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Taking Teacher Quality Seriously

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TAKING TEACHER QUALITY SERIOUSLY

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ABSTRACT

Although access to quality teachers is one of the most important aspects of a quality education, explicit concern with teacher quality has been conspicuously absent from past litigation over the right to education. Instead, past litigation has focused almost exclusively on funding. Though that litigation has narrowed gross funding gaps between schools in many states, it has not changed what matters most: access to quality teachers.

This Article proposes a break from the traditional approach to litigating the constitutional right to education. Rather than constitutionalizing adequate or equal funding, courts should constitutionalize quality teaching. The recent success of the constitutional challenge to tenure offers the first step in this direction. But the focus on teacher tenure alone is misplaced. Eliminating tenure, without addressing more important fundamental challenges for the teaching profession, may just make matters worse. Thus, this Article argues for a broader intervention strategy. When evaluating claims that

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students have been deprived of their constitutional right to education, courts should first ensure that states equally distribute existing quality teachers, regardless of the supply. Courts should then address state policies that affect the supply of teachers, which include far more than just salaries. When those remedies still prove insufficient to ensure access to quality teachers, courts must ensure that the removal of ineffective teachers is possible.

TABLE OF CONTENTS

INTRODUCTION	1601
I. THE FAILURE OF PUBLIC POLICY TO DELIVER TEACHING QUALITY	1607
<i>A. The Impact of Quality Teaching</i>	1607
<i>B. Shrinking Class Size</i>	1609
<i>C. Certifying and Credentialing Teachers</i>	1612
<i>D. Raising Teacher Salaries</i>	1615
<i>E. Paying Teachers for High Performance</i>	1618
<i>F. Identifying Teacher Effectiveness Through Student Test Scores</i>	1620
<i>G. Reasons for Policy Failure</i>	1623
II. SCHOOL FINANCE LITIGATION: IGNORING AND OVERSIMPLIFYING THE CHALLENGES OF ACCESS TO QUALITY TEACHERS	1626
<i>A. Courts that Ignore Teachers or Treat Them as Just One of Many Factors</i>	1628
<i>B. Courts that Analyze Teachers but Misunderstand Them</i>	1630
1. <i>Ignoring the Teacher Pipeline</i>	1630
2. <i>Oversimplifying the Teaching Labor Market</i>	1631
<i>C. The Outliers: Courts that Focus on Teachers</i>	1635
<i>D. Assessing the Effect of School Finance Remedies on Teachers</i>	1637
<i>E. Why Courts Must Deepen Their Analysis of Teachers</i> ..	1639
1. <i>Market Forces Are Too Complex and Powerful for Individual Districts to Counteract</i>	1641
2. <i>Race and Segregation Matter</i>	1642
3. <i>States Cannot Be Trusted to Improve Teaching for Disadvantaged Districts</i>	1645
4. <i>The Teaching Environment Matters as Much as Salary</i>	1646
<i>F. Navigating the Risks of Intervention</i>	1648
III. REFORMING SCHOOL FINANCE LITIGATION'S APPROACH TO TEACHING	1651

<i>A. Learning from the Constitutional Challenge to Tenure</i>	1653
<i>B. An Expanded and Nuanced Approach to Teaching Quality</i>	1657
1. <i>Understanding the Problem Is Not Money, Tenure, or Any Other Single Factor</i>	1658
2. <i>The Unequal Distribution of Quality Teachers Is Distinct from a Shortage</i>	1659
3. <i>Improving Teacher Quality Through Recruitment, Retention, and Removal</i>	1663
a. <i>Ensuring Competitive Salaries</i>	1664
b. <i>Leveraging Teacher Pipelines</i>	1664
c. <i>Improving the Teaching Environment</i>	1665
d. <i>Managing Teacher Quality: Evaluations, Remediation, and Tenure</i>	1667
CONCLUSION	1668

INTRODUCTION

Although social science studies and policy analyses uniformly recognize teacher quality as the primary factor affecting student achievement,¹ past litigation to enforce the constitutional right to education has primarily focused on money, largely ignoring teachers.² A surprising number of opinions do not even include the word “teacher.”³ The rest tend to relegate teacher quality to one line on the list of challenges that districts face, assuming that additional money will cure teaching inadequacies as easily as any other problem.⁴ This monetary approach to the constitutional right to education has resulted in the popular moniker *school finance litigation*.⁵

Last year, however, a California trial court used that precedent to declare teacher tenure unconstitutional, reasoning that tenure was the reason why some schools have so many grossly ineffective teachers.⁶ As recent scholarship demonstrates, numerous flaws plague the assumption that tenure causes bad teaching,⁷ but the litigation offers important lessons for school finance litigation to follow. First, tenure challenges are attempting to systematically move the constitutional doctrines established in school finance

1. See LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* (2010); James H. Stronge et al., *What Is the Relationship Between Teacher Quality and Student Achievement? An Exploratory Study*, 20 J. PERSONNEL EVALUATION EDUC. 165, 167 (2007).

2. See *infra* Part II.

3. See *infra* notes 150-51 and accompanying text.

4. See, e.g., *DeRolph v. State*, 728 N.E.2d 993, 1001 (Ohio 2000) (listing teachers among various other problems faced by districts); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 769 (Tex. 2005) (limiting the discussion of teachers to three sentences).

5. See, e.g., James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 252-58 (1999) (analyzing “school finance litigation”). In all fairness, this term does not apply to all of the litigation. Some of it is more appropriately termed “quality education litigation.” See generally William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994) (noting that school finance litigation has shifted its focus to the quality of education from equal funding).

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

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

litigation beyond just money.⁸ Relying on broadly worded language from school finance precedent that guarantees students the right to an equal or quality education, tenure challenges substantiate the premise that any state policy that systematically and substantially impedes educational opportunity—whether financially or otherwise—is unconstitutional.⁹ In this respect, the doctrinal theory embedded in the constitutional challenge to tenure expands the boundaries of the constitutional right to education. Second, the constitutional challenge to tenure focuses exclusively on the most important factor in educational outcomes: teacher quality.¹⁰ This focus makes perfect sense. What good is a constitutional right to education if it cannot ensure students have good teachers? Moreover, this focus prevents other educational issues from obfuscating the most important issue of teacher quality.

These theoretical advances demand continued attention. This Article draws on these advances to propose a reinvigorated and refocused approach to litigating the constitutional right to education. While four decades of school finance litigation have closed or narrowed various funding gaps, many would argue it has done little to improve the substantive education students receive.¹¹ Its goals and effects have been too diffuse. If the movement is to remain relevant, it must mature and deepen its analysis of what matters most: teacher quality.

The fact that courts have not already shifted their focus to teachers, however, raises the question of why. One explanation is that courts have assumed that changes in funding structures would eventually trickle down to improve teacher quality. Experience has proven this assumption false. The other explanation is that courts recognize the challenge of improving teacher quality but believe it is too complex and politically charged for courts to engage. This concern has merit. Although everyone agrees that teacher quality is key to improving educational outcomes, states' strategies for improving teaching quality have been all over the board and achieved

8. *See id.* at 123.

9. *See id.* at 125-26.

10. *See id.*

11. *See infra* Parts II.D-E.

relatively little.¹² On average, poor and minority students are still exposed to inexperienced, uncredentialed, and unqualified teachers at twice the rate of other students.¹³ Courts naturally would be reluctant to wade into a policy morass regarding teachers that others have struggled to resolve. Yet the difficulty and contentiousness of the issues surrounding the constitutional right to education are not new, nor have they stopped most courts from acting to enforce the right.

When students' constitutional right to education is in question, courts—more than any other government actor—must engage and protect the right, notwithstanding the challenges that doing so involves.¹⁴ For instance, the extent to which money affected educational outcomes was far from clear when courts first began demanding adequate and equitable school finance systems in the 1970s.¹⁵ Four decades later, aspects of the debate still linger, but courts have been able to consistently intervene on the principle that states must still take reasonable steps to act on what they do know about money and unequal access to educational opportunities.¹⁶ In the absence of such judicial intervention, the complexity of educational problems too often serves as a convenient excuse for legislative inaction that, in effect, condones inequality and inadequacy.¹⁷

12. Over the past two decades, policymakers have shrunk class sizes, increased salaries across the board, elevated certification requirements, and experimented with paying teachers for higher performance. *See infra* Part I.

13. HEATHER G. PESKE & KATI HAYCOCK, EDUC. TR., *TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY* 2 (2006).

14. *See, e.g.*, Conn. Coal. for Justice in Educ. Funding v. Rell, 990 A.2d 206, 210, 219 (Conn. 2010) (“[T]his court has a role in ensuring that our state’s public school students receive that fundamental guarantee,” and “it is ... the duty of the judiciary to determine whether the legislature has fulfilled its affirmative obligations.”); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1264 (Wyo. 1995) [hereinafter Campbell I] (“[T]he [court] has the constitutional duty to declare unconstitutional that which transgresses the state constitution.... [O]ur duty to protect individual rights includes compelling legislative action required by the constitution.”).

15. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23-24 (1973) (indicating that it was not settled whether money affected educational quality).

16. *See* Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1476-87 (2007) (detailing plaintiff victories).

17. *See id.* at 1538.

Today's challenges regarding teacher quality are no different. While the debate may continue over how to improve teacher quality, it is clear that quality teachers are central to educational outcomes and that states have failed to address the issue seriously. Judicial engagement on teacher quality can break this stalemate or recalcitrance where it exists.¹⁸ To be clear, however, this does not mean that courts should devise their own education policies or settle social science disputes. Their role is to create a framework in which states will focus on evidence and problems that states might otherwise ignore, and take steps that states might otherwise refuse.¹⁹ On this score, courts are particularly competent.²⁰ They have the ability to force parties to account for relevant evidence, to determine what the key issues are, to set standards for dealing with those issues, and to hold the parties accountable for failing to do so.²¹ This does not entail setting policy. It entails forcing states to carry out their constitutional duties.

Toward that end, this Article proposes four careful steps. First, courts and states should take holistic approaches to improving teacher quality. Experience and social science teach that there are no silver bullets to improving education or teacher quality. Neither narrow attacks on tenure, nor any other singular aspect of teacher policy, are sufficient. As suggested above, teacher quality is affected by a multitude of factors other than just salary. Realistic remedies must, for instance, account for geography, labor market dynamics, the attractiveness of the teaching profession, segregation, the teaching environment, and structural inequalities between districts.

Second, courts and states should recognize that the unequal distribution of quality teachers is different than a shortage of quality

18. See, e.g., *id.* at 1526-29.

19. See *id.* at 1541-42.

20. See, e.g., GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 350 (1996) ("Courts have some special strengths—removal from politics and the ability to stay with a complex issue long enough to implement change."); MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* (1982).

21. See, e.g., Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001) (extolling courts' fact-finding ability); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1018-21 (2004) (finding that school finance litigation has improved political negotiations).

teachers. Even if states cannot increase the supply of quality teachers, the analytical principles developed in school finance litigation should dictate that states fairly distribute the ones they have.²² In many ways, this is a more straightforward task than increasing the supply of quality teachers.

Third, courts and states should analyze the teacher labor market at a much deeper and more nuanced level than in the past. Closing basic salary gaps between districts or offering modest across-the-board salary increases will do little to achieve increases in the overall supply of quality teachers.²³ Increasing the talent pool requires states to make the profession itself more attractive overall. Evidence shows that, at the very least, attracting more talented teachers requires that teacher salaries be competitive with job opportunities outside of teaching²⁴ and that the environment within which teachers work improve.²⁵ Currently, financial and professional prestige concerns prevent many of the strongest candidates from considering teaching in the first instance.²⁶ Strong candidates who manage to set aside these front-end concerns still remain the ones most likely to leave the teaching profession later, not just to make more money but because they find the environment in which they teach inhospitable.²⁷ The solution, in short, is for courts to prompt states to treat teachers like professionals, both in the salaries they are offered and the conditions under which they work.

22. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989) (requiring efficient distribution and management of resources); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 388-89 (N.C. 2004) (discussing the State's and local districts' responsibility to allocate resources strategically). See generally Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477 (2014) (discussing distributional theory in the context of school finance litigation and equality and adequacy of educational opportunity).

23. See generally Donald Boyd et al., *Understanding Teacher Labor Markets: Implications for Equity*, in *SCHOOL FINANCE AND TEACHER QUALITY: EXPLORING THE CONNECTIONS* 55, 57 (David H. Monk & Margaret L. Plecki eds., 2003) (finding that factors other than salary play more important roles in determining where teachers decide to work).

24. See Richard M. Ingersoll & Elizabeth Merrill, *The Status of Teaching as a Profession*, in *SCHOOLS AND SOCIETY: A SOCIOLOGICAL APPROACH TO EDUCATION* 185, 192-96 (Jeanne H. Ballantine & Joan Z. Spade eds., 4th ed. 2011).

25. See AMY M. HIGHTOWER ET AL., *IMPROVING STUDENT LEARNING BY SUPPORTING QUALITY TEACHING: KEY ISSUES, EFFECTIVE STRATEGIES* 16 (2011).

26. See Ingersoll & Merrill, *supra* note 24, at 192-95.

27. See LINDA DARLING-HAMMOND, *RECRUITING AND RETAINING TEACHERS: WHAT MATTERS MOST AND WHAT CAN GOVERNMENT DO?* (2011), <http://www.help.senate.gov/imo/media/doc/Darling-Hammond.pdf> [<https://perma.cc/8UUG-2XBD>].

If states can increase the supply of quality teachers and distribute them fairly, a fourth point may become relevant: teacher removal. No matter what steps a state may take to improve teacher quality, a certain percentage of the teachers will, for a variety of reasons, fail to perform up to standard. A small percentage of underperformers do not necessarily undermine a school's overall education program.²⁸ But to the extent some schools are burdened with substantial numbers of ineffective teachers, they should not be stuck with them.²⁹ States must make removal, if necessary, a realistic possibility. This may or may not involve altering tenure, but it necessarily requires states to do two things: (1) help needy districts shoulder the financial and administrative burdens of terminating teachers, and (2) take the predicate steps outlined above to improve the profession so that disadvantaged schools can fill vacancies with stronger teachers.

This Article proceeds in three parts. Part I begins with an overview of the social science on the importance and effects of quality teachers. That overview is followed by a detailed analysis of the various policies that states have implemented to improve teaching, including why those policies have failed. Part II examines the role school finance litigation has played, or not played, in improving teaching, concluding that the litigation has either ignored or grossly oversimplified the problem. Part II then offers the rationale for why courts must deepen their analysis of teacher quality and how they can avoid separation of powers concerns. Part III identifies both the flaws and theoretical breakthroughs of the constitutional challenges to tenure and applies them to school finance precedent, as well as the social science literature on improving teacher quality. Based on this background, the Article proposes a framework for adjudicating the constitutional right to education.

28. Kevin G. Welner, *Silver Linings Casebook: How Vergara's Backers May Lose by Winning*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 121, 130-36 (2015).

29. Current data suggests disadvantaged schools do have large numbers of ineffective teachers. See EDUC. TR., *THEIR FAIR SHARE: HOW TEXAS-SIZED GAPS IN TEACHER QUALITY SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS* 3-4 (2008). This proportion, however, would presumably change with a change in the market.

I. THE FAILURE OF PUBLIC POLICY TO DELIVER TEACHING QUALITY

The importance of quality teachers is beyond dispute, but disagreements abound as to what makes a good teacher. Do experience, credentials, certification, or environmental factors correlate with quality? Some argue that none of these factors correlate with teaching quality and that the only proof of teaching quality is in the pudding—how a teacher’s students perform on standardized exams.³⁰ Regardless, by almost any definition or measure, there is a shortage of high-quality teachers, and disadvantaged students have the least access to them.³¹ The combination of this shortage and its importance to student outcomes has generated a number of systemic responses over the past two decades.³² The responses have ranged from shrinking class sizes and raising certification expectations to increasing teachers’ salaries, offering pay for performance incentives, and evaluating teachers based on their students’ test scores.³³ The following Sections address each of these policies and explain why these policies have yet to resolve the fundamental problems of identifying and increasing quality teaching.

A. *The Impact of Quality Teaching*

The research on teacher quality has grown steadily in the last three decades. The research findings consistently conclude that teacher quality is among the most significant variables in student outcomes.³⁴ Although a student’s socioeconomic status, along with that of his peers, exerts an enormous influence on educational

30. See DANIEL F. MCCAFFREY ET AL., EVALUATING VALUE-ADDED MODELS FOR TEACHER ACCOUNTABILITY 1 (2003).

31. See PESKE & HAYCOCK, *supra* note 13, at 1-2.

32. See ROBERT GORDON ET AL., BROOKINGS INST., IDENTIFYING EFFECTIVE TEACHERS USING PERFORMANCE ON THE JOB 5 (2006).

33. See *infra* Parts I.B-F.

34. See Dan Goldhaber, *Teachers Clearly Matter, but Finding Effective Teacher Policies Has Proven Challenging*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 157 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015) (tracing the history of research on teacher quality); Joseph O. Oluwole, *Tenure and the “Highly Qualified Teacher” Requirement*, 8 WHITTIER J. CHILD & FAM. ADVOC. 157, 158 (2009) (discussing the “various studies [that] have shown that teachers are important to student achievement”).

outcomes,³⁵ teacher quality is generally recognized as the most important school resource affecting student achievement.³⁶ In addition, although quality teaching is important for all students, it is most important for disadvantaged students.³⁷

The challenge, however, has been ensuring that all students have “access to competent, caring, qualified teaching in schools organized for success.”³⁸ Students who need qualified teachers the most—poor and minority students—have the least access to them. Students attending predominantly poor and minority schools are assigned to novice teachers at twice the rate as students in low-poverty schools and predominantly white schools.³⁹ Likewise, students in disadvantaged schools are taught by “out-of-field teachers” at a much higher rate than other students.⁴⁰

The long-term effects of this inequality are tremendous. Consistent exposure to low- or high-quality teachers over the course of years has a compounding effect for individual students and the nation as a whole.⁴¹ One prominent study found that “having a

35. RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 47-76 (2001); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1355-56 (2004).

36. See Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1 (2000) (finding teacher quality to be strongly related to student achievement based on a fifty-state survey and the National Assessment of Educational Progress); Goldhaber, *supra* note 34; Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417 (2005).

37. See LINDA DARLING-HAMMOND, NAT'L COMM'N ON TEACHING & AM.'S FUTURE, *DOING WHAT MATTERS MOST: INVESTING IN QUALITY TEACHING* (1997); GORDON ET AL., *supra* note 32, at 8; *Teacher Quality and Student Achievement: Research Review*, CTR. FOR PUB. EDUC. (Nov. 1, 2005), <http://www.centerforpubliceducation.org/main-menu/staffingstudents/teacher-quality-and-student-achievement-at-a-glance/teacher-quality-and-student-achievement-research-review.html> [<https://perma.cc/CC3D-VKSD>] (finding the effect of teaching on student learning is stronger for poor and/or minority students than for their more affluent and/or white peers, and the effect accumulates over time).

38. NAT'L COMM'N ON TEACHING & AM.'S FUTURE, *WHAT MATTERS MOST: TEACHING FOR AMERICA'S FUTURE* 10 (1996).

39. See PESKE & HAYCOCK, *supra* note 13, at 2; see also Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345 (2007).

40. PESKE & HAYCOCK, *supra* note 13, at 2-3.

41. See MCCAFFREY ET AL., *supra* note 30, at xii-xv; Robert L. Mendro et al., *An Application of Multiple Linear Regression in Determining Longitudinal Teacher Effectiveness* (Apr. 1998) (Paper Presentation at the 1998 Annual Meeting of the American Educational Research Association).

top-quartile teacher rather than a bottom-quartile teacher four years in a row would be enough to close the black-white test score gap.”⁴² This unequal access is sufficiently pervasive that scholars argue that it depresses overall national achievement.⁴³

B. Shrinking Class Size

In the 1990s, the way to improve teaching was thought to be to change the environment in which teachers work, not the teachers themselves. In particular, researchers thought that shrinking class size might maximize teachers’ and students’ potential.⁴⁴ The movement to shrink class size grew out of a longitudinal study by the State of Tennessee.⁴⁵ The study found that students assigned to smaller classes passed the State’s standardized language and math tests at higher rates than others.⁴⁶ The findings were even clearer in regard to grade retention. Schools retained students in larger classrooms at twice the rate of those in small classes.⁴⁷ Based on these findings, the State developed a pilot program and study in three school systems.⁴⁸ This study confirmed the earlier findings with even stronger results.⁴⁹ In Nashville—one of the pilot districts—“students who attended small classes (K-3) consistently made better grades than students in regular and regular/aide

42. GORDON ET AL., *supra* note 32, at 8. See generally Elizabeth Powell, *The Quest for Teacher Quality: Early Lessons from Race to the Top and State Legislative Efforts Regarding Teacher Evaluation*, 62 DEPAUL L. REV. 1061, 1070 (2013) (“This significant finding has heavily shaped education policy over the last several years.”).

43. See ROBIN CHAIT, CTR. FOR AM. PROGRESS, REMOVING CHRONICALLY INEFFECTIVE TEACHERS: BARRIERS AND OPPORTUNITIES 2 (2010) (“[D]ismissing the bottom quartile of novice teachers in the district after their first year based on value-added estimates would result in a net increase in student test scores gains of 1.2 percentage points annually across the district.”); Eric A. Hanushek, *Valuing Teachers: How Much Is a Good Teacher Worth?*, 11 EDUC. NEXT 41, 43 (2011).

44. See Gregory C. Malhoit & Derek W. Black, *The Power of Small Schools: Archiving Equal Educational Opportunity Through Academic Success and Democratic Citizenship*, 82 NEB. L. REV. 50, 72-73 (2003).

45. HELEN PATE-BAIN ET AL., HEROS, INC., THE STUDENT/TEACHER ACHIEVEMENT RATIO (STAR) PROJECT: STAR FOLLOW-UP STUDIES, 1996-1997 (1997), <http://files.eric.ed.gov/fulltext/ED419593.pdf> [<https://perma.cc/KVB9-4726>].

46. *Id.* at 5.

47. *Id.* at 12.

48. *Id.* at 14.

49. *Id.* at 23.

classes In English, math, and science, the students in the small classes outscored their counterparts by over 10 points.”⁵⁰

The Tennessee study sparked a growing body of research and public policy responses. Independent studies found that smaller classes—defined as those with fifteen to twenty students—can boost student achievement, particularly in early grades and particularly for minority and low-income students.⁵¹ These findings quickly translated into legislation and litigation. Several states began legislating maximum class sizes and secured Congress’s help in funding them.⁵² School finance litigators also began including social science evidence on class size in their cases, either arguing that large classes were part of a constitutional violation by the state or that smaller classes would help the state to remedy other deficiencies in the education system.⁵³ The collective result was a steady reduction in class size between 2000 and 2008.⁵⁴

Despite the quick pursuit of class size reduction, the movement to further reduce or maintain small class sizes has been beset by problems. First, some policymakers and researchers began to assert that class size reduction was not improving student outcomes as a general principle.⁵⁵ Others were more nuanced, claiming smaller classes did not matter in higher grades, did not matter for middle-income students, and reduced teacher quality because schools were forced to hire too many new teachers too quickly.⁵⁶ Still others did

50. *Id.* at 17-18.

51. *See, e.g.*, PENNY FIDLER, L.A. UNIFIED SCH. DIST., THE IMPACT OF CLASS SIZE REDUCTION ON STUDENT ACHIEVEMENT 2 (2001); DIANE WHITMORE SCHANZENBACH, NAT’L EDUC. POL’Y CTR., DOES CLASS SIZE MATTER? (2014), <http://nepc.colorado.edu/publication/does-class-size-matter> [<https://perma.cc/7F58-4SL9>].

52. EDITORIAL PROJECTS IN EDUC. RES. CTR., NATIONAL HIGHLIGHTS REPORT: QUALITY COUNTS 10 (2008) (finding that eighteen states had programs to limit or reduce class size in place); Wendy Schwartz, *Class Size Reduction and Urban Students*, ERICDIGESTS.ORG, <http://www.ericdigests.org/2003-4/class-size.html> [<https://perma.cc/6D8Q-HK3F>].

53. *See, e.g.*, *DeRolph v. State*, 677 N.E.2d 733, 745 (Ohio 1997); *Hoke Cty. Bd. of Educ. v. State*, No. 95CVS1158, 2000 WL 1639686, at *100 (N.C. Super. Ct. Oct. 12, 2000) (pointing out the value of smaller classes, particularly for at-risk students), *aff’d in part, rev’d in part*, 599 S.E.2d 365 (N.C. 2004); *see also* Malhoit & Black, *supra* note 44, at 72-73 (maintaining that small classes have numerous positive learning and teaching outcomes).

54. SCHANZENBACH, *supra* note 51, at 7.

55. *See, e.g.*, *7 Myths of Class Size Reduction—And the Truth!*, CLASS SIZE MATTERS, <http://www.classsizematters.org/wp-content/uploads/2013/04/FAQ-7-myths-04.26.13.pdf> [<https://perma.cc/6366-JBYG>] (last visited Mar. 30, 2016).

56. *Id.*

not question the positive effect of smaller classes but argued that, from a cost-benefit analysis, the money could be better spent on other education reforms.⁵⁷

Second, the financial commitment required to reduce class size is significant and hard to maintain. After the initial fervor wore off, states began to allow class sizes to creep up for a number of reasons.⁵⁸ In some instances, the explanation is no more complicated than the fact that some other agenda arose demanding money.⁵⁹ Class size caps were most often self-imposed, and thus, legislatures could easily raise the cap by a student or two occasionally.⁶⁰ The Great Recession pushed this dynamic to the extreme. In just the one year between 2009 and 2010, all the progress in reducing class size over the previous eight years was lost.⁶¹ This backtrack on class size occurred with relatively little pushback, presumably because of the extent of the economic crisis, the cost-benefit concerns, and the other critiques noted above.⁶²

Finally, the critique of class size reduction and the actual retreat from it may have been clouded by misleading data and assumptions. School- or district-wide student-to-teacher ratios, which tend to be the primary data point on which the conversation has focused, are not necessarily instructive or responsive to the more nuanced findings in the Tennessee study. That a district or school's average student-to-teacher ratio falls within acceptable levels does not mean that the district or school maintains that level across all classes or even in the most important classes. School-wide student-to-teacher ratios include special education and other specialized teachers who teach very small classes. Factoring them out causes the average class size to jump dramatically.⁶³ Rather than a national student-to-

57. See GROVER J. "RUSS" WHITEHURST & MATTHEW M. CHINGOS, BROOKINGS INST., CLASS SIZE: WHAT RESEARCH SAYS AND WHAT IT MEANS FOR STATE POLICY 3-4, 13 (2011), http://www.brookings.edu/~media/research/files/papers/2011/5/11-class-size-whitehurst-chingos/0511_class_size_whitehurst_chingos.pdf [<https://perma.cc/7AFF-JR9F>] (finding that the class size reductions were too costly in twenty-four states).

58. See SCHANZENBACH, *supra* note 51, at 7-8.

59. See *id.* at 8.

60. *Id.* at 7-8.

61. See *id.*

62. *Id.*

63. See Sarah D. Sparks, *Class Sizes Show Signs of Growing*, EDUC. WK. (Nov. 24, 2010), http://www.edweek.org/ew/articles/2010/11/24/13size_ep.h30.html [<https://perma.cc/99QJ-RF>]

teacher ratio of one to eighteen or nineteen, the ratio would be one to twenty-five.⁶⁴ In other words, schools never reduced class size to the point at which they would have achieved the important gains expected. In sum, the current narrative operates on the assumption that class sizes were small enough and, if not, it does not matter anyway.

C. Certifying and Credentialing Teachers

Class size reductions may have indirectly highlighted and exacerbated the shortage of high-quality teachers as they created demand that exceeded the supply. Class size reduction caused a migration of teachers not only between and among districts, but also from non-K-3 classrooms into newly reduced K-3 classrooms.⁶⁵ And those desirable districts with more resources could hire strong teachers from other districts, leaving the less desirable districts without strong candidates to fill their existing vacancies, much less to reduce class size.⁶⁶ Regardless, the past two decades have brought a litany of policies heavily focused on raising the bar for teacher quality rather than the conditions under which they teach.

The traditional model of improving teacher quality relies on certifications and credentials, either through degrees, testing mechanisms, or training programs.⁶⁷ Most states, however, did little to mandate high credentials or prevent schools from hiring teachers with low credentials. Even when states increased standards, they often grandfathered experienced teachers into the new regime, which—right or wrong—exempted a large portion of teachers from

EC].

64. *Id.*

65. See EDWARD WEXLER ET AL., CALIFORNIA'S CLASS SIZE REDUCTION: IMPLICATIONS FOR EQUITY, PRACTICE, & IMPLEMENTATION 3 (1998) (finding a shift in teacher movement from nonclass size reduction to class size reduction); David P. Sims, *Crowding Peter to Educate Paul: Lessons from a Class Size Reduction Externality*, 28 ECON. EDUC. REV. 465, 467 (2009).

66. See Christopher Jepsen & Steven Rivkin, *Class Size Reduction and Student Achievement: The Potential Tradeoff Between Teacher Quality and Class Size*, 44 J. HUM. RES. 223, 224 (2009) (finding that well-qualified teachers migrated to more affluent communities, prompting lower quality in South Central Los Angeles).

67. Jerry R. Parkinson, *The Use of Competency Testing in the Evaluation of Public School Teachers*, 39 U. KAN. L. REV. 845, 845 (1991) ("A majority of states now employ competency tests as a prerequisite to the initial certification of prospective teachers.").

having to comply with the quality standards.⁶⁸ The No Child Left Behind Act (NCLB) sought to address these problems by imposing a uniform national mandate that all teachers of core subjects must be highly qualified.⁶⁹

While theoretically a major step forward, NCLB was beset by limitations and did little to change the underlying fundamentals of the teaching force. Rather than set a national standard for high-quality teachers, NCLB afforded states discretion to define and measure what constituted a high-quality teacher.⁷⁰ When confronted with shortages in quality teachers, states were incentivized to redefine and lower the meaning of quality, not raise it.⁷¹ Thus, the more fundamental problem is that certification requirements did nothing to increase the number of available qualified teachers.

NCLB reporting requirements simply revealed how many uncertified and low-credentialed personnel teach in our nation's schools.⁷² It also confirmed that poor and minority students are exposed to low-credentialed teachers at much higher rates than other students.⁷³ In fact, notwithstanding the state's ability to manipulate the definition of quality, the fundamental market problems with generating and distributing quality teachers were so serious that violations of the teacher mandate mounted quicker than violations of any other requirement of NCLB.⁷⁴

68. *Id.* at 845-46 (discussing states' reluctance to require previously certified teachers to pass a competency examination).

69. 20 U.S.C. § 6319(a)(2) (2012).

70. *Id.* § 7801(23) (establishing baseline from which states define "highly qualified").

71. See generally James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004).

72. EDUC. COMM'N OF THE STATES, ECS REPORT TO THE NATION: STATE IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT 69 (2004).

73. See, e.g., EDUC. TR., *supra* note 29, at 11 (finding that less credentialed teachers are concentrated in predominantly poor and minority schools); SUSANNA LOEB & MICHELLE REININGER, PUBLIC POLICY AND TEACHER LABOR MARKETS: WHAT WE KNOW AND WHY IT MATTERS 1 (2004); Frank Adamson & Linda Darling-Hammond, *Funding Disparities and the Inequitable Distribution of Teachers: Evaluating Sources and Solutions*, 20 EDUC. POL'Y ANALYSIS ARCHIVES 1, 4 (2012).

74. EDUC. COMM'N OF THE STATES, *supra* note 72, at 69; see also John W. Sipple & Brian O. Brent, *Challenges and Strategies Associated with Rural Schools Settings*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY, *supra* note 34, at 607, 611-12 (finding rural schools often violate the NCLB requirement that teachers be highly qualified because their teachers are often responsible for teaching multiple subjects).

Even assuming these market problems could be resolved, the overall credentialing model is subject to common sense and empirical attack. The model rests on the huge assumption that teaching credentials are a reliable proxy for teacher quality. Although certain basic qualifications are surely necessary to be a competent and effective teacher,⁷⁵ studies generally show that both teacher credentials and experience (beyond novices) are poor proxies for teaching effectiveness or quality.⁷⁶ The overall literature is mixed or negative on the questions of teacher characteristics such as state and subject-specific certification,⁷⁷ in-field and out-of-field training,⁷⁸ advanced degrees,⁷⁹ and National Board Certification (NBC).⁸⁰ Only

75. See Dan D. Goldhaber & Dominic J. Brewer, *Does Teacher Certification Matter? High School Teacher Certification Status and Student Achievement*, 22 *EDUC. EVALUATION & POL'Y ANALYSIS* 129, 129 (2000).

76. See Marco A. Muñoz & Florence C. Chang, *The Elusive Relationship Between Teacher Characteristics and Student Academic Growth: A Longitudinal Multilevel Model for Change*, 20 *J. PERSONNEL EVALUATION EDUC.* 147, 148 (2007) (results are mixed as to whether teacher qualifications matter); Powell, *supra* note 42, at 1068 (“[After NCLB,] it became apparent that [h]ighly qualified’ teachers were not necessarily highly effective.”).

77. See LAURA GOE, *THE LINK BETWEEN TEACHER QUALITY AND STUDENT OUTCOMES: A RESEARCH SYNTHESIS* 43 (2007), <http://www.gtlcenter.org/sites/default/files/docs/LinkBetweenTQandStudentOutcomes.pdf> [<https://perma.cc/5JVZ-RKF3>]; KATE WALSH, *TEACHER CERTIFICATION RECONSIDERED: STUMBLING FOR QUALITY* 12, 41 (2001), http://www.nctq.org/dmsView/Teacher_Certification_Reconsidered_Stumbling_for_Quality_NCTQ_Report [<https://perma.cc/2SNW-GDZP>] (reviewing 150 studies and finding that certified teachers are not more effective); Dan D. Goldhaber & Dominic J. Brewer, *Evaluating the Effect of Teacher Degree Level on Educational Performance*, in *DEVELOPMENTS IN SCHOOL FINANCE*, 1996, at 197, 205 (1997) (finding students learn less from English teachers who held general teacher certification than from those who were not certified).

78. See GOE, *supra* note 77, at 24, 44.

79. See, e.g., MARGUERITE ROZA & RAEGEN T. MILLER, *CTR. FOR AM. PROGRESS, SEPARATION OF DEGREES: STATE-BY-STATE ANALYSIS OF TEACHER COMPENSATION FOR MASTER'S DEGREES* 1 (2009), https://www.americanprogress.org/wp-content/uploads/issues/2009/07/pdf/masters_degrees.pdf [<https://perma.cc/8E2P-R66E>]; Rivkin, Hanushek & Kain, *supra* note 36, at 419.

80. Compare LINDA C. CAVALLUZZO, *THE CNA CORP., IS NATIONAL BOARD CERTIFICATION AN EFFECTIVE SIGNAL OF TEACHER QUALITY?* 3 (2004) http://www.nbpts.org/sites/default/files/documents/research/Cavalluzzo_IsNBCAnEffectiveSignalofTeachingQuality.pdf [<https://perma.cc/BLU9-HQA8>] (finding NBC to be a “signal of teacher quality”), and Leslie G. Vandervoort et al., *National Board Certified Teachers and Their Students' Achievement*, 12 *EDUC. POL'Y ANALYSIS ARCHIVES* 1, 36 (2004) (finding that NBC has an effect of student achievement), with WILLIAM L. SANDERS ET AL., *COMPARISON OF THE EFFECTS OF NBPTS CERTIFIED TEACHERS WITH OTHER TEACHERS ON THE RATE OF STUDENT ACADEMIC PROGRESS: FINAL REPORT 2* (2005), <http://files.eric.ed.gov/fulltext/ED491846.pdf> [<https://perma.cc/E43R-6QRQ>] (finding that students with NBC teachers did not make significantly more academic progress than those with non-NBC teachers), and Steven Cantrell et al., *National Board*

with math and science teachers have studies tended to show that teacher credentials have a meaningful impact on student achievement. But even there, only some credentials matter.⁸¹ Those studies generally found that students exhibit larger gains in mathematics, and to a lesser extent in science, when they are taught by an in-subject-area teacher⁸² who is nationally or state certified and trained in the subject.⁸³

D. Raising Teacher Salaries

Raising teacher salaries is intuitively the most obvious strategy to increase the quality and quantity of teachers. Research shows that teachers, like any other professionals, generally respond to salary.⁸⁴ College students' decisions about whether to enter the profession are influenced by salary, and the decision of where to teach and how long they stay are also influenced by salary.⁸⁵ The most qualified teachers, in particular, are the most sensitive to relative changes in salaries.⁸⁶ The shortage of high-quality teachers in

Certification and Teacher Effectiveness: Evidence from a Random Assignment Experiment 37 (Nat'l Bureau of Econ. Research, Working Paper No. 14608, 2008) (finding no statistically significant differences between the math and language arts test scores of students assigned to NBC-certified teachers).

81. See JENNIFER KING RICE, *TEACHER QUALITY: UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES* 49-51 (2003); Andrew J. Wayne & Peter Youngs, *Teacher Characteristics and Student Achievement Gains: A Review*, 73 *REV. EDUC. RES.* 89, 107 (2003).

82. See CAVALLUZZO, *supra* note 80, at 1-2; Audrey Amrein-Beardsley, *Teacher Research Informing Policy: An Analysis of Research on Highly Qualified Teaching and NCLB*, 17 *ESSAYS EDUC.* (2006), <http://www.usca.edu/essays/vol17summer2006.html> [<https://perma.cc/6LKH-9VPJ>].

83. See Matthew M. Chingos & Paul E. Peterson, *It's Easier to Pick a Good Teacher than to Train One: Familiar and New Results on the Correlates of Teacher Effectiveness*, 30 *ECON. EDUC. REV.* 449, 450 (2011); Linda Darling-Hammond, Barnett Berry & Amy Thoreson, *Does Teacher Certification Matter? Evaluating the Evidence*, 23 *EDUC. EVALUATION & POL'Y ANALYSIS* 57, 68 (2001) (finding that teachers who have more education training versus content training in the area in which they teach appear to do better in improving student achievement); David H. Monk, *Subject Area Preparation of Secondary Mathematics and Science Teachers and Student Achievement*, 13 *ECON. EDUC. REV.* 125, 142 (1994).

84. LOEB & REININGER, *supra* note 73, at 39-40; Boyd et al., *supra* note 23; Eric A. Hanushek & Richard R. Pace, *Who Chooses to Teach (and Why)?*, 14 *ECON. EDUC. REV.* 101, 114 (1995).

85. See LOEB & REININGER, *supra* note 73, at 39-40; Boyd et al., *supra* note 23.

86. Marigee P. Bacolod, *Do Alternative Opportunities Matter? The Role of Female Labor Markets in the Decline of Teacher Quality*, 89 *REV. ECON. & STAT.* 737, 748 (2007); Karen J. DeAngelis, *The Relationship Between Teachers' Salaries and the Quality of the Supply of*

areas of high need has, nonetheless, remained resistant to change through teacher salary adjustments, although the problem appears to be that the salary increases and adjustments offered have been wholly inadequate.

Today, teacher salaries more closely resemble salaries of social workers, ministers, and clerical staff than those of other professionals.⁸⁷ Thus, even if higher salaries work, states have not systematically implemented them. Making matters worse, within the overall system of depressed wages, school districts have wildly unequal financial capacities to attract candidates.⁸⁸ As a result of financial inequality, a sorting of quality teachers occurs at the initial hiring stage and at the transfer stage that drives the highest quality teachers away from districts with students who need them most.⁸⁹

With that said, salaries are just one of several factors that affect teachers' employment decisions. In fact, within currently existing salary scales and incentives, salary may be the least important of the relevant factors.⁹⁰ Geographic location,⁹¹ the demographics of the students they teach,⁹² and the conditions under which they teach⁹³—such as class size, support staff, and facilities—may all be

Recent College Graduates to Teaching 167 (Mar. 2000) (unpublished Ph.D. dissertation, Stanford University).

87. Susanna Loeb & Tara Bêteille, *Teacher Labor Markets and Teacher Labor Market Research*, in *TEACHER QUALITY: BROADENING AND DEEPENING THE DEBATE* 27, 35-36 (Greg Duncan & James Spillane eds., 2008).

88. LOEB & REININGER, *supra* note 73, at 42; Adamson & Darling-Hammond, *supra* note 73; Boyd et al., *supra* note 23, at 73-75.

89. LOEB & REININGER, *supra* note 73, at 42; Gregory Gilpin, *Salary Schedules, Teacher Sorting, and Teacher Quality* 1 (Ctr. Applied Econ. & Pol'y Res., Working Paper No. 2011-004, 2011).

90. Boyd et al., *supra* note 23; Eric A. Hanushek & Steven G. Rivkin, *Pay, Working Conditions, and Teacher Quality*, 17 *FUTURE CHILD* 69, 76 (2007) ("For those teachers who move, the type of students changes far more than their salaries do."); *see also* JASON AMOS, *ALL FOR EXCELLENT EDUC., POLICY BRIEF: IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS* (2008), http://all4ed.org/wp-content/uploads/TeachDist_Policy_Brief.pdf [<https://perma.cc/53A5-SZWV>] (finding that pay increase alone is insufficient to attract teachers).

91. LOEB & REININGER, *supra* note 73, at 48; Boyd et al., *supra* note 23.

92. *See* Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *Why Public Schools Lose Teachers*, 39 *J. HUM. RES.* 326, 350-51 (2004); Susanna Loeb, Linda Darling-Hammond & John Luczak, *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 *PEABODY J. EDUC.* 44, 65 (2005); Wendy Parker, *Desegregating Teachers*, 86 *WASH. U. L. REV.* 1, 35-37 (2008).

93. LOEB & REININGER, *supra* note 73, at 46-47; Adamson & Darling-Hammond, *supra*

more important. Studies show that although teachers respond to wages, they respond to differing wages within a region more than they do across regions.⁹⁴ In other words, geography trumps salary. Likewise, a large body of literature identifies poor working conditions as a primary determinate of why teachers switch schools or quit the profession altogether.⁹⁵ Salary incentives in these schools are really just an attempt to offset the burden of the undesirable environment and thus must be large enough to create a net positive offset for relevant teachers.⁹⁶

Although they claim to care about teacher shortages and maldistributions, states and local school districts have not seriously responded to the foregoing dynamics.⁹⁷ There have been some across-the-board changes to salary, but almost none have actually changed the prevailing teacher market.⁹⁸ Regardless, because money alone is not the problem, money alone cannot be the solution, at least not without inefficiently throwing money at the problem.⁹⁹ Effective solutions require comprehensive approaches that target teaching shortages and maldistribution in the locations where they arise, the environmental conditions that produce them, and the market forces that exacerbate the problem.¹⁰⁰

note 73, at 9.

94. See LOEB & REININGER, *supra* note 73, at 42, 44; Boyd et al., *supra* note 23.

95. See LOEB & REININGER, *supra* note 73, at 35-36; Adamson & Darling-Hammond, *supra* note 73, at 9.

96. See, e.g., BARNETT BERRY ET AL., RECRUITING AND RETAINING QUALITY TEACHERS FOR HIGH-NEEDS SCHOOLS: INSIGHTS FROM NBCT SUMMITS AND OTHER POLICY INITIATIVES 4-5 (2009), http://www.nea.org/assets/docs/HE/mf_nationalstrategyforumreport.pdf [<https://perma.cc/8YJB-NW8J>]; DARLING-HAMMOND, *supra* note 27, at 12.

97. See, e.g., LOEB & REININGER, *supra* note 73, at 55 tbl.18 (finding that only two to seven states had policies to help attract and retain qualified teachers in high-need schools, depending on the policy option in question); *id.* at 56 tbl.19 (finding that often only 10 to 20 percent of the largest school districts had policies targeted at attracting and retaining teachers in high-need schools).

98. See generally David P. Sims, *Suing for Your Supper? Resource Allocation, Teacher Compensation and Finance Lawsuits*, 30 ECON. EDUC. REV. 1034 (2011).

99. Hanushek & Rivkin, *supra* note 90, at 82; Susanna Loeb & Marianne E. Page, *Examining the Link Between Teacher Wages and Student Outcomes: The Importance of Alternative Labor Market Opportunities and Non-Pecuniary Variation*, 82 REV. ECON. & STAT. 393, 407 (2000); Allison McKie, *The Short-Run Effect of State-Mandated Salary Increases on Teacher Qualifications: Do States Get What They Pay For?* 21 (Nov. 2004) (unpublished manuscript), https://economics.missouri.edu/seminars/files/2005/mckie_feb_04_2005.pdf [<https://perma.cc/U6HE-E43L>].

100. DARLING-HAMMOND, *supra* note 27, at 1.

E. Paying Teachers for High Performance

With the perceived failure of class size reduction, credentialing, and general salary increases, states have begun to move toward personnel management strategies based on statistical analysis and performance incentives. These are premised on the notion that teachers should be managed in similar ways to the private workforce. Schools should closely monitor teachers' work outputs and reward or hold teachers accountable for them. According to reformers, the lack of incentives or accountability creates a disincentive to teaching excellence and, over time, leads to "instructional lethargy where the lowest performer sets the standard for the entire staff."¹⁰¹

On the incentives side, reformers have pushed almost exclusively for pay-for-performance based on improving students' standardized test scores.¹⁰² Those teachers whose students meet certain achievement benchmarks would receive bonuses.¹⁰³ Pay-for-performance has a lot of intuitive appeal, but no social science actually supports its adoption.¹⁰⁴ Thus, pay-for-performance has been implemented mostly in terms of limited experiments in a few large urban centers.¹⁰⁵

101. Ralph D. Mawdsley et al., "A 'Law' Too Far"? *The Wisconsin Budget Repair Act: Counterpoint*, 275 EDUC. L. REP. 16, 19 (2012).

102. See Goldhaber, *supra* note 34, at 157-58; Eric A. Hanushek & Alfred A. Lindseth, *Performance-Based Funding*, in *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS* 241 (2009); Matthew G. Springer et al., *History and Scholarship Regarding U.S. Education Finance and Policy*, in *HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY*, *supra* note 34, at 3, 15. See generally *HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION* (Helen F. Ladd ed., 1996).

103. See Stephanie M. Martin, *The Determinants of School District Salary Incentives: An Empirical Analysis of, Where and Why*, 29 ECON. EDUC. REV. 1143, 1143 (2010); Matthew G. Springer, *Rethinking Teacher Compensation Policies: Why Now, Why Again?*, in *PERFORMANCE INCENTIVES: THEIR GROWING IMPACT ON AMERICAN K-12 EDUCATION* 5 (Matthew G. Springer ed., 2009); see also *HOLDING SCHOOLS ACCOUNTABLE*, *supra* note 102.

104. See Springer, *supra* note 103, at 14-15 (explaining that the appeal is enhanced by the growing recognition that teacher quality is key to student outcomes, but the link between teacher experience and educational credentials and student achievement is weak).

105. See, e.g., Roland G. Fryer, *Teacher Incentives and Student Achievement: Evidence from New York City Public Schools*, 31 J. LAB. ECON. 373, 375-76 (2013).

The results of these experiments have not been promising.¹⁰⁶ A RAND summary of the overall body of research found that pay-for-performance “did not improve student achievement at any grade level[;] ... did not affect teacher’s reported attitudes, perceptions, or behaviors”; and although “[m]any teachers reported that while the bonus was desirable, the program did not change their teaching practices.”¹⁰⁷ The problems with the programs have included lack of sufficient teacher buy-in,¹⁰⁸ high-pressure environments that incentivized a narrowing of the curriculum¹⁰⁹ and sometimes cheating,¹¹⁰ and overly complex systems that left teachers uncertain how to earn a bonus or resentful of those who did.¹¹¹ These results have not

106. MATTHEW G. SPRINGER ET AL., NAT’L CTR. ON PERFORMANCE INCENTIVES, FINAL REPORT: EXPERIMENTAL EVIDENCE FROM THE PROJECT ON INCENTIVES IN TEACHING 142-43 (2012), <https://my.vanderbilt.edu/performanceincentives/files/2012/09/Full-Final-Report-Experimental-Evidence-from-the-Project-on-Incentives-in-Teaching-2012.pdf> [<https://perma.cc/MA5J-KZ28>]; MATTHEW G. SPRINGER ET AL., NAT’L CTR. ON PERFORMANCE INCENTIVES, TEACHER PAY FOR PERFORMANCE: EXPERIMENTAL EVIDENCE FROM THE PROJECT ON INCENTIVES IN TEACHING 45-46 (2010), <https://my.vanderbilt.edu/performanceincentives/files/2012/09/Full-Report-Teacher-Pay-for-Performance-Experimental-Evidence-from-the-Project-on-Incentives-in-Teaching-2010-4.pdf> [<https://perma.cc/5VBK-BWJV>].

107. *Evaluating the Effectiveness of Teacher Pay-for-Performance*, RAND EDUC., <http://www.rand.org/capabilities/solutions/evaluating-the-effectiveness-of-teacher-pay-for-performance.html> [<https://perma.cc/BDD5-L236>] (last visited Mar. 30, 2016).

108. See ALLAN ODDEN & CAROLYN KELLEY, PAYING TEACHERS FOR WHAT THEY KNOW AND DO: NEW AND SMARTER COMPENSATION STRATEGIES TO IMPROVE SCHOOLS 60-61 (2002); Thomas Dee & James Wyckoff, *Incentives, Selection, and Teacher Performance: Evidence from IMPACT 1* (Nat’l Bureau of Econ. Research, Working Paper No. 19529, 2013); Jiefang Hu, *Teacher Evaluation Based on an Aspect of Classroom Practice and on Student Achievement: A Relational Analysis Between Student Learning Objectives and Value-Added Modeling* 28-29 (May 2015) (unpublished Ph.D. dissertation, Boston College) (on file with Boston College University Libraries) (explaining difficulties in sufficient teacher buy-in through traditional teacher evaluation systems).

109. See, e.g., Wayne Au, *High-Stakes Testing and Curricular Control: A Qualitative Metasynthesis*, 36 EDUC. RESEARCHER 258, 262 (2007); Gordon Cawelti, *The Side Effects of NCLB*, 64 EDUC. LEADERSHIP 64 (“Schools end up narrowing the curriculum because they are under considerable pressure to show adequate yearly progress in reading and math.”); Aaron Schutz, *Home Is a Prison in the Global City: The Tragic Failure of School-Based Community Engagement Strategies*, 76 REV. EDUC. RES. 691, 701 (2006).

110. The worst example was in Atlanta and ultimately led to the criminal prosecution and conviction of eight educators. Richard Fausset & Alan Blinder, *Atlanta School Workers Sentenced in Test Score Cheating Case*, N.Y. TIMES (Apr. 14, 2015), http://www.nytimes.com/2015/04/15/us/atlanta-school-workers-sentenced-in-test-score-cheating-case.html?_r=0 [<https://perma.cc/AZ26-MY52>].

111. Fryer, *supra* note 105, at 402; Michael D. Siciliano, *The Impact of Internal Competition on Collaboration in Public Organizations* (June 20, 2013) (on file with the University of Wisconsin) (Paper Presentation at the 11th Public Management Research Conference).

ended the call for performance pay, but they have seriously slowed its growth and directed more focus to simply evaluating teachers based on performance.

F. Identifying Teacher Effectiveness Through Student Test Scores

Over the past decade, reformers have pushed for much more sophisticated statistical analyses of the entire teaching force.¹¹² Based on those analyses, the least effective teachers would be remediated or terminated, and only those teachers receiving consistently effective ratings would be granted tenure.¹¹³ The highest performing teachers might or might not be financially rewarded. Such a system, however, requires an entire reenvisioning of teachers' rights and management. Currently, seniority systems, tenure, and due process protections place significant limitations on personnel actions.¹¹⁴

Traditionally, a school could remove a tenured teacher only on statutory grounds, which were limited to misconduct and performance.¹¹⁵ Performance-based removal typically required a demonstrated record of incompetent teaching over a period of years.¹¹⁶

112. See U.S. DEPT OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY 2 (2009), <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf> [<https://perma.cc/T5FU-S6BF>] (requiring states to build "data systems that measure student growth and success"); see also NAT'L COUNCIL ON TEACHER QUALITY, STATE OF THE STATES 2012: TEACHER EFFECTIVENESS POLICIES 2-3 (2012), http://www.nctq.org/dmsView/State_of_the_States_2012_Teacher_Effectiveness_Policies_NCTQ_Report [<https://perma.cc/K53J-324Y>] (finding that more states have turned to using more in-depth data on teacher performance in the granting of tenure).

113. See generally Melinda Adnot & James Wyckoff, *Increasing the Effectiveness of Teachers in Low-Performing Schools*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY, *supra* note 34, at 528, 531-34 (advocating that teaching quality will improve once effective teachers are properly retained and ineffective teachers are either retrained or removed).

114. See, e.g., PATRICK MCGUINN, CTR. FOR AM. PROGRESS, RINGING THE BELL FOR K-12 TEACHER TENURE REFORM 4 (2010), https://cdn.americanprogress.org/wp-content/uploads/issues/2010/02/pdf/teacher_tenure.pdf [<https://perma.cc/Z4U7-KBWZ>]; Nicholas Dagostino, Note, *Giving the School Bully a Timeout: Protecting Urban Students from Teachers' Unions*, 63 ALA. L. REV. 177, 196 (2011) (critiquing the role of seniority rather than teaching effectiveness in layoffs); Stephen Sawchuk, *Laws Varied for Teachers' Due Process*, EDUC. WK., Sept. 24, 2014, at 1, 14.

115. See, e.g., LA. STAT. ANN. § 17:442 (2014); MINN. STAT. ANN. § 122A.41 (West 2008); see also Sawchuk, *supra* note 114, at 14 (analyzing several state discharge statutes).

116. See, e.g., ALASKA STAT. § 14.20.170(a)(1) (2014); COLO. REV. STAT. ANN. § 22-63-301 (West 2015); CONN. GEN. STAT. ANN. § 10-151(d) (West 2015).

During this time, schools would afford a teacher notice of his deficiency and an opportunity to improve.¹¹⁷ Only after that opportunity could a school begin the termination process, which still required the school to demonstrate the teacher's incompetence with evidence and allow the teacher to contest the school's evidence and conclusions through administrative hearings and appeals.¹¹⁸ Reformers argue that this process makes removing even the most grossly ineffective teachers from the classroom extremely difficult and costly.¹¹⁹

This all changed in 2008: the recession created a freefall in state revenues; demands to improve teacher quality in some way other than NCLB's credentialing model were increasing; and Congress had allocated funding to the Department of Education through its economic stimulus package in order to foster reform.¹²⁰ The Department offered states money to begin experimenting with data-based teacher evaluation and accountability systems.¹²¹ Between 2009 and 2012, thirty-six states and the District of Columbia passed laws mandating that districts evaluate teachers based on their students' standardized test scores.¹²² Some states went so far as to mandate

117. See Sawchuk, *supra* note 114, at 14.

118. *Id.*

119. Katharine B. Stevens, *Tenured Teacher Dismissal in New York: Education Law § 3020-a "Disciplinary Procedures and Penalties"* 3 (Am. Enter. Inst., Working Paper No. 2014-1, 2014) ("[T]he current system ... prioritiz[es] the rehabilitation of ineffective teachers over ensuring adequate teaching for children.")

120. See SEAN P. CORCORAN, ANNENBERG INST. FOR SCH. REFORM, CAN TEACHERS BE EVALUATED BY THEIR STUDENTS' TEST SCORES? SHOULD THEY BE? THE USE OF VALUE-ADDED MEASURES OF TEACHER EFFECTIVENESS IN POLICY AND PRACTICE 2-3 (2010), <http://annenberginstitute.org/pdf/valueAddedReport.pdf> [<https://perma.cc/F9TZ-WZBM>] (discussing teacher evaluation at the time and the general policy); EXEC. OFFICE OF THE PRESIDENT, EDUCATIONAL IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT 4 (2009), https://www.whitehouse.gov/assets/documents/DPC_Education_Report.pdf [<https://perma.cc/7J23-RJEB>] (finding \$33 billion in states' education budget shortfalls); *id.* at 4-6 (discussing the use of funds to prompt states to improve teaching and high quality assessments).

121. See U.S. DEP'T OF EDUC., *supra* note 112, at 2; U.S. DEP'T OF EDUC., ESEA FLEXIBILITY 1, 3 (2012), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [<https://perma.cc/N9LK-54LH>] (conditioning NCLB waivers on states developing assessments that would "measure student growth," and implementing "teacher and principal evaluation and support systems that ... meaningfully differentiate [teacher] performance").

122. Benjamin Michael Superfine, *The Promises and Pitfalls of Teacher Evaluation and Accountability Reform*, 17 RICH. J.L. & PUB. INT. 591, 592-93 (2014). The extent to which the evaluations count in a teacher's overall evaluation or rating vary from the vague requirement that evaluations be a significant factor to the requirement that they count for at least 50

specific consequences for specific test score results, such as stripping a teacher of tenure or dismissing an untenured teacher who fell below expectations in consecutive years.¹²³

These new statutory frameworks for evaluating teachers have come in two varieties. The first—“value-added models” (VAMs)—estimates how a class of students would perform on standardized exams if all things were equal and attempts to determine whether individual teachers helped their students achieve better or worse scores than the estimate.¹²⁴ The second variety—“student growth percentile” models (SGPs)—measures the actual growth that a classroom demonstrates on standardized tests and ranks that growth in comparison to other classrooms.¹²⁵

While these models have the allure of objectivity, precision, and accuracy, scholars have highlighted serious problems in both their theoretical constructs and practical implementation. In practical terms, standardized exams must be designed for the models in which they operate, but current exams were not designed with this modeling in mind.¹²⁶ They were designed as rough measures of aggregate student knowledge, not individual teaching effectiveness.¹²⁷ Even worse, many teachers receive VAM and SGP ratings during years in which the teacher’s subject was not even tested on a standardized exam.¹²⁸ In other words, the models and exams are not reliable and valid measures of teaching effectiveness.¹²⁹

percent. Bruce D. Baker et al., *The Legal Consequences of Mandating High Stakes Decisions Based on Low Quality Information: Teacher Evaluation in the Race-to-the-Top Era*, 21 EDUC. POL’Y ANALYSIS ARCHIVES 1, 3-4 (2013).

123. See NAT’L COUNCIL ON TEACHER QUALITY, *supra* note 112, at 15-22; see, e.g., COLO. REV. STAT. ANN. § 22-63-203 (West 2014); LA. STAT. ANN. § 17:442(C)(1) (2012); TENN. CODE ANN. § 49-5-504 (West 2015).

124. Baker et al., *supra* note 122, at 7.

125. *Id.* at 7-8.

126. *Id.* at 9; see also Superfine, *supra* note 122, at 607.

127. See Superfine, *supra* note 122, at 608-09.

128. See, e.g., Brief of Education Law and Educational Measurement Professors as Amici Curiae in Support of Plaintiffs at 5-6, *Cook v. Stewart*, No. 14-12506-BB (11th Cir. Oct. 15, 2014); Amended Complaint at 40, *Martinez v. State*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. Apr. 1, 2014); Michael Winerip, *In Tennessee, Following the Rules for Evaluations off a Cliff*, N.Y. TIMES (Nov. 6, 2011), <http://www.nytimes.com/2011/11/07/education/tennessees-rules-on-teacher-evaluations-bring-frustration.html> [<https://perma.cc/U2LC-XF38>].

129. See generally Dan Goldhaber et al., *Does the Model Matter? Exploring the Relationship Between Different Student Achievement-Based Teacher Assessments* 4 (Ctr. for Educ. Data & Research, Working Paper No. 2012-6, 2012).

The fact that many teachers' ratings have varied drastically from one year to the next provides further evidence of this problem.¹³⁰ Some variation is expected, but the level of variation appears indicative of flawed modeling, incomplete data,¹³¹ arbitrary cut-off scores,¹³² and the inability of the models to account for the necessary demographic and external variables.¹³³ States have adopted these models on the premise that the models can detect the causal effects of quality teaching, but the models more likely detect environmental factors that simply correlate with student achievement.¹³⁴ Each of the foregoing flaws also has legal relevance and raises serious questions about whether the systems are operating within the bounds of constitutional due process.¹³⁵

G. Reasons for Policy Failure

Each of the foregoing policy failures includes its own unique explanation, but at least four overarching problems run throughout. First is the inability to determine what actually constitutes quality teaching or teachers.¹³⁶ Is a quality teacher one who possesses certain knowledge, training, and certifications? Is a quality teacher one who achieves particular results, and, if so, what are those results?

130. CORCORAN, *supra* note 120, at 26; Daniel F. McCaffrey et al., *The Intertemporal Variability of Teacher Effect Estimates*, 4 EDUC. FIN. & POL'Y 572, 585-98 (2009); Superfine, *supra* note 122, at 608.

131. See CORCORAN, *supra* note 120, at 20-21 (finding missing data for students, other attributes such as mentoring, and the type of test administered can lead to large variations in how a teacher is rated from year to year); John P. Papay, *Different Tests, Different Answers: The Stability of Teacher Value-Added Estimates Across Outcome Measures*, 48 AM. EDUC. RES. J. 163, 165-66 (2011) (finding variances depending on which test is used and when).

132. Baker et al., *supra* note 122, at 6.

133. Sarah Theule Lubienski & Corinna Crawford Crane, *Beyond Free Lunch: Which Family Background Measures Matter?*, 18 EDUC. POL'Y ANALYSIS ARCHIVES 1, 3 (2010); Jesse Rothstein, *Student Sorting and Bias in Value-Added Estimation: Selection on Observables and Unobservables*, 4 EDUC. FIN. & POL'Y 537, 538 (2009); see also AM. INST. RESEARCH, 2011-2012 GROWTH MODEL FOR EDUCATOR EVALUATION TECHNICAL REPORT: FINAL 5, 8 (2012), <https://www.engageny.org/sites/default/files/resource/attachments/growth-model-11-12-air-technical-report.pdf> [<https://perma.cc/D9P5-QSXQ>].

134. See Black, *supra* note 7, at 81.

135. See *id.* at 78-81.

136. Goldhaber, *supra* note 34, at 167 (explaining that "the inability of pre-service credentials to accurately predict teacher quality" logically explains why policymakers are exploring teacher workforce policy reforms).

Or is a quality teacher an elusive concept because quality teaching primarily occurs when competent people are given the opportunity to teach under conducive conditions? Social scientists and policy analysts would disagree as to which of these is the correct framing of the issue, as well as to the answers to their preferred frame of reference.¹³⁷ Those seeking to rise above the debate would incorporate aspects of all of the definitions, emphasizing that “a quality teacher ... has a positive effect on student learning and development through a combination of content mastery, command of a broad set of pedagogic skills, and communications/interpersonal skills” and that this effect is contingent on an environment with appropriate resources that is conducive to learning.¹³⁸ One expert on teacher effectiveness goes even further and cautions against “a one-size-fits-all definition of teacher quality ... because a variety of occasions and purposes exist for which different definitions may be appropriate.”¹³⁹

The second problem is that policymakers are resistant to this holistic concept and evaluation of quality teaching. Each of the foregoing policies, at least as implemented, is premised on the notion of a silver bullet. In other words, if we could just shrink class size to a specific number, certify all teachers, increase salaries across the board, or look at test scores in evaluating and incentivizing teachers, our teaching problems would be solved. NCLB’s high quality mandate, for instance, was the only requirement states had to meet. NCLB did absolutely nothing to address problems of low teacher salaries, funding gaps, or other environmental factors.¹⁴⁰ The premise of singular solutions is fundamentally flawed because it leads to policy disenchantment—even with good policies—when

137. HIGHTOWER ET AL., *supra* note 25, at 5 (“[T]here is no firm consensus ... as to exactly what constitutes high-quality teaching or a quality teacher.”).

138. *Id.* (quoting CTR. FOR HIGH IMPACT PHILANTHROPY, HIGH IMPACT PHILANTHROPY TO IMPROVE TEACHING QUALITY IN THE U.S. 7 (2010)). See generally Joan E. Talbert & Milbrey W. McLaughlin, *Understanding Teaching in Context*, in TEACHING FOR UNDERSTANDING: CHALLENGES FOR POLICY AND PRACTICE 167, 193 (David K. Cohen et al. eds., 1993) (“Teaching does not take place in generic classrooms stripped of subject matter concerns or mindless of the backgrounds, needs, and interests of the students who make up a class.”).

139. GOE, *supra* note 77, at 2.

140. The most egregious example is in regard to teacher salaries. A general provision in the Elementary and Secondary Education Act mandates that resources at schools receiving federal funds be at least equal to those at other schools. 20 U.S.C. § 6321(c)(2) (2012). But the Act exempts teacher salaries from that calculus. *Id.* § 6321(c)(2)(B).

the policies fail to cure all problems.¹⁴¹ This disenchantment perpetuates the third and fourth themes of policy churn and incomplete commitment to existing policies.

Continually shifting policies is, in and of itself, disruptive and harmful to the teaching workforce and educational outcomes.¹⁴² If there is anything to which educators have objected over the past few decades, it is policy churn and what has come to be the reform of reform.¹⁴³ Due to this policy churn, states rarely fully commit to the new policy. Two of the most important policies—reducing class size and raising salaries—were only partially and temporarily implemented on a wide scale.¹⁴⁴ Class sizes never shrunk to optimal levels and were permitted to rise for politically expedient reasons.¹⁴⁵ Similarly, teacher salaries overall have not increased to the level necessary to make teaching competitive with other professions,¹⁴⁶ and salaries in disadvantaged districts have not risen to the level necessary to cause existing teachers to stay in or move to those districts.¹⁴⁷ In short, the foregoing themes beg for a movement away from silver bullet theories toward comprehensive long-term

141. See, e.g., FREDERICK M. HESS, *SPINNING WHEELS: THE POLITICS OF URBAN SCHOOL REFORM 178-80* (1999). See generally *TEACHER EDUCATION POLICY: NARRATIVES, STORIES, AND CASES* (Hendrik D. Gideonse ed., 1992) (describing numerous teaching policy reforms and the conflicts that arose from them leading to eventual reform or abandoning the policies altogether).

142. DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 224-25* (2010).

143. See, e.g., HESS, *supra* note 141, at 178-80. See generally Dan Goldhaber et al., *Teacher Attitudes About Compensation Reform: Implications for Reform Implementation*, 64 *INDUS. & LAB. REL. REV.* 441, 442 (2011) (finding widespread teacher opposition to compensation policy reform).

144. GALE F. GAINES, S. REG'L EDUC. BD., *FOCUS ON TEACHER PAY AND INCENTIVES: RECENT LEGISLATIVE ACTIONS AND UPDATE ON SALARY AVERAGES 5-6* (2007), http://publications.sreb.org/2007/07s03_teacher_pay.pdf [<https://perma.cc/42WC-WYZM>]; DOUGLAS D. READY, *CLASS-SIZE REDUCTION: POLICY, POLITICS, AND IMPLICATIONS FOR EQUITY 18* (2008), http://www.equitycampaign.org/i/a/document/6863_Ready_Class_Size_Research_Review.pdf [<https://perma.cc/75W3-8NDS>].

145. READY, *supra* note 144, at 18.

146. See Linda Darling-Hammond, *Building a Profession of Teaching*, in *BACK TO THE FUTURE: LEGACIES, CONTINUITIES AND CHANGES IN EDUCATIONAL POLICY, PRACTICE AND RESEARCH 3, 5* (Maria Assunção Flores et al. eds., 2013); Ingersoll & Merrill, *supra* note 24, at 193.

147. Hanushek, Kain & Rivkin, *supra* note 92, at 350-51 (10 percent salary increase necessary for each increase of 10 percent in minority student enrollment); Loeb, Darling-Hammond & Luczak, *supra* note 92, at 46-47.

solutions. The legislative process, however, is generally not conducive toward those ends. The remainder of this Article demonstrates how school finance decisions have proven inept in many of the same respects, but theorizes that the current constitutional challenge to tenure offers lessons that suggest courts have the capacity to break the cycle.

II. SCHOOL FINANCE LITIGATION: IGNORING AND OVERSIMPLIFYING THE CHALLENGES OF ACCESS TO QUALITY TEACHERS

Plaintiffs have brought school equality or adequacy claims in nearly every state in the country and have secured victories in more than half.¹⁴⁸ This litigation has generated a sizeable body of precedent—more than one hundred opinions from state supreme courts alone.¹⁴⁹ These opinions cover the structure of education, major resource demands, and student outcomes from top to bottom. The cases cover so much detailed information about educational quality, outcomes, inputs, funding, and accountability that courts and scholars have overlooked what the cases often do not address: teachers. A review of the supreme court decisions from the twenty-six states in which plaintiffs have won reveals that the word “teacher” does not even appear in a substantial percentage of cases.¹⁵⁰ This glaring omission is repeated over and over in some states, with litigants reaching their state’s highest court multiple times without the court saying anything about teachers.¹⁵¹ With the exception of just two states,¹⁵² those high court opinions that do address teachers offer almost no indication that they appreciate the challenge of delivering consistent and equal access to quality teachers.

Courts, of course, have no obligation to discuss teachers. Either explicitly or implicitly, school funding is the primary issue in many

148. Rebell, *supra* note 16, at 1500.

149. In some states, such as New York, the supreme court is technically not the highest court. “Supreme court” is used in the text simply for ease of reference.

150. *See, e.g.*, Montoy v. State, 62 P.3d 228 (Kan. 2003); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1995).

151. The worst examples are in Texas, New York, and Arkansas. *See* DuPree v. Alma Sch. Dist., 651 S.W.2d 90 (Ark. 1983) (one time); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999) (mentioned only once).

152. *See infra* Part II.C.

cases, not how that money is or should be spent. Thus, courts do not necessarily discuss other substantive aspects of education to the exclusion of teachers. Yet teacher salaries are by far the largest single item of education budgets. They consume around 80 percent of school expenditures.¹⁵³ This fact alone makes it hard to consider education financing without also considering teachers. Moreover, as courts regularly acknowledge or emphasize, teachers are a key component of education, if not the most important.¹⁵⁴ Nonetheless, even when teachers are discussed, the analysis rarely moves beyond basic inequalities to an analysis commensurate with the importance and complexity of ensuring teacher quality.

The following Sections represent the results of a comprehensive review of high court decisions in which plaintiffs won, although some lower court decisions are discussed for further context. Losses are not included because no teacher remedy or analysis would have been in order. A review of the victories reveals four different responses to the issue of teachers: avoidance, oversimplification, flawed analysis, and focused attention. The first three categories consume nearly the entirety of the case law, with the fourth representing the outliers. Section A identifies and evaluates the first two categories of cases, as both categories are devoid of substantive analysis of teachers. Section B offers a detailed analysis of those court opinions that have offered some substantive discussion of teachers but whose discussion is either limited or flawed. Section C identifies the few outlier cases that have analyzed teachers at length and explains why they are outliers. Reviewing all four categories of opinions, Section D offers a holistic analysis of school finance precedent regarding teachers, identifying exactly how the litigation has failed to produce the teacher improvements that were presumably part of the motivation of many cases in the first instance. Section E explains why courts must deepen their analysis of teachers and identifies the issues that they must recognize. The

153. *See, e.g.*, *Wyoming v. Campbell Cty. Sch. Dist.*, 19 P.3d 518, 540 (Wyo. 2001) [hereinafter *Campbell II*].

154. *See, e.g.*, *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995) [hereinafter *Small Schools II*] (“[T]eachers, obviously, are the most important component of any education plan.”).

Section, however, also cautions against courts exceeding their separation of powers constraints.

A. Courts that Ignore Teachers or Treat Them as Just One of Many Factors

At one extreme of school finance precedent are those courts that do not even include the word “teacher” in their opinions. A substantial portion of the decisions surveyed fall in this category. The next and largest group discusses teachers, but only in general or simplistic ways that recognize a problem but underestimate its nature and the complexity of remedying it.¹⁵⁵ For instance, between 1995 and 2005, the Texas Supreme Court issued four school finance opinions.¹⁵⁶ The word “teacher” appeared a few times in those opinions, but only in the context of discussing macrolevel financial allocations.¹⁵⁷ Not until 2005 did the court note how teachers fit into the overall equation of delivering an equitable or quality education.¹⁵⁸ Even then, the discussion was limited to a few short sentences of generalities.¹⁵⁹

Courts in other states mention teachers more frequently, but still do not assign them significant analytical importance. The most common approach is simply to list and discuss teachers as one of the several factors that relate to the delivery of a constitutionally required education.¹⁶⁰ These courts, in effect, reduce teachers to part

155. See, e.g., *DuPree*, 651 S.W.2d 90; *Claremont Sch. Dist. v. Governor*, 794 A.2d 744 (N.H. 2002).

156. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279 (Tex. 1996); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995).

157. See *Neeley*, 176 S.W.3d at 806; *McKinney*, 936 S.W.2d at 283-84.

158. *Neeley*, 176 S.W.3d at 805.

159. *Id.*

160. See *DeRolph v. State*, 728 N.E.2d 993, 1001 (Ohio 2000) (“An efficient system is one in which each and every school district in the state has an ample number of teachers, sound buildings, ... and equipment sufficient for all students to be afforded an educational opportunity.”); *DeRolph v. State*, 677 N.E.2d 733, 742 (Ohio 1997) (“[A]ppellant school districts were starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs.”); *Neeley*, 176 S.W.3d at 787-90 (listing teachers as just one of eleven bulleted problems across several pages of text); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (briefly discussing teachers).

of a checklist for establishing a constitutional violation.¹⁶¹ These courts are correct that their education systems are struggling with securing appropriate numbers of qualified teachers. But teaching challenges are both more important and more difficult to resolve than the other factors alongside which they are listed. Rather than develop this point, the most that these courts do is conceptualize teachers as part of the evidence one must produce to demonstrate the existence of unequal or inadequate education.¹⁶² They do little to explore exactly why the inadequacy or inequality in regard to teachers exists or what the state might do to remedy it. They assume that money alone will resolve the problem, just as it would with decrepit facilities, outdated computers, or undersupplied libraries.

For instance, if class sizes are too big—which they often are—courts and/or litigants suggest it is only because schools lack the funding to hire more teachers.¹⁶³ Likewise, if teachers are insufficiently qualified in a district, it is because the district lacks the money to attract better candidates.¹⁶⁴ Or if teacher hiring and retention is a problem, it is because higher salaries in other districts are attracting teachers away or salaries are just too low as a general principle.¹⁶⁵ This approach reduces inadequate teaching or teachers

161. Connecticut lists teachers as just one of thirteen potential components of “suitable educational opportunity.” Conn. Coal. for Justice in Educ. Funding v. Rell, 990 A.2d 206, 212 (Conn. 2010).

162. See *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 520-21 (Mass. 1993) (parties simply stipulating to facts about teachers); *Abbott v. Burke*, 575 A.2d 359, 399 (N.J. 1990) (“[T]eacher ratios, experience, and education consistently improve as the districts’ property wealth, per pupil expenditure, socioeconomic status or other similar factor improves.”).

163. *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (“Plaintiffs contend that such inequalities arise from great variations in per-pupil expenditures from district to district.”); *Bismarck Pub. Sch. Dist. v. State*, 511 N.W.2d 247, 261 (N.D. 1994) (“Those districts have substantially higher revenues per pupil and provide their children with substantially more favorable teacher ratios.”); *DeRolph*, 677 N.E.2d at 744 (noting that “many districts lack sufficient funds” to meet the state’s class size requirements).

164. *Leandro*, 488 S.E.2d at 252; *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 234-35 (Tenn. 2002) [hereinafter *Small Schools III*]; *Fed. Way Sch. Dist. No. 215 v. State*, 219 P.3d 941, 949 (Wash. 2009).

165. *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 498-99 (Ark. 2002) (noting that “[w]ell-paid and well-motivated teachers are what make the education engine run,” but that they are not paid equally across the state); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 198 (Ky. 1989) (“[T]here is great disparity in the poor and the more affluent school districts with regard to classroom teachers’ pay.”); *McCleary v. State*, 269 P.3d 227

to just a symptom of the larger fundamental flaws in the state's school funding system, rather than recognizing teaching issues as independently significant problems.¹⁶⁶ As subsequent Sections demonstrate, this understanding is incorrect.

B. Courts that Analyze Teachers but Misunderstand Them

To their credit, a small but substantial number of courts go beyond the basics of teacher inequality and inadequacy. They implicitly recognize that understanding and solving these problems are not easy. The opinions acknowledge the teacher pipeline, the local teacher market, and real-world cost issues. But they still fail to appreciate the full complexities of these issues. Most notably, they fail to account fully for how the local teacher market interacts with larger labor market forces, how structural issues of race and poverty interfere with the normal functioning of the market, and how both economic and noneconomic factors affect the pipeline into the teaching profession.

1. Ignoring the Teacher Pipeline

The pipeline into teaching and the state's connection to it has arisen in a few cases in the context of teacher certification.¹⁶⁷ These courts explicitly or implicitly acknowledge that a pipeline into the teaching profession exists, but they do not necessarily hold the state accountable for how it manages the pipeline overall. The best example may be a trial court opinion from North Carolina that extensively analyzed the certification process and its effects on the supply of qualified teachers.¹⁶⁸ The certification process was so

(Wash. 2012) (“[T]he State consistently underfunded staff salaries and benefits.”); *Pauley v. Gainer*, 353 S.E.2d 318, 323 (W. Va. 1986) (writing that earlier decision had “required that the pay of the teachers be equalized and thereby upgraded”).

166. See, e.g., *Md. Bd. of Educ. v. Bradford*, 875 A.2d 703, 708 (Md. 2005) (“[T]he State’s failure to provide adequate funding to the City impacted its ability to recruit, support, and retain teachers and to maintain its physical facilities.”).

167. See *Hoke Cty. Bd. of Educ. v. State*, No. 95CVS1158, 2000 WL 1639686, at *29-39 (N.C. Super. Ct. Oct. 12, 2000); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 170-71 (S.C. 2014).

168. *Hoke Cty.*, 2000 WL 1639686, at *29-39.

rigorous that it restricted the supply of teachers in the state.¹⁶⁹ The court was tasked with justifying or remedying this process. The court held that the process, although limiting the number of available teachers, was an appropriate safeguard for teacher quality, not an impediment to it.¹⁷⁰

This analysis is important in that it represents a court recognizing and analyzing the role the state might play in the teacher pipeline. Nonetheless, the court failed to push the analysis far enough. The state affects or can affect the pipeline in numerous other ways. That the state is properly managing the pipeline through the certification process says little of what the state is doing to manage the pipeline overall. As subsequent Sections will demonstrate, ensuring a sufficient pipeline of teachers in terms of quality and quantity requires the state to do far more.¹⁷¹ A discussion of this broader pipeline, however, is almost entirely missing from the case law.

Disregarding the teacher pipeline as a point of focus itself may be defensible. The teacher pipeline might be more efficiently expanded by increasing the incentives at the end of the pipeline. “Building” pipelines is not necessarily easy and not always effective in the short- or long-term if the back-end incentives remain small. On the other hand, with sufficient financial incentives in the labor market itself, pipelines may build themselves. In other words, markets are arguably what matter most in regard to the teacher workforce. As later Sections point out, however, the search for silver bullets or what matters most is problematic when it is to the exclusion of holistic solutions.

2. *Oversimplifying the Teaching Labor Market*

Some courts acknowledge that market forces operate on the teaching profession, but, as with the pipeline, they do very little to engage with or fully account for those forces.¹⁷² A few courts

169. *Id.* at *35 (citation omitted).

170. *Id.* at *29-39.

171. See *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1168-69 (Mass. 2005) (Greaney, J., dissenting).

172. See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 333-34 (N.Y. 2003) [hereinafter CFE II] (recognizing labor market issues but not addressing any remedy or direct

conceptualize the market as one primarily in which school districts within a state compete with one another for the existing supply of teachers in the state, potentially with some ancillary competition along the state's borders.¹⁷³ These courts are assuming a healthy teaching market with an adequate supply of teachers in which some districts outcompete others within the state.¹⁷⁴

This localized, interdistrict understanding of the teaching market is flawed on multiple levels. The teacher market is influenced by other macro and micro forces, which can be more important than the interdistrict competition within a state. First, the teaching profession transcends local borders and regions. At the earliest decision-making point, high school students who are considering or intend to enter the teaching market may cross state borders to attend college—after which they may or may not choose to return to their homes after graduation.¹⁷⁵ Second, students' decisions are influenced not only by local conditions, but also by their perception of the profession in general. Third, teacher shortages are a national phenomenon, not one isolated in particular states or communities.¹⁷⁶ This national shortage is influenced by multiple factors, including

response to them).

173. See *Lake View Sch. Dist. No. 25 v. Huckabee*, 189 S.W.3d 1, 8-9 (Ark. 2004) (focusing on trying to control the migration of teachers from one intrastate area to another or to contiguous states); *Small Schools III*, 91 S.W.3d 232, 234-35 (Tenn. 2002) (analyzing the rural teacher market against the urban market); *Campbell II*, 19 P.3d 518, 540 (Wyo. 2001) (analyzing competitive markets).

174. The highest court in New York, for instance, ignored how inequality creates an unhealthy teacher market and indicated that the constitution requires only access to adequate teachers, not teachers of equal quality. *CFE II*, 801 N.E.2d at 333-34.

175. See *LOEB & REININGER*, *supra* note 73, at 48-49 (finding new teachers preferred to work close to their hometown); *Boyd et al.*, *supra* note 23, at 71 (same).

176. *Campbell II*, 19 P.3d at 543 (acknowledging a national teacher shortage); Tom Chorneau, *Have Millennials Turned Away from Teaching Profession?*, CABINET REP. (June 29, 2015), <https://www.cabinetreport.com/human-resources/have-millennials-turned-away-from-teaching-profession> [<https://perma.cc/LZ62-RKTX>]; *Research Spotlight on Recruiting & Retaining Highly Qualified Teachers*, NAT'L EDUC. ASS'N, <http://www.nea.org/tools/17054.htm> [<https://perma.cc/UTC9-6B6Q>] (last visited Mar. 30, 2016) (finding a shrinking teacher force).

the perception of the profession in general¹⁷⁷ and the national, regional, and local market for teachers.¹⁷⁸

Fourth and potentially most important, at each of these market levels, the teaching market cannot be isolated from the overall labor market. The salaries and job opportunities outside of teaching exert pressure on both entry to and exit from the profession as a whole.¹⁷⁹ Thus, schools are not just competing with one another in or out of the state; they are competing with private industry and other professions in and out of the state.¹⁸⁰ Each market will have reciprocal effects on the others. None of this is to suggest that individual states can easily control or influence the teaching market. They cannot.¹⁸¹ But states, and the courts prompting them to act, must appreciate how the market really operates if they have any realistic expectation of affecting it. To look only at local interdistrict competition may do nothing more than rob district “Peter” to pay district “Paul.”

Appreciating these market forces is important because they control the appropriate salary structure for teachers in any given school district and the necessary state funding scheme to support it. Flaws in conceptualizing the appropriate teaching and labor market lead to a flawed cost analysis for securing quality teacher labor. States and courts, at best, project “appropriate” base teacher salaries founded on local differences in cost of living.¹⁸² The larger competitive pressures on the profession, however, would indicate

177. GORDON ET AL., *supra* note 32, at 26 (finding that talented individuals do not pursue education careers because it is perceived as not challenging); Hamilton Lankford et al., *Who Enters Teaching? Encouraging Evidence that the Status of Teaching Is Improving*, 43 EDUC. RESEARCHER 444, 444 (2014) (finding people are deterred from entering the profession due to the profession’s low status).

178. See, e.g., Boyd et al., *supra* note 23, at 73-74 (explaining differences in salaries contribute to the sorting of teachers across regions and districts); Sipple & Brent, *supra* note 74, at 611-12 (finding that teachers tend to seek employment in urban versus rural areas).

179. See LOEB & REININGER, *supra* note 73, at ii (finding that teachers are more likely to pursue a career as a teacher “when starting teacher wages are high relative to wages in other occupations”); Ingersoll & Merrill, *supra* note 24, at 187.

180. See DARLING-HAMMOND, *supra* note 1, at 22, 110; LOEB & REININGER, *supra* note 73, at 18 (“[A]s job opportunities have opened up for female college graduates in occupations outside of teaching, the teacher workforce has lost some of its highest scoring teachers.”).

181. As discussed in Part II.E.1, market forces are sufficiently powerful that districts themselves cannot counteract them, and it is not necessarily the case that one state alone can either, depending on its position in the market.

182. In Kansas, the legislature had perpetrated this exact flaw. See *Montoy v. State*, 112 P.3d 923, 934-35 (Kan. 2005).

that locality costs may have little relation to the salaries necessary to attract and retain quality teachers.¹⁸³ In other words, a locality-based approach may help teachers afford groceries and houses in cities as easily as they could in counties, but it may not significantly affect the decision of whether to become and stay a teacher.

Both the market and cost analysis also largely fail to consider fundamental problems of racial and socioeconomic segregation in schools, which help structure the market itself and the cost of counteracting its tendencies. In many respects, inadequate teaching is a distributional problem rather than an absolute shortage problem.¹⁸⁴ The least qualified teachers are clustered in predominantly poor and minority schools.¹⁸⁵ This clustering is a result of both teachers' entry-level job selection decisions and subsequent exit decisions.¹⁸⁶ In both instances, the most highly qualified teachers prefer to teach elsewhere.¹⁸⁷ Teacher salaries, at least at current levels, do not necessarily play a significant role in interrupting these distributional patterns.¹⁸⁸ In short, even a sophisticated market does not fully account for the challenge of equitable distributions of teachers, unless it also accounts for other noneconomic structural forces relating to race and poverty. Locality costs alone surely oversimplify these dynamics, as do the small pay boosts that some

183. See JAY CHAMBERS & WILLIAM J. FOWLER, JR., PUBLIC SCHOOL TEACHER COST DIFFERENCES ACROSS THE UNITED STATES, at xix (1995) (finding there are important factors beyond the cost of living that should be considered in teacher recruitment and retention); DARLING-HAMMOND, *supra* note 1, at 40 (explaining that "working conditions are at least as powerful as salaries" in recruitment and retention).

184. See DARLING-HAMMOND, *supra* note 27, at 1-2; Boyd et al., *supra* note 23, at 59.

185. See EDUC. TR., *supra* note 29, at 2; Adamson & Darling-Hammond, *supra* note 73, at 24 fig.7 (finding that the rate of teachers with only a Bachelor of Arts or lower degree, with less than three years of experience, and without credentials, was nearly double in high-poverty districts as compared to high-wealth districts in California).

186. See Boyd et al., *supra* note 23, at 57.

187. *Id.* ("Teachers in schools with low-achieving students chose to move to higher-achieving schools, leaving many high-poverty districts with vacancies and unqualified instruction."); Hanushek, Kain & Rivkin, *supra* note 92, at 343 (finding that experienced teachers moved to high-socioeconomic status schools when positions were available).

188. See DARLING-HAMMOND, *supra* note 1, at 40 (emphasizing the importance of "working conditions"); DARLING-HAMMOND, *supra* note 27, at 2 (finding that teacher preference to teach in schools with more high-achieving and wealthy students may be due to the added benefit of better facilities or more preparation time).

localities have offered to recruit teachers to less desirable areas or schools.¹⁸⁹

C. The Outliers: Courts that Focus on Teachers

Of all the school finance cases litigated, only two came close to analyzing fully the challenge of adequately staffing schools with quality teachers. Those cases—in Tennessee and Wyoming—produced several trips to the supreme and lower courts in each state.¹⁹⁰ These two states defy the overall rule most likely because the cases were the only ones to focus almost exclusively on teachers. In fact, in several of the decisions, teachers were the only issue before the court. This laser-like focus prevented the myriad issues surrounding teachers from being obscured by other nonteacher issues.

In Tennessee, the reoccurring issue for the supreme court was whether the state's evolving funding formula properly accounted for the cost of compensating teachers.¹⁹¹ Across these decisions, the court consistently reiterated that minimum statewide salaries were insufficient, teacher salaries must be cost-driven like any other aspect of the budget, and competing for teachers means not just competing with other districts but competing with other professions outside of teaching.¹⁹² In all these respects, the court emphasized that the ultimate question must be whether teacher compensation is sufficient to ensure equal educational opportunity for students, not whether it provides equal compensation for teachers.¹⁹³

The Wyoming Supreme Court went even further. The court was forced to analyze competing statistical analyses of differing funding schemes to determine how they would affect class size and average

189. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 489-90 (Ark. 2002) (finding the problem goes beyond salary); see also *DARLING-HAMMOND*, *supra* note 27, at 3 (“[S]alary incentives to attract teachers to hard-to-staff schools ... ha[ve] had mixed success.”).

190. *Small Schools III*, 91 S.W.3d 232, 233 (Tenn. 2002); *Campbell II*, 19 P.3d 518, 518 (Wyo. 2001). Although on a much smaller scale, the New Jersey Supreme Court also engaged in a uniquely analytic evaluation of the struggle to hire teachers in a pre-K program that was competing with the federal head start program. See *Abbott v. Burke*, 790 A.2d 842, 852-54 (N.J. 2002).

191. *Small Schools III*, 91 S.W.3d at 233-34.

192. *Id.*

193. *Id.* at 233-43; *Small Schools II*, 894 S.W.2d 734, 738 (Tenn. 1995); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 143-44 (Tenn. 1993) [hereinafter *Small Schools I*].

teacher salaries.¹⁹⁴ The state posited, for instance, that where housing costs were the highest, “other amenities [would] exist” to offset the need for higher salaries.¹⁹⁵ Because those amenities would make the areas more desirable, raising compensation for teachers in those districts would “overcompensate” them.¹⁹⁶ The trial court had rejected the state’s funding scheme, “conclud[ing] that regional cost-of-living adjustments were appropriate but the modified index was inappropriate [and] did not accurately reflect the actual disparity in the cost of hiring teachers in various locations throughout the state.”¹⁹⁷ The court also questioned the efficacy of relying on past expenditures in school districts to determine the actual cost of delivering an adequate education, indicating that it is “far preferable” to rely on methods that go “shopping” for teachers, which “involve[s] determining salary and other compensation rates for professionals with training and experience comparable to teachers, counselors, administrators, etc., [and] wage rates for classifications of employee skills utilized by school districts.”¹⁹⁸

The court also acknowledged the fluidity of the market. Because this “shopping” market is subject to continual change like any other market, the state must regularly reevaluate the market and adjust its funding schemes accordingly.¹⁹⁹ For instance, one-third of current teachers in Wyoming would become “retirement-eligible by the year 2004, significantly fewer graduates [would] seek[] teaching positions, and the aggressive recruitment of Wyoming teachers by other states offering considerably higher salaries and benefits” was already underway.²⁰⁰ The unavoidable coming market changes required the state to be proactive:

The legislature does not have the luxury of waiting until the crisis fully materializes before taking the action necessary to remain viably competitive regionally and nationally.

....

194. *Campbell II*, 19 P.3d at 530.

195. *Id.* at 534.

196. *Id.*

197. *Id.*

198. *Id.* at 537.

199. *Id.* at 543.

200. *Id.*

Because teacher quality is critical to providing a constitutional education and all parties recognize the looming national problem of a teacher shortage, the legislature is also directed to monitor the supply of qualified teachers and take appropriate action should national conditions continue to worsen to the detriment of Wyoming schools. It is unacceptable for essential teaching positions to remain unfilled or to be consistently filled by unqualified applicants.²⁰¹

None of the foregoing, however, is to suggest Tennessee or Wyoming as model. Although both courts certainly addressed nuances that most other courts ignore, they still did not fully account for some of the relevant market, professional, structural, and racial challenges discussed in regard to other states. For instance, a shopping theory in Wyoming would work only if one accounts for and counteracts buyer and seller biases. The same is true for Tennessee's demand that salaries be cost-based in regard to other professions. And neither state does much to engage the teacher pipeline. The point here is simply that only two courts of all those that have intervened in educational adequacy and equality have seriously addressed teachers, but even these courts should have gone further.

D. Assessing the Effect of School Finance Remedies on Teachers

The failure to specifically analyze teachers or certain aspects of securing equal access to them does not necessarily mean school finance litigation has had no meaningful impact. Changes in school funding that add to the bottom line of education budgets will almost necessarily affect teacher salaries. And changes in teacher salaries will presumably have some effect, even if minor, on the teaching labor market. Keenly aware of this practical reality, teachers and teacher unions have been heavily involved in funding and pushing litigation in several states.²⁰² Of all the additional revenue secured through this litigation, 34 to 45 percent has been directed to teacher

201. *Id.* at 543, 550.

202. See, e.g., Michael Podgursky, *Is Teacher Pay "Adequate"?*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 131, 149 (Martin R. West & Paul E. Peterson eds., 2007); Kevin Rothstein, *Funding Advocate Puts Money Where Her Mouth Is*, *BOS. HERALD*, April 27, 2004, at 5, 2004 WLNR 399352.

wages.²⁰³ On average, this amounts to a 4 percent pay increase for each teacher or about \$1200 in additional annual salary.²⁰⁴

David Sims's detailed analysis of these salary increases, however, confirms that obfuscating teacher issues has not produced meaningful reforms.²⁰⁵ In some situations, the problems that gave rise to the constitutional violations in the first instance have remained or replicated. Across-the-board 4 percent raises are so small that they do almost nothing to change the general attractiveness of the profession.²⁰⁶ Thus, these raises ultimately fail to change the labor market in any meaningful way.

Had states concentrated these funds on salary increases for certain categories of teachers, they would have had a greater chance of meaningfully impacting the profession or certain students' access to existing teachers. For instance, Sims writes that:

[S]ome of the salary increases may be intended to attract more talent to the teaching profession over time or to retain more teachers in their early years (when attrition is very high). Hence, the increase in salaries is paying for an increase in teacher productivity. Empirically, if this were the case salaries of less experienced teachers should increase in proportion to those of their senior colleagues who have less mobility hazard. We might also expect the initial salaries for teachers to increase to attract better applicants.²⁰⁷

But the data again reveals that this has not been the case. The salaries of newer teachers have not risen and may have even fallen in some instances.²⁰⁸

The salary increases for school finance litigation have been funneled through existing salary structures that may even be counterproductive or wasteful. These existing salary structures place a premium on experience, and, thus, funneling salary increases

203. Sims, *supra* note 98, at 1043.

204. *Id.* at 1041-42 ("These results make it clear that plaintiff victories in finance lawsuits lead to higher teacher wages and more teaching personnel, as well as higher maintenance and support spending.").

205. *Id.* at 1042.

206. See LOEB & REININGER, *supra* note 73, at 53-54.

207. Sims, *supra* note 98, at 1042.

208. *Id.*

through them drives the largest increases to senior teachers.²⁰⁹ In effect, teachers who have been in place the longest and are not planning to leave are the most likely to receive the largest salary increases. Sims refers to this as “rent[] capture[.]”²¹⁰ The state increases the inputs but does not secure a change in outputs.²¹¹ In the context of constitutional claims, this means that the state is not securing additional teaching quality or remedying the problems that produced inadequate or unequal educational opportunities in the first instance.

Even with the preference for experience, states could have used the salary increases to drive experienced teachers toward high-need schools. This allocation could assist in the redistribution of existing teachers, even if it did not change the profession overall. But Sims’s work, in conjunction with others, would again indicate that this redistribution of teachers has not occurred.²¹² The funds at stake are simply too small to address the fundamental problems at hand. Based on his analysis of those fundamental problems, Gregory Gilpin calculates that “an increase in permanent income of \$19,241 for math/science teachers and \$9,717 for humanities teachers to teach in unfavorable schools may equalize teacher quality across schools.”²¹³ But nothing even approaching that order of magnitude has been available for high-need schools and districts.

E. Why Courts Must Deepen Their Analysis of Teachers

That courts have failed to engage in substantial analysis of teachers in the past does not answer the question of why they should now. One might posit that teachers are already at the center of the litigation, even if not discussed at length. As noted above, teacher salaries are by far the largest single item of education budgets.²¹⁴ Thus, school finance litigation, regardless of what is written in an opinion, is ultimately about teachers. Moreover, most courts identify

209. *Id.*

210. *Id.*

211. *Id.*

212. *See, e.g., id.*

213. Gilpin, *supra* note 89, at 25.

214. *See, e.g.,* Campbell II, 19 P.3d 518, 530 (Wyo. 2001) (“Over 80 percent of the school district costs are for personnel, primarily classroom teachers.”).

teachers as a key component of a constitutional education, if not the most important component.²¹⁵ Sophisticated or not, New York's highest court, for instance, flatly stated, "[t]he first and surely most important input is teaching."²¹⁶

Neither recognizing the importance of teachers nor their dominant effect on school budgets is enough. Inadequacies and inequalities in teaching, although interconnected with overall funding problems, are not merely symptoms of funding problems. And even if teacher challenges were only symptoms of inadequate funding, they are sufficiently important and idiosyncratic that they demand their own immediate attention. For instance, hunger and malnutrition are undoubtedly symptoms of poverty, but their importance dictates that we address these symptoms regardless of whether we address poverty. In other words, teachers have independent significance apart from funding inequality in general. Thus, courts must carefully attend to the issue of teachers and force responsibility for them upon the state.

The written opinions of courts are inconsistent with this care and responsibility. Even if the primary effect of the litigation is on teachers, it is indirect. The explicit judicial conversation, which ultimately guides legislatures in complying with judicial directives, is not about teachers. To speak of reforming education without directly engaging the complexities of teacher quality is to obfuscate the importance of teachers, to leave students' access to quality teachers entirely subject to a market that does not work to their benefit, and to trust that states will do what they have thus far refused to do. Equally important, a conversation about school finances that assumes money will indirectly solve the problem of teaching quality entirely ignores evidence that indicates teachers do not just want more money.²¹⁷ The profession and environment in which they work matter as much as money.²¹⁸ Subsections 1 through 4 explore these points further to explain why courts must substantively engage the

215. See, e.g., *Small Schools II*, 894 S.W.2d 734, 738 (Tenn. 1995) (explaining that "[t]eachers, obviously, are the most important component of any education plan" and that their compensation is "the major item in every education budget").

216. CFE II, 801 N.E.2d 326, 333 (N.Y. 2003).

217. DARLING-HAMMOND, *supra* note 1, at 40-41.

218. *Id.*

topic of teachers. Subsection 5 responds to the potential argument that courts would be exceeding their authority if they did so.

1. Market Forces Are Too Complex and Powerful for Individual Districts to Counteract

As introduced in prior Sections, securing quality teachers in adequate numbers involves complex market issues. Money certainly matters in this market, but how much, when, and where is not obvious. First, the cost analysis that works for facilities, computers, buses, and other tangible resources is ill-adapted to teachers. Teachers cannot simply be produced or procured through commercial outlets. This factor alone dictates that courts should engage in a type of analysis and remedy distinct from that most often found in school finance precedent. Courts surely are not entirely ignorant of these obvious points. They err, however, in assuming or trusting that additional funding or more equitable distributions of funding will adequately address teaching quality and shortages.

Second, individual school districts cannot control the teaching market on their own. School finance claims often speak of local districts' inability to exercise discretion and control over the educational opportunities they provide.²¹⁹ The premise is that the poorest districts could exercise the same control and discretion as wealthier ones if the state would only support them properly.²²⁰ But very few, if any, school districts have the power to counteract or control the market on their own. The market's flaws—not a school's ability to participate in it—are the primary problem. For instance, funding increases that improve some districts' ability to compete with other districts leave fundamental problems in place if the increases are insufficient to prompt a change in the overall supply of quality teachers in the market. Equalizing competitive power between districts may just cause a rearrangement of existing teachers within a state and shift the problem to another district or equally distribute the problem. But the more likely response is that wealthier districts will strike back economically to prevent the loss of their

219. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Horton v. Meskill*, 376 A.2d 359, 367-68 (Conn. 1977).

220. See, e.g., *Horton*, 376 A.2d at 368.

teachers, and disfavored districts will revert back to the same position they held before state intervention.

It is possible, of course, that the initial action and reaction will increase overall salaries to a level that the market for teaching versus other professions changes, but the resurfaced inequity between districts would remain a potentially serious problem. As scholars and some courts have pointed out—though not in the context of teachers—adequacy and equity in education are intertwined: one can rarely exist without the other.²²¹ Thus, there must be adequate funding to spur a change in the overall supply of quality teachers and be sufficiently equitable funding for all schools to compete fairly for those quality teachers.²²²

One caveat is in order. The same problems that individual districts face in controlling and participating in the teaching market are likely to occur at the state level as well. As one state begins to out-compete another by securing more teachers within its own borders, it will either drive down teaching quality in another state or prompt that state to fight back. Active and continual state-level competition, however, is more likely to create the demand that causes teaching quality to increase overall.²²³ This state-level competition, moreover, reinforces the point of this Subsection: it is a fool's errand to assume that local districts can change, control, or compete in the teaching market with only minor shifts in education funding.

2. *Race and Segregation Matter*

The equity-versus-adequacy analysis of teacher salaries also relates to an aspect of the market that has been discussed or alluded to throughout this Article: access to a stable, quality teaching force is also a distributional problem within a racially and socioeconomically segregated school structure. Predominantly white, middle-income schools have no significant problem with their workforce.²²⁴

221. See DEREK W. BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM* 205 (2013); Weishart, *supra* note 22, at 525-31.

222. See generally Weishart, *supra* note 22.

223. Again, the principle that both adequacy and equity are necessary would operate, to some extent, between states as well.

224. See DARLING-HAMMOND, *supra* note 1, at 92-119 (finding that teachers favored

The problem is in predominantly poor and minority schools, although geographically isolated schools often struggle as well for obvious reasons.²²⁵ School finance theory would have us believe that if schools serving predominantly poor and minority students just had more money, they could attract and retain better teachers.²²⁶ This is true only to some extent and depends on how much money is at stake.

Research demonstrates that the demographic characteristics of schools play a significant role in teachers' decisions of where to work—a role so significant that it tends to overshadow money.²²⁷ Higher salary structures and extra “combat pay” to teach in these schools have thus far not been able to change the distributional patterns.²²⁸ And some would argue that raising salaries to the point necessary to disrupt the problem would be economically inefficient.²²⁹ Regardless, individual schools and districts lack the power to raise salaries to that point²³⁰ or to change their demographics

predominantly white schools in higher socioeconomic areas); Boyd et al., *supra* note 23, at 10 (finding a movement away from high poverty districts); Hanushek, Kain & Rivkin, *supra* note 92, at 340 (finding that experienced teachers moved to high-socioeconomic status schools).

225. See DARLING-HAMMOND, *supra* note 1, at 42-51 (finding various problems in predominantly poor and minority schools, from dysfunctional hiring practices to noncompetitive salaries); EDUC. TR., *supra* note 29, at 2-4.

226. See Ryan, *supra* note 5, at 291-93 (critiquing the school finance premise that money alone would improve education); Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *Why Public Schools Lose Teachers* 18-20 (Nat'l Bureau of Econ. Research, Working Paper No. 8599, 2001) (concluding that higher salaries could overcome teacher reluctance to work in hard-to-staff schools).

227. See DARLING-HAMMOND, *supra* note 1, at 40 (“[W]orking conditions are at least as powerful as salaries.”); Charles T. Clotfelter et al., *Teacher Mobility, School Segregation, and Pay-Based Policies to Level the Playing Field*, 6 EDUC. FIN. & POL. 399, 403-04 (2011); Hanushek & Rivkin, *supra* note 90, at 76 (finding that the demographic characteristics of suburban schools made up for the salary decrease they experienced when transferring).

228. See Clotfelter et al., *supra* note 227, at 425 (finding that teachers with stronger qualifications are both more responsive to the racial and socioeconomic mix of a school's students and less responsive to salary than others). *But see* Charles T. Clotfelter et al., *Would Higher Salaries Keep Teachers in High-Poverty Schools? Evidence from a Policy Intervention in North Carolina*, 92 J. PUB. ECON. 1352, 1363 (2008) (finding that teachers who received \$1800 annually for teaching in hard-to-staff subjects and schools reduced teacher turnover rates by roughly 17 percent).

229. Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 390-403 (2012); Ryan, *supra* note 5, at 308.

230. See Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 120-21 (2009) (“[A] school district would have to nearly double a teacher's salary to induce the teacher to teach at a high-poverty and predominantly minority

through nonmonetary policies.²³¹ In short, these structural demographic challenges require state-level action that considers not just funding policies, but also district and school organization.²³²

The role of race and organizational structures was clear in South Carolina's most recent school finance case. Decades after the decision in *Brown v. Board of Education* declared racial segregation inherently unequal,²³³ the same community whose case had been consolidated with *Brown* brought a school finance claim against the State of South Carolina.²³⁴ Plaintiffs later demonstrated teacher inequities, among others, that were nothing short of shocking.²³⁵ Although the legal claim was strictly premised on funding inadequacy alone, one of the plaintiffs' attorneys had always asserted that the case could not be understood outside the context of race and that the state had consigned this current generation of students to educational ghettos.²³⁶ The state supreme court even rhetorically employed this language in 2014, remarking that "[s]tudents in these districts are grouped by economic class into what amounts to no more than educational ghettos."²³⁷ But the court never moved beyond rhetoric or assigned race any analytical importance.

It did, however, assign significance to the structures through which education is delivered. It wrote, "[t]he inputs and outputs described ... do not exist in a vacuum, but instead against a backdrop of ... local legislation and ... school district [structure]."²³⁸ Potentially for political reasons, the court focused solely on the administrative burden of the current district structures in the state,

school rather than elsewhere.”).

231. Although demography may be largely beyond schools' power, that demography intersects with finance inequality. EDUC. TR., FUNDING GAPS 2006 (2006). Those finance inequalities are directly within the states' control and do drive certain teachers to certain places early. See Boyd et al., *supra* note 23, at i.

232. Consider, for instance, that the greatest racial and socioeconomic segregation exists between school districts, not within them. Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, 81 N.C. L. REV. 1563, 1575-80 (2003).

233. 347 U.S. 483 (1954).

234. Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); see also Kristina Dell, *What "Brown" Means Today*, TIME (May 17, 2004), <http://content.time.com/time/nation/article/0,8599,639014,00.html> [<https://perma.cc/4GR3-T3KQ>].

235. Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 171 (S.C. 2014).

236. *Id.* at 175.

237. *Id.*

238. *Id.* at 172.

stopping short of examining the other structural forces at play.²³⁹ In short, although the South Carolina Supreme Court came closest to accounting for the larger factors affecting educational opportunity, it fell victim to the same flaws as other courts: the overestimation of economic factors and a disregard for noneconomic structural factors that shape educational opportunity and funding.

3. States Cannot Be Trusted to Improve Teaching for Disadvantaged Districts

Past school finance litigation demonstrates that states, in general, cannot be trusted to take the steps necessary to ensure adequate access to quality teachers for disadvantaged districts. The entire school finance and quality litigation movement has been an effort to force states to do what they otherwise will not. There is no more reason to believe states will deal with the complex problems of ensuring teacher quality than there is to believe that they will ensure equitable and adequate funding without consistent judicial prodding. To the contrary, there may be even less reason to trust states regarding teachers. States have proven particularly resistant to progressive change regarding teachers, probably because changes in teacher policies carry the most significant financial and administrative consequences.²⁴⁰ In fact, when litigation has most directly raised demands with regard to teachers, it has engendered the most resistance.

For instance, in Tennessee the plaintiffs were forced to bring the issue of teacher salaries to the state supreme court three times in one decade.²⁴¹ The state repeatedly failed to take the basic steps necessary to equalize salaries, even after the supreme court ordered the state to do so.²⁴² Likewise, while New Jersey's judiciary has been the most active in the country in enforcing education rights, the state has been anything but agreeable on teacher issues. The state has consistently blamed school districts for their own plight.²⁴³ The

239. *Id.* at 173.

240. See Hanushek, Kain & Rivkin, *supra* note 92, at 350-51.

241. Small Schools I, 851 S.W.2d 139, 140 (Tenn. 1993); Small Schools II, 894 S.W.2d 734, 734-35 (Tenn. 1995); Small Schools III, 91 S.W.3d 232, 232 (Tenn. 2002).

242. See, e.g., *Small Schools III*, 91 S.W.3d at 233-38.

243. See, e.g., *Abbott v. Burke*, 495 A.2d 376, 386 (N.J. 1985).

state has argued that poor management decisions in low-wealth districts;²⁴⁴ “teacher evaluation methods, and collective bargaining agreements;”²⁴⁵ and districts’ misguided concerns with classroom size were the problem,²⁴⁶ not the state’s refusal to fund educational needs.²⁴⁷ The state has also gone so far as to argue that variances between districts are irrelevant to educational quality.²⁴⁸

While Tennessee and New Jersey may offer some of the most egregious examples of states pushing back against securing adequate access to quality teachers, the problem became evident only because the litigants and courts pushed the state so hard to fulfill its obligations. Without this level of aggression, other states regularly take half-measures to address teaching costs, recruitment, and retention.²⁴⁹ Regardless of context, the conclusion is the same: states are unwilling, of their own volition, to acknowledge or deal with the complexities of ensuring adequate access to quality teachers.

4. *The Teaching Environment Matters as Much as Salary*

Research shows that the environment in which teachers work and the support that they receive matter tremendously to teachers, not just money.²⁵⁰ In fact, some research indicates that teachers care most about the quality of the teaching environment, not high salaries.²⁵¹ School finance remedies that focus only on budgets, with the assumption that they will increase teacher salaries, miss this point. Although additional funding alone could and should also affect the

244. *Id.*

245. *Abbott v. Burke*, 20 A.3d 1018, 1040 (N.J. 2011).

246. *Id.*

247. *Id.* at 1025-26.

248. *Abbott v. Burke*, 575 A.2d 359, 403-04 (N.J. 1990). Of course, the evidence has indicated otherwise, and the court has rejected such argument. *Id.* at 399-400.

249. *See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee*, 189 S.W.3d 1, 8-9, 14-15 (Ark. 2004).

250. *See LOEB & REININGER, supra* note 73, at 46-48; *Boyd et al., supra* note 23, at 13-15; *Hanushek & Rivkin, supra* note 90, at 82.

251. *See* Geoffrey D. Borman & N. Maritza Dowling, *Teacher Attrition and Retention: A Meta-Analytic and Narrative Review of the Research*, 78 REV. EDUC. RES. 367, 398 (2008); Helen F. Ladd, *Teachers’ Perceptions of Their Working Conditions: How Predictive of Planned and Actual Teacher Movement?*, 33 EDUC. EVALUATION & POL’Y ANALYSIS 235, 236, 253-55 (2011).

quality of the educational environment in which teachers work, this is, at best, an assumption.

Only a few select courts even acknowledge the connection between the environment and teaching quality. The New Jersey Supreme Court wrote, “[l]ocal conditions, too, are telling ... insofar as they attract or repel teachers who are free to choose one community rather than another.”²⁵² A California trial court noted “that schools with high teacher turnover can fall into a ‘vicious cycle’ in which the high turnover itself makes it more difficult to recruit and retain teachers, contributing to continued high turnover.”²⁵³ Outside of passing references like these, however, courts have not addressed environmental and working conditions as a means by which to improve teacher quality and retention. Environmental conditions, instead, become one of those concerns that fade into the background as the focus moves toward macrofunding issues. For instance, in the same paragraph in which the New Jersey Supreme Court acknowledged that local conditions matter to teaching quality, it relegated those conditions to just one more thing that money would cure if it were available.²⁵⁴

Salary and working conditions, which include support services, facilities, class size, and the environmental climate, all interrelate. None can be analyzed independently, nor reduced solely to issues of funding. Funding is certainly important to each, but there is little evidence that states understand the importance of funding for teachers as being about the conditions under which they teach rather than just salaries. As the superintendent of a plaintiff district in Alaska explained, teacher turnover and hiring finally improved in his district not because of higher salaries, but “because teachers have a sense of professional satisfaction as a result of the positive changes [in the district].... [M]oney will not inspire a teacher to remain teaching.”²⁵⁵ In fact, it was a teacher mentoring project run through the University of Alaska—rather than salary

252. *Robinson v. Cahill*, 303 A.2d 273, 277 (N.J. 1973).

253. *Reed v. State*, No. BC432420, 2011 WL 10893745, at *28-29 (Cal. Super. Ct. Feb. 8, 2011).

254. *See Robinson*, 303 A.2d at 277.

255. *Moore v. State*, No. 3AN049756, 2007 WL 8310251, at *32 (Alaska Super. Ct. June 21, 2007). This is not to suggest salaries do not matter. Other evidence in the case also indicated that the district in question had “the best compensation package for teachers of any rural entity in the state.” *Id.* at *72-73.

structure changes—that lowered teacher turnover in participating districts by 15 percent.²⁵⁶ In the absence of understanding how environmental factors and salaries relate, courts cannot assume that states or districts, with more resources alone, will improve the educational environment in the way that matters to teachers. The more likely inclination would be to pay teachers to work and succeed, notwithstanding the poor environment in which they work.

F. Navigating the Risks of Intervention

To be clear, school finance and quality litigation cannot, nor should it attempt to, solve all of education's ills. In fact, even when plaintiffs secure victories, the results are mixed on the question of whether the remedies that followed were meaningful.²⁵⁷ This Article does not intend to suggest otherwise. To the contrary, opponents of judicial engagement of teachers could offer at least three cautionary arguments. First, as the foregoing Sections explain, improving student access to quality teachers is not simple or easy. Solving the problem through litigation involves courts prompting states to implement remedies that they have been unable to find themselves. This begs the question of how courts could presume to help when they have less expertise on education policy than the other branches of government. Finding solutions that have evaded others would force courts to dig deeper into the social science literature regarding teachers and potentially make hard decisions when the evidence is not altogether clear.

Second, courts would be reluctant to make judgment calls about social science and education policy. They would run the risk of intruding on legislative discretion and raising serious separation of power concerns. In general, school finance litigation already pushes the bounds of separation of powers limits.²⁵⁸ Courts in a number of states have rejected school equity and quality claims entirely, citing a lack of judicially manageable standards in education, the elusive-

256. *Id.* at *19.

257. See SCHOOL MONEY TRIALS, *supra* note 202, app. at 345-58 (listing the judgments in school finance cases); see also Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010).

258. See Bauries, *supra* note 257, at 743-45.

ness of measuring educational outcomes and quality, and the need to defer to legislative discretion in policy making.²⁵⁹ Even courts that rule in favor of plaintiffs proceed cautiously in suggesting or dictating the remedy a state must adopt.²⁶⁰

The most typical and conservative approach to dealing with separation of powers is for a court simply to declare the current educational system unconstitutional without demanding a specific remedy. At most, these courts imply an appropriate remedy through their focus on and explanation of particular flaws in the current scheme. Yet a court might undercut that implication by emphasizing that it is entirely the state's obligation to devise a solution. Only after repeated state recalcitrance would such courts become more specific about remedies.²⁶¹ Dictating or implying a remedy that resolves the complex challenges of teacher quality would arguably push courts to the outer extremes of their judicial authority and call into question separation of power limits more than prior cases.²⁶²

Third, separation of power concerns aside, teachers' existing legal rights could potentially create barriers to certain remedies. Current salary structures (by statute or local provision), tenure rights, and collective bargaining agreements are likely to intersect with any remedy a court might order.²⁶³ Due process rights and existing contracts may place limits on certain remedies or, at the very least, disincentivize certain remedies.²⁶⁴

Properly framed, however, the foregoing points are reasons why courts should proceed carefully with teacher remedies, not justifications for ignoring and avoiding the challenge altogether. First, teacher quality may be more complex than other issues, but it does not pose *sui generis* separation of powers concerns. If teaching quality is part of a constitutional education, courts are bound to address it. As with any other constitutional education case, it is the province

259. See, e.g., *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1018 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156, 166-67 (Ga. 1981).

260. See, e.g., *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 758-60 (N.H. 2002).

261. See, e.g., *Campbell I*, 907 P.2d 1238, 1263-64 (Wyo. 1995).

262. New York, for instance, clearly was not prepared to push the issue further and simply lumped teachers in with monetary driven problems. *Campaign for Fiscal Equity v. State*, 861 N.E.2d 50, 53 (N.Y. 2006) [hereinafter CFE III].

263. See Black, *supra* note 7 at 82-83.

264. See, e.g., *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 465 (1979) (per curiam); *Balt. Teachers Union v. Baltimore*, 6 F.3d 1012, 1015 (4th Cir. 1993).

of courts to say what the law is and determine whether it has been violated.²⁶⁵ When violations occur, it is also the province of courts to order the state to remedy them.²⁶⁶ If multiple potential remedies are appropriate, discretion remains with the state to choose among them.²⁶⁷ But when a state fails to implement effective remedies, states' discretion can narrow. A court may respect the legislature's wide discretion in taking the first steps toward devising and implementing a remedy, but when a legislature refuses or fails to implement an appropriate remedy, some courts will assert greater authority, either through contempt proceedings against the state or by ordering more specific remedies.²⁶⁸ At the very least, the number of reasonable remedies within a state's purview shrinks when a court finds prior legislative remedies insufficient. In short, there is no question that a court could intervene on issues of teachers, just as it would with any other constitutional violation in regard to education. The question is how a court might intervene most effectively.

Second, the foregoing Sections demonstrate that states' past efforts with regard to teacher quality have been far from sufficient. In the past, most courts have taken an extremely deferential approach on the topic of teachers, demanding only that states expand resources and assuming that the state could best discern how to use those funds to improve instruction.²⁶⁹ The failure of these past remedies to resolve the problem of access to quality teachers is the basis upon which a court should now become more pointed in its analysis of violations and remedies.

Third, courts' own admonishments reveal the flaw in thinking that simply increasing available money will resolve teacher challenges. As courts and scholars have increasingly indicated over the

265. See, e.g., *Conn. Coal. for Justice v. Rell*, 990 A.2d 206, 210, 217 (Conn. 2010); *Campbell I*, 907 P.2d at 1264 (“[T]he judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution.”).

266. See, e.g., *Campbell I*, 907 P.2d at 1264.

267. See generally *Bauries*, *supra* note 257.

268. See, e.g., *Abbott v. Burke*, 20 A.3d 1018, 1040-41 (N.J. 2011); *Robinson v. Cahill*, 358 A.2d 457, 459-60 (N.J. 1976) (per curiam). Although arising in the context of violations of the Fourteenth Amendment of the U.S. Constitution, this same general give-and-take between the local school authorities and the federal courts was laid out in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971).

269. See, e.g., *CFE II*, 801 N.E.2d 326, 345, 348 (N.Y. 2003) (directing the State to reform the current system of financing school funding so that every school would have the resources necessary to provide the opportunity for a sound basic education).

past two decades, “additional money will not, without more, solve the chronic problems of educating students,” and “the manner in which the money is spent” matters most.²⁷⁰ If teachers are the most important aspect of school quality, then courts must be more mindful of how states spend money on them. Demonstrating that courts can and should act does not, however, answer the question of what exactly they should do, particularly in an area riddled with competing social science, policy proposals, and teachers’ rights. The answer to this question is the subject of Part III.

III. REFORMING SCHOOL FINANCE LITIGATION’S APPROACH TO TEACHING

In the last few years, a political and legal movement has formed to leverage school finance precedent to fundamentally alter the teaching profession.²⁷¹ A group of influential reformers became convinced that eliminating or restricting teacher tenure was the necessary first step to reforming teacher policy because tenure locks in the status quo.²⁷² So long as teacher tenure as we currently know it exists, new teacher compensation, accountability, and evaluation schemes face enormous roadblocks.²⁷³ Without tenure, reformers posit that schools would “remove the worst teachers and the rest would be motivated to improve.”²⁷⁴ School finance precedent potentially provided the key to unlock these reforms and resist the political power of teacher unions.²⁷⁵

Embedded within each of the fifty state constitutions is a right to an equal and/or adequate education.²⁷⁶ The new movement theorized that tenure and the retention of ineffective teachers violates this constitutional right.²⁷⁷ Reformers argued that “[i]f unequal funding violates the constitutional right to education, so too might ineffec-

270. *Abbott v. Burke*, 693 A.2d 417, 440-41 (N.J. 1997).

271. See Black, *supra* note 7, at 77-79.

272. *Id.* at 78.

273. See Dagostino, *supra* note 114, at 191-95, 210-12.

274. Black, *supra* note 7, at 78.

275. *Id.* at 79.

276. *Id.* at 108.

277. Haley Sweetland Edwards, *Taking on Teacher Tenure*, TIME, Nov. 3, 2014, at 35, 36 (noting that reform-oriented individuals saw litigation as the only way to break the national gridlock).

tive teaching caused by tenure.”²⁷⁸ Advocates chose California as the testing ground for this theory, filing their first case, *Vergara v. State*, in 2012.²⁷⁹

To the surprise of many, the trial court accepted this theory in 2014.²⁸⁰ At that point, the movement was off to the races. Advocates immediately filed an almost identical case in New York²⁸¹ and promised to bring cases in other states as well.²⁸² The claims in these cases rested on four factual allegations: “(1) it is [too] easy to get tenure; (2) easy tenure perpetuates the retention of ineffective teachers; (3) tenure-and-reduction in force rules make it impossible or too costly for districts to terminate ineffective teachers; and (4) these ineffective teachers cause unequal, and therefore unconstitutional, educational opportunities.”²⁸³

At the theoretical level, the claim that teacher tenure violates students’ constitutional right to education easily falls within the rights previously articulated by various state courts. Courts broadly articulate those rights in school finance precedent and make no attempt to limit the rights to school funding or academic standards.²⁸⁴ Even if those rights were limited, tenure claims would most likely fall within the scope of existing rights. Courts have explicitly recognized quality teachers as a crucial input that states routinely fail to deliver.²⁸⁵ The fact that courts have not thought closely about how

278. Black, *supra* note 7, at 79.

279. See First Amended Complaint for Declaratory & Injunctive Relief at 2-5, *Vergara v. State*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014) [hereinafter *Vergara Complaint*].

280. *Vergara*, 2014 WL 6478415, at *1-2.

281. Verified Amended Complaint at 4, *Dauids v. State*, No. 101105/14 (N.Y. Sup. Ct. July 24, 2014) [hereinafter *Dauids Complaint*].

282. Al Baker, *Lawsuit Challenges New York’s Teacher Tenure Laws*, N.Y. TIMES (July 3, 2014), <http://www.nytimes.com/2014/07/04/nyregion/lawsuit-contests-new-yorks-teacher-tenure-laws.html> [https://perma.cc/46ZB-AN33].

283. Black, *supra* note 7, at 124; see also *Vergara Complaint*, *supra* note 279, at 11-18; *Dauids Complaint*, *supra* note 281, at 9-15.

284. See Black, *supra* note 229, at 390-403 (discussing the potential breadth of constitutional rights to education); Ryan, *supra* note 5, at 307-10 (same); see also Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 997-1006 (2014) (distinguishing education rights and duties).

285. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 498-99 (Ark. 2002); *CFE III*, 861 N.E.2d 50, 53 (N.Y. 2006); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 386-87 (N.C. 2004).

to remedy the problem or how tenure might fall within it is irrelevant.

The practical effects of teacher tenure, however, do not match the theory. Plaintiffs assume a causal connection between tenure and educational opportunities that is too simple and, as of yet, unsubstantiated. Far too many other factors—for which plaintiffs do not account—affect teaching quality to conclude that tenure is decisive or of crucial importance. In other words, plaintiffs narrow their claim too far in regard to teachers. They would micromanage state tenure and retention policy and ignore everything else.

The point of this Article is not to critique the challenge to tenure, but to build on it without repeating its mistakes. The antitenure movement is extremely important for what it gets right. It uses school finance precedent to force courts to focus on the input that matters most—teachers—and insists that policy changes, not just funding increases, are necessary to improve access to quality teachers. These major steps forward provide a theoretical basis upon which to build broader holistic reforms in teacher quality. In particular, school finance precedent should be leveraged toward three categorical ends: equalizing teacher distribution; improving teacher quality (through teacher development, hiring, evaluation, and firing if necessary); and improving the conditions under which teachers work.

This set of reforms is distinct from the challenge to tenure in three important respects. First, this Article's proposed reforms are grounded in evidence. Second, they are not remedial dictates; they are factors that the state must address but which still afford the state meaningful levels of discretion as to how. Third, the reforms are holistic and avoid the fallacy of silver bullet solutions. The following Sections address each of these points in regard to tenure and this Article's proposed reforms.

A. Learning from the Constitutional Challenge to Tenure

The teacher tenure challenges currently being litigated in California and New York facially meet the basic requirements of a constitutional education claim.²⁸⁶ The plaintiffs identify a state constitutional duty in regard to education and allege a deficiency in

286. Black, *supra* note 7, at 123-24.

carrying it out.²⁸⁷ They argue that some schools have such substantial numbers of low-quality teachers that they deprive students of their constitutional right to education.²⁸⁸ Emphasizing that teachers are a key determinate of the quality of education a student receives, they argue that regular exposure to low-quality teachers causes the poor educational outcomes in these schools.²⁸⁹ They assign responsibility for these low-quality teachers and outcomes not to the school, but to the state.²⁹⁰ They argue that state statutes regulating teacher tenure and removal prevent schools from removing ineffective teachers.²⁹¹ These schools will, over time, lose many of their good teachers and remain stuck with their worst. If these schools could remove their worst teachers and replace them with just average teachers, students would accrue enormously positive short-term and long-term educational benefits.²⁹² Thus, they say, tenure violates students' constitutional right to an equal or adequate education.²⁹³

At a level of generality and theory, the challenge to tenure has significant merit. The importance of teachers is largely beyond dispute now, and, like any other profession, surely a certain percentage of teachers are very weak performers. If the existence of tenure significantly exacerbates their numbers, constitutional concerns should follow. By raising this point, the plaintiffs push courts to take the teachers' role in delivering a constitutionally required education far more seriously than they have in the past. The claims situate teachers not at the periphery of an adequacy or equity case, but at the very center. Equally important, the claims attempt to connect noneconomic state policy to what happens in the classroom and the teaching profession overall. In these respects, the tenure litigation is consistent with this Article's thesis that constitutional education litigation must focus on teachers more squarely and not assume that general changes in funding will naturally improve teaching quality.

287. Vergara Complaint, *supra* note 279, at 2-4; Davids Complaint, *supra* note 281, at 2-3.

288. Vergara Complaint, *supra* note 279, at 11; Davids Complaint, *supra* note 281, at 4.

289. Vergara Complaint, *supra* note 279, at 3; Davids Complaint, *supra* note 281, at 8-9.

290. Vergara Complaint, *supra* note 279, at 3-4; Davids Complaint, *supra* note 281, at 3.

291. Vergara Complaint, *supra* note 279, at 3-4; Davids Complaint, *supra* note 281, at 9-10.

292. Vergara v. State, No. BC484642, 2014 WL 6478415, at *4 (Cal. Super. Ct. Aug. 27, 2014); Davids Complaint, *supra* note 281, at 8-9.

293. Vergara Complaint, *supra* note 279, at 20; Davids Complaint, *supra* note 281, at 14-15.

For all its insight, however, the tenure challenge is but one step forward in a potential movement to reform school finance litigation and teaching quality. It cannot take the second step because the facts do not match the theory. The litigation does not even hint at the broader dynamics that affect access to quality teachers. First, like school finance precedent, it oversimplifies the cause of the problem. Whereas school finance cases assume salary gaps between districts or regions are the cause of inadequate teachers,²⁹⁴ the tenure challenges assume that sufficient numbers of adequate teachers exist and that the problem is simply ridding schools of ineffective ones.²⁹⁵ This leads the plaintiffs to another unsubstantiated causal assumption: the reason why ineffective teachers are retained is because the state forces districts to do so through statute.²⁹⁶ While removing teachers may be costly, available evidence indicates that districts retain them for other reasons.²⁹⁷ Regardless, courts in constitutional education litigation consistently require a sophisticated analysis of causation. This means proving that some state policy is the cause of a resource deprivation and that the deprivation has a negative causal impact on educational outcomes.²⁹⁸ The tenure challenge fails to do this.

Second, these plaintiffs narrow the frame of the teacher problem too far. They disconnect individual teachers from the broader teacher market and structures of educational opportunity. In other words, they fixate on one aspect of teacher management—tenure—and ignore everything else.²⁹⁹ They then draw vast conclusions based on

294. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 198 (Ky. 1989); *Leandro v. State*, 488 S.E.2d 249, 252 (N.C. 1997).

295. Vergara Complaint, *supra* note 279, at 10; Davids Complaint, *supra* note 281, at 8-9.

296. Vergara Complaint, *supra* note 279, at 3-4; Davids Complaint, *supra* note 281, at 3.

297. See, e.g., EDWIN M. BRIDGES, *THE INCOMPETENT TEACHER: MANAGERIAL RESPONSES* 25-27 (rev. ed. 1992); DANA GOLDSTEIN, *THE TEACHER WARS: A HISTORY OF AMERICA'S MOST EMBATTLED PROFESSION* 241 (2014); Suzanne R. Painter, *Principals' Perceptions of Barriers to Teacher Dismissal*, 14 J. PERSONNEL EVALUATION EDUC. 253, 259-61 (2000).

298. See, e.g., *Serrano v. Priest*, 557 P.2d 929, 939 (Cal. 1976) ("There is a distinct relationship between cost and the quality of educational opportunities afforded."); *Abbott v. Burke*, 575 A.2d 359, 383-84 (N.J. 1990) (recognizing dispute over whether and how money matters); CFE II, 801 N.E.2d 326, 343 (N.Y. 2003) (state argued that "inefficient management of personnel is the supervening cause ... rather than the funding system"); *id.* at 335 ("[P]laintiffs had to show that insufficient funding led to inadequate inputs which led to unsatisfactory results.").

299. Plaintiffs challenge teacher retention policies during reductions in force in addition to tenure, but this is only a variant of the overall concept of removing ineffective teachers who

the narrow problem, asserting that deficiencies at a micro level—individual grossly ineffective teachers scattered across a district—are the cause of a macro problem that rises to the level of a constitutional problem. Even if plaintiffs are correct that tenure protects grossly ineffective teachers from dismissal, it does not follow that this group of teachers is sufficient in number to undermine educational opportunity in general, which is a requirement in school finance precedent.³⁰⁰ It may be the case that these ineffective teachers—whom tenure protects—are a part of a larger systematic problem in the profession or make an already problematic educational environment worse, but plaintiffs make no attempt to account for the broader context.

That necessary broader context includes the teacher labor market, the educational environment in which these and other weak teachers teach, and the overall educational opportunities offered in disadvantaged schools. The flaw of school finance, on the whole, has been to largely ignore the market and educational environment that affects teaching. But courts have always demanded evidence of the constellation of inputs, outcomes, and factors that make up educational opportunity.³⁰¹ Sophisticated or not, these cases correctly conceptualize teachers as an evidentiary piece of a much larger puzzle of inadequate or inequitable education.³⁰² The flaw of tenure challenges is to disconnect teaching quality from the market, the teaching environment, and other nonteaching factors that go into educational opportunity. In short, the tenure challenge strips teacher quality from the broader context of education and teachers.

The challenge to tenure compounds the foregoing flaws by calling for a remedy that is too specific and too narrow. School finance

have vested interests based on tenure or seniority. See Vergara Complaint, *supra* note 279, at 17-18; Davids Complaint, *supra* note 281, at 12-14.

300. See *Sheff v. O'Neill*, 678 A.2d 1267, 1287 (Conn. 1996) (“[P]laintiffs must make a prima facie showing that the disparities ... are more than de minimis.” (quoting *Horton v. Meskill*, 486 A.2d 1099, 1106 (Conn. 1984))); *CFE II*, 801 N.E.2d at 332-36 (concluding that test results and graduation rates reflected systemic failure and that the State’s actions were a substantial cause of the constitutional violation).

301. See, e.g., *CFE II*, 801 N.E.2d at 328-29 (discussing the lower courts’ factual findings concerning inputs, outputs, and causation).

302. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 500 (Ark. 2002) (finding “discrepancies in curriculum, facilities, equipment, and teacher pay”); *CFE III*, 861 N.E.2d 50, 53 (N.Y. 2006) (discussing multiple aspects of education in assessing overall adequacy).

precedent does not presuppose a singular or narrow solution to the problems it raises.³⁰³ Prior cases might identify a state's funding scheme that relies heavily on local property tax as the cause of inadequate funding and opportunity, but the challenge would not be a per se challenge to funding schemes built on local taxes.³⁰⁴ A state could theoretically retain local funding so long as it otherwise ensured that adequate funds were available for schools. Retaining this flexibility, moreover, is part and parcel of separation of powers constraints in school finance cases.³⁰⁵ Most courts would dictate a more specific remedy only in the face of state intransigence over a period of time.³⁰⁶ The tenure cases, in contrast, present a per se challenge to tenure and retention policies³⁰⁷ and clearly envision another approach the state must take.³⁰⁸ Not only does the approach potentially transcend separation of powers boundaries, but it also disregards the possibility of other solutions.

In sum, the constitutional challenge to tenure does two important things that prior school finance litigation has failed to do: focus squarely on teachers and move beyond just money. But it also commits three errors that school finance litigation does not: assuming causation, ignoring educational context, and dictating a remedy. The next Section builds on the constitutional challenge to tenure's strength and strips away its flaws.

B. An Expanded and Nuanced Approach to Teaching Quality

The constitutional challenge to tenure is pushing courts and states to be far more attentive to teacher quality. The task of future

303. See generally Bauries, *supra* note 284.

304. See *Serrano v. Priest*, 226 Cal. Rptr. 584, 620 (Ct. App. 1986) (requiring substantial disparities that affect outcomes); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1188-89 (Ill. 1996).

305. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 214 (Ky. 1989) ("It is now up to the General Assembly to re-create, and re-establish [the] system."); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 396-97 (N.C. 2004) (reversing lower court remedy because state gets first opportunity); *McCleary v. State*, 269 P.3d 227, 232 (Wash. 2011) (refusing "to specify standards for staffing ratios, salaries, and other program requirements").

306. See, e.g., *Abbott v. Burke*, 710 A.2d 450, 460-61 (N.J. 1998); *Campbell I*, 907 P.2d 1238, 1246 (Wyo. 1995).

307. See *Edwards*, *supra* note 277, at 36.

308. *Vergara Complaint*, *supra* note 279, at 4-5 (asserting state statutes are facially unconstitutional).

litigants and courts is to build upon that instinct and move school finance litigation toward a far more nuanced analysis of the problem of teacher quality and potential remedies to it. This nuance, moreover, makes sense as part of the natural evolution of the school finance movement from one aimed only at utterly gross inadequacies and inequities that require blunt force remedies to one that pushes states to go further and move schools from marginal adequacy to consistent high quality.³⁰⁹ To do otherwise is to leave school finance litigation open to critiques of wasted money and ineptness in improving educational opportunities.

None of this is to suggest that courts are competent to micromanage teacher policy. To the contrary, courts lack substantive expertise in education policy. But courts do have expertise in identifying relevant factors to substantive problems and disputes, setting standards by which parties should act, and holding actors accountable for failing to consider the relevant factors and act according to the appropriate standard.³¹⁰ This expertise can force states to develop policies they otherwise would not and account for evidence they otherwise would ignore. In the context of teachers, this means forcing states to address the fundamental challenges in the profession that impede educational quality and equality rather than simply reformulating budgets and ignoring teacher policies. Courts can do this through a five-pronged approach: (1) moving beyond focusing on money alone to analyze a broader set of factors affecting quality teaching, (2) requiring the equitable distribution of existing teachers, and improving teacher quality by (3) making the profession attractive, (4) supporting teachers once they enter the profession, and (5) removing those who are ineffective, notwithstanding support and a proper environment.

1. Understanding the Problem Is Not Money, Tenure, or Any Other Single Factor

As argued throughout this Article, the first and most important step courts must take is to broaden the scope of their analysis regarding teachers, not narrow it. Both school finance opinions and

309. See generally Black, *supra* note 7.

310. See generally REBELL & BLOCK, *supra* note 20.

the current constitutional challenge to tenure run from complexity rather than confront it. Therein lies the fundamental flaw. Existing teachers choose to work (and not work) within a varying context of geography, professional options, school building environments, professional support, student body needs, and salary requirements.³¹¹ Potential teachers likewise operate within a broader economic and intellectual market in which teaching competes with other careers.³¹²

These complexities cannot be reduced to frameworks premised on singular solutions, such as closing salary gaps or ending tenure. This is not to suggest that money does not matter or that current tenure policies work well, but rather that neither salary changes alone—at least ones that states are reasonably willing to offer—nor the elimination of tenure will ensure quality instruction in all classrooms. No silver bullet exists to resolve the problem. Courts should presume the opposite and demand that states account for and address all of the internal and external forces that operate on the teaching market and students' access to quality teachers. In general, the relevance of these factors is not in dispute. They are just not accounted for and addressed. Thus, courts need not mediate social science evidence or devise novel policy reforms; they need to demand that states focus on the factors that matter.

2. The Unequal Distribution of Quality Teachers Is Distinct from a Shortage

Inadequate access to quality teachers includes two distinct structural aspects: an actual shortage of highly qualified teachers and an unequal distribution of those we have. Courts should recognize and address both. In the past, courts have focused predominantly on the shortage, if focusing on teachers at all.³¹³ Most shortages are

311. See generally LOEB & REININGER, *supra* note 73; Boyd et al., *supra* note 23; Hanushek & Rivkin, *supra* note 90; Loeb, Darling-Hammond & Luczak, *supra* note 92.

312. See, e.g., LOEB & REININGER, *supra* note 73, at ii, iv. See generally Darling-Hammond, *supra* note 146; Ingersoll & Merrill, *supra* note 24.

313. See, e.g., *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, 2004 WL 5719215, at *23-24 (Tex. Dist. Ct. Nov. 30, 2004) (focusing on the severe shortage of qualified teachers); *Campbell II*, 19 P.3d 518, 550 (Wyo. 2001) (“Because teacher quality is critical to providing a constitutional education ..., the legislature is also directed to monitor the supply of qualified teachers and take appropriate action.”).

manageable so long as they are equally distributed.³¹⁴ But, as a practical matter, even small shortages have proved problematic because their effects are often concentrated in particular districts.³¹⁵ Although this concentration is currently driven by teacher choice, it is not beyond the states' control. To the contrary, states' current funding and assignment policies, among others, play a huge role in unequally distributing the teachers that are in the market.³¹⁶ These same policies can be leveraged to do the opposite.

Independent of the supply of quality teachers, courts should demand that states address the maldistribution of quality teachers. School finance precedent arguably already requires as much. That precedent generally obligates states to address their distributional failures in regard to key education resources and regularly indicates that the manner in which states and local school districts allocate their resources is as important as the amount of resources they have.³¹⁷ Equity litigation, for instance, is inherently premised on the notion that a state must structure its finance system to provide all school districts equal access to resources.³¹⁸ If the inequitable distribution of a resource affects educational opportunity in a state where education is a fundamental right or students have a right to equal educational opportunity, the distribution is facially problematic.³¹⁹

Strategic distribution of resources is not as obviously required in adequacy cases but still exists. So long as all schools still meet the minimum constitutional quality benchmarks, states can theoretically waste resources and ignore inequality.³²⁰ In practice, however,

314. See DARLING-HAMMOND, *supra* note 27, at 1-2 (arguing that there is not actually a shortage of quality teachers but a maldistribution of them).

315. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 73-75, 85-86 (1973) (Marshall, J., dissenting); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 160-61 (S.C. 2014).

316. See, e.g., *Rodriguez*, 411 U.S. at 85-86.

317. See, e.g., *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 388-89 (N.C. 2004) (discussing the State's and local districts' responsibility to allocate resources strategically); *Abbott v. Burke*, 575 A.2d 359, 377-82 (N.J. 1990) (discussing the variance in how efficiently districts use their funds and the problem it creates in determining whether money matters).

318. See Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 497-98 (1995) (discussing two approaches to litigating school finance equity cases, both premised on an equal protection argument).

319. See *id.* at 505-11, 513 (discussing the scrutiny both state courts and the Supreme Court applied to inequities or resource allocation within state education systems).

320. See, e.g., *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (rejecting equality claim by permitting adequacy claim); see also William S. Koski & Rob Reich, *When "Adequate" Isn't:*

delivering quality educational opportunities to all students also requires strategic resource distribution.³²¹ The North Carolina Supreme Court, for instance, rooted the State's educational failures in the fact "that neither the State nor ... [its school districts] are strategically allocating the available resources to see that at-risk children have the equal opportunity to obtain a sound basic education."³²² Rather than simply mandate more resources, the court directed both the state and the "school district[s] to conduct self-examinations of the present allocation of resources and to produce a rational[,], comprehensive plan which strategically focuses available resources and funds towards meeting the needs of all children, including at-risk children[,] to obtain a sound basic education."³²³

As many as twenty state constitutions include explicit language that speaks to this distributional principle.³²⁴ These state constitutions mandate an "efficient" education.³²⁵ Courts have found that this efficiency mandate carries the normal dictionary meaning: "[P]erforming or functioning in the best possible manner with the least waste of time and effort' and 'satisfactory and economical to use.'³²⁶ The West Virginia Supreme Court wrote that this mandate requires "the education system be absolutely complete, attentive to every detail, extending beyond ordinary parameters.... [I]t must produce results without waste," and it requires "careful state and local supervision to prevent waste and to monitor pupil, teacher and

The Retreat from Equity in Educational Law and Policy and Why It Matters, 56 EMORY L.J. 545, 562-65 (2006).

321. See Weishart, *supra* note 22, at 537-38.

322. *Hoke Cty.*, 599 S.E.2d at 388-89 (quoting trial court).

323. *Id.* at 389; see also *Small Schools I*, 851 S.W.2d 139, 141 (Tenn. 1993) (indicating that the State should impose "funding and management responsibilities upon counties, municipalities, and school districts" and prevent mismanagement).

324. Black, *supra* note 229, at 399-400; see, e.g., ARK. CONST. art. 14, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; ILL. CONST. art. X, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.J. CONST. art. VIII, § 4, ¶ 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1.

325. See, e.g., KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide an efficient system of common schools throughout the State.").

326. Black, *supra* note 229, at 400 (quoting *Efficient Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/efficient> [<https://perma.cc/UP3N-6PLS>] (last visited Mar. 30, 2016)); see, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 210 (Ky. 1989); *Pauley v. Kelly*, 255 S.E.2d 859, 874 (W. Va. 1979).

administrative competency.”³²⁷ The Kentucky Supreme Court similarly emphasized:

The General Assembly must not only establish the [qualitatively adequate educational] system, but it must monitor it on a continuing basis so that it will always be maintained in a constitutional manner. The General Assembly must carefully supervise it, so that there is no waste, no duplication, no mismanagement, at any level.³²⁸

In short, school finance precedent articulates a duty not just to fund and support schools but also to ensure that schools are run well and to maximize the impact of the resources the state provides. This entails strategic allocation, distribution, and monitoring of resources at the state and local levels. It is also worth noting that enforcing this mandate falls more squarely within the purview of courts than any other educational concept because efficiency amounts to a definite structural obligation rather than a qualitative educational concept.³²⁹

These equitable distribution principles should apply with added force to teachers. Funding inequities require nuanced analysis of the manner in which school funds are generated and how much each particular school needs based on demographic, geographic, and other factors.³³⁰ Identifying the inequitable distribution of teachers, however, is simple by comparison. Basic math reveals that disadvantaged geographic and demographic groups have fewer teachers, and those they have are less credentialed and qualified by almost any measure one might use.³³¹ No expert analysis is required to reach this conclusion. Remedying the maldistribution of teachers

327. *Pauley*, 255 S.E.2d at 874, 877.

328. *Rose*, 790 S.W.2d at 211.

329. Concepts of adequacy, thoroughness, or high quality necessarily call on courts to make qualitative educational assessments. It is also worth emphasizing that a court's competency and judicial authority is at its peak in regard to efficiency because the term "efficient" is, in key respects, less ambiguous than other educational mandates.

330. See Bradley W. Joondeph, *The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 769-72 (1995).

331. See, e.g., *Reed v. State*, No. BC43240, 2011 WL 10893745, at *21-25 (Cal. Super. Ct. Feb. 8, 2011) (finding that constant teacher turnover has led to unqualified teachers and long-term substitutes disrupting students' ability to receive a coherent lesson plan); EDUC. TR., *supra* note 29, at 2.

would implicate more complex questions, but the question of how best to remedy the maldistribution is separate from whether maldistribution exists and violates the Constitution. The answer to these latter questions is simply, yes.

The answer of how to remedy maldistribution is three-fold. The first step is for states to end those aforementioned funding, student assignment, and teacher assignment policies that incentivize and exacerbate the maldistribution.³³² In other words, state policies must be part of the solution, not the problem. The second step is for states to offer meaningful incentives for the most effective teachers to remain in or move to disadvantaged and high-need schools. States' past incentive experiments have been small, particularly in light of the disincentives to teaching in high-need schools that other state policies create.³³³ The third step is to carry out the overall strategy for improving teacher quality that is outlined in the next Section. Improving teacher quality overall would ease the intense competition for quality teachers that currently leads to maldistribution.

3. Improving Teacher Quality Through Recruitment, Retention, and Removal

Remedying the shortage of quality teachers is a function of three factors: bringing more strong candidates into the profession, keeping the best teachers in the profession, and removing the weakest teachers. Closing salary gaps between districts or states—the current prevailing remedy—does not necessarily address any of these factors and certainly does not address all three. Simply closing salary gaps is primarily an attempt at internal redistribution of teachers, albeit insufficient in and of itself.³³⁴

332. See *supra* notes 313-31 and accompanying text.

333. See Sims, *supra* note 98, at 1043.

334. Studies have found that other factors tend to weigh heavily in a teacher's decision on where to teach. Thus, closing the salary gap may not cause teachers to migrate to the teaching profession or high-need schools. See Boyd et al., *supra* note 23, at 57, 73-74, 77.

a. Ensuring Competitive Salaries

Bringing stronger candidates into the profession requires salaries commensurate with or in excess of what those individuals might earn in other professions. Current teacher salaries are well below that level.³³⁵ Thus, current salary incentives must increase. Courts must push states to provide salaries that respond to this reality. With that said, the solution to the shortage of *quality* teachers is not simply increasing all existing or new teachers' salaries. Past experience suggests that a quick remedy of this nature will do little to change or increase the quality of those entering the profession.³³⁶ More likely, it will increase the salary of those who already teach or are considering teaching,³³⁷ which might be warranted as a general principle and help with long-term solutions, but that is not the immediate goal. Instead, both short-term and long-term goals could be achieved more efficiently through targeted salary incentives, with a phasing in of higher overall salaries over time.³³⁸ A court, however, need not order any specific salary policies as a remedy. It would be enough for a court to focus states on the relevant factor: the competitiveness of teaching compared with other professions. If quality teaching is part of a constitutional education, states must devote the resources realistically necessary to secure it.

b. Leveraging Teacher Pipelines

States must pursue strategies beyond just salary to change the pool of those entering the teaching profession. States control the teacher pipeline through certification programs, training programs, institutions of higher education, and financial aid and scholarships,

335. See DARLING-HAMMOND, *supra* note 1, at 12, 110; Ingersoll & Merrill, *supra* note 24, at 188, 193-94.

336. Boyd et al., *supra* note 23, at 57, 73-75, 77.

337. Sims, *supra* note 98, at 1042-43 (discussing what he calls rent capture increases in teacher salary).

338. Some of these raises will inevitably produce windfalls for some teachers, but this may just be the cost of doing business as a state attempts to transform the profession. Surely, the inverse pattern occurs when a state lets salaries dip. In the early years, states will retain high-quality teachers, but over time they will leave the profession or the state. In other words, short-term thinking in the area of teacher salaries, whether it is increasing or decreasing them, will have long-term consequences.

just to name a few.³³⁹ But states currently do little to leverage this pipeline to attract the strongest candidates. Instead, they accept almost all interested students to colleges of education—which brings down the prestige of the profession—and then attempt to counteract that open door policy by imposing a strict and burdensome certification process at the end.³⁴⁰ This is the exact opposite of what successful education systems do in other countries.³⁴¹ Again, a court need not dictate any specific change to the teaching pipeline, but it should hold the state accountable for leveraging that pipeline itself, as the state exerts more direct influence on the teaching market through the pipeline than any other strategy.

c. Improving the Teaching Environment

Salaries are relevant to keeping the best teachers in the profession. If salaries are not high enough to consistently attract high-quality candidates to teaching, they are not high enough to consistently keep them either. With that said, salaries are not exclusively controlling at the hiring or retention stages.³⁴² At retention, salary may be even less relevant.³⁴³ Surveys indicate that teachers want fair salaries, not exorbitant ones.³⁴⁴

By reducing teacher hiring and retention solely to salaries, states and courts overlook the other equally important aspect of hiring and retaining teachers: creating environments conducive to the

339. See PREPARING TEACHERS FOR A CHANGING WORLD: WHAT TEACHERS SHOULD LEARN AND BE ABLE TO DO 408, 414-16 (Linda Darling-Hammond & John Bransford eds., 2005) [hereinafter PREPARING TEACHERS]; ROBIN R. HENKE ET AL., NAT'L CTR. FOR EDUC. STATISTICS, PROGRESS THROUGH THE TEACHER PIPELINE: 1992-93 COLLEGE GRADUATES AND ELEMENTARY/SECONDARY SCHOOL TEACHING AS OF 1997, at 23-26, 28 (2000); Boyd et al., *supra* note 23, at 58-59, 61-62, 68-70.

340. See Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1944-46 (2012).

341. See *id.* at 1949 (discussing the prestige of the teaching profession in Finland, South Korea, and Singapore); see also DARLING-HAMMOND, *supra* note 1, at 163-93 (discussing how other countries make the teaching profession more attractive).

342. See PREPARING TEACHERS, *supra* note 339, at 110.

343. See *id.* at 40-41.

344. See REPORTS OF THE HEADS OF DEPARTMENTS OF THE COMMONWEALTH OF PENNSYLVANIA PART 2, at 122, 130 (1883) (finding that, as far as teachers are concerned, a fair salary is necessary); Patrick J. Kearney, *When Did Teachers Become So Unpopular?* (Dec. 14, 2014), [https://patrickjkearney.wordpress.com/2014/12/\[https://perma.cc/6RSE-HXBL\]](https://patrickjkearney.wordpress.com/2014/12/[https://perma.cc/6RSE-HXBL]) (asserting that teachers “have worked over time to be fairly compensated”).

demanding work expected of teachers. Teachers regularly cite the environment—not their salary—as the reason they leave teaching or a particular school.³⁴⁵ Changing the environment will have its own independent benefits to teacher quality and presumably have reciprocal positive effects on the actual salary necessary to recruit and retain teachers.

For the purposes of this Article, it suffices to say that quality of the environment depends on the physical place where a teacher teaches, the number of students for which a teacher is responsible (class size and course load), student behavior in the classroom, the administrative and support services available, and professional development opportunities. All but student behavior are entirely within the control of the state,³⁴⁶ and most of these environmental factors already arise as part of educational equity and quality litigation.³⁴⁷ Moving the analysis in those cases toward the theory of this Article, however, requires a change in framing. The current question in those cases tends to be whether class size, facilities, or any other resource has a direct correlation with student outcomes. If not, a court might deem those resources irrelevant. But if the educational environment is relevant to teacher quality, these factors should remain important, regardless of whether they can be closely correlated with student outcomes.³⁴⁸

In short, courts should continue to focus on those educational inputs that have been shown to affect educational outcomes. Teachers are foremost among those factors. But unlike other resources, teachers cannot simply be bought and sold by the highest bidder. Thus, courts should focus states on addressing those non-

345. See DARLING-HAMMOND, *supra* note 1, at 40-41 (“[W]orking conditions are at least as powerful as salaries in predicting whether schools can recruit and retain teachers who have other options.”); Hanushek, Kain & Rivkin *supra* note 92, at 328, 335-37 (finding that experienced teachers moved to high-socioeconomic status schools when positions were available).

346. Student behavior and discipline are issues of distinct significance that require strategies that go well beyond the scope of this Article, but it suffices to say here that the environment matters to students as well. Smaller classes matter because they create a more manageable workload for teachers, but they also matter in creating a more personal and well-behaved classroom.

347. See, e.g., CFE III, 861 N.E.2d 50, 52-53 (N.Y. 2006); *DeRolph v. State*, 728 N.E.2d 993, 1020-21 (Ohio 2000).

348. New York’s highest court, for instance, reasoned that safe and adequate facilities were part of a constitutional education even though the plaintiffs could not demonstrate their effect on student achievement. CFE III, 861 N.E.2d at 59-60.

monetary factors that affect teaching quality and comprise the overall environment in which they work.

d. Managing Teacher Quality: Evaluations, Remediation, and Tenure

Finally, putting aside the question of how many grossly ineffective teachers currently teach and whether their numbers rise to the level of an independent constitutional violation,³⁴⁹ the possibility that a school cannot get rid of incompetent teachers raises constitutional concerns. If the state must improve its recruitment, hiring, and environment as part of a holistic approach to teachers, it is hard to argue that removing ineffective ones, if necessary, is not part of that approach.³⁵⁰

The more complicated questions are how to reliably identify ineffective teachers and what to do with them. The current litigation in California and New York assumes that we will recognize ineffective teachers by their students' test scores and that the solution is to eliminate or delay tenure and minimize due process so that schools can more easily remove these teachers. None of these assumptions is self-evident. Interpreting student test scores, controlling for the various demographic factors necessary to compare apples to apples, and attributing them to individual teachers has proved to be very difficult to do fairly and reliably.³⁵¹ One of the worst things the state could do is pressure or eliminate teachers who are actually doing their job well.

For that reason, the process of removal must proceed carefully and fairly. Doing so may involve significant unavoidable costs. If so, the answer is not to eliminate tenure or process; the answer is for the state to provide schools the support necessary to carry out teacher removals. For instance, the state might create a fund for teacher removal or take responsibility for carrying out the process itself.

349. As explored at length in Black, *supra* note 7, the number of grossly ineffective teachers has been estimated only; the estimate is not necessarily a high one and likely does not meet the constitutional requirements for establishing harm or state-level causation.

350. By "ineffective," this Article means a teacher who lacks the skill or desire to be effective. Because environment matters, teachers may not produce student gains because they are in an environment that makes effectiveness elusive. Teachers should not become the scapegoat for education ills over which they themselves have no control.

351. Baker et al., *supra* note 122, at 6-8, 16-18.

Either way, schools with ineffective teachers are not caught in an intractable situation. On the other hand, if the process can be carried out more efficiently without sacrificing fairness, states should pursue those options.

The definitive answers and solutions to each of these issues, however, are irrelevant for courts. The role of courts is to identify the relevant issue. Here, that issue is the ability to remove ineffective teachers, when necessary, as part of a holistic approach to improving teaching quality. The conditions under which to remove (or remediate) a teacher should, consistent with separation of powers, remain within the states' purview, so long as the state ensures a process consistent with improving the quality of teaching.

CONCLUSION

The constitutional challenge to tenure spreading across the nation has exposed an enormous hole in previous litigation over the constitutional right to education—the failure to focus on what matters most. Whereas the challenge to tenure focuses exclusively on teachers, past litigation over the constitutional right to education has focused almost exclusively on money. Past litigation has assumed that more money would indirectly improve teaching quality and that inequities between school districts would disappear. This assumption has proved false. Poor and minority students are still exposed to ineffective teaching at twice the rate of other students. The challenge of ensuring quality teachers for disadvantaged students is far too important and complex to leave to chance.

The initial theory and success of the constitutional challenge to tenure offers a potential path to reinvigorating and refocusing the constitutional right to education to address these challenges. The tenure litigation has demonstrated that the precedent regarding the constitutional right to education is sufficiently broad to encompass demands for teacher quality reforms. Both courts and the public appear receptive. Unfortunately, the substantive theory of the tenure litigation is no more likely to improve and reform teaching than is school funding litigation because it also oversimplifies the problem of ineffective teaching. The tenure challenges naïvely assume that if schools could just remove the worst teachers, teacher quality would dramatically improve.

The goal of future litigants and courts should be both to build on the insights of the challenge to tenure and to avoid that strategy's flaws. This entails bringing a laser-like focus to teaching quality and forcing states to account for the extensive body of research that demonstrates that realistic solutions must account for the pipeline into teaching, structural forces related to race and geography, the general desirability of the teaching profession, and the conditions under which teachers work. This deeper engagement of teacher quality would represent a natural evolution and maturation of school finance precedent.

The facts in past school finance cases have included troubling disparities in almost every aspect of education, from teachers and facilities to technology, transportation, and instructional supplies, just to name a few. These disparities have been so gross that the education systems would have fallen below almost any constitutional standard or approach, so long as a court defined the required education as something more than just a building with teachers and books. As states eliminate the grossest disparities, the important question will be exactly where the constitutional threshold lies and how states can meet it. Is it enough to eliminate gross disparities, or must states refine their education systems to deliver educational opportunities that are, in fact, equal and substantively adequate? This inquiry is necessarily more complex and nuanced, and teaching quality lies at the center of it. Thus, deepening the analysis of teacher quality is the necessary next step in meeting the constitutional obligation of equal and adequate education.

