mike Rose eds., 2013).

<sup>12</sup> *See* H. Richard Milner, *Policy Reforms and De-professionalization of Teaching*, NAT’L EDUC. POL’Y CENTER, i, i (Feb. 2013), [http://nepc.colorado.edu/files/pb-deprof-teaching\\_0.pdf](http://nepc.colorado.edu/files/pb-deprof-teaching_0.pdf).

<sup>13</sup> The trial court decision is available on the plaintiffs’ website. *See Vergara v. State*, No. BC484642 (Cal. Super. Aug. 27, 2014), available at [http://studentsmatter.org/content/uploads/2014/08/SM\\_FinalJudgment\\_08.28.14.pdf](http://studentsmatter.org/content/uploads/2014/08/SM_FinalJudgment_08.28.14.pdf). The appeal was filed on August 29, 2014. *See* Notice of Appeal, *Vergara v. State of California*, No. BC484642, (Cal. Super. Aug. 27, 2014), available at <https://www.documentcloud.org/documents/1283281-teacher-vergara-canoticeofappeal082914>.

exit” model of teacher employment.<sup>14</sup> Instead of building pedagogical content knowledge<sup>15</sup> and developing strong, professional expertise as a vital part of preparing candidates for teaching, policies now lower the barriers to entry into teaching through a variety of alternative certification approaches.<sup>16</sup> Some, perhaps many, of these new teachers will succeed; others will fail. Such failure is to be determined through a calculation with multiple measures but relying foremost on the test-score improvements of a teacher’s students.<sup>17</sup>

To make such a system work, principals need to weed out the failures. Laws that make this weeding difficult serve to thwart the easy-entry, easy-exit system, and California has among the strongest such laws.<sup>18</sup> The stage was thus set for the *Vergara* lawsuit, which was crafted by a group called “Students Matter” that favors the easy-entry, easy-exit system.<sup>19</sup>

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<sup>14</sup> See Ron French, *Michigan Classroom Loaded With Rookie Teachers Who Wash Out*, BRIDGE MAGAZINE, Oct. 14, 2013, <http://bridgemi.com/2013/10/michigan-classrooms-loaded-with-rookie-teachers-who-soon-wash-out/>.

<sup>15</sup> Professor Lee Shulman offered the term “pedagogical content knowledge” as encompassing the complex process required of teachers who must integrate their knowledge of what to teach with their knowledge of how to teach it. See Shulman, L. S., *Those Who Understand: Knowledge Growth in Teaching*. EDUC. RESEARCHER, 15(2), 4, 9 (1986).

<sup>16</sup> See, e.g., City Year, LACY Partnerships: Alternative Certification Programs, CITY YEAR ALUMNI, <http://alumni.cityyear.org/?LACYPartnerEducatio> (last visited Mar. 5, 2015). Alternative certification includes well-known programs such as Teach for America and TNTP’s options, as well as various other fellow, residency, and training programs. *Id.*

<sup>17</sup> Thomas J. Kane, *Capturing the Dimensions of Effective Teaching*, 12 EDUCATION NEXT, Fall 2012, 34 at 35 (2012), available at [http://educationnext.org/files/ednext\\_20124\\_kane2.pdf](http://educationnext.org/files/ednext_20124_kane2.pdf).

<sup>18</sup> Erica E. Phillips, *Teacher Tenure Dealt Legal Setback*, THE WALL STREET JOURNAL (June 10, 2014), available at <http://www.wsj.com/articles/california-teacher-job-protections-struck-down-in-students-suit-1402422428>.

<sup>19</sup> See Haley Sweetland Edwards, *The War on Teacher Tenure*, TIME (Oct. 30, 2014), available at <http://time.com/3533556/the-war-on-teacher-tenure/>. See also Heather Sommerville, *David Welch, Silicon Valley Entrepreneur, Leads Court Fight Against Teacher Tenure Laws*, SAN JOSE MERCURY NEWS (Aug. 11, 2014), available at [http://www.mercurynews.com/business/ci\\_25943802/dave-welch-silicon-valley-entrepreneur-leads-fight-against](http://www.mercurynews.com/business/ci_25943802/dave-welch-silicon-valley-entrepreneur-leads-fight-against).

The *Vergara* opinion was issued by the Hon. Rolf Treu, a state trial court judge, who decided in favor of the plaintiffs' challenge to five California Education Code statutes.<sup>20</sup> The plaintiffs argued, and the court agreed, that the statutes provide job protections to teachers, particularly more senior teachers, that are too extensive and are thus harmful to students. In truth, policy analysts could easily find fault with some of the challenged laws. What makes Judge Treu's decision remarkable was not that he was critical of the provisions, but rather that he found them so "shock[ing]"<sup>21</sup> as to violate the equal protection clause of the California Constitution.

This Article begins, in Section I, with an explanation of the main elements of the opinion of the trial court in *Vergara*. Section II follows with a critique of the opinion's legal analysis and causation analysis. Section III then presents an argument that the legal rule set forth by the trial court judge is a positive development because it would, if granted precedential authority,<sup>22</sup> give real teeth to rhetoric about protecting the educational rights of political minorities.<sup>23</sup> Finally, Section IV maintains that there are distinctions we can and should draw between the *Vergara* court's legal rule and its application of the rule to the evidence in that case.

## I. THE TRIAL COURT DECISION

The *Vergara* decision struck down five statutes within the California Education Code: § 44929.21(b), which requires a two-year

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<sup>20</sup> CAL. EDUC. CODE § 44929.21(b) (1987); CAL. EDUC. CODE § 44934 (1977); CAL. EDUC. CODE § 44938(b)(2) (1976); CAL. EDUC. CODE § 44944 (1977); CAL. EDUC. CODE § 44955 (1976).

<sup>21</sup> *Vergara v. State*, No. BC484642, 1, 7 (Cal. Super. Aug. 27, 2014), available at [http://studentsmatter.org/wp-content/uploads/2014/08/SM\\_Final-Judgment\\_08.28.14.pdf](http://studentsmatter.org/wp-content/uploads/2014/08/SM_Final-Judgment_08.28.14.pdf).

<sup>22</sup> The trial court decision has already had an outsized impact, generating headlines and policy initiatives, in addition to new lawsuits. But legal authority, in a way that is persuasive or binding on other courts, will only come about through a published appellate decision. See Edwards, *supra* note 19.

<sup>23</sup> Much of this article is drawn from pieces I published in the *Washington Post's* "Answer Sheet" as well as in the Division L Newsletter of the American Educational Research Association; it also draws on a presentation at the "Courts, Teachers, and Student Rights: Are *Vergara*, *Dauids*, and *Wright* Steps Forward or Missteps?" conference at Teachers College, Columbia University.

review process before teachers are given permanent employment status, commonly known as tenure; §§ 44934, 44938 (b)(1) and (2), and 44944, containing due process procedures attached to dismissal; and, § 44955, which mandates seniority protections in the case of layoffs (albeit with exceptions for newer but specialized teachers who meet the district's needs), and earned the nickname "Last-In-First-Out," or "LIFO" from its opponents. The court concluded that each of these statutes exposes students to "grossly ineffective teachers" in violation of the California Constitution's equal protection clause.<sup>24</sup>

The court's opinion is surprisingly terse – only about 15 double-spaced pages long. The crux of the argument is set forth in one key passage:

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. Therefore the Challenged Statutes will be examined with 'strict scrutiny,' and State Defendants/Intervenors must 'bear [] the burden of establishing not only that [the State] has a compelling interest which justifies [the Challenge Statutes] but that the distinctions drawn by the law[s] are necessary to further [their] purpose'".<sup>25</sup>

The court's reasoning can be synthesized according to the following syllogism: (a) each statute causes some children to be taught by grossly ineffective teachers; (b) each statute therefore caused a "real and appreciable impact" on those students' fundamental right to equality of education; (c) strict scrutiny review is thus in order; and (d) the state failed to show that its statutes advanced a compelling interest and therefore failed to satisfy the strict scrutiny standard.

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<sup>24</sup> CA. CONST. Art.1, § 7(a). ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ...").

<sup>25</sup> *Vergara*, No. BC484642 at 8 (citing *Serrano v. Priest*, 487 P.2d 1241, 1249 (Cal. 1971)).

The opinion briefly cites some testimony—including from Harvard professors Thomas Kane and Raj Chetty<sup>26</sup>—and concludes that none of the three policies (seniority-based layoffs, a two-year review period before a tenure decision, and strong due process protections) advanced a compelling enough interest. More specifically, the court found that the statutes were causing the employment of “from 2,750 to 8,250”<sup>27</sup> grossly ineffective teachers throughout California, and that this undermined the quality of education for the students in those classrooms.

Importantly, the court’s decision is, by legal necessity, grounded in a finding of a causal link between the five statutes and the employment of several thousand grossly ineffective teachers. The idea that there are more effective and less effective teachers is not controversial; there undoubtedly exists a range of teacher effectiveness, however defined, with some teachers falling at the bottom of that range. Of course, to note such a variance in quality among teachers is to merely state the obvious and the inevitable, and

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<sup>26</sup> *Id.* “Based on a massive study, Dr. Chetty testified that a single year in a classroom with a grossly ineffective teacher costs students \$1.4 million in lifetime earnings per classroom. *Id.* Based on a four-year study, Dr. Kane testified that students in LAUSD 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.” *Id.* The “9.54 months” figure is based on statistical modeling and should be taken with several grains of salt. See Gary Rubinstein, *Kanine Years*, GARY RUBINSTEIN’S BLOG (June 15, 2014), <https://garyrubinstein.wordpress.com/2014/06/15/kanine-months/>. More broadly, the research that Kane and Chetty presented to the court, which is grounded in the notion of causally attribute student test scores to their teachers, is highly controversial and has been subjected to various critiques. Regarding Chetty’s very high-profile study, see Audrey Amrein-Beardsley, *Rothstein, Chetty et. al. and VAM-Based Bias*, VAMBOOZLED (Oct. 19, 2014), <http://vamboozled.com/rothstein-chetty-et-al-and-vam-based-bias/>. Leaders in the statistical research community and the educational research community have strongly cautioned against policies that make such causal inferences in high-stakes settings. See American Statistical Association, *ASA Statement on Using Value-Added Models for Educational Assessment*, (April 8, 2014), [http://www.amstat.org/policy/pdfs/ASA\\_VAM\\_Statement.pdf](http://www.amstat.org/policy/pdfs/ASA_VAM_Statement.pdf). See also American Education Research Association and National Academy of Education, *Getting Teacher Evaluation Right: A Brief for Policymakers*, <https://edpolicy.stanford.edu/sites/default/files/publications/getting-teacher-evaluation-right-challenge-policy-makers.pdf> (last visited Mar. 6, 2015).

<sup>27</sup> *Vergara*, No. BC484642 at 8.



this applies to every workplace. The variation itself is proof of almost nothing; it is the causal question—the link between these statutes and the continued employment of what Judge Treu calls “grossly ineffective teachers”—that is key to the legal and the policy questions at hand.

The next inquiry that logically flows from the court’s conclusion is how best to design sound policies that further the presumed goal: the highest-quality teaching possible. The *Vergara* decision focuses intensely on just one part of this picture: how to forcibly remove the weakest teachers.

As discussed below in Section II *infra*, the court did not address:

1. How to attract stronger teachers;
2. How to develop stronger teachers;
3. How to retain stronger teachers; or
4. How to convince weaker teachers who are not developing to leave voluntarily.<sup>28</sup>

These issues implicate questions of working conditions and teacher labor markets,<sup>29</sup> and of providing professional resources and supports for teachers. Looking at just the “firing” issues in isolation obscures the complete picture—and it is this complete picture that California precedent, described below, likely required the court to consider.

The primary precedent for Judge Treu’s decision is the 1992 California Supreme Court decision in *Thomas K. Butt v. State of California*.<sup>30</sup> In that case, the Court found that students’ equal protection rights were violated when the Richmond Unified School District ran out of money and ended the spring semester six weeks

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<sup>28</sup> Gene V. Glass, “Dismissed” “Fired” “Counseled” What Difference Does It Make?, EDUC. IN TWO WORLDS (June 12, 2014), <http://ed2worlds.blogspot.com/2014/06/dismissed-fired-counseled-what.html>.

<sup>29</sup> Dana Goldstein, *Will California’s Ruling Against Teacher Tenure Change Schools?*, THE ATLANTIC (June 11, 2014), <http://www.theatlantic.com/education/archive/2014/06/california-rules-teacher-tenure-laws-unconstitutional/372536/>.

<sup>30</sup> 842 P.2d 1240 (Cal. 1992).

early. The Court held that the State of California had a constitutional duty to step in to ensure that these students received “basic equality of educational opportunity.”<sup>31</sup> The *Butt* Court stressed that the early closure of the schools would result in “the sudden loss of the final six weeks, or almost one-fifth, of the standard school term” and would therefore “cause an extreme and unprecedented disparity in educational service and progress,” resulting in an “extensive educational disruption.”<sup>32</sup> The *Butt* Court’s holding, succinctly stated, was: “Unless the actual quality of the district’s program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs.”<sup>33</sup>

The *Vergara* opinion does not address or even mention these elements of *Butt*. No “viewed as a whole.” No “fundamentally below.” No “extreme and unprecedented disparity.” The judge provided only a finding of real and appreciable impact followed by a shift of the burden to the state to prove that the five statutes are necessary in order to further a compelling state interest.<sup>34</sup> These are not the only legal problems with the trial court opinion, which has been criticized by, among others, a law professor who helped write the brief in the *T. K.*

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<sup>31</sup> *Id.* The “real and appreciable impact” language used centrally in *Vergara* comes from *Butt*, although Judge Treu does not make this clear. *Vergara*, No. BC484642 at 8. The passage in the opinion reads as follows: “Within the framework of the issues presented, this Court must now determine what test is to be applied in its analysis. It finds that based on the criteria set in *Serrano I* and *II* and *Butt*, and 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” (emphasis in original). *Id.*

<sup>32</sup> *Butt*, 842 P.2d at 1252–53.

<sup>33</sup> *Id.* at 1252.

<sup>34</sup> *Vergara*, No. BC484642 at 7. The court does conclusively state that the evidence of grossly ineffective teachers “shocks the conscience.” The court’s opinion includes brief discussions of the challenged policies, cursorily pointing to evidence and then concluding that, for example, the dismissal provisions are “tortuous.” *Id.* at 12. The decision, therefore, includes some discussion of evidence, and it certainly includes some strong wording. What is lacking, however, is fidelity between the legal precedent set out by *Butt* and how those rules are applied to the facts of *Vergara*—there is a surprisingly thin discussion of the evidence *as applied to* the legal rules.

*Butt* case<sup>35</sup> as well as the attorney who was counsel of record and presented the *Butt* case at oral argument.<sup>36</sup>

## II. THE CAUSATION QUESTION

The *Vergara* opinion was grounded in the evidentiary determination that each of the five statutes caused grossly ineffective teachers to remain in classrooms. The number of grossly ineffective teachers purportedly allowed by the five statutes, according to the opinion, is between 2,750 and 8,250.<sup>37</sup>

While it is easy to see how any one of these rules could result in the continued employment of an inferior teacher in a given instance, it is much harder to see causal proof that the effect of the statute, “viewed as a whole,” would result in more such teachers. A judge taking a more holistic view would understand the statutes to be elements of a larger system of teacher employment. That is, one would expect that a statute providing for seniority-based layoffs or for due process or a tenure decision after two years would shape the nature of teaching as a profession, with ripple effects on who decides to become a teacher or to stay in the profession.

The causal theory of action that won the day at the trial court level in *Vergara* is represented in Figure 1. To arrive at the stronger teaching force, and thus meet the state’s constitutional duty to honor

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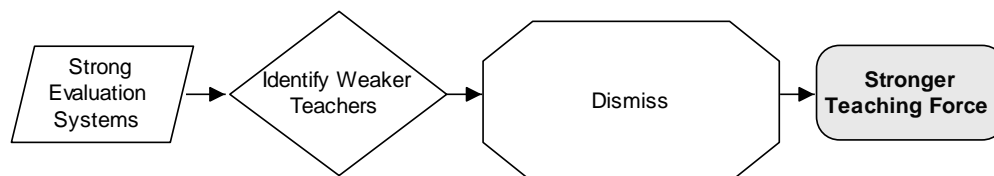
<sup>35</sup> Jordan Weissmann, *The Guesstimate That Struck Down California’s Teacher Tenure Laws*, SLATE, [http://www.slate.com/articles/business/moneybox/2014/06/judge\\_strikes\\_down\\_california\\_s\\_teacher\\_tenure\\_laws\\_a\\_made\\_up\\_statistic.html](http://www.slate.com/articles/business/moneybox/2014/06/judge_strikes_down_california_s_teacher_tenure_laws_a_made_up_statistic.html) (last visited Mar. 8, 2014).

<sup>36</sup> Michael Hersher, *Are Teacher Tenure and Seniority Really Unconstitutional?* JD SUPRA (June 13, 2014) <http://www.kmtg.com/node/3274> (last visited March 7, 2015).

<sup>37</sup> *Vergara*, No. BC484642 at 7 (“Given that the evidence showed roughly 275,000 active teachers in this state, the extrapolated number of grossly ineffective teachers ranges from 2,750 to 8,250.”). It should be noted that the testimony underlying this claim, from defendants’ expert Dr. Berliner, was not about “grossly ineffective teachers,” *per se*. The question that prompted his “guesstimate” of 1-3% was about the “percentage of teachers who consistently have strong negative effects on student outcomes [as estimated by value-added models] no matter what classroom and school compositions they deal with.” Weissman, *supra* note 35.

students' fundamental right to equality of education, the system needs to focus on identifying weaker teachers and then dismissing them.

**Figure 1: Vergara Theory of Action**



But this theory of action ignores a vital part of the system. Approaches like Peer Assistance and Review recognize the reality that many weaker teachers improve with assistance and that most teachers who leave do so voluntarily, often as a result of being counseled out by principals and even fellow teachers; they leave for reasons other than outright dismissal.<sup>38</sup> In fact, when evaluation and induction programs are sound, identification of weaker teachers is tightly linked to improvement efforts and to counseling out – usually in that order.<sup>39</sup> Only when those efforts come up short would a school turn to dismissal.

Counseling out is particularly noteworthy here, because attrition numbers for beginning teachers can be large.<sup>40</sup> An isolated

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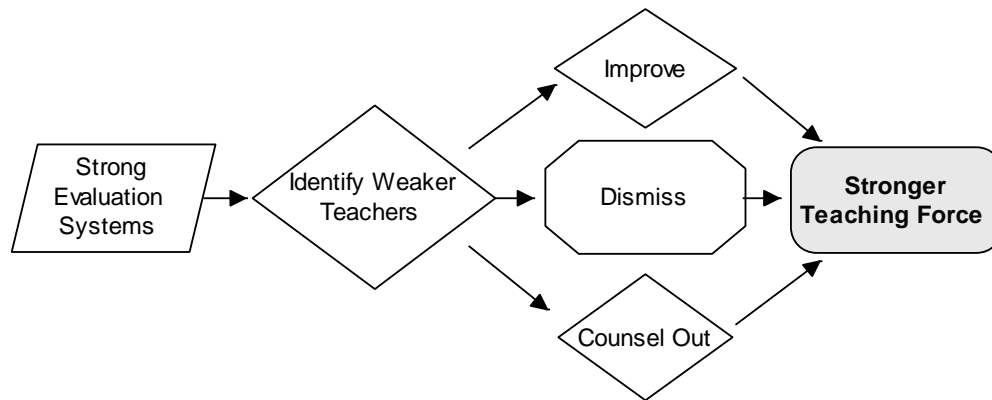
<sup>38</sup> John P. Papay & Susan M. Johnson, *Is PAR a Good Investment? Understanding the Costs and Benefits of Teaching Peer Assistance and Review Programs*, 26 EDUC. POL. 696, 697 (2012) (asserting that Peer Assistance and Review is an approach that combines close evaluation with strong supports, particularly in the beginning years of a teacher's career).

<sup>39</sup> HARVARD GRADUATE SCH. OF EDUC., A USER'S GUIDE TO PEER ASSISTANCE AND REVIEW 7 (2009) (available for download at <http://www.gse.harvard.edu/~ngt/par/>).

<sup>40</sup> Older estimates of attrition were that 40% to 50% leave within the first five years of teaching. Richard Ingersoll & Dave Perda, *How High is Teacher Turnover and Is it a Problem?*, CONSORTIUM FOR POL. RESEARCH IN EDUC. (2010). Recent data suggest a substantially lower number, at least during the years following the Great Recession of 2008-2009. See Emma Brown, *Study: Far Fewer New Teachers are Leaving the Profession than Previously Thought*, THE WASHINGTON POST (April 30, 2015), <http://www.washingtonpost.com/news/local/wp/2015/04/30/study->

focus on dismissal numbers without understanding that teacher attrition will include many weaker teachers can be highly misleading.<sup>41</sup> It is also misleading to focus on dismissal without understanding that hard-to-staff schools by definition do not generally have an eager pool of highly qualified teachers waiting to fill a dismissed teacher's position. Principals at these schools are well aware of this reality. The due process hurdles to dismissing a weaker teacher are much more discouraging to a principal when the end result is the hiring of a replacement teacher who is not likely to be significantly stronger.

**Figure 2: More Developed Theory of Action**



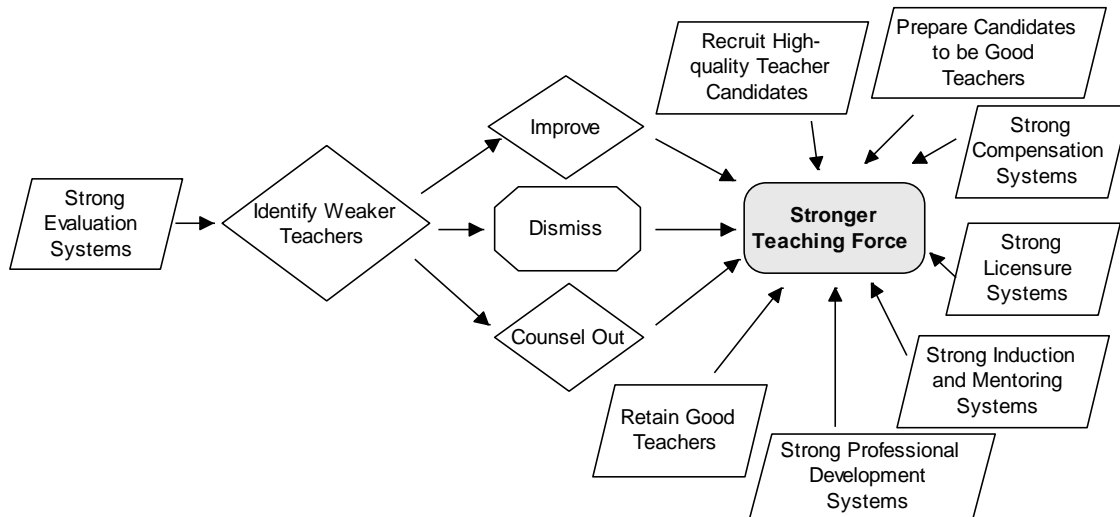
A comprehensive theory of action would take context into account. It would place tenure and dismissal rules within the system as a whole. A system designed to produce quality teaching implicates at least 10 different causal mechanisms. Teacher quality depends on many factors, and having the right dismissal rules – whatever those happen to be – is only a small part of the overall system.

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new-teacher-attrition-is-lower-than-previously-thought/ (suggesting numbers as low as 17 percent by the end of the first four years).

<sup>41</sup> Geoffrey D. Borman & N. Martiza Dowling, *Teacher Attrition and Retention: A Meta-Analytic and Narrative Review of the Research*, 78 REV. OF EDUC. RES. 367, 371 (2008).

**Figure 3: A Comprehensive Theory of Action**



This system involves many feedback loops. For example retaining good teachers depends in part on strong systems of compensation,<sup>42</sup> professional-development,<sup>43</sup> and induction and mentoring.<sup>44</sup> Teacher retention is also heavily dependent on something not shown in Figure 3: good working conditions. Working conditions are also key to recruiting good teachers in the first place. In surveys of teachers, working conditions emerge as the most important reason teachers stay at a school or stay in the profession.<sup>45</sup> Among the factors influencing or constituting working conditions are relationships with

<sup>42</sup> Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 PEABODY J. OF EDUC. 44, 46 (2005).

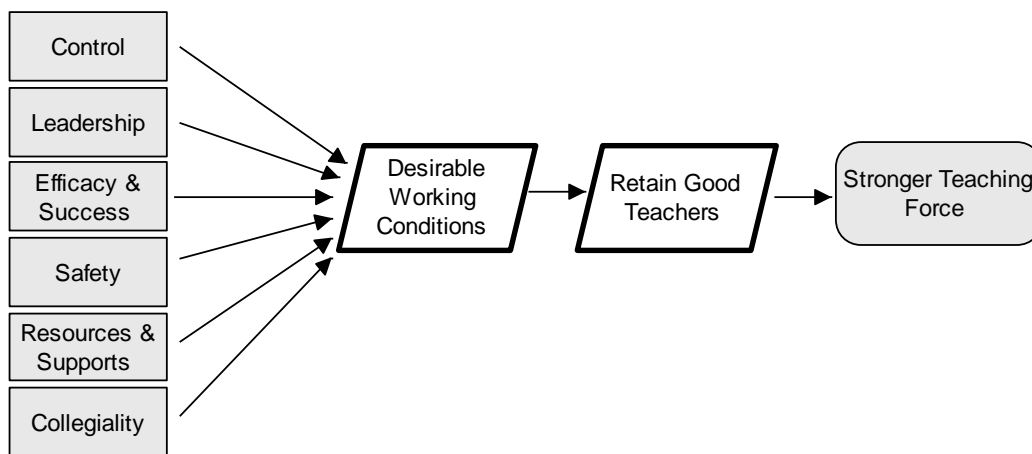
<sup>43</sup> Barnett Berry, *Good Schools and Teachers for All Students: Dispelling Myths, Facing Evidence, and Pursuing the Right Strategies*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 181, 190 (Prudence L. Carter & Kevin G. Welner eds., 2013).

<sup>44</sup> Richard M. Ingersoll & Michael Strong, *The Impact of Induction and Mentoring for Beginning Teachers: A Critical Review of the Research*, 81 REV. OF EDUC. RES. 201, 201 (2012); see also Richard M. Ingersoll, *Beginning Teacher Induction: What the Data Tells Us*, 93 PHI DELTA KAPPAN 47, 47 (2012).

<sup>45</sup> SUSAN MOORE JOHNSON ET AL., HOW CONTEXT MATTERS IN HIGH-NEED SCHOOLS: THE EFFECTS OF TEACHERS' WORKING CONDITIONS ON THEIR PROFESSIONAL SATISFACTION AND THEIR STUDENTS' ACHIEVEMENT 3 (2011).

school leadership,<sup>46</sup> relationships with colleagues,<sup>47</sup> the level of control teachers have over school operations,<sup>48</sup> the teachers' likelihood of feeling at the end of the day that they've been successful,<sup>49</sup> perceived order or safety in the workplace,<sup>50</sup> and the level of supports and resources provided for teachers and for students.<sup>51</sup> Figure 4 focuses on just that one element of the system.<sup>52</sup>

**Figure 4: Creating Desirable Working Conditions**




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<sup>46</sup> *Id.* at 3–4; see also Richard M. Ingersoll, *Teacher Turnover and Teacher Shortages: An Organizational Analysis*, 38 AM. EDUC. RESEARCH J. 499, 509 (2001).

<sup>47</sup> JOHNSON ET AL., *supra* note 45, at 3–4.

<sup>48</sup> WILLIAM H. MARINELL & VANESSA M. COCA, WHO STAYS AND WHO LEAVES? FINDINGS FROM A THREE-PART STUDY OF TEACHER TURNOVER IN NYC MIDDLE SCHOOLS 38 (2013); see also Ingersoll, *supra* note 46, at 509.

<sup>49</sup> Susan Moore Johnson & Sarah E. Birkeland, *Pursuing a “Sense of Success”*: New Teachers Explain Their Career Decisions, 40 AM. EDUC. RESEARCH J. 581, 584 (2003).

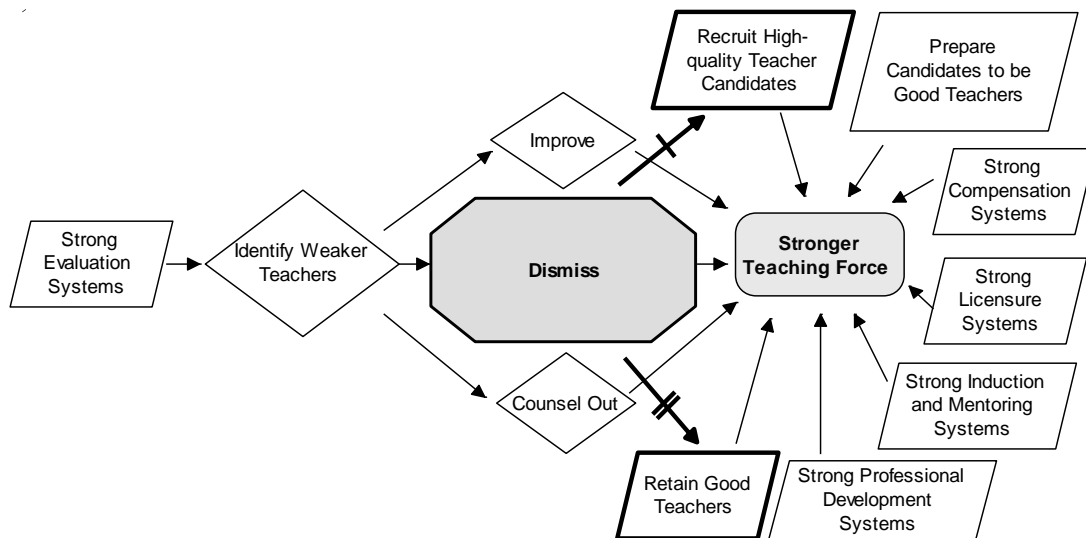
<sup>50</sup> MARINELL & COCA, *supra* note 48, at 25.

<sup>51</sup> Loeb et al., *supra* note 42, at 45.

<sup>52</sup> This discussion highlights an important point: Even if one concludes that *Vergara*'s focus on tenure and dismissal is a distraction, teacher quality and teaching quality remain important. Moreover, substantial evidence points to a systemically inequitable distribution of high-quality teaching, whether we define “quality” by teachers' experience level, by their amount of preparation and education, or by the level of supports provided to teachers in the school.

While teachers certainly want to have strong colleagues, a system focused on identifying teachers for dismissal seems like a counter-productive way to increase positive working conditions. Such an approach would make hard-to-staff schools even harder to staff. Judge Treu’s focus on easing dismissals seems to have failed to take into account such a policy’s effect on recruitment and retention. When the firing element of the larger system is ramped up, particularly when it is based on attributing student test scores to teachers, a method teachers often feel is unfair and arbitrary, it has effects on these other parts of the system that are likely to be negative.

**Figure 5: Systemic Impact of Magnified Dismissal**



As UC Berkeley Professor of Economics Jesse Rothstein pointed out in the *New York Times*, the types of cases that the Vergara decision was based on—funding cases and desegregation cases—are qualitatively different from cases that involve more nuanced and multi-part policy decisions: “Few would suggest that too much integration or too much funding hurts disadvantaged students. By contrast, decisions about firing teachers are inherently about trade-



offs: It is important to dismiss ineffective teachers, but also to attract and retain effective teachers.”<sup>53</sup>

Judge Treu apparently did not consider these broader matters in the *Vergara* case. Unfortunately, schools with the greatest need for excellent teachers are often also the ones with the most disadvantages in many other crucial areas. They are generally the most criticized by the media and the public, the most disrupted and unsafe, and the most likely to have a transient staff (principals and other teachers) and the weakest supports (e.g., common planning time and strong professional development). They also have the most poorly maintained buildings, the largest class sizes, the most transient students, and the most tenuous status under accountability laws (e.g., are the most likely to be threatened with a “turnaround” under federal and state law).<sup>54</sup> One effect of all this is that teaching jobs at these schools are generally perceived as less attractive. The most marketable teachers, those with the opportunities to leave, are the ones who disproportionately do so. Firing teachers will not help to make those schools more desirable.

### III. OPENING DOORS FOR EDUCATION RIGHTS LITIGATION

A key contention in this Article is that the *Vergara* opinion diverged from California precedent when it applied the “real and appreciable impact” language in isolation from other language in the *Butt* case. As noted above, the California Supreme Court in *Butt* applied the “real and appreciable impact” rule, but that was not the end of its analysis: it found that the truncated school year at issue in the case (140 days) had a “real and appreciable impact” on the students’ education because, “viewed as a whole,” it fell “fundamentally below” the prevailing statewide standard of 175-180 days of instruction per year. Applying that full analysis, the relevant question would be whether each of these five statutes had a “real and appreciable impact”

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<sup>53</sup> Jesse Rothstein, *Taking On Teacher Tenure Backfires: California Ruling On Teacher Tenure Is Not Whole Picture*, N.Y. TIMES (June 12, 2014), [http://www.nytimes.com/2014/06/13/opinion/california-ruling-on-teacher-tenure-is-not-whole-picture.html?\\_r=2](http://www.nytimes.com/2014/06/13/opinion/california-ruling-on-teacher-tenure-is-not-whole-picture.html?_r=2).

<sup>54</sup> See, e.g., No Child Left Behind Act of 2001, Pub. L. No 107-110, 115 Stat. 1425 (codified as amended in 20 U.S.C.); Elementary and Secondary Education Act, 20 U.S.C. § 1003 (2014); Investing in Innovation, 74 Fed Reg. 52,214, 52,214 (Oct. 9, 2009).

on students' education because it resulted in schooling that, when "viewed as a whole," falls "fundamentally below prevailing statewide standards."

The case is now on appeal, so it is unclear whether the statutes will ultimately be affirmed as unconstitutional and, if so, whether Judge Treu's reasoning will be adopted at the appellate level.<sup>55</sup> Consider, however, how future education rights litigation might be impacted if the evidence and reasoning at play in *Vergara* take on precedential weight.

There has, since *Brown v. Board*, been an ongoing tension over how strenuously courts should work to ensure that children in disadvantaged communities receive educational opportunities equal to

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<sup>55</sup> It is certainly possible that the California appellate courts will affirm the trial court's decision but still avoid creating precedent that would help future plaintiffs. At the very least, an appellate court that is determined to uphold the decision to strike down the statutes as unconstitutional will likely tinker around the edges—looking for ways to weaken the precedential import of the decision. That was the approach used by the U.S. Supreme Court in *Bush v. Gore*, which handed the 2000 election to Gov. Bush. The Court applied equal protection principles to hold that it is unconstitutional to use different vote-counting standards in different counties. *See* 531 U.S. 98, 104-105 (2000). The Court's decision included the qualification that, "[o]ur consideration is limited to the present circumstances," which was widely understood as a warning against citing the case as precedent. *Bush*, 531 U.S. at 109.

Another maneuver for an appellate court that wanted to reach the same decision without setting forth an easier route for future plaintiffs would focus on the legal rule to be applied. An appellate court might restore the complete *Butt* precedent—applying the full legal standard—but nonetheless conclude that the factual record developed through the *Vergara* trial suffices to support a finding that each of the five statutes being struck down does in fact result in schooling that, when viewed as a whole, falls "fundamentally below prevailing statewide standards." Such a decision would leave in place the existing legal rule but would also create confusing guidance for future courts, since Judge Treu's opinion and the overall factual record developed in the case provide very little solid evidence to support such a conclusion.

This point about the nature of the statutes and the evidence is crucial: it would suggest to future courts that it does not take much for a statute to result in unconstitutional schooling. If these tenure-related statutes are so shockingly damaging to students, then it is easy to see a long line of state and district policies waiting precariously for the gallows.

those in more affluent communities.<sup>56</sup> The general trend has been for courts to defer to the *realpolitik* of executive and legislative discretion. Since the “all deliberate speed” edict of *Brown II* in 1955, courts have signaled that their rhetoric about equality would only take plaintiffs so far.<sup>57</sup> True equality would have to be achieved through the normal political process—a process that is, almost by definition, likely to undervalue the rights of political minorities.<sup>58</sup>

Enter the *Vergara* plaintiffs. The individuals and groups backing the lawsuit are solidly in the “reform” camp that seeks to transform education through school choice, test-based accountability and—particularly relevant here—identification and removal of teachers thought to be relatively ineffective.<sup>59</sup> In the policy tug-of-war between those who argue for more resources and enriched opportunities<sup>60</sup> and those who argue for changes to organizational structures and incentives, the plaintiffs’ backers are prominently in the latter group. This is noteworthy because, even though striking down the teacher-protection statutes certainly pleases the group now, they might come to regret their success in much the same way that the Religious Right likely came to regret the Equal Access Act.

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<sup>56</sup> KEVIN WELNER, *LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUITY* 4–5 (SUNY Press 2001).

<sup>57</sup> *Brown v. Board of Education*, 75 S. Ct. 753, 756–57 (1955); GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* xxi (1996).

<sup>58</sup> Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, U. ILL. L. REV. 673, 683 (2004).

<sup>59</sup> *This Case and Who’s Behind It*, THE VERGARA TRIAL, <http://www.vergaratrial.com/who> (last visited Mar. 7, 2015) (containing a list of backers of the *Vergara* lawsuit, as compiled by the lawsuit’s opponents); see also Sweetland Edwards, *supra* note 19; Heather Somerville, *Dave Welch, Silicon Valley Entrepreneur, Leads Court Fight Against Teacher Tenure Laws*, SAN JOSE MERCURY NEWS (June 11, 2014), [http://www.mercurynews.com/business/ci\\_25943802/dave-welch-silicon-valley-entrepreneur-leads-fight-against](http://www.mercurynews.com/business/ci_25943802/dave-welch-silicon-valley-entrepreneur-leads-fight-against).

<sup>60</sup> See, e.g., BOLDER, BOLDER APPROACH TO EDUCATION <http://www.boldapproach.org/> (last visited Mar. 8, 2015); Gloria Ladson-Billings, *Lack of Achievement or Loss of Opportunity?*, in *CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE* 11, 15 (Prudence L. Carter & Kevin G. Welner eds., 2013).

To illustrate, consider potential litigation challenging curricular tracking.<sup>61</sup> There are hundreds of thousands of children in California who are enrolled in low-track classes, where the curriculum, instruction and expectations are watered down.<sup>62</sup> These children are denied equal educational opportunities; the research is much stronger regarding the harms of these low-track classes than the research about teachers heard by Judge Treu in the *Vergara* case.<sup>63</sup> That is, plaintiffs' attorneys would easily be able to show a "real and appreciable impact" on students' fundamental right to equality of education. Further, enrollment in low-track classes falls disproportionately on lower-income students and students of color.<sup>64</sup>

This means that the burden of proof in such cases would shift to the school districts that engage in tracking practices. They would, under the hypothetical *Vergara* precedent, have to show a compelling state interest in maintaining low-track classes, and they would have to show that their particular practices are necessary to further that compelling state interest. Since the plaintiffs will be able to point to highly successful schools that do not track,<sup>65</sup> the defendants would not be able to meet that burden.

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<sup>61</sup> The practice is also known variously as ability grouping, leveling, streaming and homogeneous grouping. By whatever name, the practice is designed to increase efficiency and is intended to sort students into different classrooms based on their perceived ability and then to differentially target curriculum and instruction to those different ability levels. See Kevin G. Welner & R. Holly Yettick, *Tracking*, in *ENCYCLOPEDIA OF CURRICULUM STUDIES* 885, 885 (Craig Kridel ed., 2010).

<sup>62</sup> Using an estimation approach similar to that used by the *Vergara* trial court, one can estimate that at least half of California's 6.2 million public school students are enrolled in schools using some form of tracking, primarily in the secondary grades. If just a quarter of those 3.1 million are enrolled in low-track classes, we can estimate 775,000 low-track children. See, e.g., Kevin Welner, *A Silver Lining in the Vergara Decision?*, *THE WASHINGTON POST* (June 11, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/06/11/a-silver-lining-in-the-vergara-decision/>.

<sup>63</sup> See, e.g., JEANNIE OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* 141–146 (2nd ed., Yale University Press 2005); CAROL C. BURRIS ET AL., *UNIVERSAL ACCESS TO A QUALITY EDUCATION: RESEARCH AND RECOMMENDATIONS FOR THE ELIMINATION OF CURRICULAR STRATIFICATION* 5 (2009).

<sup>64</sup> OAKES, *supra* note 63, at 67; WELNER, *supra* note 56, at 67.

<sup>65</sup> CAROL C. BURRIS ET AL., *UNIVERSAL ACCESS TO A QUALITY EDUCATION: RESEARCH AND RECOMMENDATIONS FOR THE ELIMINATION OF CURRICULAR*

Similar research-based scrutiny could be repeated for a wide array of other policies and practices, including in suits grounded in very different claims about teacher quality. Using Judge Treu's reasoning, imagine a lawsuit by students in a place like Los Angeles or New Orleans challenging laws that allow charter schools to hire inexperienced, un-credentialed teachers. Such plaintiffs would have little difficulty mustering at least the same degree of evidence as the *Vergara* plaintiffs to support such a challenge.<sup>66</sup> Similarly, the plaintiffs in a lawsuit challenging a layoff policy that relied on scores derived from value-added modeling might legitimately argue that such policies often result in unpredictable, arbitrary and unfair results and are getting rid of better teachers and, even more importantly, discouraging good teachers from working in the most challenged communities or maybe even leaving teaching altogether.<sup>67</sup>

Another possibility opened up by *Vergara* would be a lawsuit challenging the disparities in working conditions between teachers in wealthier and in lower-income communities. The *Vergara* plaintiffs pointed to the need to identify and dismiss ineffective teachers, and they assume that we have a sensible way of doing that. But even

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STRATIFICATION 5 (2009); see also Carol C. Burris, *Accountability, Rigor, and Detracking: Achievement Effects of Embracing a Challenging Curriculum as a Universal Good for All Students*, 110 TEACHERS COLLEGE RECORD 571, 575–76 (2008).

<sup>66</sup> The first three to five years of a teacher's career generally see substantial improvement, so a pattern of hiring inexperienced teachers can be detrimental to student learning. See Donald Boyd et al., *The Influence of School Administrators on Teacher Retention Decisions*, 48 AM. EDUC. RESEARCH J. 303, 305 (2011); Helen F. Ladd & Lucy C. Sorensen, *Returns to Teacher Experience: Student Achievement and Motivation in Middle School*, 1–2 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 112, 2014); Jonah E. Rockoff, *The Impact of Individual Teachers on Student Achievement: Evidence from Panel Data*, 94 AM. ECON. REV. 247, 250–251 (2004).

<sup>67</sup> MICHAEL HOUT & STUART W. ELLIOTT, INCENTIVES AND TEST-BASED ACCOUNTABILITY IN EDUCATION 32 (Committee on Incentives and Test-Based Accountability in Public Education & National Research Council, 2011); AMERICAN STATISTICAL ASSOCIATION, ASA STATEMENT ON USING VALUE-ADDED MODELS FOR EDUCATIONAL ASSESSMENT 4 (2014); AMERICAN EDUCATION RESEARCH ASSOCIATION & NATIONAL ACADEMY OF EDUCATION, GETTING TEACHER EVALUATION RIGHT: A BRIEF FOR POLICYMAKERS 5–6, <https://edpolicy.stanford.edu/sites/default/files/publications/getting-teacher-evaluation-right-challenge-policy-makers.pdf>.

setting aside logistical concerns about the identify-and-dismiss approach, the research is much stronger about the greater importance of addressing issues of working conditions. Moreover, poor working conditions in a school impair the teaching of every teacher, regardless of their personal teaching abilities.

Judges' subjectivities necessarily come into play, as do the foci of the challenges brought into court. So if the *Vergara* approach became the guiding precedent, an issue like teacher quality could result in a variety of different findings and remedial orders, some of which could include components that push policy in precisely the opposite direction as Judge Treu's order in *Vergara*.

Other lawsuits might challenge laws and policies that result in inequities in class size, access to high-quality preschool, grade retention, exclusionary discipline, access to enriched and engaging curriculum, transportation, buildings and facilities, funding formulas, access to and use of technology, testing and accountability policies, and school choice policies.

Some of these hypothetical lawsuits are more of a stretch than others. But the essential point here is that the approach of the trial court in *Vergara* increases the potential success of all of these possible suits, as well as the likelihood that they will be filed. In the past, courts' reluctance to intervene in these policy areas has not been primarily due to a lack of evidence that these are harmful practices. The restraint has been simply that: a restraint – a view that policy decision-making involving trade-offs within complex systems is a task to which the legislative branch is best-equipped. Once that deference is tossed aside and we move to an activist judicial model, a new world of litigation suddenly opens up.

While the development of equal protection jurisprudence would certainly be a break from the past, it would not necessarily be ill-advised. Courts are given an extremely important role within our constitutional system: protecting political minorities from the tyranny of the political majority. An anti-majoritarian or counter-majoritarian

role is clearly necessary when a threshold is crossed.<sup>68</sup> When courts surrender that role, stepping aside and granting discretion to the executive and legislative branches, the predictable consequence is that laws and rules will disadvantage that minority. The *Vergara* plaintiffs and Judge Treu, whether intentionally or unintentionally, are pointing us to a different model—sometimes denounced as “judicial activism.”<sup>69</sup> Whatever the characterization, active engagement of courts in ensuring that laws protect the educational opportunities of minorities could be a crucial step forward toward meaningfully closing opportunity gaps and thus achievement gaps.

Put another way, the job of a court is to interpret and apply statutes and constitutional provisions. Without the courts, legal protections have no meaning—those with power, including legislators and governors, would be able to flaunt the law with impunity. Some of the most repressive societies on earth have lovely language about human rights in their constitutions; they just don’t have a judiciary that is able and willing to give meaning to that language.<sup>70</sup> Our own Fourteenth Amendment equal protection clause was of little use for its intended beneficiaries for 86 years, until the Supreme Court applied it in a meaningful way in *Brown*.<sup>71</sup>

Ideally we would never need a court to invalidate a state law because legislatures would not pass unconstitutional laws and governors would not sign them. Yet when such laws are passed and signed, there is good reason to want courts to engage. The way courts do this is to declare the law unconstitutional and therefore unenforceable, and then to kick the ball back to the legislature with a directive to pass a revised, constitutional law.<sup>72</sup>

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<sup>68</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 19 (Vail-Ballou Press, Inc., Binghamton, New York, 1962).

<sup>69</sup> Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CALIF. L. REV. 1441, 1443 (2004).

<sup>70</sup> David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 936–37 (2013).

<sup>71</sup> Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980); see also RICHARD KLUGER, *SIMPLE JUSTICE* 585 (1977).

<sup>72</sup> This is precisely the approach of Judge Treu. *Vergara*, No. BC484642 at 15–16.

Are most judges well-suited to make education policy? The only fair answer is no. But then, are most legislators well-suited to enforce constitutional provisions that protect education rights? It is difficult to conclude that they are. The American system is thus based on trade-offs. A public that cares enough about enforcing these provisions must be willing to accept the drawbacks when judges make decisions that complicate education policy. The alternative is what we have now: a system that is largely ineffective at interrupting the cycle of intergenerational poverty linked to our persistent opportunity gaps.<sup>73</sup>

#### IV. DISTINGUISHING BETWEEN SEVERITY, EVIDENCE, AND RULE

The pre-*Vergara* California precedent, derived from *Serrano II*<sup>74</sup> and *Butt*, is among the most plaintiff-friendly in the nation. In California, education is a fundamental right and poverty is a suspect classification. Yet the statement of rule set forth by the California Supreme Court in *Butt* leaves in place a daunting burden of proof for education-rights plaintiffs. Not only must the plaintiff show that the challenged state action caused a real and appreciable impact on the plaintiff's education rights, but "[u]nless the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs."<sup>75</sup>

Judge Treu took several steps to lower this burden on the plaintiffs. Perhaps most importantly, he truncated the rule, stopping after "real and appreciable impact."<sup>76</sup> But he also gifted the plaintiffs with a finding of causation based on an evidentiary record that most judges would find inadequate. It is helpful to separate these two issues in considering the possible lasting impact of the decision. The court, had it chosen to do so, might have adopted the truncated rule but still found an insurmountable evidentiary or causal obstacle.

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<sup>73</sup> Richard Rothstein, *Why Children From Lower Socioeconomic Classes, on Average, Have Lower Achievement Than Middle-Class Children*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 61, 63 (Prudence L. Carter & Kevin G. Welner, eds., Oxford University Press 2013).

<sup>74</sup> *Serrano v. Priest*, 557 P.2d 929, 958 (1976).

<sup>75</sup> *Butt*, 842 P.2d at 1252.

<sup>76</sup> *Vergara*, No. BC484642 at 8.



As a policy matter, this raises the issue of how severe a constitutional violation must be to give rise to judicial intervention. Imagine comparing two dichotomous variables—rule and severity—in a two-by-two table. The first quadrant would contain cases using the relatively difficult *Butt* rule and alleging a relatively doubtful constitutional violation. These cases have almost no chance of success. The second quadrant would also apply the *Butt* rule but would allege a constitutional violation that is more stark. These cases would be difficult, but would have some chance of success, depending on the evidence produced and the lawyers and judges involved. But the third and fourth quadrants apply the plaintiff-friendly *Vergara* rule. The third contains cases like *Vergara* itself, where the evidence supports at worst a relatively doubtful constitutional violation; more stark violations fall into the fourth quadrant.

It is this fourth quadrant that is most important. While a rule that lowers obstacles for successful constitutional challenges to laws and policies may lead some courts to strike down laws that probably do not violate the constitution, such a rule also puts courts in a much better position to address actual violations. Yes, courts should not strike down a law as unconstitutional unless the evidence of a violation is substantially stronger than that seen in *Vergara*. But this criticism of Judge Treu’s application of his legal standard should be largely separate from a consideration of the merits of the legal standard itself.

By declining to defer to legislative discretion or to consider the challenged statutes within the complex totality of the system or indeed in any larger context, Judge Treu has begun to pave a narrow path that leads to consideration of only the immediate impact of the particular state action selected by the plaintiffs for a constitutional challenge. It is much easier to show that one part of a complex system has a real and appreciable impact on students’ opportunities to receive an equal education than it is to grapple with larger, systemic effects and prove that, when viewed as a whole, the challenged law causes the plaintiffs’ education to fall “fundamentally below” a “prevailing statewide

standard[.]”<sup>77</sup> Accordingly, if the decision and its legal reasoning are upheld on appeal, this precedent would breathe new life into education-rights litigation, for better or worse. Yes, some decisions will leave us scratching our heads, but given the troubled political system, perhaps that is a downside we should be willing to accept. Political systems are designed to further the ideas and interests of the political majority, which works wonderfully in many contexts. But it does not work wonderfully in distributing educational opportunities. Judicial review is a decidedly imperfect way to protect the rights of political minorities, but at least that’s part of the design—part of what judges are asked to do. The *Vergara* legal rule, as well as the plaintiff-friendly application of that rule, offers the sort of check on political power that would be necessary to generate any real progress in closing the nation’s appalling opportunity and achievement gaps.

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<sup>77</sup> *Butt*, 842 P.2d at 1252.