

VERGARA V. STATE OF CALIFORNIA: THE END OF TEACHER TENURE OR A FLAWED RULING?

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“Today the ineffective tenured teacher has emerged as a feared character, a vampiric type who sucks tax dollars into her bloated pension and health care plans, without much regard for the children under her care.”

Dana Goldstein¹

“If teacher tenure is an important obstacle to achievement, Mississippi (with no teacher tenure) should have stellar schools and Massachusetts (with teacher tenure) should have failing ones. Instead, it’s the other way around.”

Brian Jones²

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¹ Dana Goldstein, *The Teacher Wars: A History of America’s Most Embattled Profession* 5 (2014).

² Brian Jones, *Protections of Teacher Tenure Do Not Hurt Students*, N.Y. Times (June 12, 2014), <http://www.nytimes.com/roomfordebate/2014/06/11/does-tenure-protect-bad-teachers-or-good-schools/protections-of-teacher-tenure-do-not-hurt-students>.

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I. INTRODUCTION

Teacher tenure, often the subject of controversy, has once again become a hot button issue in the last several years,³ rallying “a very unusual coalition from both sides of the political spectrum”⁴ to question its educational value and demand its demise. Tenure is “under assault from coast to coast, in state legislatures,⁵ in state courtrooms,⁶ and in the

³ North Carolina Ass’n of Educators, Inc. v. State: Repeal of Tenure Violates Tenured Teachers’ Constitutionally Protected Contractual Rights, 128 HARV. L. REV. 995 (Jan. 12, 2015), <http://harvardlawreview.org/2015/01/north-carolina-assn-of-educators-inc-v-state/>; see Trip Gabriel, Teachers Wonder, Why the Scorn?, N.Y. Times (March 2, 2011), http://www.nytimes.com/2011/03/03/education/03teacher.html?_r=0 (citing placards and online comments, “Oh you pathetic teachers...You are glorified babysitters who leave work at 3 p.m. You deserve minimum wage.”); Christine Emmons, No Teacher Is an Island, Educ. Week (April 5, 2011), <http://www.edweek.org/ew/articles/2011/04/06/27emmons.h30.html> (writing, “The current educational climate seems riddled with blame, especially blame of teachers. Teacher-bashing is very much in fashion.”); Nick Morrison, It’s the Constant Criticism That’s Putting People Off Teaching, Forbes (Dec. 23, 2014), <http://www.forbes.com/sites/nickmorrison/2014/12/23/its-the-constant-criticism-thats-putting-people-off-teaching/> (commenting on why teaching is not appealing, “teachers are constantly being criticized and blamed for poor results”). Eric Kalenze, in his critique on education reform floated the “lazy bum hypothesis” driving school reform. He asserts that this hypothesis underlying education reform is that teachers are lazy bums who achieve tenure, stop caring and go on autopilot and that the response is to “beat lazy teachers into working harder.” Eric Kalenze, Education is Upside-Down: Reframing Reform to Focus on the Right Problems 104 (2015).

⁴ Ana Choi, Getting Rid of Teacher Tenure Will Not Lead to Education Equality, Harvard L. & Pol’y Rev. HLPB Blog (Sept. 19, 2014), <http://harvardlpr.com/2014/09/19/getting-rid-of-teacher-tenure-will-not-lead-to-education-equality/>.

⁵ For a discussion of the legislative response to tenure, see Laura McNeal, Total Recall: The Rise and Fall of Teacher Tenure, 30 Hofstra Lab. & Emp. L.J. 489, 496-504 (2013); Ann E. Blankenship, Teacher Tenure: The Times They Are a Changin’, 1 Educ. L. & Pol’y Rev. 193 (2014).

⁶ Legal Clips, *Court Strikes Down NC Law Eliminating Teacher Tenure; Ruling Applies Only to Those with Tenure*, NAT’L SCH. BD. ASSOC. (May 22, 2014), <http://legalclips.nsba.org/2014/05/22/court-strikes-down-nc-law-eliminating-teacher-tenure-ruling-applies-only-to-those-with-tenure/> (discussing a lower court decision subsequently appealed as *N.C. Ass’n of Educators, Inc. v. State*, 776 S.E.2d 1 (N.C. Ct. App. 2015)); Legal Clips, *Groups of Teachers Terminated After Receiving a Series of Negative Evaluations File Suit Challenging Nevada Law Eliminating Teacher Tenure Protections*, NAT’L SCH. BD. ASSOC. (July 23, 2015), <http://legalclips.nsba.org/2015/07/23/group-of-teachers-terminated-after-receiving-a-series-of-negative->

media.”⁷ California Superior Court Judge Rolf M. Treu has galvanized this debate and captured the national spotlight with his ruling in *Vergara v. State of California*.⁸ Judge Treu held that four California Education Code statutes on tenure and dismissal, as well as a fifth statute on Last-In-First-Out (“LIFO”) layoffs,⁹ were unconstitutional. He found that these five statutes violated California students’ fundamental right to equality of educational opportunity, especially minority students and students from poor communities.

The Editorial Board of *The New York Times* heralded the *Vergara* case as *A New Battle for Equal Education*.¹⁰ Stephen Sawchuk, writing in *Education Week*, states, “[i]n the annals of education-equity cases, the decision in *Vergara v. State of California* was nothing less than a bombshell.”¹¹ An article in the *Washington Post*’s opinion section carried this headline, “*Vergara* Decision Signals the Start of a Third Wave of Education Reform.”¹² This third wave, author Joshua Lewis asserts, focuses on the “prioritization of student outcomes over adult interests.”¹³

The proponents of *Vergara* view tenure as a safe harbor to be ineffective, an indicator of how teacher unions harm public education by protecting teachers and not students.¹⁴ Nearly 71 percent of just over 7,000

evaluations-file-suit-challenging-nevada-law-eliminating-teacher-tenure-protections/?utm_source=NSBA+e-Newsletter+Subscribers&utm_campaign=959c2682cc-Legal+Clips+Newsletter&utm_medium=email&utm_term=0_498fb22860-959c2682cc-309623925; Davids v. New York, Index No. 1011 101105/14, at *9 (N.Y. Sup. Ct. Richmond Cty. July 25, 2014) (alleging New York dismissal statutes make it nearly impossible to dismiss ineffective teachers).

⁷ See, e.g., Richard D. Kahlenberg, *Tenure: How Due Process Protects Teachers and Students*, AM. EDUCATOR, Summer 2015, at 4, <http://www.aft.org/ae/summer2015/kahlenberg>; Campbell Brown, *Campbell Brown: Advocacy Journalism and Why Not Every Story Has Two Sides*, THE SEVENTY FOUR (July 11, 2015), <https://www.the74million.org/article/campbell-brown-journalism-advocacy-and-why-not-every-story-has-two-sides>. For a discussion of school district responses to anti-tenure laws, see Stephen Sawchuk, N.C. *Districts, Teachers Sour on State’s Anti-Tenure Law*, EDUC. WEEK 1 (April 23, 2014).

⁸ *Vergara v. State*, No. BC484642, 2014 WL 2598719, at *5 (Cal. Super. Ct. L.A. Cty. June 10, 2014).

⁹ CAL. EDUC. CODE § 44929.21 (West 2014) (on tenure); CAL. EDUC. CODE §§ 44934, 44938 (b)(1) and (2), and 44941 (West 2014) (on dismissal); CAL. EDUC. CODE § 44955 (West 2014) (on “LIFO”).

¹⁰ Editorial Board, *A New Battle for Equal Education*, N.Y. TIMES (June 11, 2014), http://www.nytimes.com/2014/06/12/opinion/in-california-a-judge-takes-on-teacher-tenure.html?_r=0 (concluding, “Teachers deserve reasonable due process rights and job protections. But the unions can either work to change the anachronistic policies cited by the court or they will have change thrust upon them.”). What is interesting about this quote, is the case does not directly deal with any collective bargaining agreement that the teacher unions would have control over. Unions, like school districts, will adapt to any legislative changes, but unions cannot change the laws associated with tenure, dismissal, or layoffs.

¹¹ Stephen Sawchuk, *Teacher Case Raises Stakes in Equity Fight*, EDUC. WEEK 1 (July 9, 2014).

¹² Joshua Lewis, ‘*Vergara*’ Decision Signals the Start of a Third Wave of Educational Reform, WASH. POST (Aug. 14, 2014), http://www.washingtonpost.com/opinions/vergara-decision-signals-the-start-of-a-third-wave-of-education-reform/2014/08/14/4abe128a-1f28-11e4-ae54-0cfe1f974f8a_story.html.

¹³ *Id.*

¹⁴ TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS 102 (2011) (asserting, “[T]enure is also enormously beneficial for teachers, essentially guaranteeing them a job for life. Who wouldn’t want that, if they were only thinking of themselves?”); *Protecting Bad Teachers*, TEACHERS UNION EXPOSED, <http://teachersunionexposed.com/protecting.php> (last

responding principals in the National Center for Education Statistics *Principal Questionnaire, 2007-2008*, identified tenure as the major barrier for dismissal of poor performing and incompetent teachers.¹⁵ Though teacher unions and collective bargaining are not part of the complaint in *Vergara*, Harvard Kennedy School Professor Paul E. Peterson wants to expand the reach of *Vergara* to include both: “*Vergara* provides an opportunity to break the union stranglehold over teacher-tenure policy.... The court has done its job.”¹⁶

However, the Editorial Board of *The Washington Post*, while supporting the *Vergara* decision, offers a more tempered assessment: “[w]e recognize that simply making it easier to fire ineffective teachers won’t correct the ills of public education or ensure better student achievement.”¹⁷ Similarly, Erwin Chemerinsky, Dean of the School of Law at the University of California at Irvine, cautions that “[g]etting rid of tenure and due process will not encourage more teachers to stay in the profession. It will drive them out and discourage other qualified people from entering the profession in the first place.”¹⁸ The former Research Director at the Brown Center on Education Policy, Matthew Chingos, questions the utility of eliminating teacher tenure for the improvement of student outcomes: “...policies surrounding teacher dismissal may be the less important side of the teacher quality coin. The failure of the public system to retain its best employees represents a wasted opportunity to improve student outcomes.”¹⁹

visited Jan. 31, 2016) (writing, “As long as union leaders possess the legal ability to drag out termination proceedings for months or even years—during which time districts must continue paying teachers, substitute teachers to replace them, and lawyers to arbitrate the proceedings—the situation for students will not improve.”).

15 Vincent J. Connelly, Todd A. DeMitchell, & Douglas Gagnon, *Teacher Evaluation: Principal Perceptions of the Barriers to Dismissal: Research, Policy, and Practice*, 1 EDUC. L. & POL’Y REV. 172, 183 (2014) (noting the next highest barrier was the effort required for the documentation for dismissal (67 percent responding yes)).

16 Paul E. Peterson, Editorial, *Teacher-Tenure Decision Is NOT an Abuse of Judicial Power*, EDUC. NEXT, Fall 2014, at 5, <http://educationnext.org/teacher-tenure-decision-abuse-judicial-power/>. Judge Treu granted motions by the California Teachers Association and the California Federation of Teachers to intervene. *Vergara v. State*, No. BC484642, 2014 WL 2598719, at *2 (Cal. Super. Ct. L.A. Cty. June 10, 2014).

17 Editorial Board, *California Tenure System Ruling Is a Smart Decision for Students*, WASH. POST (June 13, 2014), http://www.washingtonpost.com/opinions/california-tenure-system-ruling-is-a-smart-decision-for-students/2014/06/13/63e467fa-f273-11e3-9ebc-2ee6f81ed217_story.html (writing further that poverty and other external factors impact student achievement, “[b]ut it’s hard to see how keeping bad teachers in the classroom helps solve any of them”). However, see Catherine Rampell, *Eliminating Teacher Tenure Won’t Improve Education*, WASH. POST (June 12, 2014), http://www.washingtonpost.com/opinions/catherine-rampell-eliminating-teacher-tenure-wont-improve-education/2014/06/12/26d1314c-f25d-11e3-914c-1fbd0614e2d4_story.html (writing, “[m]aking it easier to fire bad teachers isn’t going to magically cause the educational gap to disappear. You need to be able to attract and retain more good teachers, too.”).

18 Erwin Chemerinsky, *Teacher Tenure: Wrong Target*, N.Y. DAILY NEWS (Oct. 23, 2014), <http://www.nydailynews.com/opinion/teacher-tenure-wrong-target-article-1.1983826>.

19 Matthew M. Chingos, *Ending Teacher Tenure Would Have Little Impact on its Own*, BROOKINGS (Sept. 18, 2014), <http://www.brookings.edu/research/papers/2014/09/18-teacher-tenure-chingos>.

Others defend tenure more forcefully by claiming that it provides important benefits for the community, not just teachers. Tenure insulates teachers from the political vagaries of shifting ideologies and offers protection from overzealous and/or vindictive administrators,²⁰ enabling teachers to deliver instruction that best meets students' individual needs and that exposes students and future citizens to diverse perspectives on a wide range of pressing economic, social, and political issues. Tenure also "protects teachers from well-connected parents who may push their own children's interests to the detriment of others."²¹ In addition, tenure allows teachers to share their professional views on proposed policy changes and reform initiatives within and beyond their school district, assessments that would otherwise not reach community taxpayers, parents, legislators, and other concerned citizens. Finally, given our nation's more than century-long contentious debate over the goals, purposes, content, and delivery methods of Kindergarten to twelfth grade public schooling, tenure supports greater teacher innovation and risk-taking in a work environment fraught with persistent tension over what constitutes a "good" education. This is especially salient in a time of increased teacher accountability: a time when the "nexus between teacher effectiveness and large-scale student testing is gaining acceptance by many policy makers and researchers."²²

This paper will analyze the *Vergara* decision, explore its ramifications, and assess the merits of a growing movement to remove tenure from the public schools. Part II will review the idea of tenure and the public policies that support it. Part III will summarize the *Vergara* decision. Part IV examines whether *Vergara* is a fundamentally flawed or legally sound ruling. It will not analyze the LIFO legislation because the focus of the paper is on teacher due process rights for dismissal and not reduction in force rights. Part V is our conclusion regarding *Vergara* and teacher due process rights.

II. TENURE

A. WHAT IS TENURE?

Teacher tenure is not a job guarantee. Rather, it is protection "against termination of employment in cases where there are no grounds for termination or where a teacher has no fair opportunity to present a defense."²³ Tenure is essentially due process applied to educators in public

²⁰ See Michael Hiltzik, *Why That Ruling Against Teacher Tenure Won't Help Your School Children*, L.A. TIMES (June 11, 2014), <http://touch.latimes.com/#section/-1/article/p2p-80476702/> ("Eviscerating the due process protection of teachers on the job won't guarantee quality; it will only give administrators more leeway to harass or promote teachers for any reasons they choose.").

²¹ Kahlenberg, *supra* note 7, at 7.

²² Todd A. DeMitchell, Terri A. DeMitchell, & Douglas Gagnon, *Teacher Effectiveness and Value-Added Modeling: Building a Pathway to Educational Malpractice?* 2012 BYU EDUC. & L. J. 257, 260 (2012).

²³ Jennifer Thomsen, *Teacher Performance Plays Growing Role in Employment Decisions*, EDUC. COMM. OF THE STATES 4 (May 2014), <http://www.nnstoy.org/download/Various/11242.pdf>.

school contexts.²⁴ The Fourteenth Amendment states that the government can only take away a person's life, liberty, or property with due process of law.²⁵ "The touchstone of due process is protection of the individual against arbitrary action of government."²⁶ Noted education philosopher and expert on evaluation, Michael Scriven, characterized due process as an exercise in applied ethics.²⁷

At its core, due process means fundamental fairness. It requires the government to implement fair laws in a fair manner if it infringes upon a person's life, liberty, or property interests. It is rooted in common law dating back to the *Magna Carta* in 1215. Two elements comprise due process—procedural due process and substantive due process—both of which are guaranteed in the United States Constitution (i.e., Amendment Five and Fourteen). In the context of public schooling, these procedural and substantive protections must be balanced against and limited by the State's interest in providing an essential and efficient service to the broader public.²⁸

Procedural due process guarantees that a person who is deprived of her/his life, liberty, or property is entitled to a fair process. The procedures must meet the requirements of a fair notice and a fair hearing. The notice must contain specific information about the day, time, and place of the hearing, as well as notice of the charges against the person so that he/she can prepare an adequate defense. The hearing must be held before a neutral tribunal with authority in the matter. There must be an orderly proceeding, and the "accused" must have the opportunity to cross-examine witnesses. The hearing, except in the matter of exigency of immediate harm, must be held prior to the implementation of discipline. Procedural due process is "tailored" according to the extent of the deprivation a person may have suffered at the hands of government.²⁹ In other words, the greater the deprivation, the greater the procedural protections.

²⁴ See Jacqueline A. Meese, *Expectations of the Exemplar: An Exploration of the Burdens on Public School Teachers in the Absence of Tenure*, 19 CUNY L. REV. 131, 138 (2015) (writing, "However, tenure is a statutorily-created interest in a teacher's employment that guarantees certain due process rights before termination.").

²⁵ In public education, claims for a property right in employment thus triggering due process are supported by *Bd. of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972).

²⁶ *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

²⁷ Michael Scriven, *Due Process in Adverse Personnel Action*, 11 J. PERSONNEL EVAL. EDUC. 127, 128 (1997).

²⁸ For an example of the balancing act of individual rights (free speech of public employees) and the efficient delivery of governmental services (public education), see *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (writing, "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

²⁹ See *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884) (writing, "Due process of law is [a process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (stating, "Once it is determined that due process applies, the question remains what process is due. It

Substantive due process is concerned with the substance of the law, rule, or regulation; that is, any deprivation to an individual's life, liberty, or property must be reasonable and consistent with the American sense of fairness.³⁰ Any deprivation must be clearly and rationally related to a lawful state function. The "reasonable person" test is applied, which asks, "would a reasonable person understand what to do or not do after reading the law, rule, or regulation?"³¹ Substantive due process challenges include questions of vagueness³² or over-breadth,³³ as well as questions about fundamental fairness (whether it constitutes conscious-shocking behavior).³⁴ Substantive

has been said so often by this Court and others as not to require citation of authority that due process is flexible, and calls for such procedural protections as the particular situation demands."); *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (discussing the flexibility needed for suspensions of students from public school, "We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that, in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.").

30 *County of Sacramento v. Lewis*, 523 U.S. 833, 845-6 (1998) (stating, "We have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government' whether the fault lies in denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.") (internal citations omitted); *Exploring Constitutional Conflicts: Procedural Due Process*, UNIV. MISSOURI-KANSAS CITY, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/proceduraldueprocess.html> (last visited Apr. 13, 2016) (writing, "The Due Process Clause is essentially a guarantee of basic fairness."); *Generally: The Principle of Fundamental Fairness*, JUSTIA, <http://law.justia.com/constitution/us/amendment-14/52-procedural-due-process-criminal.html> (last visited Apr. 13, 2016) (referring to due process, "Further, the Court has held that the due process clause protects against policies and practices which violate precepts of fundamental fairness.").

31 See KATHARINE CLARK & MATTHEW CONNOLLY, THE WRITING CENTER, A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES, GEORGETOWN UNIVERSITY LAW CENTER 3 (2006), <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf> (writing, "Courts generally assume that the words of a statute mean what an 'ordinary' or 'reasonable' person would understand them to mean.").

32 Vague rules fail to provide adequate notice of what is impermissible, inviting uneven, biased, and variable application. Examples of school regulations found to be vague include: regulations on gang related activities, such as display of colors, symbols, signals, and signs. The term "gang related activities" was not defined and left students unclear about what was allowed and gave school officials too much discretion to decide what constituted a gang symbol (*Stephenson v. Davenport Community Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997)); a rule against "misconduct" (*Soglin v. Kauffman*, 295 F.Supp. 978 (W.D. Wis. 1968)); and, a rule forbidding "inappropriate actions" or "unacceptable behavior" (*Galveston Indep. Sch. Dist. v. Boothe*, 590 S.W.2d 553 (Tex. Ct. App. 1979)).

33 An overbroad rule does more than necessary to achieve the desired ends and in so doing infringes on constitutionally protected rights. Most over-breadth issues arise within the connection with the regulation of speech. Overbroad regulations prohibit types of conduct but unconstitutionally sweep constitutionally protected activities into its ambit. For example, a student is punished for distributing obscene literature at school in violation of a school rule that bans the distribution of all literature by students; is the regulation overbroad thus overturning the student's punishment, even though obscene literature can be banned but the distribution of other forms of literature is constitutional?

34 See *Rochin v. California*, 342 U.S. 165, 169 (1952), where the Supreme Court held that substantive due process is violated when government "offend[s] those canons of decency and fairness." *Id.* In other words, government must act with a "sense of justice" and must not "shock[] the conscience." *Id.* at 172-73. Similarly, due process is violated when government conduct reaches "a demonstrable level of outrageousness." *Hampton v. United States*, 425 U.S. 484, 495, n.7 (1976). A New York court described conscience shocking behavior in a school district case as, "a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 234 (1974).

due process protection is reserved not merely for unwise or erroneous governmental decisions, but also for egregious abuses of governmental power that are “shocking to the judicial conscience.”³⁵

Our legal system has viewed tenure as a property right that is granted by the State when certain conditions have been met, such as completing a specific number of years of service.³⁶ When a teacher has been granted tenure, his or her employment becomes “property” in that there is an expectation of continued employment, which can only be taken away under the due process of law doctrine. This requires a pre-termination hearing regarding the termination, which gives the terminated employee the right to respond to the charges supporting his or her dismissal.³⁷ Despite the assertions of opponents,³⁸ tenure is not a means of guaranteeing lifetime employment, but rather it is a mechanism that assures employees that their employers must demonstrate just cause for their termination. In other words, “[t]enure, as originally designed, only protects teachers from frivolous dismissals, not for legitimate reasons such as incompetence, inadequate performance, immoral conduct, insubordination, willful neglect of duties, or any other sufficient cause.”³⁹ Just cause terminations must explain the basis for the adverse employment decision, as well as provide a hearing in which the government employer must produce a preponderance of evidence to support the denial of the employee’s property. The burden is on the government to prove the case for dismissal rather than on the employee to prove his or her competence.

A teacher who has not met the requirements of tenure has not attained employment as a matter of “property,” and, without that property right in place, no process is due. A non-tenured teacher has no reasonable expectation of employment for the following year, and their employment contract may or may not be renewed. This is analogous to employees in the private sector. Absent contractual protections, most workers in the private sector are “at-will” employees, with the exception of private sector employees working in the state of Montana.⁴⁰ “At-will” means that “an

35 See *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). See *Brito v. Walcott*, 982 N.Y.S.2d 105 (N.Y. App. Div. 2014), for the application of the conscious shocking standard to a teacher’s sexual misconduct with an adult colleague in a darkened classroom after school hours when neither were acting in their official capacity. The court found that the behavior was a lapse in judgment and a one-time mistake.

36 See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539 (1985) (asserting property interests “are created and their dimensions defined by existing rules or understandings that stem from an independent course such as state law. . .”).

37 *Id.* at 544.

38 Perry Zirkel, *The Myth of Teacher Tenure*, WASH. POST: ANSWER SHEET (July 13, 2010), <http://voices.washingtonpost.com/answer-sheet/teachers/the-myth-of-teacher-tenure.html> (“It is a myth that teacher tenure provides a guarantee of lifetime employment.”).

39 McNeal, *supra* note 5, at 509.

40 National Conference of State Legislatures, *The At-Will Presumption and Exceptions to the Rule*, NCSL, <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> (last visited Jan. 31, 2016).

employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability.”⁴¹

At its core, the constitutional right of due process establishes the legal basis for tenure and requires the government to treat individuals fairly. As a result, public schools function as guardians of constitutional rights to which their employees are privy. The nature of this function separates public schools from comparable private sector employers.

Given the amount of power the government has and the long, global history of government abuse of its citizens, it would be in the public’s best interest to continue to enact policies that restrain the government through due process protections. In 2015, democratic societies throughout the world celebrated the eight hundred year anniversary of the *Magna Carta* (1215), in large part, because of its provision of due process.⁴²

B. PUBLIC POLICY RATIONALES FOR TENURE

In addition to being the first state to initiate free, public education for all children in 1827, Massachusetts was the first to adopt a pre-college teacher tenure law in 1886, which allowed schools to enter into employment contracts for longer than one year.⁴³ A few decades later, during the Progressive Era, New Jersey passed comprehensive tenure legislation in 1909,⁴⁴ and shortly thereafter in 1917, reformers in Chicago successfully lobbied for a statewide tenure law in Illinois in response to an attack on the Chicago Teachers Federation.⁴⁵ Similarly, educational leaders in New York challenged the state’s spoils system at this time, as “the new three-year probationary period followed by tenure was seen as a clean government reform after decades of politically influenced teacher appointments, in which schools were part of the patronage machine.”⁴⁶

41 *Id.*

42 *See, e.g.,* Caroline Davies, *Magna Carta: leaders celebrate 800th anniversary of the Great Charter*, GUARDIAN (June 15, 2015), <http://www.theguardian.com/uk-news/2015/jun/15/magna-carta-leaders-celebrate-800th-anniversary-runnymede>.

43 CARL E. VAN HORN & HERBERT A. SCHAFFNER, WORK IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, POLICY AND SOCIETY 549 (2003); Michael Shulman, *The Truth About Teacher Tenure*, PEOPLE’S WORLD (Sept. 11, 2012), <http://www.peoplesworld.org/the-truth-about-teacher-tenure>; Pauline Liu, *Getting Tenure Tougher for New Teachers*, TIMES HERALD-RECORD (April 27, 2015), <http://www.recordonline.com/article/20150426/NEWS/150429466>.

44 John Martin, *N.J. Gov. Christie Signs Bipartisan Reform of Nation’s Oldest Teacher Tenure Law*, CNN (Aug. 7, 2012), <http://schoolsofthought.blogs.cnn.com/2012/08/07/n-j-gov-christie-signs-bipartisan-reform-of-nations-oldest-teacher-tenure-law/>; TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS 170 (2011).

45 Thomas A. Kersten, *Teacher Tenure: Illinois School Board Presidents’ Perspectives and Suggestions for Improvement*, 37 PLANNING & CHANGE 234, 237 (2006), <http://files.eric.ed.gov/fulltext/EJ756253.pdf> (writing, “As friction grew between the Chicago Board of Education and the Chicago Federation of Teachers, a political and legal battle ensued. After a series of perceived arbitrary teacher dismissals tied to an authoritarian district administration, an unbending school board, and anti-union sentiment, Illinois passed the 1917 Otis Bill which provided Chicago teachers with tenure protections after three years of employment. This bill, though, was designed exclusively for Chicago since it only applied to school districts with at least 100,000 inhabitants.”)

46 GOLDSTEIN, *supra* note 1, at 85.

Historically, tenure was not intended as a personal protection that insulated teachers from accountability. Rather, tenure was designed to enhance and support the learning environment for students.⁴⁷ In a 2014 *Teachers College Record Commentary*, Diana D'Amico writes, "A look at the past reveals that teacher tenure never really protected teachers, nor was it supposed to."⁴⁸ She identified several reasons for the development of tenure laws in the early twentieth century, including the following: (1) the paperwork associated with rehiring a growing teaching force each year was time-consuming and inefficient, and (2) there was a desire to entice the 'right' teachers to stay in the system, as too often teachers were hired and fired "based on personal connections, whims, and politics."⁴⁹

Once established through state statutes, these employee protections were challenged in the courts. For example, in 1939, a California Court of Appeals case involving the dismissal of a teacher wrote that the purpose of the State Teachers' Tenure Act, "is to ensure an efficient permanent staff of teachers for our school whose members are not dependent upon caprice for their positions as long as they conduct themselves properly and perform their duties efficiently and well."⁵⁰ The New York Court of Appeals asserted that tenure serves the interests of the public in the education of our youth through a system "designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of supervisors."⁵¹ In another New York case, the Court noted that tenure laws are "a critical part of the system of contemporary protections that safeguard tenured teachers from official or bureaucratic caprice."⁵² Similarly, an Illinois court asserted that the purpose of tenure is to improve the school system by "assuring teachers of experience and ability of continuous service" through protection from dismissal for "reasons that are political, partisan, or capricious."⁵³ In other words, courts have viewed due process rights of teachers (i.e., tenure)

47 For example, the Court of Appeals of North Carolina in a 2015 case involving the constitutionality of a law essentially stripping tenure from teachers found the affidavits from the State asserting that tenure "creates insurmountable obstacles to dismissing ineffective teachers" as vague and conclusory. *North Carolina Ass'n of Educators, Inc. v. State*, 776 S.E.2d 1, 15 (N.C. Ct. App. 2015). Instead, the court supported the affidavits from eight North Carolina administrators, who concluded that the tenure law was "an asset for attracting and retaining quality teachers to serve in [the] State's public schools." *Id.* at 14. See also *North Carolina Ass'n of Educators, Inc. v. State*, No. 13, 2014 WL 495210, at *4 (N.C. Super. Ct. June 5, 2014), the lower court ruling, in which Judge Hobgood stated that eliminating tenure would make it "harder for school districts to attract and retain quality teachers."

48 Diana D'Amico, *The Myth of Teacher Tenure*, COMMENTARY TEACHERS COLLEGE RECORD 1, 3 (July 23, 2014) (writing also that "The California ruling further legitimized the historic finger wagging at teachers. Not only is this unfair to teachers, it is detrimental to the nation's children.").

49 *Id.* at 2.

50 *Fresno High Sch. Dist. v. De Caristo*, 33 Cal. App.2d 666, 673 (1939). California passed the Teachers' Tenure Act, establishing probationary and permanent classes of teachers in 1921 (Stats. 1921, ch.878).

51 *Ricca v. Bd. of Educ.*, 47 N.Y.2d 385, 391 (1979) (continuing, "In order to effectuate these convergent purposes, it is necessary to construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system by manipulation of the requirements for tenure.").

52 *Holt v. Bd. of Educ., Webutuck Cent. Sch. Dist.*, 52 N.Y.2d 625, 632 (1981).

53 *Donahoo v. Bd. of Educ.*, 109 N.E.2d 787,789 (Ill. 1952).

as serving the public good by preventing administrators from acting on the basis of caprice, malice, ideological bias across the full spectrum of public issues, and other forms of discriminatory bias.

The United States Supreme Court also reviewed cases concerning the property rights of public employees. In *Cleveland Board of Education v. Loudermill*, the Supreme Court held that the interests of the public employer in the immediate termination of employees does not outweigh the interest served in recognizing the property interests of public employees.⁵⁴ Loudermill was a security guard for the Cleveland Board of Education. On his employment application he stated that he had never been convicted of a felony, when in fact he had been convicted of grand larceny. The school board dismissed him for dishonesty and did not grant him an opportunity to respond to the charge or to challenge his dismissal. Because Loudermill was classified as a permanent civil servant, he could only be terminated “for cause.”⁵⁵

The Supreme Court held that Loudermill was granted property rights in his employment under Ohio statute. Once the property right was conferred, due process procedural safeguards were guaranteed by the U.S. Constitution. The Court reasoned that both the public employer’s and the public employee’s interests are served by pre-termination hearings to avoid disruption of the workplace and erroneous decisionmaking.⁵⁶ Thus, the Court concluded that protections of due process provide for greater transparency with regard to teacher dismissal and reduce the chance of communities losing valuable educators for questionable or unwarranted reasons.

Furthermore, in *The Teacher Wars: A History of America’s Most Embattled Profession*, Dana Goldstein notes, “the history of American public education shows that teachers are uniquely vulnerable to political pressures and moral panics that have nothing to do with the quality of their work.”⁵⁷ Tenure provides protection for teachers who educate the community’s youth in the ideas regarding human understanding of the animate and inanimate world; important fictional forms, representations, and meanings expressed by poets, novelists, playwrights, painters, and others artists; and a wide range of thorny public issues in preparation for civic life. Given the nation’s multiculturalism and commitment to individual liberty, disagreements over what should be taught in Kindergarten through twelfth grade public schools should be viewed as inevitable in all but the most homogenous communities. In short, it is not in the community interest to redefine teachers as “at-will” employees and forgo due process rights, as far too many will then abandon their

54 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544 (1985).

55 *Id.* at 535.

56 *Id.* at 544.

57 GOLDSTEIN, *supra* note 1, at 230. See GOLDSTEIN, *supra* note 1, at 91-109, for a discussion of an “orgy of investigations” of teachers.

professional judgment, forego experimentation, and stick to the straight and narrow out of fear of termination.

The Sixth Circuit Court of Appeals agreed when it enlisted teacher protections for life science teacher, Edward Strachura, after he was disciplined for teaching a lesson on human reproduction to gender segregated classes.⁵⁸ The case was triggered by a parental complaint alleging improper teaching methods, even though Strachura was using a textbook approved by the School Board and films that were approved by the principal and used previously without incident.⁵⁹ Much of the complaint was based on unfounded rumors that sparked vehement protests.⁶⁰ The school superintendent warned Strachura to stay away from the open school board meeting where the complaints were to be discussed, in order to avoid “angry hotheads.”⁶¹ At the meeting, there were even “calls to tar and feather Strachura.”⁶²

The Court noted, “when public protest arose neither the administrative officials of the school board nor the School Board itself saw fit to defend this embattled teacher, or publicly to assume responsibility for their own decisions.”⁶³ The Court of Appeals agreed with the lower court that the actions of the School Board “‘imposed a stigma on Strachura and foreclosed a definite range of employment opportunities’ which [Strachura] would otherwise have available.”⁶⁴ The Appellate Court also held that Strachura’s First Amendment rights were infringed and that his “academic freedom” reflected rather than violated his superior’s instructions;⁶⁵ that is, Strachura did what they told him to do and had allowed him to do previously. The Court concluded that Strachura was never given a fair opportunity to present his defense and that the Board failed to act in good faith.⁶⁶ Consequently, the Court upheld the jury award of \$321,000 against the School Board⁶⁷ for compensatory and punitive damages for the “public attacks,” letter of reprimand, and his effective discharge resulting in damage to his reputation and professional career.⁶⁸

Strachura’s case illustrates how a successful health educator would have been metaphorically run over by the school bus the administration and

58 *Stachura v. Truszkowski*, 763 F.2d 211, 213-14 (6th Cir. 1985).

59 *Id.* at 213.

60 *Id.*

61 *Id.* at 214.

62 *Id.*

63 *Id.* at 213-14.

64 *Id.* at 215.

65 *Id.*

66 *Id.*

67 *Id.* at 212. The award of \$28,250 against Truszkowski, the parent, was set aside by the judge on the basis of immunity to petition under the First Amendment. The Court of Appeals, upholding this finding, wrote, Ms. Truszkowski’s role in these events is not a pretty one, nevertheless, her actions were protected. *Id.* at 213.

68 *Id.* at 214. The United States Supreme Court granted certiorari on the issue of whether a compensatory-damages award is authorized under 42 U.S.C. § 1983, which the Court reversed and remanded. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 304 (1986).

School Board threw him under, had there not been due process protections in place.

Another curricular area that is frequently a flashpoint between educators, their community, and the school board is evolution. Science teachers are sometimes pressed to teach creation science, intelligent design, or evidence against evolution, contrary to their academic preparation and tenets of scientific inquiry.⁶⁹ Policymakers and legislators have attempted “to distort the teaching of evolution as ‘only a theory’ or that would require a textbook or lesson on evolution to be preceded by a disclaimer.”⁷⁰ Science teachers are often caught in the middle,⁷¹ wondering if the school board and the administration will repudiate them for presenting empirically derived and widely accepted science concepts and processes when faced with community pressure from religious zealots. Without due process (i.e., tenure), will the fruits of all physical, biological, and social science inquiry be discarded when the political will of school administrators is lacking?

C. PUBLIC POLICY RATIONALES AGAINST TENURE

Republican Governor of New Jersey, Chris Christie, declared in his State of the State Address on January 11, 2011, “[t]he time to eliminate teacher tenure is now.”⁷² The push to end tenure comes at a time when teachers, not just their unions, are under attack.⁷³ “Around the country, many teachers see demands to cut their income, benefits and . . . how schools are run through collective bargaining as attacks not just on their livelihoods, but on their value to society.”⁷⁴ During the fight over Wisconsin Governor Scott Walker’s Budget Repair Act, Mark McKinnon characterized teachers as the privileged class.⁷⁵ The Budget Repair Act was

⁶⁹ See Eugenie C. Scott, *Cans and Can't of Teaching Evolution*, NAT'L CTR. SCI. EDUC. (Oct. 17, 2008), <http://ncse.com/evolution/education/cans-cants-teaching-evolution>.

⁷⁰ National Science Teachers Association, *NSTA Position Statement: The Teaching of Evolution*, NSTA (July 2013), <http://www.nsta.org/about/positions/evolution.aspx>.

⁷¹ An informal survey in 2005 conducted by the National Science Teachers Association found 31 percent of science teachers felt pressure to include creationism, intelligent design, or other nonscientific alternatives into their classroom teaching. Additionally, 30 percent felt pressure from parents and students to de-emphasize or omit evolution and related topics from their curriculum. National Science Teachers Association, *News Bulletin: Survey Indicates Science Teachers Feel Pressure to Teach Nonscientific Alternatives to Evolution*, NSTA (Mar. 24, 2005), <http://www.nsta.org/about/pressroom.aspx?id=50377>.

⁷² Diane D'Amico, *NJEA Plans to Fight Gov. Christie Over Plans to Eliminate Teacher Tenure*, PRESS OF ATLANTIC CITY (Jan. 13, 2011), http://www.pressofatlanticcity.com/education/njea-plans-to-fight-gov-christie-over-plan-to-eliminate/article_52062a6e-1eaf-11e0-9f79-001cc4c002e0.html.

⁷³ See, e.g., Todd A. DeMitchell & Martha Parker-Magagna, *A “Law Too Far?” The Wisconsin Budget Repair Act: Point*, 275 ED. LAW REP. 1 (2012); Ralph D. Mawdsley, Charles J. Russo & James L. Mawdsley, *A “Law Too Far?” The Wisconsin Budget Repair Act: Counterpoint*, 275 ED. LAW REP. 16 (2012).

⁷⁴ Gabriel, *supra* note 3.

⁷⁵ Mark McKinnon, *Do We Still Need Unions? Let's End a Privileged Class*, NEWSWEEK, Mar. 7, 2011, at 19 (writing, “[t]wo simple but fundamental purpose of public unions today, as ugly as it sounds, is to work against the financial interests of taxpayers: the more public employees are paid in wages and uncapped benefits, the less taxpayers keep of the money they earn. It's time to call an end to the privileged class.”). Accepting McKinnon's premise that when more wages and benefits are paid to

described as anti-labor and involving a struggle—over money, power, and the relevance of the public sector union—which labor lost.⁷⁶ Florida Governor Rick Scott told the Greater Miami Chamber of Commerce that “[g]ood teachers know they don’t need tenure. There is no reason to have it except to protect those that don’t perform as they should.”⁷⁷

Critics of tenure offer a number of reasons for abolishing the practice; we list here three recurring complaints. The most common objection is the difficulty of removing tenured teachers, both in terms of time and money.⁷⁸ Second, heightened job protection “makes it possible and indeed likely teachers will become lax and complacent after... two to three years[.]”⁷⁹ In other words, tenure removes incentives for teachers to put in more than the minimum effort. Finally, opponents argue that tenure is no longer necessary because current laws protect against job discrimination.⁸⁰

III. VERGARA V. STATE OF CALIFORNIA

A. THE COMPLAINT⁸¹

Vergara v. State of California was brought on behalf of nine plaintiffs. The plaintiffs were minors, ages seven to fifteen, and citizens of California.⁸² The suit was brought and financed by David Welch and his organization, Students Matter.⁸³ The complaint sought declaratory relief and injunctive relief from five statutes pertaining to the following: (i)

public sector union employees, the less money the taxpayer keeps, isn’t it true that the same thing happens when a non-unionized public sector employee gets a raise or an increase in fringe benefits, the taxpayer also pays for the non-union public employee as well?

⁷⁶ DeMitchell & Parker-Magagna, *supra* note 73, at 2.

⁷⁷ Trip Gabriel & Sam Dillon, *G.O.P. Governors Take Aim at Teacher Tenure*, N.Y. TIMES (Jan. 31, 2011), http://www.nytimes.com/2011/02/01/us/01tenure.html?_r=1.

⁷⁸ See Michael J. Petrilli, *Teacher Accountability: The Next Front in the School Reform Wars*, EDUC. NEXT (Apr. 15, 2010), <http://educationnext.org/teacher-accountability-the-next-front-in-the-school-reform-wars/> (“Most obviously, union contracts and civil service rules make it next to impossible to fire low-performers, whether they are central office bureaucrats, principals, teachers, or aides. And this creates an insidious cycle of cynicism that permeates the schools.”).

⁷⁹ Joy Pullman, *Research & Commentary: Loosening Teacher Tenure*, HEARTLAND INST. (Mar. 5, 2012), <https://www.heartland.org/policy-documents/research-commentary-loosening-teacher-tenure>. What seems to be missing from this assertion is empirical evidence that tenure causes employees to become complacent or lax. It may be a conclusion in search of a rationale. Consequently, does this argument assert that private or public sector employees, who do not have tenure, are not complacent or lax?

⁸⁰ See DARLENE LEIDING, *REBUILDING SCHOOLS FOR STUDENTS: LET THE CHANGE BEGIN* 85 (2013). However, anti-discrimination laws are more narrowly drawn than just cause protections. Furthermore, protections against discrimination can be rolled back by legislative action. North Carolina passed HB2, which reversed ordinances around the state that extended some protection to gay and transgender individuals. This sets up a potential conflict with Title IX regarding discrimination in school programs. See Michael Gordon, Mark S. Price & Katie Peralta, *Understanding HB2: North Carolina’s law solidifies state’s role in defining discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016, 11:00 AM), <http://www.charlotteobserver.com/news/politics-government/article68401147.html>.

⁸¹ First Amended Complaint for Declaratory and Injunctive Relief, *Vergara v. State*, No. BC484642 (Cal. Super. Ct. L.A. Cty. May 14, 2012).

⁸² For a description of the plaintiffs, see *id.* at 5-8.

⁸³ Haley Sweetland Edwards, *The War on Teacher Tenure*, TIME (Oct. 23, 2014), <http://www.csa-nyc.org/csa/sites/default/files/Teacher%20Tenure%20Time.pdf>.

teachers gaining permanent status (Permanent Employment Statute); (ii) schools giving notice of teacher deficiencies (Written Charges Statute); (iii) schools providing deficient teachers an opportunity to improve (Correct and Cure Statute); (iv) dismissing teachers (Dismissal Hearing Statute); and (v) using seniority in layoff procedures (LIFO Statute).⁸⁴ Furthermore, the plaintiffs sought an “award of costs, disbursements, and reasonable attorney’s fees.”⁸⁵ The plaintiffs alleged that California’s Challenged Statutes (i.e., the five statutes in question) are unconstitutional on their face and, as applied, deny students equal access to the fundamental right of an education because the state retains grossly ineffective teachers as a direct result of them.⁸⁶ In addition, these grossly ineffective teachers are “disproportionately assigned to schools serving predominantly minority and economically disadvantaged students.”⁸⁷

Using *Serrano v. Priest* and other school finance cases,⁸⁸ the plaintiffs asserted in their complaint that students have a fundamental interest in a publically supported education. Consequently, where substantial disparities exist in “quality and extent of educational opportunities... the State has a duty to intervene and ensure equality of treatment to all pupils of the state.”⁸⁹ Essentially, *Vergara* is cast as a civil rights case protecting the equal rights of students in schools that serve a large percentage of minority and economically disadvantaged students. It is argued that these students, when compared to their non-minority and economically advantaged peers, receive an education of lesser quality because of the targeted statutes.

The plaintiffs also argued that the statutes “prevent school administrators from prioritizing—or even meaningfully—considering the interests of their students in having effective teachers when making employment and dismissal decisions.”⁹⁰ Consequently, by “perpetuating” the employment of “grossly ineffective teachers” who do not meet their students’ needs, these students are denied equal access to quality teaching. Their complaint cited research on the essential role of teachers in student learning, reflecting Harvard education professor Susan Moore Johnson’s admonishment, “[w]ho teaches matters.”⁹¹

The plaintiffs assert that California schools routinely hire and retain grossly ineffective teachers at alarming rates.⁹² The five targeted statutes “make it nearly impossible” for school administrators to dismiss them.⁹³ They stated that grossly ineffective teachers “are disproportionately

84 First Amended Complaint, *supra*, note 81, at 25.

85 *Id.* at 26.

86 *Id.* at 4-5.

87 *Id.* at 5.

88 *Serrano v. Priest*, 5 Cal. 3d 584 (1971); *Serrano v. Priest*, 18 Cal. 3d 728 (1976).

89 First Amended Complaint, *supra* note 81.

90 *Id.* at 3.

91 SUSAN MOORE JOHNSON, *TEACHERS AT WORK: ACHIEVING SUCCESS IN OUR SCHOOLS* xiii (1990); see also Elizabeth A. City, *Leadership in Challenging Times*, 70 *EDUC. LEADERSHIP* 11 (2013) (“People are the most precious resource in a school.”).

92 First Amended Complaint, *supra* note 81.

93 *Id.*

situated in schools that serve predominantly low-income and minority students.”⁹⁴ The plaintiffs conclude that in the absence of these statutes, school administrators could make employment and dismissal decisions that serve the interests of students.⁹⁵ The contested statutes pertain to the attainment of tenure after approximately 18 months of service,⁹⁶ the dismissal statute, which includes written charges,⁹⁷ correct and cure,⁹⁸ and dismissal procedures.⁹⁹ While the plaintiffs assert that “recent research studies” have found that the dismissal statutes (notice, chance to improve, and procedures for dismissal) “effectively” prevent California school administrators from dismissing teachers for poor performance, the only authority stated is the cost of dismissal and the results of the procedures.¹⁰⁰

94 *Id.* at 11. The Complaint uses value-added modeling (VAM) to support its conclusions about grossly ineffective teachers. However, for a critique of value-added modeling as a valid and reliable measure of teacher effectiveness, see Dale Ballou & Matthew G. Springer, *Using Student Test Scores to Measure Teacher Performance: Some Problems in the Design and Implementation of Evaluation Systems*, 44 *EDUC. RESEARCHER* 77, 78 (2015) (“Teacher value-added estimates are notoriously imprecise.”); Bruce D. Baker, Joseph O. Oluwole, & Preston C. Green, *The Legal Consequences of Mandating High Stakes Decision Based on Low Quality Information: Teacher Evaluation in the Race-to-the Top Era*, 21 *EDUC. POL’Y ANALYSIS ARCHIVES* 1, 9 (Jan. 28, 2013) (“Specifically, value-added measures tend to be highly unstable from year to year, and have very wide error ranges when applied to individual teachers, making confident distinctions between ‘good’ and ‘bad’ teachers difficult if not impossible.”); National Association of Secondary School Principals, *Value-Added Measures in Teacher Evaluation*, NASSP (Nov. 7, 2014), [https://www.nassp.org/Content.aspx?topic=Value Added Measures in Teacher Evaluation](https://www.nassp.org/Content.aspx?topic=Value%20Added%20Measures%20in%20Teacher%20Evaluation) (critiquing the use of value-added modeling, writing, “[a]nd so, at first glance, it would appear reasonable to use VAMs to gauge teacher effectiveness. Unfortunately, policymakers have acted on that impression over the consistent objections of researchers who have cautioned against this inappropriate use of VAM.”).

95 First Amended Complaint, *supra* note 81.

96 *Id.* at 12 (citing CAL. EDUC. CODE § 44929.21 (West 2014)). The Statute, “alone and in conjunction with other statutes at issue, also ensures that children of substantially equal age, aptitude, motivation, and ability will not have equal access to education.” *Id.* at 13. It is noted that this tenure statute only pertains to school districts that have an average daily attendance of at least 250 students. Since most of these school districts are rural with possibly economically disadvantaged students, is there any showing that the absence of this tenure statute has had a material effect on the learning of those students, especially students of color and/or students from disadvantaged family backgrounds? These data may help to either buttress the plaintiff’s argument of disparity or refute the claim.

97 *Id.* at 14 (citing CAL. EDUC. CODE § 44934 (West 2014)). While not clearly discussed as a separate argument, are the plaintiffs arguing that teachers should not receive a notice of written charges? If yes, does that mean that they can be dismissed without knowing the basis for their dismissal much like Josef K. in *FRANZ KAFKA, THE TRIAL* (1925), who is arrested by unidentified agents from an unidentified agency for an unspecified crime?

98 *Id.* (citing CAL. EDUC. CODE § 44938(b)(1)(2) (West 2014)). Similar to the written charges notice, do the plaintiffs assert that an opportunity for teachers to correct their deficiencies should not be afforded to them? Is summary dismissal with no notice and no opportunity to correct and cure the deficit the goal?

99 *Id.* at 15 (citing CAL. EDUC. CODE § 44944 (West 2014)). The complaint cited a ten-step process for the dismissal of a tenured teacher.

100 *Id.* at 14-15. The study cited was a non-attributed statement about the cost, \$3.5 million, to dismiss seven teachers. It provided no empirical evidence to support the claim. However, for an analysis of dismissal cases that discusses the judicial trend supporting school district decisions, see Perry A. Zirkel, *Case Law for Performance Evaluation of Public School Professional Personnel: An Update*, 314 *EDUC. L. REP.* 1, 8 (2015) (writing, “[c]ourts have followed the long tradition of ‘academic abstention’ to generally defer to school district’s substantive judgments in teacher evaluation cases, whether nonrenewals or terminations”). Diana Pullin, supporting Zirkel’s research, writes, “in past court cases over issues concerning teacher evaluations, terminations, and licensure, the overwhelming majority of cases were won by school officials.” Diana Pullin, *Legal Issues in the Use of Student Test Scores and Value-added Models (VAM) to Determine Education Quality*, *EDUC. POL’Y ANALYSIS ARCHIVES*, Jan. 29, 2013, at 4.

Furthermore, the plaintiffs contested California's LIFO statute.¹⁰¹ This code section requires that seniority be the basis for retention in layoff situations. In their complaint, the plaintiffs argued that top-performing teachers with low seniority are being laid off, preventing school administrators from laying off lower-performing senior teachers.¹⁰²

The plaintiffs assert that the disputed statutes retain grossly ineffective teachers and then disproportionately assign those teachers to schools that serve minority and economically disadvantaged students. Consequently, because these grossly incompetent teachers are not fired or laid off, school administrators do not "have the flexibility to attract teachers of superior performance . . . and to provide incentives to encourage teachers to become or remain high performers."¹⁰³

B. THE DECISION:
"UBER DUE PROCESS"¹⁰⁴

Judge Rolf M. Treu framed the issue as whether the tenure, dismissal, and seniority lay-off statutes negatively affect the education of students generally and minority and low-income students in particular.¹⁰⁵ Specifically, he asked whether the Challenged Statutes "cause the potential and/or unreasonable exposure of grossly ineffective teachers" to California students "by adversely affecting the quality of the education they are afforded by the state."¹⁰⁶

First and foremost, Judge Treu asserted in his findings of fact that an incompetent teacher does great harm to the education of his/her students and harms the school as a whole. Teachers stand at the crossroads of education. Consequently, "[i]t is generally assumed that quality teaching plays a major, if not the most important, role in shaping students' academic performances."¹⁰⁷ Judge Treu accepted the findings of economic professors Raj Chetty, John N. Friedman, and Jonah Rockoff¹⁰⁸ in their study, "The Long-Term Impacts of Teachers: Teacher Value-Added and Student

101 CAL. EDUC. CODE § 44955.

102 First Amended Complaint, *supra* note 81, at 16-17.

103 *Id.* at 19. The causal relationship between assignment of teachers, a local school district decision, not dictated by these challenged tenure, dismissal, and layoff statutes, is not discussed; it is just asserted as fact. Similarly, no support is offered for the assertion that these statutes reduce the flexibility of administrators to attract superior teachers. The plaintiffs' position assumes that there is a cadre of superior teachers wanting to teach but who are waiting on the sidelines until all of the grossly ineffective teachers have been cleared out. One of the co-authors who was a former principal, director of personnel, and superintendent has never experienced or heard of this group of superior teachers waiting for the deadwood to be cleared from schools so that they could teach.

104 Vergara v. State, No. BC484642, 2014 WL 2598719, at *5 (Cal. Super. Ct. L.A. Cty. June 10, 2014) ("State Defendants/Intervenors raise the entirely legitimate issue of due process. However, given the evidence above stated, the Dismissal Statutes present the issue of *uber* due process.").

105 *Id.* at *2.

106 *Id.*

107 Jian Wang et al., Editorial, *Quality Teaching and Teacher Education: A Kaleidoscope of Notions*, 62 J. TCHR. EDUC. 331, 331 (2011).

108 Vergara, 2014 WL 2598719, at *4.

Outcomes in Adulthood”¹⁰⁹ without comment.¹¹⁰ Therefore, whom to place in front of students in a classroom, how to assist that teacher to reach higher levels of performance, when and how to identify deficiencies, and when to dismiss are critical decisions. The U.S. Supreme Court in 1952 declared “that school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of schools as a part of ordered society cannot be doubted.”¹¹¹ DeMitchell, in his article, asserts:

[p]rincipals and superintendents who make quality and accountability come alive by insisting on the rendering of professional services by all who are

109 Judge Treu does not cite to the study. We use the original paper from the National Bureau of Economic Research as the Chetty et al. study. Raj Chetty, John N. Friedman & Jonah E. Rockoff, *The Long-Term Impacts of Teachers: Teacher Value-Added And Student Outcomes in Adulthood* (Nat'l Bureau of Econ. Research, Working Paper No. 17699, 2011), <http://www.nber.org/papers/w17699.pdf>. Chetty et al. assert that a grossly ineffective teacher in one year costs the students in his/her class \$1.4 million in lifetime earnings per class. *Id.* at 5. His study tracks students from elementary school to age 28 and then assumes that the impact of a teacher with a high VAM score “remains constant.” *Id.* at 4. In other words, he does not have data beyond projecting a straight line of difference from age 28 and beyond. Furthermore, his research concludes that having a “quality” teacher as defined by VAM scores, would impact earnings by 1 percent on average, the average gain would be \$25,000 (undiscounted) on average in a cumulative lifetime of income. *Id.* Chetty et al. further finds that by replacing the bottom 5 percent of VAM identified teachers with teachers with an average VAM score would result in an increase of lifetime income of \$267,000 per classroom taught. With an average of 25 students per classroom, this translates into roughly \$10,000 over a working lifetime per student. Which means that after 40 years of work (age 22 to age 62 for example) the net gain would be \$250 a year. *Id.* at 5. The scary \$1.4 million figure comes from footnote 8, page 5. A \$250 a year difference in earnings over a lifetime of work can surely be attributed to individual work and family decisions rather than a teacher who may have had a low VAM score when the worker was a student, but may have had a higher one the following year if she/he had not been fired.

A really interesting conclusion from this study, in which Chetty et al. place the responsibility on parents to retain “good” teachers, is the following: “With an annual discount rate of 5%, the parents of a classroom of average size should be willing to pool resources and pay this teacher [a teacher one standard deviation above the median considering leaving the district] approximately \$130,000 (\$4,600 per parent) to stay and teach their children during the next school year.” *Id.* at 51.

The question is raised whether, as the plaintiffs and Judge Treu assert, there are long-term serious, negative consequences for students to be taught by a single “grossly ineffective teacher” as defined by VAM analysis. This harm requires the removal of due process protections for all teachers. It appears to be a thin reed of support based on the research of Chetty and his colleagues. This becomes especially pertinent in light of research published by the National Education Policy Center that shows that between 8 and 12 percent of teachers shifted from one year to the next between ineffective and effective quintiles. DEREK BRIGGS & BEN DOMINGUE, *DUE DILIGENCE AND THE EVALUATION OF TEACHERS: A REVIEW OF THE VALUE-ADDED ANALYSIS UNDERLYING THE EFFECTIVENESS RANKINGS OF LOS ANGELES UNIFIED SCHOOL DISTRICT TEACHERS BY THE LOS ANGELES TIMES 5* (2011). *See also* SEAN P. CORCORAN, *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 26* (2010) (finding that just less than one-quarter of teachers moved from the lowest quintile to the highest quintile in one year).

110 For critiques of Dr. Chetty’s research, see Moshe Adler, *Findings vs. Interpretation in “The Long Term Impacts of Teachers” by Chetty et al.*, EDUC. POL’Y ANALYSIS ARCHIVES, Feb. 1, 2013, at 2 (“There is just one problem: as we explain below, the study does not show what the authors claim it shows.”); Bruce D. Baker, *Revisiting the Chetty, Rockoff & Friedman Molehill*, NAT’L EDUC. POL’Y CNTR (June 10, 2013), <http://nepc.colorado.edu/blog/revisiting-chetty-rockoff-friedman-molehill> (“Indeed it’s an interesting study, but to suggest that this study has important immediate implications for school and district level human resource management is not only naive, but reckless and irresponsible and must stop.”).

111 *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952).

employed, probably help to improve their schools by a larger measure than any spate of reform reports generated outside the schoolhouse gate.¹¹²

Judge Treu filed a tentative decision on June 10, 2014,¹¹³ and his judgment on August 27, 2014.¹¹⁴ With the exception of the opening two paragraphs, which announced that he was filing a tentative decision and a statement assuring the parties that he “carefully considered each and every point of contention proffered,”¹¹⁵ the reasoning and conclusions of the judgment are identical to the tentative decision.

Judge Treu cast the argument of the constitutionality of the five Challenged Statutes as essentially a civil rights case. First, he noted the fundamental interest of education for California’s students and citizens and the concomitant right to equal educational opportunity under *Brown v. Board of Education*.¹¹⁶ Because education is not recognized as a fundamental interest under the U.S. Constitution,¹¹⁷ he pivoted to the landmark California school finance case, *Serrano v. Priest*,¹¹⁸ which recognized it under California constitutional law.¹¹⁹ As we will discuss later, this finding is critically important, as Judge Treu defined the legal issue as involving a fundamental right, which then triggers strict scrutiny, the highest standard of judicial assessment. The third case supporting his civil rights approach is *Butt v. State of California*,¹²⁰ a case in which *Serrano*’s finding of education as a fundamental interest was applied to a district which had closed its school six weeks early because of budgetary constraints. California’s High Court in 1992 ruled that, “[t]he State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity.”¹²¹

Judge Treu expanded the fundamental interest of education as laid out in *Serrano*, writing that, “While these cases [*Brown*, *Serrano*, and *Butt*] addressed the issue of lack of **equality** of educational **opportunity** based on discrete facts raised therein, here this Court is directly faced with the issues that compel it to apply these constitutional principles to the **quality**

112 Todd A. DeMitchell, *Competence, Documentation, and Dismissal: A Legal Template*, 4 INT’L. J. EDUC. REFORM 88, 94 (1995). *But see* Connelly, DeMitchell, & Gagnon, *supra* note 15, at 179 (writing, “But it must be understood that the evaluation system must be fair, accurate, and conducted in good faith if it is to be a positive and meaningful process that develops, improves, and maintains teaching skills and competencies. Evaluation must be about more than dismissal and discipline. If it is only perceived as punitive and not a system infused with fairness built to identify, support, and build effectiveness, its true value in developing professionals may get lost in the turbulence of discipline and dismissal.”).

113 *Vergara*, 2014 WL 2598719, at *1.

114 *Id.*

115 *Id.*

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

117 *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

118 *Serrano v. Priest*, 5 Cal. 3d 584 (1971).

119 *Id.* at 608-09 (asserting, “[w]e are convinced that the distinctive and priceless function of education in our society warrants, indeed, compels, our treating it as ‘fundamental interest’”).

120 *Butt v. California*, 4 Cal. 4th 668 (1992).

121 *Id.* at 704.

of the educational experience.”¹²² He concluded that the Court applied the constitutional principles to the Challenged Statutes and that the legislature must “fulfill its mandated duty to enact legislation on the issues herein discussed that passes constitutional muster, thus providing each child in this state with a basically equal opportunity to achieve a quality education.”¹²³

Essentially, Judge Treu asserted that California public school students are constitutionally entitled to equal opportunity to a “quality” education. *Serrano* held that education was a fundamental interest of students and that on the basis of their wealth, students in property poor communities had less access to a quality public education than students from property rich school districts. In its 1976 *Serrano II* decision, the California Supreme Court wrote,

Substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities. For this reason, the school financing system before the court fails to provide equality of treatment to all the pupils in the state.¹²⁴

Therefore, there was a denial of equal access to the same educational opportunities based on the wealth of the district. The remedy was for all districts to have equitable funding, thus allowing students to have equal access to the educational programs those equal funds provide. The two *Serrano* decisions, cited by the *Vergara* Court, addressed fiscal inequality. Thus, the argument in *Serrano* focused on what the state provides in terms of financial resources; it is essentially an argument for the equity of educational opportunities remedied through funding redistribution.¹²⁵ It is an equity resolution based on wealth, which does not address the “quality” of the equitable program that concerned Judge Treu.¹²⁶

The *Vergara* Court defined the issue as whether the five Challenged Statutes “cause the potential and/or unreasonable exposure of grossly ineffective teachers to all California students in general and to minority and/or low income students in particular, in violation of the equal protection clause of the California Constitution.”¹²⁷ The Court found that education is a fundamental interest and “that the Challenged Statutes

¹²² *Vergara v. State*, No. BC484642, 2014 WL 2598719, at *2 (Cal. Super. Ct. L.A. Cty. June 10, 2014) (emphases in original).

¹²³ *Id.* at *7.

¹²⁴ *Serrano v. Priest*, 18 Cal. 3d 728, 747 (1976).

¹²⁵ See Stephen R. Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PENN. L. REV. 504, 544 (1972) (writing “[s]ince the court’s equal wealth standard allows for these continued educational disparities, the essential concern of *Serrano* is not the school child but the taxpayer.”).

¹²⁶ *Id.* at 511 (Goldstein questions, “Why, then, did the [*Serrano*] court focus on wealth differences as the constitutional vice, rather than disparities in expenditures, regardless of cause?”).

¹²⁷ *Vergara*, 2014 WL 2598719, at *2.

impose a real and appreciable impact on students' fundamental rights."¹²⁸ Therefore, the standard that is used when a fundamental right is at issue is "strict scrutiny," the highest, most rigorous standard of the three equal protection tests (i.e., strict scrutiny, heightened scrutiny, and rational basis).¹²⁹ Strict scrutiny analysis presumes that the disputed state action is presumed to be unconstitutional and will only survive if the government: (1) articulates a compelling interest that justifies the challenged law; and (2) the law is necessary to achieve that interest.¹³⁰ An example of a compelling state interest is found in two U.S. Supreme Court cases in which institutions of higher education used diversity in admissions criteria as a compelling state interest.¹³¹

Once Judge Treu determined the standard of strict scrutiny,¹³² he applied it to each of the five statutes.

1. The Permanent Employment Statute

The Court analyzed the tenure statute that grants permanent status after two years of service (effectively after eighteen months of service because of the required March 15th notice of non-renewal of the contract).¹³³ Judge Treu argued that the statutory two-year tenure period does not provide enough time for an informed tenure decision—both for students and teachers.¹³⁴

The Court concluded "that both students and teachers are unfairly, unnecessarily, and for no legally cognizable reason (let alone a compelling one), disadvantaged by the current Permanent Employment Statute."¹³⁵ In other words, it appears that Judge Treu finds, but does not explicitly state, that these disadvantaged teachers and students effect a compelling state

¹²⁸ *Id.* at *4. *See also* *Butt v. California*, 4 Cal. 4th at 683 (writing, "the unique importance of public education in California's constitutional scheme requires careful scrutiny of state interference with basic educational rights").

¹²⁹ *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) for a discussion of strict scrutiny analysis as applied to education and the definition of what constitutes a suspect class, the second trigger, along with a fundamental interest; *see also*, Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (Jan. 27, 2014), http://blogs.findlaw.com/law_and_life/2014/01/challenging-laws-3-levels-of-scrutiny-explained.html.

¹³⁰ *See* Timothy M. Bragshaw, *The Phantom Standard: Compelling State Interest Analysis and Political Ideology in the Affirmative Action Context*, 2013 UTAH L. REV. 409, 409-10 (2013).

¹³¹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (opinion of Powell, J.); *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

¹³² *Vergara*, 2014 WL 2598719, at *4-7.

¹³³ *Id.* at *4-5.

¹³⁴ The shift from the rights of students, the issue in the case, to teacher interests seems oddly placed. The finding that school districts will not renew probationary teacher contracts if there is "any doubt" would seem to strengthen the argument of the importance of the fundamental right of the student to receive an equitable and quality education, and is resolved in favor of the student—get rid of the teacher if there is a concern about the teacher's competence. *Id.* at *5. Judge Treu finds that this short time denies teachers an adequate opportunity to establish their competence and deprives "students of potentially competent teachers." *Id.* at *5. However, Judge Treu and the plaintiffs clearly want to make firing a teacher easier. The definition of a "potentially competent" teacher is not explained. However, VAM, which is cited for identifying grossly ineffective teachers, cannot judge potentially competent teachers.

¹³⁵ *Id.* at *5.

interest to retain competent teachers, however, the means chosen, a two-year evaluation period, is not necessary to achieve this state interest. Consequently, the statute failed strict scrutiny analysis on the prong of process, not substance.

2. *Dismissal Statutes*

The Court discussed the time and cost restraints of firing a tenured teacher that “cause[s] districts in many cases to be very reluctant to even commence dismissal proceedings.”¹³⁶ Substantial evidence, according to the Court, showed that dismissals could take anywhere from two to almost ten years and could cost \$50,000 to \$450,000.¹³⁷ All the while, the Court asserted, grossly ineffective teachers were left in the classroom.¹³⁸ Even worse, dismissals were extremely rare in California.¹³⁹

Similar to the analysis of the tenure statute, Judge Treu moved from discussing the dearth of teacher dismissals (but without citing evidence that they were caused by time and cost constraints) to a critical examination of the “uber due process” rights of teachers, which he concedes is a “legitimate issue”¹⁴⁰ in relation to the due process rights of non-teaching personnel under *Skelly v. State Personnel Board*.¹⁴¹ Judge Treu asserted the due process rights under *Skelly* applied to classified personnel (i.e., employees who do not need to possess a teaching or administration credential to hold their position, such as school secretaries, bus drivers, and custodians) and to certificated employees (i.e., teachers, administrators, etc.) who have a property right. We disagree, which we will explain below in Section IV.

Judge Treu argued that these *Skelly* rights involve “much less time and expense than those of teachers”¹⁴² and, therefore, they address the time and cost constraints he asserts at the beginning of the dismissal statutes analysis. He noted that at the conclusion of the *Skelly* rights process, the employee has the option of the multi-state appellate review process by state courts.¹⁴³

Furthermore, Judge Treu asked and answered his question as to whether classified employees have a lesser property interest in their employment than teachers.¹⁴⁴ In other words, he argued that if the due

136 *Id.*

137 *Id.*

138 *Id.*

139 However, as Professor of Education Law, Perry Zirkel notes, “Courts have followed the long tradition of ‘academic abstention’ to generally defer to school districts’ substantive judgments in teacher evaluation cases, whether non-renewals or terminations.” Zirkel, *supra* note 100.

140 *Vergara*, 2014 WL 2598719, at *5.

141 *Skelly v. St. Pers. Bd.*, 15 Cal.3d 194 ((1975).

142 *Vergara*, 2014 WL 2598719, at *5.

143 *Id.* at *5-6. Judge Treu does not appear to have a problem with this extension of due process rights in terms of additional time and costs. Is it not true that the time and costs associated with teacher dismissal—two to ten years and close to a half million dollars—may well, and would likely, involve the costs and times as well?

144 *Id.*

process rights for the bus driver or cafeteria worker are sufficient under *Skelly*, they would be sufficient for teachers.

Judge Treu conducted his strict scrutiny analysis in seven lines. He first asserted that “[t]here is no question that teachers should be afforded reasonable due process when their dismissals are sought.”¹⁴⁵ However, because the process is time consuming and expensive, it makes the process for a “fair dismissal of a grossly ineffective teacher illusory.”¹⁴⁶ Judge Treu concluded that the defendant did not carry its burden in this case.

3. *Last In, First Out (LIFO)*

The strict scrutiny analysis of the LIFO statute was even more cursory. Essentially, the Court set the examination table with a “gifted junior teacher” and a “grossly ineffective senior teacher,” and then asked which one would you want to retain in a layoff and which one would you want to let go. The Hobson’s choice leads to one conclusion: keep the gifted teacher and get rid of the grossly incompetent teacher.¹⁴⁷ Therefore, seniority keeps competent teachers from students and retains incompetent ones.

In this construction there are only two types of teachers, the gifted new teachers and the grossly incompetent senior teachers. There are no novice teachers or more experienced veterans from which to make the decision to retain. Experience seems to count for nothing. And in this hypothetical, when the dismissal statutes are found unconstitutional and the grossly incompetent teachers are removed, the only teachers that remain are gifted beginners.

In summary, *Vergara* reconfirms that California’s public school students have a fundamental constitutional right to equitable educational opportunity, and Judge Treu introduced a new fundamental student right to a “quality education.”¹⁴⁸ All five challenged statutes failed strict scrutiny analysis and all were found unconstitutional. If this ruling withstands appellate review, California teachers will lose their tenure/permanent status, their right to a written notice of deficiencies, an opportunity to correct those deficiencies, and the right to dismissal procedures. In addition, seniority would no longer be mandated as part of the layoff procedures. We will explore below whether *Vergara* is a flawed ruling or one that is legally sound and beneficial to California’s and, by implication, our nation’s Kindergarten to twelfth grade public school students.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* at *7.

IV. VERGARA: BENEFICIAL REFORM OR A FLAWED RULING?

Vergara found teacher protection statutes unconstitutional. One of the lead attorneys for the plaintiffs said, “The need for change is now. We cannot waste another day, cannot waste another child.”¹⁴⁹ Education Secretary Arne Duncan is quoted in *The Wall Street Journal* praising *Vergara* as, “a mandate to fix educational inequities” and an opportunity to “build a new framework for the teaching profession.”¹⁵⁰

Will the *Vergara* decision help “fix” public education? Is the removal of pre-termination protections for teachers necessary for school reform to be effective? Given that both parties in the *Vergara* case agree that teachers are the most significant school variable in student learning, will making it easier to fire them improve or diminish the quality of California’s teaching force going forward? Also, because *Vergara* expands the fundamental right to an education beyond equity and adequacy to a “quality” education, will this lead to greater student learning or simply more lawsuits that wrangle over the definition of “quality education” and research evidence regarding which children do and do not receive it?

We will respond to these questions by examining three legal issues raised in *Vergara*. First, does strict scrutiny analysis support or undermine a compelling state interest regarding due process for teachers? Second, is the reliance on *Skelly* rights sufficient protection for teachers in the event that the Challenged Statutes in *Vergara* are abandoned? Third, does the new fundamental student right to a “quality” education have unintended and undesired consequences?

A. STRICT SCRUTINY ANALYSIS: ARE THERE COMPELLING STATE INTERESTS AND ARE THE MEANS NECESSARY?

The high bar of strict scrutiny analysis involves a two-step process to ascertain the constitutionality of a law. First, the law must further a compelling state interest and not simply an important state interest (i.e., heightened scrutiny, an intermediate standard) or a legitimate state interest (i.e., rational basis, the lowest threshold or standard). In addition, the means used to achieve the compelling state interest must be necessary to serve the asserted interest.¹⁵¹ It is clearly the hardest of the three levels of analysis for

149 John Fensterwald, *Judge Strikes Down All 5 Teacher Protection laws in Vergara Lawsuit*, EDSOURCE (June 10, 2014), <http://edsource.org/2014/judge-strikes-down-all-5-teacher-protection-laws-in-vergara-lawsuit/63023>. Michelle Rhee was quoted as saying of the decision, “It is my hope that this movement continues on the national stage for all of our students.” *Id.*

150 Editorial Board, *A School Reform Landmark*, WALL ST. J. (June 10, 2014), <http://www.wsj.com/articles/a-school-reform-landmark-1402442804>.

151 *Id.* See *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1850 n.6 (1986) (using “narrowly tailored” as the same as “necessary”); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PENN. L.R. 2417 (1997) (stating that content-based restrictions

governments to defend, leading to the now famous quip— “strict in name, but fatal in practice.”¹⁵²

Once strict scrutiny analysis was selected by the Court, the five state statutes were required to support a compelling state interest, that is, the retention of competent teachers who are critical in securing students’ fundamental right to an equitable and quality public education. Next, the means used by the state to meet the compelling state interest have to be necessary. For the five contested statutes in *Vergara*, Judge Treu ruled that each failed to meet this test.

The first application of strict scrutiny reviews whether a compelling state interest exists to retain competent teachers. Prior to the analysis, Judge Treu asserted that competent teachers are critical to the success of students.¹⁵³ This would seem to meet the compelling state interest prong—the retention of competent teachers. The analysis then turns to the “necessary means” prong of strict scrutiny, that is, whether the means used by the state to retain competent teachers is necessary. Judge Treu pointed out that the two-year period is an outlier among states, that many states require a longer time for the tenure decision.¹⁵⁴ If the time frame is a means for retaining competent teachers, thus securing the students’ fundamental constitutional rights, and the court finds that the eighteen months “does not provide nearly enough time for an informed decision,”¹⁵⁵ then what time frame would be “necessary” for the retention of competent teachers?¹⁵⁶ How could any time frame for retaining teachers be necessary given the lack of consensus as to what time frame is best for making such a decision and thereby granting the teacher due process rights? Three years, four years, or five years may be reasonable and fair, but are they necessary? Unfortunately, there is no agreement among educational researchers on this issue. Therefore, how can Judge Treu claim that any particular time frame can be identified as “necessary”? He cites two education experts for the defense who agreed that “three to five years would be a better timeframe to make the tenure decision for the mutual benefit of students and teachers.”¹⁵⁷ Under a strict scrutiny analysis, means that are reasonable or “better” may not be necessary.

under strict scrutiny analysis must be “narrowly tailored to serve a compelling state interest.”). We will use the term necessary, consistent with Judge Treu’s use for the strict scrutiny ends-means test.

¹⁵² This quip is based on a quote from Stanford Law professor, Gerald Gunther in a 1972 *Harvard Law Review* article. See *Biographical Memoirs: Gerald Gunther*, 148 PROCEEDINGS AM. PHIL. SOC’Y 494, 496 (2004), <https://amphilsoc.org/sites/default/files/proceedings/480409.pdf>.

¹⁵³ *Vergara v. State*, No. BC484642, 2014 WL 2598719, at *7 (Cal. Super. Ct. L.A. Cty. June 10, 2014).

¹⁵⁴ *Id.* at *10.

¹⁵⁵ *Id.*

¹⁵⁶ The defendants’ appeal states, on this issue, “if the districts lack of resources to conduct adequate observation and evaluation, that problem exists regardless of the length of the probationary period and is not caused by §44929.21(b).” Appeal from Final Judgment, Opening Brief of Intervenor-Appellants California Teachers Association and California Federation of Teachers, *Vergara v. State*, No. B258589 (Cal. Super. Ct. L.A. Cty. May 1, 2015).

¹⁵⁷ *Vergara*, No. BC484642, 2014 WL 2598719, at *10.

Teachers without tenure have only one year in which to show that they demonstrated competence to have their contract renewed for another year. Is this timeframe necessary to preserve student rights to an equitable and quality education? It can be argued that the longer the decision to grant permanent status is extended, the greater the opportunity to retain teachers who are not competent. In short, there is no magic number with regard to a necessary timeframe for attaining permanent status.

While there is a compelling state interest in retaining competent teachers, how can it be served if there is no basis upon which the various alternatives—although reasonable or maybe better—can clearly be held to be “necessary” to the attainment of this interest? There may be a compelling end, but no “necessary” means to achieve that end; there may be reasonable alternatives with no one alternative necessary to the exclusion of others. The substitution of three years for two years may not be necessary to retain competent teachers, just as the selection of four years over three years. It is entirely possible that no selected timeframe is necessary, while several may be rational. Therefore, can any specified time for attaining permanent status be necessary to serve the compelling state interest?

Problems also arise in Judge Treu’s analysis of the three dismissal statutes: notice, opportunity to correct, and procedures. His strict scrutiny analysis lumped them together when they should have been analyzed separately. Even more problematic, Judge Treu fails to demonstrate that the three statutes individually lack a compelling state interest. He describes the process required by the three dismissal statutes as “tortuous,”¹⁵⁸ but this seems to apply more to the necessary prong of strict scrutiny, which reviews the process. If there is not a compelling interest that underlies each of the three statutes, then the analysis can conclude at that point and find that the disputed state action does not survive the strict scrutiny analysis. However, Judge Treu may approach the compelling interest obliquely by referring to the due process rights of teachers. He states, “There is no question that teachers should be afforded reasonable due process when their dismissal is sought.”¹⁵⁹ Furthermore, he asserts that the judiciary is as committed as the legislature to protecting reasonable due process rights as it is in protecting the “rights of children to constitutionally mandated equal educational opportunities.”¹⁶⁰ Therefore, is the right of teachers to due process the compelling state interest?

While leaving this question hanging, Judge Treu pivots, without notice, to the necessary prong of strict scrutiny. Consequently, due process rights for teacher dismissal may be compelling, but are the means necessary and narrowly drawn to provide due process? As stated above, Judge Treu asserts that the due process rights contained in the three statutes are

158 *Id.* at 12.

159 *Id.* at 13.

160 *Id.* at 12.

“tortuous.” Essentially, he argues that *Skelly* rights afforded to non-teachers are sufficient because “their discipline cases resolved with much less time and expense than those of teachers.”¹⁶¹

Judge Treu does not separate the three contested dismissal statutes and subject each to a full and searching strict scrutiny analysis based on the individual merits or flaws of each statute. He does not clearly state that teacher due process is the compelling state interest upon which the statutes rest. However, he finds that *Skelly* rights will meet the interests of teacher due process. We will turn next to his reliance on *Skelly* for the interests of securing teacher due process rights.

B. *SKELLY* RIGHTS:
A VAIN HOPE AND A FALSE PROMISE?

As discussed above, the plaintiffs sought a permanent injunction enjoining the implementation and application of the five statutes: the Permanent Employment Statute, the Written Charges Statute, the Correct and Cure Statute, the Dismissal Hearing Statute, and the LIFO Statute. They sought to reduce the protections against unwarranted dismissal found in the current statutes and to make teacher protections going forward based on *Skelly* rights¹⁶² afforded to other state employees who have attained permanent status.¹⁶³ The plaintiffs asserted that the removal of the Dismissal Statutes would automatically allow teachers to be covered under the *Skelly* rights. This may have been a desired outcome but it is not a foregone conclusion given that pre-termination rights for tenured teachers preceded the *Skelly* ruling and, thus, are separate from and not dependent upon *Skelly*.

In *Skelly v. State Personnel Board*, a 1975 case, the Supreme Court of California found the dismissal statute of the State Civil Service Act, for permanent civil service employees, to be unconstitutional for failure to protect the due process rights of those civil service employees.¹⁶⁴ The case involved a physician employed by the State Department of Health Care Services who had attained permanent status but was dismissed without being afforded any pre-termination rights. Dr. John F. Skelly’s permanent employment status was governed by California civil service law,¹⁶⁵ however, California educators are not covered by the civil service law. Instead, teachers are covered by the state’s Education Code, of which five code sections were declared unconstitutional, with four directly related to permanent status and dismissal. This raises the legal question of whether *Skelly* rights are available to California educators in the absence of a statutory right to permanent status.

161 *Id.* at 11.

162 *Skelly v. St. Pers. Bd.*, 15 Cal.3d 194 (1975).

163 *Vergara v. State*, No. BC484642, 2014 WL 2598719, at *4 (Cal. Super. Ct. L.A. Cty. June 10, 2014).

164 *Skelly*, 15 Cal. 3d at 215.

165 *Id.* at 202.

The *Skelly* case revolved around the issue of due process in response to a property right, which is granted through the California Civil Service Act.¹⁶⁶ However, under the California Constitution, the “teaching staff of schools are under the jurisdiction of the Department of Education or the Superintendent of Public Instruction”¹⁶⁷ and are exempt from civil service. Thus the Civil Service Act does not apply to public school teachers, who are the target in *Vergara*. Therefore, how do *Skelly* rights accrue to the constitutionally exempt public school teachers?

A 1978 California Court of Appeals ruling held that the crucial determination of a state employee’s pre-termination rights does not turn on whether the state worker is employed in the civil service system.¹⁶⁸ This case involved a hospital pharmacist assistant at the University of California, San Francisco Medical Center, a part of the state’s university system. The University of California is exempted from civil service.¹⁶⁹ However, the Court asserted that “nonacademic university employees who gained regular or career status” are protected under *Skelly*.¹⁷⁰

However, accepting, by way of analogy from a nonacademic career employee to a tenured public school teacher, that civil service employment is not necessary, the next requirement is dispositive; the employee must have “a constitutionally protected property interest in his continued employment.”¹⁷¹ In this case, the employer was the University of California, which has quasi-legislative functions and had established the property right. Public school districts do not have the ability to grant permanent status to teachers separate from legislative action.

In short, teachers are granted permanent status (i.e., property) through the very statute that the *Vergara* Court declared null and void.¹⁷² *Skelly* rights are available when there is a separate and existing legally enforceable property right by those employees covered by the civil service laws. *Skelly* does not create a property right; it only ensures that when a property right is implicated that due process rights are triggered.¹⁷³ *Skelly* provides due process rights for permanent status civil service employees, not tenured teachers, so if the Permanent Employment Statute is removed, as in *Vergara*, how do California public school teachers establish a property right that would trigger *Vergara* due process protections?

166 *Id.* at 206 (writing, “We begin our analysis in the instant case by observing that the California Statutory scheme regulating civil service employment confers upon an individual who achieves the status of ‘permanent’ employee a property interest in continuation of his employment which is protected by due process.”).

167 Cal. Const. art. 7, § 4 (i), http://www.leginfo.ca.gov/const/article_7.

168 *Mendoza v. Regents of Univ. of California*, 78 Cal. App.3d 168 (1978).

169 Cal. Const. art. 7, § 4 (i), http://www.leginfo.ca.gov/const/article_7 (officers and employees of the University of California and the California State Colleges are exempted).

170 *Mendoza*, 78 Cal. App.3d at 176.

171 *Id.* at 174. In the *Mendoza* case, the plaintiff had successfully completed her probationary period and had achieved the status of career employee. *Id.* at 175.

172 First Amended Complaint, *supra* note 81 (referencing CAL. EDUC. CODE §44929.21).

173 See *Skelly v. St. Pers. Bd.*, 15 Cal.3d 194 (1975).

Additionally, if *Vergara* survives on appeal, what statutory basis might teachers pursue to gain a legally enforceable property right? Property rights do not arise from the U.S. Constitution, but from state law (e.g., tenure statutes or civil service laws)¹⁷⁴ or other external sources.¹⁷⁵ The *Skelly* court, citing to *Board of Regents v. Roth* writes, “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”¹⁷⁶

The statutory basis that creates property for teachers is declared null and void in *Vergara*, thus removing their employment as property. Public school educators would be without any due process protection because they would not be considered permanent employees through any state action. Additionally, *Skelly* rights only pertain to those employees who have attained permanent employment status. Therefore, they would essentially be untenured employees who could be non-renewed at the end of their ongoing year-to-year contracts. Where is the legal entitlement justifying continued employment if the permanent employment statute is declared unconstitutional and must be removed? If this is accurate, how are the best interests of students served when all teachers can lose their jobs at the end of the year for any or for no reason?

Legislation would have to be enacted immediately, and in the interim, all California teachers would be probationary and could be let go (their contract non-renewed) at the end of the contract year—every California teacher—without recourse. The assertion that *Skelly* rights would automatically be available to California teachers may well be a very dangerous chimera with potentially devastating effects on the quality of the state’s teaching force. Consequently, the elimination of due process rights for 97 to 99 percent of today’s California teachers, as well as all future teachers in the state, in pursuit of the one to three percent of the grossly ineffective teachers, may profoundly undermine the state’s interest in attracting and retaining competent teachers.

C. FROM “EQUITABLE” AND “ADEQUATE” TO *VERGARA*’S “QUALITY”
EDUCATION: HAS PANDORA’S BOX BEEN OPENED?

Judge Treu references *Brown v. Board of Education*, *Serrano v. Priest*, and *Butt v. State of California* for the legal basis to find the five California statutes unconstitutional. He asserted that these cases form the right to an equal education for California public school students.¹⁷⁷ These rights

¹⁷⁴ *But see* Montana Wrongful Discharge from Employment Act of 1987, MONT. CODE ANN. §§ 39-2-901 to 39-2-915 (which prohibits discharge after serving a probationary period allowing employees to challenge the termination in court or before an arbitrator).

¹⁷⁵ *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

¹⁷⁶ *Skelly v. St. Pers. Bd.*, 15 Cal. 3d 194, 206-07 (1975) (citing to *Bd. of Regents v. Roth*, 408 U.S. 564 at 577).

¹⁷⁷ *Vergara v. State*, No. BC484642, 2014 WL 2598719, at *1 (Cal. Super. Ct. L.A. Cty. June 10, 2014).

establish that students cannot be denied the right to an equal education on the basis of their race, funding for public school students must be equitable, and that students must be afforded an equitable opportunity to the length of the school term.¹⁷⁸ Judge Treu writes, “the Constitution of California is the ultimate guarantor of a meaningful, basically equal educational opportunity being afforded to the students of this state.”¹⁷⁹ However, the Vergara decision establishes a new constitutional right: a quality education.¹⁸⁰ By quality education, the Court meant,¹⁸¹ not just an equitable education under Serrano, but a quality education that is equitably available to all students. Originally, Serrano found that disparities in public school funding required an equitable resolution for all of California’s children, however, subsequent litigation moved the focus from dollar disparity to what the dollar provides—from equity to adequacy.¹⁸² An insufficient amount of money distributed equally does not support an adequate education; it only supports an equally inadequate education. “The adequacy argument casts the issue of school finance reform in terms of what is the constitutionally guaranteed level of education that must be provided to all of the state’s children.”¹⁸³

The Vergara decision moves beyond equity and adequacy to find that the public school students of California are entitled to a “quality” educational experience. Judge True asserts on multiple occasions in his ruling that quality is the new constitutional standard in California:

While these cases addressed the issue of a lack of equality of educational opportunity based on the discrete facts raised therein, here this Court is directly faced with issues that compel it to apply these constitutional principles to the quality of the educational experience.¹⁸⁴

All this Court may do is apply constitutional principles of law to the Challenged Statutes as it has done here, and trust the legislature to fulfill its mandated duty to enact legislation on the issues herein discussed that pass

178 *Id.*

179 *Id.* at *3.

180 See Education Counsel, *TLE Legal Update: Vergara v. California*, EDUC. COUNSEL, June 20, 2014, at 4.

[http://www.educationcounsel.com/docudpot/EducationCounsel%20Vergara%20v%20California%20Summary%20Analysis%20\(June%202014\).pdf](http://www.educationcounsel.com/docudpot/EducationCounsel%20Vergara%20v%20California%20Summary%20Analysis%20(June%202014).pdf) (writing about the tentative decision, “Moreover, Vergara also involved a judge who was willing to apply precedent on the equality of public education to inform a challenge to the quality of instruction.”) (emphasis in original).

181 *Id.*

182 See William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL’Y 376 (1994); Frederick M. Hess, *Stimulant Or Salve? The Politics Of Adequacy Implementation*, Conference at Kennedy School of Government, Harvard University: Adequacy Lawsuits: Their Growing Impact on American Education (Oct. 13-14, 2005); Robert Andrew Nelli, *Operations And Maintenance Of Adequacy In California Public Schools: An Evidence-Based Approach* (May 2006) (unpublished doctoral dissertation), University of Southern California; Christine Kiracofe, *Serial and Second Generation School Finance Reform Litigation: 2003-13*, 299 ED. LAW REP. 1 (2014).

183 Todd A. DeMitchell, *School Finance Reform: The Carousel Reform*, 65 SCH. BUSINESS AFFAIRS 42, 45 (1999).

184 *Vergara*, 2014 WL 2598719, at *2.

constitutional muster, thus providing each child in this state with a basically equal opportunity to achieve a quality education.¹⁸⁵

No one argues with the proposition that all of our public school students should receive a quality education. However, there are differing opinions as to the definition of what constitutes a quality education, how it is delivered to all students, and how it would be measured and evaluated. An additional question that remains unanswered is what is the remedy when “quality” is lacking?¹⁸⁶

Vergara has vested all California public school students with a new fundamental right,¹⁸⁷ which requires not rational basis, but rather strict scrutiny analysis. That fundamental right is a quality education, and this belongs to the students, not the parents. While the *Vergara* decision focuses on teacher tenure, dismissal, and layoffs, there is no reason to believe that the fundamental right of a student to a quality education does not extend beyond those considerations to such things as the curriculum, the instruction, the selection of the teachers and principals, and any organizational decision that defines, supports, and implements the education that a student receives.

A quality education has become a fundamental right of public school students in California. Consequently, complaints regarding policies, procedures, and regulations that provide the legal foundation for public education must, under strict scrutiny analysis, meet the two-part test of serving a compelling state interest and using necessary means to achieve that interest. This is a high hurdle for schools to meet.

V. CONCLUSION

Vergara is a profoundly flawed decision. Judge Treu’s ruling does not employ a comprehensive strict scrutiny analysis; it asserts a false hope that *Skelly* rights will replace the four due process rights he found unconstitutional, and it fails to explore the impact of fashioning a fundamental student right to a “quality” education. In addition, *Vergara* does nothing to improve the educational opportunity or outcomes for disadvantaged students.¹⁸⁸ Finding that these statutes are unconstitutional

¹⁸⁵ *Id.* at 7.

¹⁸⁶ For a discussion of the possible use of educational malpractice, although not a call for its use, in response to VAM, see DeMitchell et al., *supra* note 22; Ethan Hutt & Aaron Tang, *The New Educational Malpractice Litigation*, 99 VA. L. REV. 419 (2013). Citing to Chetty’s VAM research, an attorney for the plaintiffs stated, “The fact that we could show how students were actually harmed by bad teachers—that changed the argument.” Edwards, *supra* note 80.

¹⁸⁷ *Vergara*, 2014 WL 2598719, at *4.

¹⁸⁸ See, e.g., *Ending Child Poverty Now*, CHILDREN’S DEF. FUND (2015), <http://www.childrensdefense.org/library/PovertyReport/EndingChildPovertyNow.html> (“Child poverty creates gaps in cognitive skills in babies . . . Childhood toxic stress can negatively impact brain functioning for life . . . Child hunger jeopardizes children’s health and ability to learn . . . Poor children are less likely to graduate from high school.”). These outcomes of poverty on learning are not addressed by eliminating tenure. Every teacher who is fired under *Vergara* does not alleviate the pernicious impact of poverty on the lives and opportunities of children of poverty.

will not alter the method by which teachers are assigned to schools, are allowed to transfer between schools, or seek to leave the school district for another assignment.

Easy dismissal of all tenured teachers, by itself, is a false promise for closing the achievement gap between minority and white students and between students of poverty and students of wealth. We summarize below three conclusions: a) teachers are stripped of any due process rights; b) due process protections benefit the community; and c) excellence is not achieved by a focus on firing, but is instead achieved through a focus on building human resources in schools. We also offer comments about the role of unions, even though unions are not mentioned in the lawsuit.

First, by declaring unconstitutional four California Education Code statutes on tenure and dismissal, the *Vergara* decision strips tenured public school teachers of their due process rights and, as we have argued, it is not at all clear how these teachers can reclaim a property interest (and thus due process) under *Skelly*. It is simplistic to assert that the elimination of due process for teachers—protections recognized by the *Vergara* Court as important—can occur without repercussions, especially for students. Judge Treu's reliance on the availability of *Skelly* rights¹⁸⁹ without additional legislation recognizing permanent status is not only misplaced, but also misleading, given the clear statements of *Skelly* and *Loudermill* that pre-termination due process rights are based on permanent status.¹⁹⁰

Second, the *Vergara* decision fails to recognize any educational benefit that tenure and due process provides communities as they attempt to deliver (and improve) free, public education. We adamantly believe that granting teachers the protection of due process through tenure is good public policy for the betterment of our nation's 98,000 public schools¹⁹¹ and forty-nine million public school students.¹⁹²

Public school teachers are unlike most other public (or private) employees. They work in a fish-bowl environment with parents and community members having access throughout the year to many aspects of their daily work with children. Consequently, their work is scrutinized to a much higher degree than most employees; this is also in part because parents view the work of teachers as having enormous short-term and long-term consequences for their children. Teachers also undergo heightened scrutiny because the field of education is plagued by perennial

189 *Vergara*, 2014 WL 2598719, at *5; see generally *Skelly v. St. Pers. Bd.*, 15 Cal. 3d 194 (1975). See *supra* notes 141–44.

190 Even if *Vergara* is upheld on appeal and California teachers are determined to have *Skelly* rights, the due process protections under *Skelly* are not sufficient for public school educators and the communities they serve given (i) disagreement regarding criteria for teacher evaluation (due to the perennial conflict over educational goals, content, and methods) and (ii) teachers are the single most important school variable for the educational success of children, necessitating heightened transparency in retention and dismissal cases.

191 National Center for Education Statistics, *Digest of Education Statistics*, tbl.5 (2011), http://nces.ed.gov/programs/digest/d12/tables/dt12_005.asp.

192 National Center for Education Statistics, *Digest of Education Statistics*, tbl.37 (Fall 2010), http://nces.ed.gov/programs/digest/d12/tables/dt12_037.asp.

disagreements over reform plans, what should be taught and, to a lesser extent, how instruction should be delivered.¹⁹³ The *Strachura* case discussed above is a good example of this fish-bowl atmosphere, in which politics, administrator bias, and conflict over educational goals and “appropriate” content too often divide all but the most homogenous communities.

An example of the increased scrutiny of the fish-bowl that the community places on its public school teachers is the concept of “exemplar,” in which teachers have historically been considered role models, even when they are off-duty.¹⁹⁴ As role models, not only was their classroom conduct reviewed, but their private lives outside of school were scrutinized. Law professor John Rumel, writes, “seldom does a week pass without the popular press reporting on teacher off-duty conduct or speech that causes a stir in the local community and triggers adverse employment or licensure consequences for K-12 teachers.”¹⁹⁵ Jonathan Turley, a law professor at George Washington University, wrote critically in a *Los Angeles Times* op-ed piece about this incident, observing that we expect a lot from teachers who put in long hours in overcrowded classrooms while making lower salaries than comparable professionals. “For this sacrifice, we now demand that they live their lives according to a morality standard set to satisfy the lowest common denominator of parental sensibilities.”¹⁹⁶

Due process rights for tenured teachers eliminates the constant fear of termination, contributing to greater teacher experimentation and creativity, richer and more authentic relationships with students, and a willingness by teachers to inform the community about the effectiveness of reform strategies and practices advocated by school leaders. In short, government acting fairly towards its schoolteachers serves the public good.

In regards to our final concern, organizations do not fire their way to excellence. Stripping tenured teachers of their due process is a simple-minded, highly flawed approach to the complex and difficult task of improving instructional quality and student learning, especially in our nation’s poorest communities. The *Vergara* ruling is a placebo for reform, in which the easy solution—remove the 1–3 percent—is substituted for the long-term, difficult task of attracting, developing, and retaining high quality

193 See HERBERT M. KLIBARD, *THE STRUGGLE FOR THE AMERICAN CURRICULUM: 1893-1958*, 290 (3d ed. 2004) (writing, “the curriculum in any time and place becomes the site of a battleground where the fight is over whose beliefs will achieve the legitimation and the respect that acceptance into the national discourse provides.”).

194 See DAVID B. TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820–1980*, 174 (1982) (writing, “[e]vidence abounds that townspeople kept a vigilant eye on the out-of-class behavior of educators, and that moral ‘lapses’ resulted in firings more often than did incompetence in the classroom”).

195 John E. Rumel, *Beyond Nexus: A Framework for Evaluating K-12 Teacher Off-Duty Conduct and Speech in Adverse Employment and Licensure Proceedings*, 83 U. CIN. L.R. 685, 685 (2015).

196 *Id.*

teachers,¹⁹⁷ as well as confronting the socio-economic problems that negatively impact the ability of students to realize their potential.

Professor Kevin Welner notes that the very schools with large minority populations and concentrations of poverty are the ones perceived to be less attractive and, therefore, the “most marketable teachers, those with the opportunities to leave, are the ones who disproportionately do so.”¹⁹⁸ Firing teachers will not create conditions in which individuals are motivated to develop professionally, remain with the school district, and assume greater responsibilities, including the mentoring of new hires.

The number of teachers who leave the profession is quite large and “teacher turnover rates can be high, particularly in schools serving low-income, non-White, and low achieving-student populations.”¹⁹⁹ Stanford University professor, Linda Darling-Hammond, notes that there are higher turnover rates in lower-income schools,²⁰⁰ the very schools that the *Vergara* case asserts are disproportionately harmed. And, unfortunately, the educational cost associated with schools that become known as places to leave, is borne by students at these schools.²⁰¹ Using math and English/language arts scores, a study conducted by Ronfeldt and others found that the negative effect of teacher turnover “was larger in schools with higher proportions of low-achieving and Black students.”²⁰² The authors went on to speculate that turnover negatively affects collegiality, trust, and the possession of institutional knowledge among faculty, all of which are critical for supporting student learning.²⁰³ Similarly, Douglas Gagnon and Marybeth Mattingly, researchers from the Carsey School of Public Policy, conclude that their research “supports the notion that school collegiality, coherence, and community—all characteristics that are lacking

197 See THE NEW TEACHER PROJECT, THE IRREPLACEABLES: UNDERSTANDING THE REAL RETENTION CRISIS IN AMERICA’S URBAN SCHOOLS 2 (2012), http://tntp.org/assets/documents/TNTP_Irreplaceables_2012.pdf (writing, “[i]rreplaceables’—teachers who are so successful they are nearly impossible to replace, but who too often vanish from schools as the result of neglect and inattention.”).

198 Kevin G. Welner, *Silver Linings Casebook: How Vergara’s Backers May Lose by Winning*, 15 U. MD. L.J. RACE, RELIG., GENDER & CLASS 121, 136 (2015).

199 Matthew Ronfeldt, Suzanne Loeb & James Wyckoff, *How Teacher Turnover Harms Student Achievement*, 50 AMER. EDUC. RES. J. 4, 5 (2013).

200 Linda Darling-Hammond, *Recruiting and Retaining Teachers: What Matters Most and What Can Government Do?* 2, <http://www.help.senate.gov/imo/media/doc/Darling-Hammond.pdf> (estimating that teacher costs are high, on average \$15,000 per recruit).

201 See Donald Boyd et al., *Who Leaves? Teacher Attrition and Student Achievement*, NAT’L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RES. 1, Working Paper 23 (2009), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/1001270-Who-Leaves-Teacher-Attrition-and-Student-Achievement.PDF> (“Teacher retention may affect student learning in several ways. First, in high-turnover schools, students may be more likely to get inexperienced teachers who we know are less effective, on average. Second, high turnover creates instability in schools making it more difficult to have coherent instruction. This instability may be particularly problematic when schools are trying to implement reforms, as the new teachers coming in each year are likely to repeat mistakes rather than improve upon implementation of reform. Third, high turnover can be costly in that it takes time and effort to continuously recruit teachers.”).

202 Ronfeldt et al., *supra* note 199, at 5.

203 *Id.* at 18.

in schools with high turnover—are important aspects of effective schools.”²⁰⁴

Does making it easier to fire teachers help solve the problem of teacher turnover? Tenure does not assign teachers to particular schools; rather, school district policies, procedures, practices, and salary schedules determine teacher retention and attrition in schools with high minority enrollments. Professor Jesse Rothstein asserts that “attacking tenure as a protection racket for ineffective teachers makes for good headlines. But it does little to close the achievement gap, and risks compounding the problem.”²⁰⁵ The preparation, selection, retention, and ongoing professional development of teachers needed to build “social capital” and professional development communities in schools holds greater promise for effective reform.²⁰⁶

Finally, unions must not use due process to protect incompetence or marginal competence, and administrators must possess the fortitude and energy to gather the necessary data to successfully fire ineffective teachers. The process by which a teacher is considered for dismissal must be relatively swift. Protracted due process hearings do not serve the public or the profession. As DeMitchell has argued, “blind protection ill serves the profession; fair protection is necessary.”²⁰⁷ Blind protection elevates the needs of the employee over the needs of recipients of the professional service. Unions must not only speak for teachers, but they must speak for the teaching profession, students, and the community. In turn, teachers should be able to expect a fair notice of inefficiencies arrived at through the use of a sound evaluation system,²⁰⁸ a reasonable opportunity to remediate, and a fair hearing held in a timely manner.

204 Douglas J. Gagnon & Marybeth J. Mattingly, *Rates of Beginning Teachers: Examining One Indicator of School Quality in an Equity Context*, 108 J. EDUC. RES. 226, 227 (2015) (“It seems logical that new teachers thrive in schools where they may benefit from the support of experienced, effective teachers. But without potential mentors, new teachers may quickly move on or burn out and be replaced with more new teachers.”). This raises the question as to whether the elimination of due process rights for these mentor teachers will move them on and possibly move them out of education and the schools where they are the most needed.

205 Jesse Rothstein, *Taking on Teacher Tenure Backfires*, N.Y. TIMES (June 12, 2014), <http://www.nytimes.com/2014/06/13/opinion/california-ruling-on-teacher-tenure-is-not-whole-picture.html> (“In short, while the notion of ‘clearing the stables’ of bad teachers seems attractive, it is almost impossible to get right in practice. No conceivable system can eliminate all ‘grossly ineffective’ teachers, and efforts aimed at doing so can do more harm than good.”). See also Pedro Noguera & Michelle Fine, *Teachers Aren’t the Enemy*, THE NATION (Apr. 21, 2011), <http://www.thenation.com/article/teachers-arent-enemy/> (“Raging debates over LIFO, seniority, teacher evaluation and test-based school closings do little to improve schools and much to distract from the real challenges.”).

206 Michael Fullan, *Choosing the Wrong Drivers for Whole System Reform*, CENTRE FOR STRATEGIC EDUC., Seminar Series Paper No. 204 (2011).

207 TODD A. DEMITCHELL, LABOR RELATIONS IN EDUCATION: POLICIES, POLITICS, AND PRACTICES 136 (2010).

208 Carla M. Evans, *The Missing Framework: A Case for Utilizing Ethics to Evaluate the Fairness of Educator Evaluation Systems*, TEACHERS COLLEGE RECORD 2 (June 5, 2015), <http://www.tcrecord.org> (“ethical notions of fairness may be a useful additive component in the design, implementation, and evaluation of educator evaluation systems because ethics provide a normative framework for considering fairness: a framework that has been missing”).

Vergara has focused the nation's attention on an important educational problem: how do we move toward (rather than away from) greater equality of educational opportunity while also honoring the due process rights of citizens (in this case, tenured teachers), which date back to the Magna Carta? The long struggle to limit the power of government officials through transparent procedure cannot be abandoned, nor can our meritocratic society and differential levels of wealth and prosperity be justified without equality of educational opportunity. Government acting fairly towards its employees and its citizens serves the public good. There must be a fair process using fair laws, rules, and regulations when a teacher who has attained tenure status is being fired. We must remove those educators who impede the achievement of students and thwart the educational program, but it must be done in a fair manner.

As both the plaintiffs and the court acknowledged, teachers are the core of the educational system, the most indispensable school resource, and the critical school lever for student learning. Due process is an acknowledgement of this fact and serves to protect a cherished community resource through transparent process. Focusing on dismissal is a poor approach to building the capacity of teachers and enhancing educational opportunities for all students in the state of California. Teacher performance is critical, but as Harvard professor Richard Elmore argues, accountability is a reciprocal process.²⁰⁹ The *Vergara* decision should be overturned on appeal so that the necessary hard work of placing, developing, and retaining the most qualified educators can move forward.

AUTHORS' NOTE

Just prior to going to press, the California Court of Appeals of the Second Appellate District reversed the trial court's decision and remanded the case with directions to enter a judgment in favor of defendants on all causes of action. The Court of Appeals wrote, "Plaintiffs failed to establish that the challenged statutes violate equal protection, primarily because they did not show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students."²¹⁰ The Appellate Court stated that the trial court while highlighting drawbacks to the tenure, dismissal and layoffs statutes, failed to demonstrate a facial constitutional violation. However, the court, also found that the evidence at trial "revealed deplorable staffing decisions being made by some local administrators that have deleterious impact on poor and minority students in California's public schools."²¹¹

209 RICHARD F. ELMORE, BRIDGING THE GAP BETWEEN STANDARDS AND ACHIEVEMENT: THE IMPERATIVE FOR PROFESSIONAL DEVELOPMENT IN EDUCATION 5 (2002) ("For every increment of performance I demand from you, I have an equal responsibility to provide you with the capacity to meet that expectation.").

210 *Vergara v. State of California*, No. B258589, at *6 (Cal. App. Dep't Super. Ct. April 14, 2016), <http://www.courts.ca.gov/opinions/documents/B258589.PDF>.

211 *Id.* at *35.