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THE RUNAWAY WAGON: HOW PAST SCHOOL
DISCRIMINATION, FINANCE, AND ADEQUACY
CASE LAW WARRANTS A POLITICAL
QUESTION APPROACH TO EDUCATION
REFORM LITIGATION

*Anthony Bilan**

INTRODUCTION

Courtroom battles surrounding school finance and adequacy claims are very much alive today, nearly forty years after their progenitor, *Serrano v. Priest*.¹ In spawning a potential new chapter in this history, a trial court in California struck down its state's battalion of teacher tenure and employment laws under a legal analysis based in the education quality that those laws provided.² This "landmark" case, *Vergara*, is generating conversation that its results could be duplicated throughout the nation.³ In a format familiar to school finance litigation, the *Vergara* court found that the state's tenure statutes so detrimentally affected teaching that education quality was unconstitutionally harmed.⁴ While this result may seem extreme, the history of state education litigation, with comparisons to federal segregation litigation, shows not only that these dramatic remedies are not surprising but also that an application of the political question doctrine proves effective in scaling back any policy-based court excesses. As will be argued here, then, *Vergara* displays the natural conclusion of courts accepting inherently political questions as admissible claims.

* Candidate for Juris Doctor, Notre Dame Law School, 2016. I would like to thank my instructor, Professor Nicole Garnett, for her thoughtful suggestions and helpful discussions, which were instrumental to this Note's development. I would also like to thank Professor Peter Karsten in whose undergraduate seminar I learned to read the law. Any oversights are solely the responsibility of the author.

1 557 P.2d 929 (Cal. 1976).

2 *Vergara v. California*, No. BC484642, slip op. at 15–16 (Cal. Super. Ct. Aug. 27, 2014).

3 Jennifer Medina, *Judge Rejects Teacher Tenure for California*, N.Y. TIMES (June 10, 2014), <http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html> (noting that the case could "prompt challenges to tenure laws in other states").

4 *Vergara*, slip op. at 9–10.

Part I of this Note, after a brief introduction to the political question doctrine, outlines relevant school segregation case law and follows up with a history of school finance and adequacy litigation. Part II discusses the patterns and parallels formed by these two areas of law, with particular attention focused on the choices and consequences of judicial decisions under the rubric of the political question doctrine. Part III introduces a few recent additions to the history of school finance litigation, with particular focus on *Vergara*. Part IV discusses these recent cases in light of the analysis in Part II. Part IV particularly considers how recent school finance litigation resembles the character of federal discrimination cases before limiting principles were installed by the U.S. Supreme Court. Furthermore, Part IV discusses how cases like *Vergara* are the logical conclusion of not applying political question concerns to school finance claims. Ultimately, courts ought to make a universal reference to the political question doctrine as a controlling principle for decisions in school adequacy litigation.

I. POLITICAL QUESTIONS: FROM SCHOOL DISCRIMINATION TO SCHOOL FINANCE

The political question doctrine is a branch of nonjusticiability, which acts as a restriction on court authority to accept claims. This jurisdictional bar has developed as a response to concerns that courts were rendering judgments in the area of public policy. The federal political question doctrine seeks to remove issues from court supervision that by their nature are better left to the cognizance of another branch of government.⁵ While it is true that state courts are under no obligation to accept federal instruction on justiciability, many state courts have adopted and applied the federal political question factors as enunciated in *Baker v. Carr*.⁶ The political question doctrine prevents judges from using limited courtroom tools to fashion remedies that overturn or compel new legislation. Otherwise, judges may be utilizing testimony limited to selected experts in order to change policies originally crafted by the representative legislature. Additionally, the political question doctrine contemplates that there are certain issues where policy and law are

5 *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Political question[s] . . . [are] essentially a function of the separation of powers.”). The critical factors are

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

6 See *infra* text accompanying notes 46, 129, 133 (discussing applications of *Baker* by state courts).

so intermingled that the question simply becomes unfit for judicial resolution. When judges try to resolve these deep, policy-based issues in a courtroom, high emotion may generate “bad law.”⁷ Worse yet, as courts proceed to resolve cases that are *actually* policy questions, judicial power shakes off its definitive boundaries.

By way of introduction, political question issues in education law emerged from attempts at education reform where advocates, frustrated with the legislative process, sought to use courts to enforce their policy goals.⁸ Although reformers initially succeeded in the segregation context, the difficulties in controlling this policy-oriented litigation compelled the U.S. Supreme Court to limit federal authority in discrimination cases partially through use of political question principles. Similar to this, the various waves of school finance and adequacy litigation produced startlingly differing results depending on whether the political question doctrine was imposed or not. States accepting the political question doctrine resemble later, muted segregation litigation, while states admitting school finance litigation have struggled against the problems that motivated the political question shift in segregation litigation. As discussed in detail later, *Vergara* and other current cases reveal the very real and current continuing egregious results of courts persisting in admitting the inherently political questions of school finance litigation.

A. *The Expansion and Contraction of Discrimination Litigation in the Federal Courts*

Federal court involvement in school desegregation begins with *Brown v. Board of Education*.⁹ This Note only considers a few narrow aspects of the celebrated *Brown* decision and does not quarrel with—or analyze—its central holding. Rather, the focus here is on the evidence applied to the *Brown* decision and the consequent legacy of broad judicial remedies and oversight that the *Brown* decision ultimately set into motion. To depart from the entrenched doctrine of “separate but equal” under *Plessy v. Ferguson*,¹⁰ the Court utilized social science evidence, outside of traditional constitutional analysis. Specifically, the Court held that segregated or “[s]eparate educational facilities are inherently unequal” and thus violate the Equal Protection

7 N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting) (“Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”).

8 Quentin A. Palfrey, *The State Judiciary’s Role in Fulfilling Brown’s Promise*, 8 MICH. J. RACE & L. 1, 5–6 (2002) (“[C]ourts have been important battlegrounds in the struggle for education reform. . . . [P]laintiffs have challenged state education systems in both state and federal courts on the basis of racial segregation, funding disparities, and overall inadequacy of schooling.”).

9 347 U.S. 483 (1954).

10 163 U.S. 537 (1896).

Clause of the Fourteenth Amendment, based primarily on studies suggesting segregation generates a “sense of inferiority [that] affects the motivation of a child to learn.”¹¹ Of particular note is that the scientific validity of the most influential core evidence, the doll studies conducted by Kenneth Clark, has been criticized.¹² While the justification for the inclusion of social science is debated,¹³ its decisive role in the case established that scientific expert evidence could be applied to decisions surrounding education.

Brown set into motion the enormous remedial process of judicially desegregating schools. These remedies are listed in *Brown II*, which, under equity principles, empowers federal courts to inspect and alter administration, physical school condition, “the school transportation system, personnel, . . . school districts and attendance areas[,] . . . [and] local laws and regulations which may be necessary in solving the foregoing problems.”¹⁴ This naturally led to an immense transformation of the relations between federal courts and school districts. In pursuit of a “unitary” school system, and without clear boundaries of authority, a school in violation could find itself compelled by a federal court to adopt racial quotas, reconfigure attendance zones, and most prominently, redraw busing routes.¹⁵ When one federal court doubted its jurisdiction to utilize its powers, since only a part of a school district was found to be segregated, the U.S. Supreme Court lowered the bar and required only that a “substantial portion” of a school district be segregated to merit the full force of federal court equity jurisdiction.¹⁶ On the side of litigants, private plaintiffs, backed by special interests like the NAACP, pushed for expansive remedies and played strong roles in determining what the eventual court-ordered remedy would consist of, particularly with regard to consent decrees.¹⁷ With increased federal oversight of schools via the federal courts and a growing list of possible remedies, judges found themselves increasingly in management roles over local school districts.¹⁸

11 *Brown*, 347 U.S. at 494–95 (quoting Transcript of Record at 246, *Brown*, 347 U.S. 483 (No. 1)).

12 See John Hart Ely, *If at First You Don't Succeed, Ignore the Question Next Time? Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT. 215, 217 n.9 (1998) (noting that the doll study contained many uncontrolled variables and its results were “worse than indeterminate” in being contrary to the Court’s findings).

13 For an interpretation that the Court sought to better legitimize its decision by using social science, see David K. Cohen & Janet A. Weiss, *Social Science and Social Policy: Schools and Race*, in EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS 72, 79 (Ray C. Rist & Ronald J. Anson eds., 1977).

14 *Brown v. Bd. of Educ.* (*Brown II*), 349 U.S. 294, 300–01 (1955).

15 *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22–31 (1971).

16 *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 201 (1973).

17 See Randolph D. Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1813–14, 1813 n.14 (1986) (discussing the strength of privately litigated remedies, including one argued by the NAACP, compared with more anemic remedies negotiated by the U.S. Government over the same period).

18 John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1135 (1996) (“Thus, from its beginnings in the school desegregation cases, the judiciary’s equitable remedial authority ha[d] expanded to

In 1974, the U.S. Supreme Court issued its first opinion signaling a course change from its previous track on school desegregation cases. *Milliken v. Bradley* trimmed federal court remedial power toward school segregation¹⁹ and notably was the first time the Court had rejected a position of the NAACP on desegregation.²⁰ Specifically, the Court cautioned against district courts acting in the role of “*de facto* ‘legislative authorit[ies]’” and “school superintendent[s]” in restructuring state educational laws, viewing that as “a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.”²¹ In another case, based heavily on academic expert testimony and social science, the Court permitted a district court to impose compensatory education programs, in-service training programs, and guidance counseling programs as part of a desegregation plan.²² However, once again, the Court curtailed the new judicial reach in *Missouri v. Jenkins* where it reversed a district court remedy to increase faculty salaries on grounds that it went beyond the court’s intradistrict remedial power.²³ The district court had grounded its authority on a “desegregative attractiveness” theory; however, according to the Court, this theory could justify any increased expenditure with no “objective limitation” and thus be a “hook on which to hang numerous policy choices about improving the quality of education in general.”²⁴

Justice Thomas, concurring with the 5-4 majority, would more clearly enunciate the political question issues that *Jenkins* evoked. He refuted the ability of federal judges to make “fundamentally political decisions as to which priorities [were] to receive funds and staff, which educational goals are to be sought, and [what] values are to be taught” since in doing so “they detract from the independence and dignity of the federal courts and intrude

the point where federal courts in some instances ha[d] replaced state and local officials as the managers of state institutions.”).

19 418 U.S. 717, 745 (1974) (requiring “racially discriminatory acts of the state or local school districts . . . [as] a substantial cause of interdistrict segregation” before ordering an interdistrict remedy).

20 MARK G. YUDOF ET AL., *EDUCATION POLICY AND THE LAW* 432–33 (5th ed. 2012).

21 *Milliken*, 418 U.S. at 743–44.

22 *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 267, 272 (1977); see also Betsy Levin, *School Desegregation Remedies and the Role of Social Science Research*, 42 *LAW & CONTEMP. PROBS.* 1, 30–33 (1978) (explaining that the Court affirmed these remedies based on extensive testimony that desegregation plans may require such educational components to achieve an adequate remedy).

23 515 U.S. 70, 100 (1995).

24 *Id.* at 98–99 (quoting *Missouri v. Jenkins* (*Jenkins II*), 495 U.S. 33, 76 (1990) (Kennedy, J., concurring)). Prior to the case, the district court’s “desegregative attractiveness” plan had resulted in per-pupil expenditures far exceeding, perhaps even doubling, that of surrounding suburban schools. *Id.* at 99. Among other amenities, district high schools contained a twenty-five acre farm, a planetarium, a temperature-controlled art gallery, a diesel mechanics room, and an editing and animation lab. *Id.* at 79.

into areas in which they have little expertise.”²⁵ The limiting, political question-oriented tone of cases like *Jenkins* and *Milliken* has endured in federal school discrimination law today.²⁶

Around the time of *Milliken*, education reformers were launching a new offensive in California, spawning the progeny of cases known as school finance litigation. Though it was not based on discrimination law, this litigation would raise the same political question issues noted above. School finance litigation, like discrimination litigation, faced the same problems associated with courts attempting to answer political questions: the limits of court expert testimony and evidence, focused interest group influence, and over-expansive court power. Predictably, just as the U.S. Supreme Court provided limits on discrimination law, some state courts likewise curtailed school finance claims. However, for courts admitting causes of action under that litigation, the plethora of cases in their jurisdictions prove all the more that a political question approach should have been applied.

B. *State Diversity in School Finance Litigation*

Like the advocates for racial equality in schools, education reformers who saw disparities in quality and funding between school districts turned to courts to seek remedies. Judges as a result began peering into the funding systems of school districts, with California hosting the first prominent case. *Serrano v. Priest*²⁷ started as a federal equal protection case until the U.S. Supreme Court in *San Antonio School District v. Rodriguez* subsequently rejected both a federal right to education and an application of strict scrutiny to disparate school funding systems.²⁸

San Antonio's federalism-based opinion provides some kernels of wisdom for adjudicating school finance litigation. Faced with claims described as a “direct attack on the way . . . Texas has chosen to raise and disburse state and local tax revenues,” the Court deferred to state legislatures due to a lack of “expertise” required to make “wise decisions” concerning tax collection and expenditure.²⁹ The Court further noted the divisive problems of education policy where the judiciary’s “lack of specialized knowledge and experience

25 *Id.* at 132–33 (Thomas, J., concurring) (“Federal courts simply cannot gather sufficient information to render an effective decree, have limited resources to induce compliance, and cannot seek political and public support for their remedies.”).

26 *United States v. Mississippi*, 941 F. Supp. 2d 708, 712 (N.D. Miss. 2013) (referencing *Jenkins* and *Milliken* in noting that “we have sometimes closed our eyes to federal judicial overreaching, as in the context of school desegregation” (alteration in original) (quoting *Lewis v. Casey*, 518 U.S. 343, 386 (1996))). The court went on to note: “However, this Court is also well aware that ‘[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.’” *Id.* (alteration in original) (quoting *Freeman v. Pitts*, 503 U.S. 467, 490 (1992)).

27 487 P.2d 1241 (Cal. 1971).

28 411 U.S. 1, 28, 37 (1973).

29 *Id.* at 40–41.

counsel[ed] against” interfering with “informed” state and local judgment.³⁰ Importantly, “[o]n even the most basic questions in this area” as general as the connection between education expenditures and quality, “the scholars and education experts are divided.”³¹ These problems of limited court expertise—supplemented by conflicting scholarship—would prove equally troublesome to later state litigation, although the state courts had much more varied outcomes.

Serrano failed at the federal level but persisted to victory as a *state* constitutional equal protection challenge.³² Although the *Vergara* opinion traces itself to *Serrano*, *Serrano* focused on education “equity” in finance rather than “adequacy.”³³ “Adequacy” principles, related to the quality aspects of *Vergara*, in application often result in carving judicially enforced education funding and quality requirements from substantive education guarantees in state constitutions.³⁴ School adequacy litigation in state courts is remarkable in its diversity among the states³⁵ but ultimately, as will be described, the cases resulted either in courts taking an active role in enforcing state educational constitutional provisions or instead holding that the claims were nonjusticiable as political questions.

When school finance litigation has been permitted to thrive, it has been described as “sprawling, complicated, and seemingly endless.”³⁶ Sparring between the state legislature and judiciary over these cases has resulted in political action to remove judges; however, “political resistance . . . has in nearly all instances been overcome by state courts that . . . compel[] enact-

30 *Id.* at 42–43.

31 *Id.* at 42.

32 *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976) (holding that equal protection principles in the state constitution require a standard of strict scrutiny, under which the school funding scheme ultimately failed); *cf. id.* at 963 (Richardson, J., dissenting) (“So long as the Legislature has operated under its constitutional authority we should withhold intervention.”).

33 *Vergara v. California*, No. BC484642, slip op. at 2 (Cal. Super. Ct. Aug. 27, 2014) (“While these cases addressed the issue of a lack of equality of educational opportunity based on the discrete facts raised therein, here this Court is directly faced with issues that compel it to apply these constitutional principles to the quality of the educational experience.”).

34 David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown [But How It Can Get Us Closer]*, 2014 MICH. ST. L. REV. 575, 602 (“[P]laintiffs began asserting adequacy claims under the education clauses of state constitutions as a means to improve educational opportunities and achievement for all children.”).

35 NATHAN L. ESSEX, *SCHOOL LAW AND THE PUBLIC SCHOOLS* 338 (6th ed. 2016) (noting the lack of any uniformity on the part of state courts with regard to funding adequacy).

36 JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART* 145 (2010); *see also* VICTORIA J. DODD, *PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY* 145 (2d ed. 2010) (listing several state supreme court cases on education funding and rights). In this area of litigation, as of 2010, New Jersey has issued at least twenty supreme court opinions, Texas has at least four, and Idaho, California, and Connecticut each have three opinions. *Id.*

ment of reform legislation.”³⁷ While some courts, in their remedies, invalidate standing legislation and then permit the legislature to fill the breach, other courts issue prerequisites to new education legislation. The Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*, took upon itself the duty to parse out in great detail the meaning of the state constitution’s requirement to an “efficient . . . education.”³⁸ After looking to traditional sources of constitutional interpretation, such as founding legislative debates—emphasizing only the importance of education—the court looked to different experts in the academic field who each defined an “efficient” system in their own way, including an “adequate and uniform” system with no financial waste or hardship, a unitary system focusing on teacher pay and school building resources, or some combination of the two.³⁹ While the court adopted this evidence, it rejected a countering expert school superintendent who described an “efficient” system as “one which is operated as best as can be with the money that was provided.”⁴⁰ More famously, the court then proceeded to outline constitutionally required adequacy as “at least . . . seven . . . capacities.”⁴¹ Amid the more vague standards were “sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization,” along with “training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently.”⁴² Important to this discussion, evidence promulgated by interest groups played a heavy role in influencing the court.⁴³ The Kentucky Supreme Court is not alone in

37 John Dinan, *School Finance Litigation: The Third Wave Recedes*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 96, 103 (Joshua M. Dunn & Martin R. West eds., 2009).

38 790 S.W.2d 186, 211 (Ky. 1989).

39 *Id.* at 210–11 (noting that the expert definitions of “‘efficient’ were documented and supported by numerous national and local studies, prepared and authorized by many of the giants of the education profession”).

40 *Id.*

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

42 *Id.*

43 See Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–1995*, 26 LAW & SOC. INQUIRY 631, 664 n.41 (2001) (noting that the court’s adequacy requirements were a “version of the Select Committee’s list of ‘capacities’ that a common school system should foster in all students”). The “Select

rejecting legislative deference by defining judicially enforceable education requirements, as other courts have engaged in similar practices.⁴⁴ Beyond this, as noted above, school finance litigation generally can last for decades as a result of continued attempts to enforce judgments.⁴⁵ The struggles to find clear standards and provide effective court enforcement have culminated in some courts taking less active approaches to education litigation and declaring them largely nonjusticiable political questions.

As noted by the dissenters of school adequacy cases, each of the claims at issue could have been dismissed as a political question. Indeed, dissents were clear in stating issues of soft judicial standards and calling for more deference to the legislative branch.⁴⁶ However, some states' judiciaries have adopted the political question position. In *Committee for Educational Rights v. Edgar*, the Illinois Supreme Court held that providing judicially enforceable content to the "efficient" education clause of the state constitution was a political question.⁴⁷ The court dismissed claims that "efficiency" implied "equality" after looking at the original intent of the state constitution and characterizing conflicting court analyses as an "intellectual shell game."⁴⁸ The court, in reaffirming legislative dominance on policy questions, restated its self-prohibition against the power to "legislate in the field of public education [or] any other area."⁴⁹ Specifically, the court stated that it "would be a

Committee" had been appointed by the original trial judge for the case to assist in crafting a remedy. However, the committee was composed of individuals heavily tied to the plaintiffs in the suit. *See id.* at 657 n.33.

44 *See Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (listing eight areas in which each child educated in the system should develop to full capacity); *see also Abbott ex rel. Abbott v. Burke*, 710 A.2d 450, 473 (N.J. 1998) (ordering implementation of full-day kindergarten and a half-day pre-school program as well as school-to-work and college-transition programs).

45 *See RYAN*, *supra* note 36, at 145 (providing a colorful description of school finance litigation).

46 *Rose*, 790 S.W.2d at 225 (Leibson, J., dissenting) (noting that the question whether the "Assembly has responded adequately to its constitutional responsibility" is a political question where "judicially manageable standards are lacking" (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962))); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 120 (Wash. 1978) (en banc) (Rosellini, J., dissenting) ("[Individuals] can write to their representatives or appear before them and let their protests be heard. The court, however, is not so easy to reach nor is it so easy to persuade that its judgment ought to be revised. A legislature may be a hard horse to harness, but it is not quite the stubborn mule that a court can be." (citation omitted)); *Pauley*, 255 S.E.2d at 897 (Neely, J., dissenting) (noting that the political question doctrine appears to law students "that such deference to other authorities is more cowardice . . . than . . . statesmanship" but that "maturity brings a recognition that all power has its inherent limitations and . . . the majority has overstepped the limits of a court").

47 672 N.E.2d 1178, 1190 (Ill. 1996).

48 *Id.* at 1188 (quoting Richard D. Ballot, Note, *State Constitutional Law—Public School Financing—Spending Disparity Between Wealthy School Districts and Poor Urban School Districts, Caused by Reliance on Local Property Taxes, Is Violative of the "Thorough and Efficient Education" Clause*, 21 SETON HALL L. REV. 445, 478 (1991)).

49 *Id.* at 1190.

transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense” since “the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.”⁵⁰ The court also expressed misgivings about deciding educational quality issues from the courtroom as it would “deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals” and furthermore:

Judicial determination of the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present. Members of the general public, however, would be obliged to listen in respectful silence. We certainly do not mean to trivialize the views of educators, school administrators and others who have studied the problems which public schools confront. But nonexperts—students, parents, employers and others—also have important views and experiences to contribute which are not easily reckoned through formal judicial factfinding.⁵¹

Having analyzed the lack of manageable standards and evidentiary constraints for debating policy issues, the court issued a parting shot for other courts that would still press forward in that the court refused “under the guise of constitutional interpretation” to “presume to lay down guidelines or ultimatums for [the legislature].”⁵²

In another case, in Pennsylvania—where the state supreme court had previously declared funding equity as essentially a political question⁵³—the intermediate appellate court was able to dismiss an adequacy claim with clear precedent that the legislature has “responsibility for the maintenance and support of the public school system” and as such, no court would “inquire into the reason, wisdom, or expediency of the legislative policy with regard to education” or “judicially define what constitutes an ‘adequate’ education or what funds are ‘adequate’ to support such a program.”⁵⁴ Likewise, in Florida, previous precedent favoring political questions provided a trial court with the means to quickly dismiss an adequacy challenge that sought an equitable remedy to order that foster children receive special state-funded tutors.⁵⁵ The court noted that “adequacy”—as a term requiring equal education performance—was not in the Florida constitution, and as a result, any further remedy was beyond the “province of [the] court.”⁵⁶

50 *Id.* at 1191.

51 *Id.*

52 *Id.* at 1192 (alteration in original) (quoting *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 128 (Wash. 1978) (en banc) (Rosellini, J., dissenting)).

53 *Danson v. Casey*, 399 A.2d 360 (Pa. 1979).

54 *Marrero ex rel. Tabales v. Commonwealth*, 709 A.2d 956, 965 (Pa. Commw. Ct. 1998).

55 *Undereducated Foster Children of Fla. v. Fla. Senate*, 700 So.2d 66, 67 (Fla. Dist. Ct. App. 1997) (per curiam).

56 *Id.* at 67 & n.1.

In conclusion, the contrast between approaches to education finance litigation is clear. Courts have either applied a political question approach in some form to dismiss the case or attempted to find judicially enforceable standards. Part II will compare the mechanics and outcomes of the state education cases with federal segregation litigation.

II. LIMITING PRINCIPLES: COMPARING SCHOOL SEGREGATION AND SCHOOL FINANCE

Several lessons can be gleaned from a comparison of school segregation and finance cases. Both sets of cases show the approaches and limitations of a court enforcing substantive constitutional guarantees when such rights are connected to political questions. The policy concerns at play in these two legal areas are integrated schools and the quality of education. As will be explained, courts were forced to grapple with evidentiary issues, remedy issues, standard of review issues, and issues of judicial restraint. The federal segregation lawsuits, prior to the limitations of the U.S. Supreme Court, show the difficulty of keeping remedies and litigation reasonably contained. Likewise, state courts that have permitted finance litigation have faced similar problems limiting court remedies and stopping repeated litigation. In contrast, the political question doctrine, which informed later federal segregation cases and expressly dictated the holdings of some state finance cases, creates more reliable barriers against courts entering areas where judicial talents are unsuited.⁵⁷

When courts enter unfamiliar policy-based areas, procedural justifications and legal standards are insufficient to resolve the matter at hand. As a result, courts are required to hear expert testimony and scientific evidence to find the best outcome between the parties.⁵⁸ However, when the adversarial party is a school board or state, and the issue is education policy, the court in essence is deciding the best outcome for the community, not just the parties, based on this evidence.⁵⁹ As previously noted, the *Brown* Court was thought

57 Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 329–30 (2002) (discussing the institutional weakness of courts relative to legislatures that can “better tap the flow of ideas in the marketplace to reach their decisions”); see also *id.* at 335 (noting that in the absence of the political question doctrine, courts are “left alone to police the boundaries of [their] power”).

58 See FED. R. EVID. 702 advisory committee’s note (1972 proposed rules) (“An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.”).

59 See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (noting how an education policy ruling will impact school administrators and teachers as well as students, parents, and employers unrepresented in the proceedings); see also Scott Birkey, Note, *Gordon v. Texas and the Prudential Approach to Political Questions*, 87 CALIF. L. REV. 1265, 1276 (1999) (discussing a district court’s denial of jurisdiction as a political question due to the “[s]ignificant scientific and economic studies” required to be conducted in order to issue a ruling which in any case would have diverse policy impacts (quoting

to have utilized social science evidence as a means to strengthen its legitimacy as it made a shift from merely demanding a strict enforcement of “separate but equal” to a holding that “separate but equal” is “inherently unequal.”⁶⁰ The Court’s evidentiary limitations are evident since this particular social science was later criticized from a scientific perspective.⁶¹ While court holdings can last for decades, social science evidence may be ephemeral. This expert evidentiary issue in *Brown* is coupled with the federal courts’ struggles to flesh out segregation remedies in later cases, where they were compelled to rely on the parties to the case as found by the NAACP’s impact on case outcomes and its shaping of remedies as noted particularly by differences between stronger NAACP remedies and weaker State Department-negotiated remedies.⁶² Reliance on parties for the structure of remedies becomes disconcerting when, as is the case in policy questions, special interests exert strong influence on the evidence and remedies.

The same evidentiary issues present in shaping the standards and the remedies of segregation cases are paralleled in school finance cases, as will be seen. To determine the definitions of state constitutional education provisions, which, for example, contain standards requiring an “adequate education,” courts have turned to disputable experts, rather than traditional constitutional interpretation methods like legislative history.⁶³ Since this litigation is driven by education reformers, there is no shortage of interest groups exerting their influence and deploying experts, in turn naturally requiring defendants to present their own countering experts. This battle of the experts is now a standard part of litigating such claims, as noted in a practitioner’s guide to handling school adequacy litigation.⁶⁴ As the majority in *Edgar* pointed out earlier, the competing positions of experts do not sufficiently account for the needs of all stakeholders.⁶⁵ A legislature, at the least, can take better account of these stakeholders than court selected experts can.⁶⁶ Moreover, in this education policy area, the adversarial system may operate less than optimally as can occur in public policy settings. A school district defendant (or even the state itself) and a non-profit defendant may

Gordon v. Texas, 965 F. Supp. 913, 916 (S.D. Tex. 1997), *rev’d*, 153 F.3d 190 (5th Cir. 1998)).

60 See generally Cohen & Weiss, *supra* note 13, at 72–92 (discussing interrelation of social science research on race and education and its impact on legislative and judicial decision making).

61 See Ely, *supra* note 12, at 217 n.9.

62 See Moss, *supra* note 17.

63 See Section I.B (noting particularly the variety of interpretations provided by experts to the *Rose* court in determining an efficient education).

64 DODD, *supra* note 36, at 143 (“Practice Tip. While earlier cases frequently turned on expert testimony concerning financial disparities, educational experts in the areas of educational skills, school facilities, and teacher adequacy now are pivotal.”).

65 Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996).

66 See Samuel Estreicher, *Judicial Nullification: Guido Calabresi’s Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126, 1169 (1982) (“There is still little basis for confidence that courts are especially competent surveyors of a legal topography.”).

share their dislike of a statute or system. The binary adversarial system, when confronted with the variable policy question of what an adequate education is, may be deciding an issue where supposedly feuding sides have common ground.⁶⁷ Legal certitude then would simply become expert consensus as judged by a court. If parties are truly adversarial, then the situation fares no better, since judges would simply be picking a winner among various schools of thought.⁶⁸ Like judges deciding difficult segregation remedies, courts here could use education experts and interest group submissions as proxies to determine the content of an adequate education for everyone.

In addition to the troubling evidentiary issues, both segregation and school finance cases share similar structural difficulties in standards. Prior to *Brown*, courts checked if facts conformed to the comparative “separate but equal” standard that asked if two areas were equal.⁶⁹ In the post-*Brown* discrimination cases, rather than a comparative standard, courts sought a substantive goal of integration.⁷⁰ In school finance, the gradual shift among states from comparative school equity litigation to qualitative school adequacy litigation appears analogous to *Brown*’s shift in standard. Equity standards applied through an equal protection clause are comparative in nature where judges can compare school districts in order to gauge educational opportunity by funding.⁷¹ Unlike equity cases, education adequacy cases, instead of comparing district funding, seek to achieve a substantive goal of determining what constitutes a basic education.⁷² Both the results-oriented

67 See Jeremy Zeitlin, *Whose Constitution Is It Anyway? The Executives’ Discretion to Defend Initiatives Amending the California Constitution*, 39 HASTINGS CONST. L.Q. 327, 340 n.87 (2011) (noting that “the imposition of unwilling government counsel . . . raises concerns about inadequate advocacy” exemplified by United States Solicitor General Erwin Griswold apathetically “defend[ing] in court, against his own political view, the constitutional validity of the Voting Rights Act Amendments” (citation omitted)).

68 See Thomas M. Crowley, *Help Me Mr. Wizard! Can We Really Have “Neutral” Rule 706 Experts?*, 1998 DETROIT C.L. L. REV. 927, 956 (noting that no expert is definitively able to present a neutral argument since to be “capable of being an expert must mean having taken some position in regard to” one of many schools of thought (citation omitted)). As the author later notes, “to the extent that our rhetoric of impartiality buries the realities of bias, it contributes to the corruption of power.” *Id.* at 970 (quoting Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1949 (1988)).

69 See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950) (finding that black and white law schools were substantially unequal in the opportunities they provided and thus finding an exclusion of a black student from the white school invalid under the Equal Protection Clause of the Fourteenth Amendment).

70 See *supra* text accompanying notes 14–15 (discussing the policy goal of the *Brown* holding and the equitable remedies permitted to carry it out).

71 Hinojosa & Walters, *supra* note 34, at 600–01 (describing education equity claims that link the policy goal of educational opportunity to the examination of spending disparity by school districts).

72 *Id.* at 602 (“[A]dequacy litigation . . . shifted the focus away from trying to equalize the amount spent on each student and instead questioned the sufficiency of school funding for students based on educational need.”).

standards applied to post-*Brown* segregation cases and school adequacy cases presented difficult management issues. In the segregation cases, courts struggled to flesh out what exactly the substantive standard of unitary integration required.⁷³ Likewise in the education finance context, the more manageable equity standard required only evidence of comparative values while the much more difficult substantive adequacy standard required expert evidence to flesh out the components of a basic constitutionally mandated education.⁷⁴

In the area of remedies, both early school segregation cases and school adequacy cases proved extremely difficult to limit. To meet substantive integration goals, federal court equitable power expanded up to high-water marks in both *Milliken*, where the district court sought to disband school districts on a statewide theory, and later in *Jenkins*, where a district court compelled the levying of taxes and the creation of magnet school districts.⁷⁵ To achieve educational adequacy, state courts have gone so far as to strike down education systems; however, the high-water mark of judicial authority is not yet certain in this area of law, since the litigation continues in many states.⁷⁶

Finally, both segregation and school finance litigation share a commonality in that they seem to have no final resolution point. Since both areas of law are so heavily tied to policy, standards requiring unitary integration or educational adequacy essentially cannot be fully met without legislative action and the correct policy to remedy the problems. So long as the problems of segregation or underachieving schools exist, the litigation exists.⁷⁷ *Milliken* and *Jenkins* signaled a pullback of equitable power but did

73 *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (“[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”).

74 DODD, *supra* note 36, at 143 (“Practice Tip. While earlier cases frequently turned on expert testimony concerning financial disparities, educational experts in the areas of educational skills, school facilities, and teacher adequacy now are pivotal.”).

75 See *supra* text accompanying notes 19–24 (explaining the *Jenkins* and *Milliken* opinions).

76 *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989) (“[T]he result of our decision is that Kentucky’s *entire system* of common schools is unconstitutional. . . . This decision applies to the entire sweep of the system—all its parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.”).

77 See Yoo, *supra* note 18, at 1128 (“A court’s inability to achieve such unattainable social change may result in the retention of jurisdiction over a structural reform case for years, if not decades.”); see also Chip Jones, *Freeman v. Pitts: Congress Can (and Should?) Limit Federal Court Jurisdiction in School Desegregation Cases*, 47 SMU L. REV. 1889, 1903 (1994) (“[T]he [Supreme] Court held that a district court should ‘retain jurisdiction until it is clear that disestablishment has been achieved’ and until the goal of ‘a desegregated, non-racially operated school system is rapidly and finally achieved.’” (quoting *Rainey v. Bd. of*

not end integration litigation while school finance cases likewise continue into the present day.

The shared problems of these cases—evidentiary issues, problems surrounding standards and remedies, and litigation that ultimately depends on a substantive goal being met—all suggest the value of applying the political question doctrine to dismiss the issue. The segregation cases did not decrease because total integration was achieved. Rather, the Supreme Court tightened standards, lessened the variety of remedies available, and generally curbed the authority of federal courts. The Court more tightly defined the *de jure/de facto* segregation and interdistrict remedy distinction.⁷⁸ Remedies were likewise curtailed with *Milliken* effectively ending busing, while *Jenkins* halted a costly court-imposed magnet school plan, as noted above.⁷⁹ Even though segregation cases were not halted by formal nonjusticiability limits, political question concerns informed and motivated the analysis of the majority opinions in *Milliken* and *Jenkins*, which narrowed old, broader segregation standards.⁸⁰ Similarly for school finance cases, the *San Antonio* Court's dismissal was heavily informed by judicial competency concerns,⁸¹ while several state courts dismissed school finance litigation on political question grounds.

The problems of expanding court power, exemplified in the segregation cases where courts were levying taxes and disbanding districts statewide, have troubled school finance litigation today in states where it has not been dismissed as a political question. *Vergara v. California* and *Texas Taxpayer and Student Fairness Coalition v. Williams*, two modern school finance cases, will dominate the remaining discussion. As with the segregation cases of the past, the finance cases of today share the same problems, which can be curbed by the political question doctrine.

III. THE NEW FRONTIERS IN EDUCATION LITIGATION

Vergara v. California is the logical conclusion of a court accepting claims on school quality, rather than dismissing the claims under the political question doctrine. Likewise, *Texas Taxpayer and Student Fairness Coalition v. Wil-*

Educ. 391 U.S. 443, 449 (1968)); Barbara Grijalva, *TUSD Paying Millions in Court Fees in Desegregation Case*, WORLDNOW (Sep 30, 2015, 9:57 PM), <http://www.tucsonnewsnow.com/story/30157784/tusd-paying-millions-in-court-fees-in-desegregation-case>.

78 *Milliken*, 418 U.S. at 745 (“[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”); see also YUDOF ET AL., *supra* note 20, at 440 (noting that in light of *Jenkins*, a “district court would have to show that the programs would remedy only the effects that *de jure* segregation may have had on achievement, separating out those effects from the effects of . . . *de facto* segregation”).

79 See *supra* text accompanying notes 19–24 (explaining the *Jenkins* and *Milliken* opinions).

80 See *supra* text accompanying notes 19–26 (describing the majority components of each opinion invoking political question issues as well as Justice Thomas’s concurrence to *Jenkins*).

81 See *supra* text accompanying notes 29–31 (describing the reasoning in *San Antonio*).

liams shows the continued longevity and expansiveness of school finance litigation generally. This Part provides background to *Vergara* and *Williams*, while also discussing the current situation in some states that have applied the political question doctrine and other states where the political question doctrine application is a novel issue.

A. *Vergara: The Logical Conclusion of School Finance Litigation*

Vergara and the other plaintiffs were school students who sued the state of California as well as their individual school districts for declaratory and injunctive relief against the state corpus of tenure laws composed of permanent employment statutes, last-in, first-out laws, and dismissal statutes.⁸² The California permanent-employment statutes require a school district to give teachers notice that they have not been “reelected” and hence tenured by March 15 of the second year of employment, which gives a district less than two years to decide whether to deny tenure.⁸³ Dismissal statutes generally describe the process and standards required to terminate a tenured teacher.⁸⁴ “Last in, first out” or LIFO statutes require that the last-hired teacher must be the first fired teacher in the event of a layoff, with no exceptions or waivers possible for teacher effectiveness.⁸⁵ The crux of the plaintiffs’ claim was that these statutes combine to tenure “grossly ineffective teachers,” who are then disproportionately placed in “predominately low-income and minority” schools.⁸⁶ In effect, these teachers, so placed, negatively impact the quality of education that the state provides. Since the *quality* of student education was negatively impacted, the injurious legislation was held to violate California’s equal protection clause. Thus, the court placed itself in the position to assess the different statutes’ effect on education and to examine if they cause “potential and/or unreasonable exposure” of “grossly ineffective teachers” to students generally and to minority/low income students particularly, finding for plaintiffs on both questions.⁸⁷

The trial court first drew a lineage of its authority beginning with *Brown v. Board of Education*, quoting both its overruling of racial inequality and its famous trumpeting of the value of educational opportunity.⁸⁸ After noting *Serrano*, the court cited *Butt v. State of California*,⁸⁹ which, in striking down an

82 *Vergara v. California*, No. BC484642, slip op. at 3 (Cal. Super. Ct. Aug. 27, 2014).

83 CAL. EDUC. CODE § 44929.21; *see also* Michael Futterman, *Teacher Tenure Laws Violate California Constitution*, 24 No. 8 CAL. EMP. L. LETTER 8 (July 28, 2014).

84 CAL. EDUC. CODE §§ 44934, 44938(b)(1)–(2), 44944; *see* Futterman, *supra* note 83.

85 CAL. EDUC. CODE § 44955; *see* Futterman, *supra* note 83.

86 *Vergara*, slip op. at 3.

87 *Id.* at 8 (noting that as a result of finding for plaintiffs defendants “bear[] the burden of establishing not only that [the state] has a *compelling* interest which justifies [the challenged statutes] but that the distinctions drawn by the law[s] are *necessary* to further [their] purpose” (quoting *Serrano v. Priest*, 487 P.2d 1241, 1249 (Cal. 1971) (alterations in original))).

88 *Id.* at 1–2.

89 842 P.2d 1240 (Cal. 1992).

early closing of schools due to a state budget shortfall, prohibited school term length inequality. The court confirmed that previous courts had addressed lack of *equality* based on the “discrete facts” of their cases; however, this particular case required the trial judge to apply “constitutional principles to the *quality* of the educational experience.”⁹⁰ In order to adjudicate the degree to which a statute impacts education quality, the court’s analysis naturally requires an assumption that a constitutionally protected level of education exists; thus the standard applied by the trial judge inclines toward one of educational adequacy.

The effect of “grossly ineffective” teachers was established as “substantially undermin[ing] the ability of [children] to succeed in school” since it was unchallenged by either side and supported by several studies.⁹¹ Also without dispute, another expert testified to the percentage of ineffective teachers, and from this number, the court computed the estimated number of ineffective teachers operating in the state.⁹² Remarkably, the court was able to find that grossly ineffective teachers would be harmful “as long as said teachers hold their positions,”⁹³ in essence leaving no possibility for improvement.

In a separate analysis, the court found that the statutes posed a disproportionate effect on poor and minority students. A state report provided the crux of the evidence, as it claimed that students attending “high-poverty, low-performing schools” were more likely than wealthy students to “attend schools having a disproportionate number of underqualified, inexperienced, out-of-field, and ineffective teachers and administrators.”⁹⁴ Since minorities also disproportionately attend such schools, this is evidently enough to suggest a disparate impact. Evidence also suggested that the statutes created a “churning” phenomenon where the teaching faculty is essentially a revolving door of underqualified teachers.⁹⁵

Moving to the challenged statutes, as an initial matter, the court said it would only consider “evidence and law” rather than the “wisdom” of the statutes.⁹⁶ The court characterized the two-year permanent employment statute as a “misnomer” with “bizarre” effects, since notice of tenure must be given

90 *Vergara*, slip op. at 2 (emphasis in original).

91 *Id.* at 7 (citing studies claiming that grossly ineffective teachers cost students both \$1.4 million in lifetime earnings per classroom and 9.54 months of learning in a single year compared to students with average teachers).

92 *Id.* at 8 (citing expert testimony that “1–3% of teachers in California are grossly ineffective” and that because there are “roughly 275,000 active teachers in this state, the extrapolated number of grossly ineffective teachers ranges from 2,750 to 8,250”).

93 *Id.*

94 *Id.* at 15 (quoting CALIFORNIA DEPARTMENT OF EDUCATION, EVALUATING PROGRESS TOWARD EQUITABLE DISTRIBUTION OF EFFECTIVE EDUCATORS 5 (2007)).

95 *Id.* at 15. The churning effect is referred to as the “Dance of the Lemons.” For a description of this phenomenon, see *Dance of the Lemons*, ECONOMIST (Mar. 15, 2014), <http://www.economist.com/news/united-states/21599005-reformers-want-make-it-easier-sack-bad-teachers-dance-lemons>.

96 *Vergara*, slip op. at 5.

by March, thus necessitating evaluation even earlier—*before* the concurrent two-year new teacher credentialing program.⁹⁷ A defense expert provided support to the proposition that the statute did not provide “nearly enough time for an informed decision to be made regarding the decision of tenure,” while two other defense experts stated that three to five years would be a better time frame.⁹⁸ In response, the court found that the statute failed strict scrutiny as teachers could be tenured who otherwise would not be, while teachers who presented the slightest doubt as to their ability were denied tenure even if they could potentially improve.⁹⁹ Yet, while California’s statutes admittedly provided generous tenure grants, the state is by no means alone in its provisions when compared with other state governments.¹⁰⁰

The dismissal statutes fared no better, as evidence suggested that dismissal cases could take “two to almost ten years and cost \$50,000 to \$450,000” to conclude, thus leading officials to simply not prosecute cases.¹⁰¹ As another defense witness documented the extreme difficulty of dismissal, the court refuted arguments of due process by finding that the statutes provided “uber” due process that is “so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory.”¹⁰² This finding was made in light of evidence that “teachers themselves do not want grossly ineffective colleagues in the classroom.”¹⁰³

The court likewise struck down the LIFO statute, but not before making some noteworthy findings. The court was centrally appalled by the statute’s lack of an exception for teacher effectiveness, and colorfully commented on the logic of the circumstances:

No matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who all parties agree is creating a positive atmosphere for his/her students, is separated from them and a senior grossly ineffective one, who all parties agree is harming the students entrusted to her/him, is left in place. . . . Distilled to its basics, the State Defendants’/Intervenors’ position requires them to defend the proposition that the state has a compelling interest in the *de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetent ones.¹⁰⁴

Naturally, the court found this logic to be insufficient for strict scrutiny. However, the court stayed its injunctions against the enforcement of the stat-

97 *Id.* at 9.

98 *Id.* at 9–10.

99 *Id.*

100 *See id.* at 14 (“[O]nly 10 states, including California, provide that seniority is the sole factor, or one that must be considered.”). Likewise, “California is one of only five outlier states with a period of two years or less.” *Id.* at 10.

101 *Id.* at 11 (“LAUSD alone had 350 grossly ineffective teachers it wished to dismiss at the time of trial regarding whom the dismissal process had not yet been initiated.”).

102 *Id.* at 13.

103 *Id.* at 12.

104 *Id.* at 13–14.

utes, pending appeal.¹⁰⁵ Overall, *Vergara* represents a new height of judicial oversight of the legislature, where employment laws can be pulled into the strict scrutiny of the judiciary by their connection to education. This outcome is the result of not imposing the political question doctrine, and instead permitting school finance litigation in a jurisdiction over a long period of time.

B. *The Texas Taxpayer and Student Fairness Coalition v. Williams Case Longevity*

Texas's financial litigation has been extensively documented for its extended period of legislative and judicial sparring.¹⁰⁶ Its most recent chapter, *The Texas Taxpayer and Student Fairness Coalition v. Williams*,¹⁰⁷ represents the continuing struggle. In brief, the bulk of the challenge stemmed from declining legislative funding to education and was based on adequacy claims, qualitative efficiency claims, and suitability claims.¹⁰⁸

The string of litigation associated with this particular case resulted in “hearing from over eighty live witnesses and building a record containing over 5,000 admitted exhibits” with an intervening legislative action causing a rehearing containing “another twelve live witnesses and . . . an additional 700 exhibits.”¹⁰⁹ Moreover, the plaintiffs and intervenors were a large coalition of school districts, charter schools, and interest groups suing the state. The final opinion itself is over 200 pages in length.

The court found for the plaintiffs on the adequacy and suitability claims, while it did not find a violation for the efficiency claims. The variety of issues the court investigated in the adequacy claim indicates of the scope of its authority under the cause of action. The court examined the ethnic and economic composition of state schools and identified education and wealth gaps, which if unaddressed—as testified by experts—would result in a “stark future” of “declining income, higher rates of poverty, reduced consumer spending, reduced tax revenues, and higher state expenditures.”¹¹⁰ By previous school finance precedent, state courts in Texas could find a constitutional violation if legislative goals for schools were not met with sufficient

105 *Id.* at 14.

106 *See supra* note 36 and accompanying text (noting that the Texas Supreme Court alone has issued four opinions on the issue).

107 No. D-1-GN-11-003130 (Tex. Dist. Ct. Aug. 28, 2014).

108 *See id.*, slip op. at 1–2. The adequacy claim in question is derived from a state constitutional clause requiring “general diffusion of knowledge” interpreted as “requiring the Legislature to ensure that school districts are reasonably able to provide *all* students with a meaningful opportunity to learn the essential knowledge and skills reflected in the state curriculum such that upon graduation, students are prepared to continue to learn in post-secondary educational, training, or employment settings.” *Id.* at 1. *Qualitative efficiency* requires a public education system to be productive of results with little waste, while *Suitability* requires “the school finance system to be structured, operated, and funded so it can accomplish a general diffusion of knowledge for all Texas children.” *Id.* at 1–2.

109 *Id.* at 1.

110 *Id.* at 4.

legislative resources and support.¹¹¹ The court—detailing that while education standards have risen, the legislature had made cuts to specific education related grants—found that these education cuts posed a particular risk to an “at-risk” student population.¹¹² The primary evidence used by the court to arrive at this determination consisted of standardized test passage rates.¹¹³ As a result of lacking additional resources, school districts would be unable to improve their performance using the principal strategies listed by the court:

(1) smaller class sizes, particularly in the early grades, (2) full-day quality pre-K programs, (3) more competitive teacher salaries to improve the hiring and retention of quality teachers, (4) instructional coaches, (5) tutors, and (6) extended day and summer school programs. . . . In the absence of state funds, districts have had to increase local tax rates and use revenues that are supposed to provide districts with meaningful discretion in order to provide for an adequate education—or, worse yet, to go without these programs entirely.¹¹⁴

Evidence presenting cuts by school districts to these listed programs was likewise indicative—according to the court—of insufficient legislative support, and therefore, a constitutional violation.¹¹⁵ In turn, the court concluded that current legislative monetary support is unconstitutionally “arbitrary” and “inadequate,” and constitutional adequacy requires a “substantial investment of additional resources” in the form of a specific tax levy available “without being made subject to a vote in a special election; otherwise local taxpayers can deprive local students access to the constitutionally required level of education.”¹¹⁶

Likewise, the court granted relief for the plaintiffs’ suitability claims where the means the legislature had chosen to educate students was declared insufficient. Again, student performance evidence was utilized to declare the legislative means unconstitutional.¹¹⁷ The legislative program and funding regiment was again declared outdated, poorly designed, and insufficiently funded.¹¹⁸ The court was particularly persuaded by the legislature’s failure to comply with funding amounts recommended by an interest group: the

111 *Id.* For the previous precedent, see *Neeley v. W. Orange-Cove Consolidated Independent School District*, 176 S.W.3d 746, 785 (Tex. 2005) (“It would be arbitrary . . . for the Legislature to define the goals for accomplishing the constitutionally required general diffusion of knowledge, and then to provide insufficient means for achieving those goals.”).

112 *Williams*, slip op. at 4.

113 *Id.* at 5 (“Despite the roll-out of tougher academic requirements and the dismal performance results, neither the Legislature nor the Texas Education Agency has made any effort to determine the costs of meeting increasing standards and providing remediation to struggling students.”).

114 *Id.* at 6.

115 *Id.*

116 *Id.* at 6–7.

117 *Id.* at 9 (noting evidence of “hundreds of thousands of high school students who are off-track for graduation, the low levels of college readiness, and the substantial performance gaps (especially for economically disadvantaged and ELL students)”).

118 *Id.*

“School Finance Working Group composed of members of nearly every educational organization in Texas.”¹¹⁹

The constitutional efficiency requirement was found not to be violated, mostly due to overreaching by the plaintiffs. The plaintiffs demanded that efficiency required new legislative actions, including: “eliminating the statutory cap on charter schools; changing laws, regulations, and practices that govern teacher compensation, hiring, firing, and certification; creating greater school choice or vouchers; and modifying school district financial reporting requirements,” as a “better” means to achieve efficiency.¹²⁰ To rule for the plaintiffs, the court viewed, would be “judicial interference in specific questions of education policy.”¹²¹

In ruling for the plaintiffs, the court enjoined the State from “giving any force or effect to the sections of the Education Code relating to the financing of public school education”; however, it stayed its injunction to give the legislature time to address the situation.¹²² Ultimately, *Williams* is an example of a mature school finance litigation state. The amount of complexity, expense, and judicial oversight of the legislature is staggering.

C. *Current Courts Adjudicating or Dismissing Political Questions*

Three jurisdictions referenced earlier—Illinois, Pennsylvania, and Florida—have previously dismissed state education adequacy claims based on the political question doctrine.¹²³ Searches for current school finance litigation in those jurisdictions revealed no recent published trial orders or court opinions referencing constitutional claims based on educational adequacy, except in Pennsylvania.¹²⁴ One recent Pennsylvania case referenced the state’s education clause, establishing that unlike the environmental constitutional provision at hand in the case, Pennsylvania’s education clause lacked any “judicially manageable standard for determining whether the Legislature’s enactment of [the challenged statute] resulted in a failure to provide for a ‘thorough and efficient system of public education.’”¹²⁵ More on point, recently Pennsylvania’s intermediate appellate court succinctly announced that claims seeking to invalidate state school funding as insufficient to meet

119 *Id.*

120 *Id.* at 12–13.

121 *Id.* at 13.

122 *Id.*

123 *See supra* text accompanying notes 47–56.

124 Searches were conducted either for cases featuring educational finance claims or language of the respective state’s education amendment within the last three years.

125 *Pa. Envtl. Def. Found. v. Commonwealth*, No. 228 M.D. 2012, 2013 WL 3942086, at *13 (Pa. Commw. Ct. Jan. 22, 2013) (quoting *Pa. Sch. Bds. Ass’n, Inc. v. Commonwealth Ass’n of Sch. Adm’rs*, 805 A.2d 476, 490–91 (Pa. 2002)); *id.* (“Further, the challenge at issue impermissibly raised questions concerning the soundness of the policy set forth by the Legislature. For these reasons, the Court held the political question doctrine barred [the] challenge.”).

education standards presented nonjusticiable political questions.¹²⁶ In brief, the court said that it could

no more determine what level of annual funding would be sufficient for each student in each district in the statewide system to achieve the required proficiencies than the Supreme Court was able to determine what constitutes an ‘adequate’ education or what level of funding would be ‘adequate’ for each student in such a system.¹²⁷

Applying the political question approach to school finance claims remains a live issue. In a recent Iowa case, parents and students sued the state for having “failed to establish standards, failed to enforce any standards, failed to adopt effective educator pay systems, and failed to establish and maintain an adequate education delivery system,” in accordance with a state constitutional provision on education.¹²⁸ Although the court ultimately did not dismiss the case as a political question—since it could dismiss the claim on another ground—it would lay out a strong case to declare the question nonjusticiable in the future. Drawing on the criteria from *Baker v. Carr*, the court found that the specific reference to the state legislature in each relevant constitutional section suggested a commitment of authority to it.¹²⁹ Furthermore, the Court suggested that standards like “moral improvement” were not manageable and that the court might be compelled to make an initial policy judgment when entering the “longstanding debate over the merits of state mandates versus local control in public education.”¹³⁰ Lastly, the court was influenced by a persuasive Indiana case that found the issue to be a political question.¹³¹

However, another court in Kansas recently directly addressed the justiciability issue for various school finance claims from a massive class action—with a class composed of school districts, students, and teachers—against the state. The court discussed justiciability in detail and ultimately found all questions justiciable and remanded on the adequacy claim for application of a standard akin to that applied in *Rose*.¹³²

126 *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 114 A.3d 456, 464 (Pa. Commw. Ct. 2015).

127 *Id.* at 463. The case is currently on appeal. See Karen Langley, *Pennsylvania’s School Funding Dispute Headed to State’s High Court*, PITTSBURGH POST-GAZETTE (April 21, 2015), <http://www.post-gazette.com/news/state/2015/04/21/Court-dismisses-lawsuit-claiming-Pa/stories/201504210172>.

128 *King v. State*, 818 N.W.2d 1, 5–6 (Iowa 2012). The relevant state constitutional provision reads: “The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement.” *Id.* at 12 (emphasis removed) (quoting IOWA CONST. art. IX, 2nd, § 3).

129 *Id.* at 17–18.

130 *Id.*

131 *Id.* at 18–19 (discussing *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518, 520–22 (Ind. 2009) (quoting *Nagy ex rel. Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 491 (Ind. 2006))).

132 *Gannon v. State*, 319 P.3d 1196, 1203 (Kan. 2014) (“[T]he adequacy requirement is met when the public education financing system provided by the legislature for grades

Mainly, the court analyzed two *Baker* factors: the “textually demonstrable constitutional commitment” to the legislative branch and a lack of “manageable” judicial standards to resolve the issue.¹³³ For both factors, the court noted that a “clear majority” of state courts have ruled in favor of justiciability.¹³⁴ The court, throughout its opinion, was heavily influenced by the Texas Supreme Court, which, as noted above, also rejected political question analysis. In first determining whether there was a constitutional commitment, the court said that although the relevant constitutional sections specifically name the legislative branch as the controlling party, a responsibility for the judiciary can nonetheless be presumed since the relevant section did not specify the legislature’s discretion as “absolute.”¹³⁵ Rather, the use of “shall” rather than “may” imposed a “mandatory constitutional dut[y]” that “envisions something more than funding public schools by legislative fiat.”¹³⁶ In considering manageable standards, the modifiers in the clause, such as efficient, uniform, or (in this case) *suitable*, provided a standard implying court participation.¹³⁷ For the standard of “suitability” in particular, the court stated that “[t]he judiciary is well accustomed to applying substantive standards the crux of which is reasonableness.”¹³⁸ Furthermore, suitability is composed of “minimum requirements of adequacy and equity” where the court function is to ask if the legislature has “performed its duty.”¹³⁹ The court continued its discussion by noting the frequent judicial duty to “defin[e] and apply[] various, perhaps imprecise, constitutional standards.”¹⁴⁰ Ultimately, the court saw the standard applying if the legislative fund is “so low” that it was not a “suitable provision” for state education.¹⁴¹ The court concluded by moving forward to the merits, as it was in its power alone to “apply, interpret, define, and construe all words, phrases, sentences and sections” in the state constitution.¹⁴²

These cases provide the most recent additions to the corpus of school adequacy law. The selections provide examples of states with no political question restraints, states applying the political question doctrine, and states currently addressing the political question doctrine as a novel matter. The

K-12 . . . is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.”).

133 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

134 *Gannon*, 319 P.3d at 1219. In particular, the court notes that many other state courts have rendered the question nonjusticiable for constitutions less clear than their own. *Id.* at 1226; *cf., e.g., Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So.2d 400, 406–07 (Fla. 1996); *McDaniel v. Thomas*, 285 S.E.2d 156, 168 (Ga. 1981).

135 *Gannon*, 319 P.3d at 1220 (citing *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005)).

136 *Id.* at 1221.

137 *Id.* at 1225.

138 *Id.* (citing *Neeley*, 176 S.W.3d at 778).

139 *Id.* at 1226 (emphasis removed).

140 *Id.* at 1228.

141 *Id.* (quoting *Montoy v. State*, 62 P.3d 228, 235 (Kan. 2003)).

142 *Id.* at 1231 (quoting *Montoy v. State (Montoy III)*, 112 P.3d 923, 930 (Kan. 2005)).

succinct dismissal and dearth of any adequacy claims from states that have accepted the application of the political question are especially notable. The comparative analysis of these cases, both against each other and in light of the material from the previous section, is discussed in the next Part.

IV. THE BURDENS OF REJECTING THE POLITICAL QUESTION DOCTRINE

Like the cases described in Part I, the recent cases in school adequacy reveal problems with evidence, standards of review, remedies, and limits on the judiciary. Additionally, the fact that these problems have emerged in litigation suggests that courts have indeed accepted a political question for adjudication. The cases of *Williams* and *Vergara* each progressed without the political question doctrine limiting their courts' authority.

An indication that *Vergara's* claim at heart was a political question begins with the evidence. Critical evidence in the case was based on education policy and promulgated by experts and government offices.¹⁴³ Topics in the evidence range from measuring effects of teacher quality upon student achievement to the impact of tenure statutes on teacher quality. These are normal and acceptable discussion topics within a legislature where there is a broad range of views. However, in a courtroom, the evidence presented is limited to experts who are selected by litigants. Potentially radical changes to legislative education policy may be made by one judge who is relying on whatever evidence is present. As an old legal axiom¹⁴⁴ similarly relates, applied here to the segregation cases, when scientific evidence is used to buttress a legal argument, the fallibility of the evidence can make bad law.¹⁴⁵ Additionally, the limits of the adversarial method were exemplified in *Vergara*. Much of the persuasive and critical evidence was undisputed here. The court was quick to point out, perhaps in an effort to boost credibility, that defense experts supported viewpoints hostile to their side.¹⁴⁶ Critically, however, when a court permits political questions to enter the courtroom, governments and interest groups who agree on the issues can short-circuit a legislature by having a law struck down in court. As a result of these evidentiary problems in *Vergara*, debatable theories on the effects of tenure policy and teacher quality are now correct in the eyes of the law. In truth, the employment statutes in question only *may* create firing difficulties and *may* result in more grossly negligent teachers working in low-income areas. The heart of the matter is that limits of courtroom evidence combined with the

143 See *supra* text accompanying notes 91–95 (examining the evidence sources in *Vergara*).

144 See *supra* note 7 (stating the axiom that cases considered “great” are often “bad law” since their judgments were distorted by emotions).

145 See Ely, *supra* note 12, at 217 n.9 (casting doubt on the science supporting *Brown v. Board of Education*). In short, just as legal judgments driven by changing emotions can twist the law, a ruling driven by fluid science may likewise be distorting.

146 See *supra* text accompanying notes, 91, 92, 98, 102 (citing situations in *Vergara* where the court noted defense experts provided support for the plaintiff or where the defense left plaintiff's assertions unchallenged).

finality of court decisions is a critical problem when addressing questions that are political in nature. One solution to the limits of evidence is to simply receive a large quantity of information. *Williams* contains a multitude of evidence, such that it practically looks like a legislative report.¹⁴⁷ However, regardless of the amount of information and number of interveners, courts are still limited by the adversarial system and the rules of evidence that are invariably less representative of societal opinion than a legislature. After all, the *Williams* court was still heavily influenced by education requirements promulgated by interest groups.¹⁴⁸ Additionally, the fact that the *Williams* court was required to receive such a volume of policy information suggests that the adjudicated claims are indeed political questions since this behavior relates more to that of a legislature rather than the judiciary.

The standards of review and their applications also suggest that the questions adjudged here are political. The ruling in *Gannon* is not uncommon in that it claimed “suitability” would be a sufficient standard grounded in “reasonableness.”¹⁴⁹ Unfortunately, in cases of political questions, soft standards can be stretched under the pressure of interest groups and political crises. The standard in *Vergara*, apparently based on the state equal protection clause, now analyzes education quality and judges with strict scrutiny any laws that are harmful to any court’s perception of education quality. A large range of statutes, from funding adjustments to building regulations, which may have deleterious effects on education, may now be examined with strict scrutiny. Balancing the benefits and burdens of legislative policy is difficult under the unforgiving test of strict scrutiny. *Gannon*’s court has attempted to control the suitability standard by cordoning its effect to when state education funding is too low.¹⁵⁰ However, even that limit proves insufficient to keep courts above the political fray. For example, the *Williams* court, in preventing low funding, still behaved like a legislature where budget cuts to education were struck down based on performance scores of students and recommended funding levels from interest groups.¹⁵¹ The lineage of case law preceding *Vergara* began with a seemingly stable equitable standard concerned purely with comparative funding. However, following *Vergara*, the

147 *Tex. Taxpayer & Student Fairness Coal. v. Williams*, No. D-1-GN-11-003130, slip op. at 1 (Tex. Dist. Ct. Aug. 28, 2014) (citing the thousands of exhibits and multitudes of evidence in the case).

148 *See supra* text accompanying note 119 (citing the influence of the School Finance Working Group).

149 *Gannon v. State*, 319 P.3d 1196, 1225 (Kan. 2014).

150 *Id.* at 1228 (quoting *Montoy v. State*, 62 P.3d 228, 235 (Kan. 2003)).

151 *See supra* text accompanying note 119 (citing the influence of the School Finance Working Group); *see also* William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Years After Rose*, 98 Ky. L.J. 789, 809 (2010) (“[I]n amassing expertise and continuously monitoring the behavior of the primary reform actors, the Kentucky legislature might be coming to resemble nothing so much as the ideal activist court” (citing James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 263 (2003))).

standard is now a substantive examination of general harm to education. When courts take on political questions, standards—which are already soft to begin with—are not stable or judicially manageable.

The “Runaway Remedy Problem” of political questions in courts is closely tied to the need to find limits on court power. Cases where political questions are adjudicated soon result in legislative-like remedies in scope and size. The segregation cases found courts striking down school district boundaries statewide and levying taxes until the U.S. Supreme Court, influenced by political question concerns, intervened and began to curb court power.¹⁵² The *Rose* court struck down an entire education system and replaced it with its own promulgated guidelines.¹⁵³ *Vergara* and *Williams* are cases where no political question restraint has yet been employed, and as a result, they are proceeding down the same road as the segregation and *Rose*-type cases. After *Vergara*, besides striking down the entire teacher employment regime as harmful to education,¹⁵⁴ many laws in the state may now likewise fall under judicial oversight due to possible deleterious effects on education. Under *Williams*, the Texas assembly is locked into a certain funding level by the judiciary now. The political question doctrine was designed to avoid these sorts of rulings. *Vergara* and others like it are the direct result of a failure to apply the political question doctrine.

CONCLUSION

Some questions are political by nature, regardless of whether a court has properly dismissed them or not. Four factors have been presented in order to examine if a case is political. If a court uses an extremely flexible standard, evidence that is heavily policy-based, remedies that continue to grow, or no clear judicial limits, the court may likely be answering a political question. In particular, if the evidence is as vast as the content of legislative debates and if the remedies seem to be actions normally taken by a legislature, then a court may have accepted political questions for adjudication. It is necessary to state that this Note was limited to education cases, but these cases are instructive in showing what may occur when courts attempt to answer political questions generally.

In order to cure the malady of conflicts and endless lawsuits plaguing school adequacy litigation states, courts must take an approach that is influenced by the political question doctrine. Courts that have taken the medicine of the political question approach are no longer faced with repeated education claims pushed by persistent interest groups. However, in jurisdictions where school adequacy litigation thrives, having already interpreted their state constitutions to permit the litigation, it is unlikely that courts can simply dismiss claims as political questions. Courts may take the approach of the segregation cases, though, and simply allow their subsequent

152 Section I.A.

153 See *supra* text accompanying notes 38–43 (describing the details of the *Rose* case).

154 See Section III.A (describing the *Vergara* court’s reasoning in detail).

opinions to be informed by the political question doctrine as they curtail excessive remedies or tighten particular standards. This is the pathway out of the morass of making policy from the judge's bench. This is how to regain control of the runaway wagon of school adequacy litigation. *Vergara* and cases like it have shown the effects of judges bringing political questions into the courtroom. With large swaths of teacher employment litigation being struck down in court-ordered remedies, employing a robust political question doctrine could not be more important. Without some careful reliance on the political question doctrine, states like Kansas, which have just begun school adequacy litigation, will wind up with remedies like *Vergara*.

