

## THE RIGHT TO EDUCATION: RECONCILING TEACHER TENURE AND THE CURRENT STATE OF PUBLIC EDUCATION

*Michael J. DeJianne\**

### I. INTRODUCTION

The Supreme Court of the United States has long recognized that the administration and implementation of the public school system is the most important function of state and local governments.<sup>1</sup> Specifically, the Court's unanimous ruling in *Brown v. Board of Education* emphasized education's significance to a child's potential success in life and the survival of any democratic society.<sup>2</sup> The decision famously held, "[s]uch an opportunity, where the state has undertaken to provide it, is a right which *must be made available to all on equal terms*."<sup>3</sup> These words, though written by Chief Justice Earl Warren more than six decades ago, still hold true and reflect this country's enormous investment of time, money, and effort into creating an education system with the goal of giving every child the tools necessary to succeed in life and ultimately foster our democracy.

Though its importance is rarely called into question, the level of constitutional protection offered to education has resulted in controversial judicial rulings.<sup>4</sup> Some state courts elevate the right to education to a fundamental interest,<sup>5</sup> while the United States Supreme Court<sup>6</sup> and other state courts have declined to do so.<sup>7</sup> Because those states and the federal

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\* J.D. Candidate, 2016, Seton Hall University School of Law; M.B.A., 2012, Seton Hall University; B.A., 2009, Providence College. I want to thank Dean Mark Alexander for all the guidance and support in writing this Comment. I am also thankful for my family's love, patience, and words of encouragement, especially those of my wife, Corinne, my brothers, Peter and Thomas, and my parents, Joseph and Lorraine.

<sup>1</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (emphasis added).

<sup>4</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (holding that education is not a fundamental right while emphasizing its high importance to society).

<sup>5</sup> *Serrano v. Priest*, 487 P.2d 1241, 1255 (Cal. 1971) (holding that education is a fundamental right).

<sup>6</sup> *Rodriguez*, 411 U.S. at 59.

<sup>7</sup> *Robinson v. Cahill*, 303 A.2d 273, 2865 (N.J. 1973) (holding that education is not a

government offer a lower level of equal protection analysis to education, statutes that allegedly detract from education's quality must only be rationally related to a legitimate government interest.<sup>8</sup> These decisions helped shape this country's state and national education policy and, some argue, contributed to a deteriorating experience in the American classroom.<sup>9</sup>

Some of the most controversial legislation surrounding education policy is teacher tenure statutes. Tenure is an employment protection awarded to teachers,<sup>10</sup> the qualifications of which vary by state. Though the right to tenure does not technically create absolute immunity from dismissal, tenure reform advocates argue that some state statutes protect ineffective teachers from termination and thereby directly harm the quality of education.<sup>11</sup> Overturning these statutes has proven to be difficult, especially when state supreme courts offer education the lowest level of equal protection analysis.<sup>12</sup>

In August of 2014, a California district court held that certain state teacher tenure statutes violate the California Constitution.<sup>13</sup> In *Vergara v. State of California*, Judge Rolf Treu held that the challenged teacher tenure statutes detracted from the quality of California's education and enjoined their enforcement.<sup>14</sup> Because California considers education a fundamental right, state courts must apply the highest level of equal protection analysis.<sup>15</sup> Plaintiffs in New York subsequently challenged state teacher tenure statutes in a similar fashion.<sup>16</sup> With the upcoming appeal of the *Vergara* decision and a trial scheduled in 2015 for *Dauids v. New York*,<sup>17</sup> it is important to analyze whether teacher tenure statutes detract from the quality of education and therefore violate a state's constitution.

This Comment aims to answer these questions, examine the plaintiffs'

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fundamental right).

<sup>8</sup> See, e.g., *id* at 496–99.

<sup>9</sup> See Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 49 (2011).

<sup>10</sup> See Arnold Shep Cohen, *Striking a Balance Between Teachers' Employment Rights and Professional Responsibilities*, N.J. LAW., July 1993, at 43 (outlining various state laws regulating teacher tenure, including probationary periods and teacher effectiveness).

<sup>11</sup> See Nicholas Dagostino, *Giving the School Bully a Timeout: Protecting Urban Students from Teachers' Unions*, 63 ALA. L. REV. 177, 195 (2011).

<sup>12</sup> See generally, *infra* Parts II & III.

<sup>13</sup> *Vergara v. California*, 2014 WL 6478415, at \*2 (Cal. Super. Ct. Aug. 27, 2014).

<sup>14</sup> *Id.* at \*5–7.

<sup>15</sup> *Serrano v. Priest*, 487 P.2d 1241, 1257 (Cal. 1971).

<sup>16</sup> See Javier C. Hernandez, *New York Educators Fight Back on Attacks to Tenure*, N.Y. TIMES (July 29, 2014), <http://www.nytimes.com/2014/07/30/nyregion/new-york-educators-fight-back-on-attacks-to-tenure.html>.

<sup>17</sup> *Dauids v. New York*, No. 101105/2014 (N.Y. Sup. Ct. filed July 24, 2014).

arguments in *Vergara* and  *Davids*, and evaluate the effectiveness of New Jersey's recent teacher tenure reform. Parts II and III of this Comment outline federal and state equal protection analysis and the level of protection education receives from the Supreme Court and the state courts in New Jersey, New York, and California. Part IV examines the current landscape of teacher tenure in these states and explains Judge Treu's analysis in the *Vergara* decision. Part V then applies the plaintiffs' arguments in *Vergara* and *Davids* to California and New York's equal protection clauses. Ultimately, this Comment advocates for courts to accept the plaintiffs' arguments, recognize the states' teacher tenure statutes as void, and direct the California and New York legislatures to adopt an approach similar to New Jersey's recent reform. Part VI concludes.

## II. HOW IS EQUAL PROTECTION ANALYZED?

### A. Federal Equal Protection Analysis

Before evaluating the constitutional validity of current teacher tenure statutes as they relate to the right to public education, it is necessary to examine courts' equal protection clause analyses. The Supreme Court has traditionally utilized a three-tiered test when legislation is challenged under the United States Constitution's Equal Protection Clause ("the Equal Protection Clause").<sup>18</sup> First, laws that affect fundamental rights or classify individuals based on race and national origin are subject to the highest level of scrutiny.<sup>19</sup> Legislation that falls under this category must serve a compelling interest, and the government action must be narrowly tailored to allow the violation of equal protection.<sup>20</sup> Second, laws that classify individuals based on gender are traditionally analyzed under intermediate scrutiny.<sup>21</sup> This analysis requires the law to be substantially related to an important government interest.<sup>22</sup> Finally, at a minimum, any statutory classification must be rationally related to a legitimate government interest.<sup>23</sup> All laws, whether passed by Congress or state legislatures, must meet this constitutional floor.<sup>24</sup> Any law that fails to meet this "rational basis" standard violates the Equal Protection Clause<sup>25</sup> and will be void.

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<sup>18</sup> See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>19</sup> See *id.* (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 672 (1966)).

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

<sup>22</sup> *Id.*

<sup>23</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

<sup>24</sup> *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959).

<sup>25</sup> See *id.*

*B. New Jersey's Equal Protection Analysis*

Though the Supreme Court's equal protection analysis is highly influential, each state utilizes a unique approach to its respective state constitution's equal protection clause. The New Jersey Constitution's Liberty Clause ("the Liberty Clause") reads, "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."<sup>26</sup> While the Liberty Clause does not explicitly mention equal protection, the New Jersey Supreme Court has read it to grant equal protection under the law.<sup>27</sup>

When a statute is challenged under the Liberty Clause, the court departs from the three-tiered federal analysis and opts for a balancing test that weighs the right violated against the need for the alleged inequality.<sup>28</sup> In *Greenberg v. Kimmelman*, the New Jersey Supreme Court outlined this fluid balancing test where state courts must consider "[t]he nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction."<sup>29</sup> According to the court, this analysis uses an approach implicit in the federal test.<sup>30</sup> Justice Pollock explained, "in [federal] equal protection analysis, the nature of the right is the crucial consideration in characterizing a right as 'fundamental,' the initial step in determining whether the governmental regulation will receive 'strict scrutiny' or a more relaxed standard of judicial review."<sup>31</sup> While the New Jersey Supreme Court's test is less mechanical than the federal test, it still aims to define the importance of the right and analyze the level of protection that right receives from the Liberty Clause. This guarantees protection against unequal treatment of people who should be treated alike, such as all students in the classroom.<sup>32</sup>

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<sup>26</sup> N.J. CONST. art. I, § 1.

<sup>27</sup> See *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006).

<sup>28</sup> See *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985).

<sup>29</sup> *Id.*

<sup>30</sup> See *id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

*C. California's Equal Protection Analysis*

Much like New Jersey, California applies a different equal protection analysis than its federal counterpart. California's equal protection clause is in-depth and reads more like a statute than a constitutional provision.<sup>33</sup> Like the Equal Protection Clause, however, California's equal protection clause still ensures that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."<sup>34</sup> At its core, this article promises that persons who are similarly situated are treated equally under the law.<sup>35</sup>

The California Supreme Court has held that the state's equal protection clause possesses validity independent from the Fourteenth Amendment of the United States Constitution.<sup>36</sup> When legislative action classifies individuals and is challenged as violating the state's constitution, California courts use a two-tiered standard of review.<sup>37</sup> The California Court of Appeals explained in *Molar v. Gates* that strict scrutiny analysis is required for the violation of fundamental interests or suspect classifications.<sup>38</sup> The state must show that the violation of the right or the creation of such classification is necessary to accomplish a compelling interest.<sup>39</sup> California does not recognize a distinction between classifications of race or gender.<sup>40</sup> Instead, the state analyzes these classifications under the same level of scrutiny.<sup>41</sup> All other legislation must bear some rational relationship to a legitimate state purpose, meeting the constitutional floor that the Supreme Court requires.<sup>42</sup>

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<sup>33</sup> See CAL. CONST. art. I, § 7. In 1979, the California Legislature amended this provision to specifically outline how instruments of the state must enforce equal protection. This clearly departs from New Jersey, New York, and the United States Constitution's respective equal protection amendments, as it is much more in depth.

<sup>34</sup> See CAL. CONST. art. I, § 7(a).

<sup>35</sup> *In re Evans*, 57 Cal. Rptr. 2d 314, 319 (Cal. Ct. App. 1996).

<sup>36</sup> See, e.g., *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d. 592, 598 (Cal. 1979).

<sup>37</sup> See *Molar v. Gates*, 159 Cal. Rptr. 239, 246 (Cal. Ct. App. 1979).

<sup>38</sup> *Id.* at 247.

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., *Sail'er Inn, Inc. v. Kirby*, 485 P.2d. 529, 540–41 (Cal. 1974) (holding that a California statute prohibiting women from obtaining bartender licenses compels the application of strict scrutiny analysis and ultimately violates the equal protection clause of the California Constitution).

<sup>41</sup> *Id.*

<sup>42</sup> *Molar*, 159 Cal. Rptr. at 247.

*D. New York's Equal Protection Analysis*

New York's Constitution extends equal protection of state laws to all persons and prohibits the violation of an individual's civil rights.<sup>43</sup> When statutes are challenged under this constitutional provision, the New York Court of Appeals opts to use an analysis that closely resembles the Supreme Court's three-tiered test.<sup>44</sup> First, strict scrutiny is appropriate in New York for an alleged discrimination based on suspect classification or violation of a fundamental interest.<sup>45</sup> Second, in *Alevy v. Downstate Medical Center*, the New York Court of Appeals explained intermediate scrutiny, or the "sliding scale" test.<sup>46</sup> The court first must ask if the alleged discrimination satisfies a substantial state interest and furthers a legitimate government purpose.<sup>47</sup> If the discrimination or violation of rights serves a substantial state interest and furthers a governmental purpose, then the court must answer if the objectives could be achieved by less offensive means.<sup>48</sup> Third, similar to the federal analysis, all classifications must be at least rationally related to a legitimate government interest.<sup>49</sup>

### III. IS THERE A RIGHT TO AN EDUCATION?

*A. The Guarantee of an Equal Education*

The administration of public schools largely falls on state and municipal governments.<sup>50</sup> While some argue that the United States Department of Education has taken strides towards creating a national education policy,<sup>51</sup> state constitutions, particularly those of New Jersey, California, and New York, require that their respective legislatures provide free schooling to all children.<sup>52</sup> The practical effect of this constitutional obligation has led to legislatures passing numerous statutes that regulate nearly every aspect of operating a statewide education system.<sup>53</sup> These include mechanisms for funding each school district, education standards

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<sup>43</sup> N.Y. CONST. art. I, § 11.

<sup>44</sup> See *Bd. of Educ. v. Nyquist*, 408 N.Y.S.2d 606, 634 (N.Y. Sup. Ct. 1978).

<sup>45</sup> *Id.* at 635.

<sup>46</sup> See *Alevy v. Downstate Med. Ctr.*, 348 N.E.2d 537, 545–46 (N.Y. 1976).

<sup>47</sup> *Id.* at 545.

<sup>48</sup> *Id.* at 546.

<sup>49</sup> *Nyquist*, 408 N.Y.S.2d at 638.

<sup>50</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 7 (1973).

<sup>51</sup> See Sarah G. Boyce, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal Government's Quest to Leave No Child Behind*, 61 DUKE L.J. 1025, 1027 (2012).

<sup>52</sup> CAL. CONST. art. IX, § 1; N.J. CONST. art. VIII, § 4; N.Y. CONST. art. XI, § 1.

<sup>53</sup> See, e.g., School Funding Reform Act, N.J. STAT. ANN. § 18A:7F-44 (West 2008) (outlining the structure and calculations used to fund New Jersey's public school system for all children between the ages of five and eighteen).

for student advancement, and evaluation criteria for teacher and administrative job performance.<sup>54</sup> These statutes show that education policy is, very much so, both a state and local concern. When individuals believe that this legislation detracts from the state's educational experience, the laws are challenged as violating the state's guarantee of an education.<sup>55</sup>

Legal precedent in this area evaluates whether government benefits or programs are elevated to fundamental rights. States provide many services that its citizens need, some of which are mandated by their state constitutions.<sup>56</sup> For example, the New York Constitution requires the state legislature to maintain a public welfare system in support of the needy.<sup>57</sup> While this is certainly an important role for the government, the New York Court of Appeals has held that public welfare is not a fundamental right.<sup>58</sup> Likewise, education is not elevated to a fundamental right in many states, and therefore receives a lower level of protection under a state's equal protection clause.<sup>59</sup> But, as the Supreme Court explained, state laws that violate equal protection must always bear at least some rational relationship to a legitimate government interest.<sup>60</sup> Therefore, in states where education is not a fundamental right, laws cannot go below this constitutional floor and detract from a basic level of education.

Many landmark judicial decisions regarding the administration of education have focused on state funding mechanisms.<sup>61</sup> In New Jersey, California, and New York, the public school system is primarily funded by general revenue raised through property and income taxes.<sup>62</sup> Those opposed to the funding scheme have argued that poorer school districts do not have access to adequate tax revenue, resulting in an inferior educational experience that violates the state's constitutional obligation and equal

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<sup>54</sup> See CAL. EDUC. CODE § 44830 (West 2009) (outlining the employment qualifications for public school teachers); see also N.J. STAT. ANN. § 18A:7F-44; N.Y. EDUC. LAW § 3220 (McKinney 2008) (requiring all students to participate in physical fitness exams during the academic year).

<sup>55</sup> See, e.g., *Rodriguez*, 411 U.S. at 1 (challenging the constitutionality of the education funding system in Texas).

<sup>56</sup> See N.Y. CONST. art. XVII, § 1 (requiring the state legislature to provide public support to the needy).

<sup>57</sup> *Id.*

<sup>58</sup> *Bd. of Educ. v. Nyquist*, 439 N.E.S.2d 359, 365 (N.Y. 1982).

<sup>59</sup> See, e.g., *id.* (holding that education is not a fundamental right in New York).

<sup>60</sup> *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959).

<sup>61</sup> See, e.g., *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (challenging the constitutionality of the education funding system used in New Jersey).

<sup>62</sup> CAL. CONST. art. XVI, § 8 (requiring that state revenue be set aside for public school funding); N.J. STAT. ANN. § 18A:7F (West 2008); N.Y. EDUC. LAW § 3602 (McKinney 2014) (requiring that public money be made available to each school district from state and local revenue).

protection.<sup>63</sup> Key cases from New Jersey, California, and New York are helpful to summarize for purposes of this Comment. Each decision discussed below outlines the obligation to provide an education and analyzes whether the respective constitutional provisions recognize a fundamental right. This will ultimately provide a framework to discuss whether the challenged teacher tenure statutes violate the state constitution.

*B. The Supreme Court's View*

There is neither an explicit nor an implicit guarantee to education under the United States Constitution.<sup>64</sup> The U.S. Supreme Court was confronted with this question in *San Antonio Independent School District v. Rodriguez*.<sup>65</sup> At trial, plaintiffs argued that the Texas public education financing system, through the Texas Minimum Foundation School Program ("Program"), violated the Equal Protection Clause.<sup>66</sup> The Program was designed in response to the development of industrial cities and population shifts, which resulted in many rural Texas communities lacking sufficient public school funding.<sup>67</sup> The legislature understood that disparities in expenditures harmed the quality of education in rural districts and passed legislation designed to increase funding.<sup>68</sup> The Program supplied funds to school districts from general state revenue, which financed each district with roughly eighty percent of the annual school budget.<sup>69</sup> The remaining funds came directly from the district's budget by way of local property taxes, calculated as a percentage of residential and commercial property value.<sup>70</sup> The goal of the Program was twofold: (1) place the heaviest burden on school districts most capable of paying and (2) ensure that every school district contributes to the education of its children without completely exhausting local resources.<sup>71</sup>

The plaintiffs came from Edgewood, the least affluent district in the San Antonio area.<sup>72</sup> Because of low property values and limited municipal resources, the district could only contribute \$26 to the education of each student for the 1967–1968 academic year.<sup>73</sup> With the contribution from the Texas state revenue, total expenditures per student for the academic year

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<sup>63</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 7–8 (1973).

<sup>64</sup> *Id.* at 35.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 9–10.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 9–11.

<sup>69</sup> See *Rodriguez*, 411 U.S. at 9.

<sup>70</sup> *Id.* at 9–10.

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.* at 12.

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were \$248.<sup>74</sup> At trial, plaintiffs introduced the 1967–1968 expenditures of Alamo Heights, the most affluent district in the San Antonio area.<sup>75</sup> Because of greater property values and state contribution, Alamo Heights supplied \$594 per pupil.<sup>76</sup> The federal district court concluded that the Program failed strict scrutiny analysis under the Equal Protection Clause on the basis that an individual's wealth is a suspect classification, and education is a fundamental right.<sup>77</sup>

The Supreme Court overturned the district court on two separate grounds.<sup>78</sup> Writing for the majority, Justice Powell explained that the plaintiffs failed to offer evidence that the financing system discriminated against a definable group of impoverished people and led to a total lack of education.<sup>79</sup> It was unclear to the majority if the Program discriminated against all poor people, all people with lower property values, or the ten percent of Texas school districts surveyed for purposes of trial.<sup>80</sup> The Court therefore concluded that the financing system did not disadvantage a suspect class.<sup>81</sup>

The majority then held that education is not a fundamental right that requires a higher level of scrutiny.<sup>82</sup> Justice Powell explained that education is vital in a free society, both to individual citizens and the country as a whole.<sup>83</sup> The importance of a state function, however, does “not determine whether [that function] must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”<sup>84</sup> Fundamental rights are provided to individuals through a guarantee in the Constitution, while economic and social rights call for a lower level of scrutiny under equal protection analysis.<sup>85</sup> Because it is not explicitly nor implicitly guaranteed in the Constitution, the Court concluded that education is not a fundamental right.<sup>86</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *See Rodriguez*, 411 U.S. at 12–13.

<sup>76</sup> *Id.* at 13.

<sup>77</sup> *Id.* at 16.

<sup>78</sup> *Id.* at 18.

<sup>79</sup> *Id.* at 23–25.

<sup>80</sup> *Id.* at 26–27.

<sup>81</sup> *See Rodriguez*, 411 U.S. at 28.

<sup>82</sup> *Id.* at 30.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* at 34–35.

<sup>86</sup> *Id.*

*C. New Jersey's View*

The New Jersey Supreme Court confronted a similar public school funding issue in the same year as the *Rodriguez* decision.<sup>87</sup> In *Robinson v. Cahill*, plaintiffs challenged the constitutionality of New Jersey's public school financing plan.<sup>88</sup> Much like Texas' Program, New Jersey's public schools received funding from general state revenue and local property taxes.<sup>89</sup> This resulted in a disparity of dollars spent per pupil, particularly in areas with low property values.<sup>90</sup> The plaintiffs argued that this inequality violated a student's fundamental right to an education, asking the court to declare the funding scheme as void on the basis of the Liberty Clause.<sup>91</sup>

In addition to the guarantee of equal protection through the Liberty Clause, the New Jersey Constitution requires the legislature to supply a "thorough and efficient" public school system to all children.<sup>92</sup> Plaintiffs urged the court to invoke the highest level of scrutiny when evaluating the funding scheme's violation of this constitutional provision.<sup>93</sup> The plaintiffs specifically pointed to the Supreme Court's holding in *Rodriguez*, which elevated explicit constitutional guarantees to the level of fundamental rights.<sup>94</sup> The plaintiffs argued that the holding in *Rodriguez* only bolstered Chief Justice Warren's unanimous decision in *Brown*, where the Court held that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>95</sup>

The New Jersey Supreme Court used the *Rodriguez* decision to guide its analysis and found that the funding disparities neither violated a fundamental right nor invoked the highest level of scrutiny under the Liberty Clause.<sup>96</sup> Chief Justice Weintraub explained that the guarantee of an efficient education does not mandate a uniform expenditure plan.<sup>97</sup> The constitutional guarantee implicitly involves municipal participation, which undoubtedly leads to varying budgets and expenditures.<sup>98</sup> While involvement at the state level is constitutionally mandated, the funding disparities that result from the statutory scheme are not "irrational" and do

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<sup>87</sup> See *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

<sup>88</sup> *Id.* at 276.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 276-77.

<sup>91</sup> See *id.* at 277.

<sup>92</sup> N.J. CONST. art. VII, § 4.

<sup>93</sup> *Robinson*, 303 A.2d at 283-84.

<sup>94</sup> *Id.* at 282.

<sup>95</sup> *Id.* at 284 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>96</sup> See *id.* at 282.

<sup>97</sup> *Id.* at 286.

<sup>98</sup> *Id.* at 286-87.

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not invoke a higher level of scrutiny.<sup>99</sup> Therefore, the requirement to furnish a service does not automatically elevate the state's obligation to a fundamental right.<sup>100</sup>

*D. New York's View*

Throughout the late 1970s and early 1980s, New York's public school funding scheme faced numerous challenges in the *Board of Education v. Nyquist* line of cases.<sup>101</sup> Like New Jersey and Texas, New York's funding scheme resulted in disparities where property values were low.<sup>102</sup> In the case's final disposition, the New York Court of Appeals looked to the Supreme Court's decision in *Rodriguez* and ultimately held that education is not a fundamental right.<sup>103</sup> Justice Jones explained that public education is one of the most important services that the state performs, a notion expressly manifested in the New York State Constitution.<sup>104</sup> As mentioned *supra*, however, dedication to a government program does not automatically elevate the level of scrutiny to that of a fundamental right.<sup>105</sup> Other constitutionally mandated programs, such as public assistance to the needy, are also very important but do not call for a higher level of scrutiny.<sup>106</sup> Strict or intermediate scrutiny is appropriate only when the state action groups persons together by reason of personal characteristics, such as race or gender.<sup>107</sup> For these reasons, the court held that the proper standard of review for purported violations of the right to education in New York is rational basis.<sup>108</sup>

*E. California's View*

California's view of public education departs from the holdings in *Rodriguez*, *Robinson*, and *Nyquist*.<sup>109</sup> In *Serrano v. Priest*, California's public school funding statutes encountered a challenge for violating California's equal protection clause.<sup>110</sup> Similar to challenges in New York

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<sup>99</sup> *Robinson*, 303 A.2d at 286.

<sup>100</sup> *Id.*

<sup>101</sup> *Bd. of Educ. v. Nyquist*, 408 N.Y.S.2d 606, 634 (N.Y. Sup. Ct. 1978), *modified by Bd. of Educ. v. Nyquist*, 443 N.Y.S.2d 843 (N.Y. App. Div. 1981), *modified by Bd. of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982).

<sup>102</sup> *See Nyquist*, 439 N.E.2d at 361.

<sup>103</sup> *Id.* at 367.

<sup>104</sup> N.Y. CONST. art. XI, § 1; *Nyquist*, 439 N.E.2d at 366.

<sup>105</sup> *Nyquist*, 439 N.E.2d at 366.

<sup>106</sup> N.Y. CONST. art. XVII, § 1; *Nyquist*, 439 N.E.2d at 366.

<sup>107</sup> *Nyquist*, 439 N.E.2d at 366.

<sup>108</sup> *Id.*

<sup>109</sup> *See, e.g., Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

<sup>110</sup> *Id.* at 1244.

and New Jersey, plaintiffs attacked the statutes for creating funding disparities that resulted in substandard educational opportunities for students living in school districts with lower property values.<sup>111</sup> The plaintiffs argued that this violated a fundamental right.<sup>112</sup>

The California Supreme Court believed that the plaintiffs' claims had legal merit and remanded the proceedings for trial.<sup>113</sup> Writing for the majority, Justice Sullivan noted that the right to public education in California is a fundamental interest,<sup>114</sup> requiring a higher level of scrutiny for an alleged violation. In support of this conclusion, the court pointed to Chief Justice Warren's decision in *Brown*.<sup>115</sup> Justice Sullivan explained that the majority in *Brown* espoused two themes when speaking about the importance of education: (1) the importance to individuals and (2) the importance to society.<sup>116</sup> Both of these themes directly impact the success of America's democracy, and are both supported by the language in California's Constitution: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."<sup>117</sup> Because of the "distinctive and priceless" role that education serves in society, the majority held that the right to education is a fundamental interest that requires the highest level of scrutiny and protection.<sup>118</sup>

#### F. *What Really Affects a Student's Education?*

The plaintiffs in the preceding cases attacked plans funding education in Texas, New Jersey, California, and New York.<sup>119</sup> With the exception of California, the courts largely rejected plaintiffs' arguments that education

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<sup>111</sup> *Id.*

<sup>112</sup> *See id.* at 1255 (noting "[p]laintiffs' contention—that education is a fundamental interest").

<sup>113</sup> *Id.* at 1265.

<sup>114</sup> *See id.* at 1255–56 ("The fundamental importance of education has been recognized in other contexts by the United States Supreme Court and by this court. These decisions—while not *legally* controlling on the exact issue before us—are persuasive in their accurate factual description of the significance of learning.")

<sup>115</sup> *Serrano*, 487 P.2d at 1256 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

<sup>116</sup> *Id.* at 1257.

<sup>117</sup> CAL. CONST. art. IX, § 1; *Serrano*, 487 P.2d at 1258 (quoting CAL. CONST. art. IX, § 1).

<sup>118</sup> *Serrano*, 487 P.2d at 1258.

<sup>119</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano*, 487 P.2d at 1241; *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982).

deserves heightened constitutional protection.<sup>120</sup> The courts held that disparities in funding do not violate a fundamental right, while recognizing education's significance to society.<sup>121</sup> As mentioned *supra*, the importance of education is exemplified by this country's commitment of time, money, and effort into educating every child. Even though not every state recognizes education as a fundamental right, this commitment compels legislatures to ensure that laws governing educational policy meet the required level of equal protection, even if that level is the "constitutional floor."<sup>122</sup> Laws that fail to meet the standard and detract from a student's education should, therefore, be declared void.<sup>123</sup>

Though funding is an important aspect of operating state public school systems, it is not the primary influence on education's quality.<sup>124</sup> For example, some statistics show that Newark, New Jersey spends about \$22,000 per pupil, while only 22% of students graduate from high school.<sup>125</sup> In comparison, Chatham, New Jersey spends about \$12,000 per pupil and has a high school graduation rate of virtually 100%.<sup>126</sup> Some may argue that comparing New Jersey's largest city to a small suburb creates an inaccurate portrayal of Newark's school system. But the facts cannot be ignored: Newark, and many cities like it, spends huge sums of money on its public school system with extremely disappointing results. Therefore, other factors have as much, if not more, influence on a child's education.

The Supreme Court has recognized some of these other factors that affect public education's quality.<sup>127</sup> In *Brown*, the Court famously struck down the segregation of children in public schools based on race.<sup>128</sup> Even if facilities were "tangibly" equal, the psychological effect of separating students based on physical characteristics negatively impacts students' education.<sup>129</sup> The Court, therefore, recognized that environmental factors

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<sup>120</sup> See *supra* note 119.

<sup>121</sup> *Rodriguez*, 411 U.S. at 30; *Robinson*, 303 A.2d at 283–84; *Nyquist*, 439 N.E.2d at 366.

<sup>122</sup> See *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959).

<sup>123</sup> See *id.*

<sup>124</sup> See *Dagostino supra* note 11, at 180.

<sup>125</sup> *Id.*

<sup>126</sup> STATE OF NEW JERSEY, *NJ School Performance Report 7* (2014), <http://www.state.nj.us/education/pr/2013/27/270785010.pdf>; SCHOOL DISTRICT OF THE CHATHAMS, *Budget Newsletter 2* (Apr. 2014), <http://www.chatham-nj.org/cms/lib/NJ01000518/Centricity/Domain/992/Budget%20Newsletter%202014-2015.pdf>.

<sup>127</sup> See *Brown v. Bd. of Educ.* 347 U.S. 483, 493 (1954).

<sup>128</sup> *Id.* at 495.

<sup>129</sup> *Id.* at 494.

have an impact on education's quality.<sup>130</sup>

The Supreme Court also held that facilities and materials play an important role in education's quality.<sup>131</sup> In *Sweatt v. Painter*, the plaintiff was denied admission to the University of Texas Law School based on his race.<sup>132</sup> Texas operated a law school solely for African Americans, something that the Texas Court of Civil Appeals found as an appropriate remedy for the plaintiff.<sup>133</sup> The Supreme Court disagreed and ordered the University of Texas to admit the plaintiff to its law school.<sup>134</sup> In its analysis, the Court compared the schools' facilities.<sup>135</sup> The University of Texas had access to scholarship funds, moot court facilities, and 65,000 volumes in its library.<sup>136</sup> The African American law school had no faculty, almost no volumes in its library, and lacked accreditation.<sup>137</sup> The Court held that the insufficient facilities detracted from the plaintiff's legal education and, therefore, violated his constitutional rights.<sup>138</sup> Implicit in its decision, *Painter* recognized that facilities and academic materials have an effect on one's education.<sup>139</sup>

While funding, environmental factors, facilities, and materials all play a vital role in the quality of a public school, effective teachers play the most vital role.<sup>140</sup> A teacher has the most lasting impact on a student's education, with some studies showing that students with effective teachers earn more money, are less likely to have children in their teens, and are more likely to attend college.<sup>141</sup> According to the same study, an ineffective teacher could lead to almost \$2.5 million of lost lifetime earnings per classroom.<sup>142</sup> Providing the best teachers for students only seems logical with these results; however, some argue that teacher tenure statutes directly detract from this goal by protecting ineffective teachers' positions.<sup>143</sup> If teachers detract from the classroom experience and are

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<sup>130</sup> *See id.*

<sup>131</sup> *See Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>132</sup> *Id.* at 631.

<sup>133</sup> *Id.* at 632.

<sup>134</sup> *Id.* at 636.

<sup>135</sup> *Id.* at 632–33.

<sup>136</sup> *Id.*

<sup>137</sup> *Painter*, 339 U.S. at 633.

<sup>138</sup> *Id.* at 636.

<sup>139</sup> *See id.*

<sup>140</sup> *See, e.g., Annie Lowrey, Big Study Links Good Teachers to Lasting Gain*, N.Y. TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/06/education/big-study-links-good-teachers-to-lasting-gain.html?pagewanted=all>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (“Replacing a poor teacher with an average one would raise a single classroom’s lifetime earnings by about \$266,000 . . . Multiply that by a career’s worth of classrooms.”).

<sup>143</sup> Dagostino, *supra* note 11, at 195.

protected from termination, this practice may have constitutional implications even at the lowest equal protection analysis. This leads us to an important discussion about teacher tenure and its effect on the classroom experience.

#### IV. THE CURRENT LANDSCAPE OF TEACHER TENURE

##### A. *What is Tenure?*

Tenure was initially established to provide protection from random termination and create a degree of permanency and expertise within the teaching profession.<sup>144</sup> Tenure guarantees that an employee can only be dismissed for cause after a hearing is held and a decision is rendered by the state's education agency.<sup>145</sup> Contrary to popular belief, tenure for public school teachers does not provide absolute immunity from termination.<sup>146</sup> As explained in *Donahoo v. Board of Education*, the goal of tenure is to ensure that the best teachers continue service and are protected from termination based on arbitrary or capricious reasons.<sup>147</sup> Proponents of tenure argue that this protection adds value to the classroom experience, while opponents believe it restricts the ability of administrators to effectively shape state education policies and standards.<sup>148</sup> Laws regulating the hearing process vary by state; however, the charges that an individual teacher may face for termination are less varied.<sup>149</sup> Therefore, it is possible to terminate a tenured teacher's position.<sup>150</sup>

##### B. *Efforts at Tenure Reform: The TEACHNJ Act*

The recent economic downturn, shrinking state budgets, and underperforming schools brought teacher tenure to the forefront of the education reform debate.<sup>151</sup> Many states passed legislation modifying teacher evaluations, extending the probationary period before teachers become tenure-eligible, and eliminating the highly controversial "last-in,

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<sup>144</sup> See Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 HOFSTRA LAB. & EMP. L.J. 489, 491 (2013).

<sup>145</sup> See *id.* at 492.

<sup>146</sup> Cohen, *supra* note 10, at 43.

<sup>147</sup> *Id.* (citing *Donahoo v. Bd. of Educ.*, 109 N.E.2d 787, 789 (Ill. 1952)).

<sup>148</sup> Compare McNeal, *supra* note 144, at 490 (explaining that recent attempts to eliminate tenure have been viewed by many teachers as an attack on the profession), with Dagostino, *supra* note 11, at 195 (arguing that tenure keeps ineffective teachers in the classroom).

<sup>149</sup> Cohen, *supra* note 10, at 43 (noting that a teacher may be disciplined for inefficiency, incapacity, unbecoming conduct, or other just cause).

<sup>150</sup> *Id.*

<sup>151</sup> See McNeal, *supra* note 144, at 489.

first-out” seniority system utilized for school layoffs.<sup>152</sup> New Jersey was not immune to the budgetary and education issues faced by other states, and Republican Governor Chris Christie felt that tenure reform would help improve some of the state’s ailing school districts.<sup>153</sup> After a highly publicized fight between Governor Christie, the Democratic controlled legislature, and the New Jersey Education Association, all three eventually worked together to create the first comprehensive tenure reform in New Jersey since 1909.<sup>154</sup>

In 2012, New Jersey passed the Teacher Effectiveness and Accountability for the Children of New Jersey Act (the “TEACHNJ Act”) for the 2013–2014 academic year.<sup>155</sup> The TEACHNJ Act addresses the probationary period and evaluation process for public school teachers in New Jersey.<sup>156</sup> As mandated by the law, teachers become eligible for tenure after one year of mentorship with an experienced teacher followed by two positive evaluations over the following three years.<sup>157</sup> The new evaluation system rates teachers as “ineffective,” “partially effective,” “effective,” or “highly effective.”<sup>158</sup> A panel of experienced teachers and administrators completes the evaluations, balancing both subjective and objective factors.<sup>159</sup> Once tenure is earned, two consecutive years of an “ineffective” rating result in a loss of tenure.<sup>160</sup> The teacher then must have two consecutive years of “effective” or “highly effective” ratings in order to avoid dismissal.<sup>161</sup> Further, the costs of a dismissal hearing are capped at \$7500.<sup>162</sup> According to supporters of the TEACHNJ Act, this allows administrators and state regulators to proceed against an ineffective teacher without being discouraged by expensive and ongoing litigation, a problem that existed before the TEACHNJ Act’s passage.<sup>163</sup>

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<sup>152</sup> See *id.* at 498–99 (detailing Michigan’s new law that created a five-year probationary period, Indiana’s new law that created four categories for teacher evaluations, and Nevada’s new law that eliminated automatic seniority protection during school layoffs).

<sup>153</sup> See Dagostino, *supra* note 11, at 180 (explaining that only twenty-two percent of students in Newark, New Jersey graduate from high school); McNeal, *supra* note 144, at 501–02.

<sup>154</sup> McNeal, *supra* note 144, at 501.

<sup>155</sup> See Teacher Effectiveness and Accountability for the Children of New Jersey Act, N.J. STAT. § 18A:6-117 (West 2012).

<sup>156</sup> N.J. STAT. § 18A:6-118(b).

<sup>157</sup> *Id.*

<sup>158</sup> McNeal, *supra* note 144, at 502.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 502–03.

<sup>162</sup> *Id.* at 503.

<sup>163</sup> *Id.*; Dagostino, *supra* note 11, at 194 (explaining that in some states, a legal battle for teacher dismissal costs an average of \$500,000).

*C. Legal Challenges Brought Against Teacher Tenure**1. Vergara v. California*

In the same year that New Jersey passed the TEACHNJ Act, tenure reformers in California mounted a legal battle in *Vergara v. California*.<sup>164</sup> The plaintiffs challenged five statutes from the California Education Code that allegedly violated the equal protection clause of the California Constitution.<sup>165</sup> The statutes included California Education Code: (1) Section 44929.21(b) (the “Permanent Employment Statute”); (2) Section 44934 and Sections 44938(b)(1)–(2) (“Dismissal Statutes”); and (3) Section 44955 (“Last-In-First-Out Statutes” or “LIFO Statutes”).<sup>166</sup> The plaintiffs argued that each statute protected ineffective teachers from dismissal, which contributed to a failing education system within their respective school districts.<sup>167</sup> Because education is considered a fundamental right in California, the plaintiffs believed that the statutes failed under strict scrutiny analysis and violated the guarantee of equal protection under the California Constitution.<sup>168</sup>

Arguing before Judge Treu, the plaintiffs presented evidence that the Permanent Employment Statute disadvantaged both students and competent teachers.<sup>169</sup> As mandated by the statute, teachers are informed of their tenure status at the end of a two-year probationary period.<sup>170</sup> In practice, the decision must be communicated by March 15<sup>th</sup> of the second year, approximately three months before the end of the academic term.<sup>171</sup> This requires administrators to make the actual decision well before the March 15<sup>th</sup> deadline.<sup>172</sup> The teacher simultaneously undergoes a credentialing process during the first two years of employment; however, that decision cannot be made until the actual expiration of the second academic term.<sup>173</sup> This inconsistency can result in a district having a tenured teacher without state credentials.<sup>174</sup> Plaintiffs also presented evidence that if any doubt arose as to a teacher’s ability, time constraints forced administrators to make a tenure decision without adequate opportunity for the teacher to

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<sup>164</sup> See *Vergara v. California*, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014).

<sup>165</sup> *Id.*; CAL. CONST. art. I, § 7.

<sup>166</sup> *Vergara*, 2014 WL 6478415, at \*2.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at \*4.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; CAL. EDUC. CODE § 44929.21 (West 2014).

<sup>172</sup> *Vergara*, 2014 WL 6478415, at \*4.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

prove competency.<sup>175</sup>

Judge Treu held that this statute unfairly affected both students and teachers.<sup>176</sup> Because education is considered a fundamental right in California, the state must offer a compelling reason for students to be deprived of potentially competent teachers and for teachers to not have enough time to prove their abilities within the classroom.<sup>177</sup> Judge Treu found that the state failed its burden and held that the Permanent Employment Statute violated the equal protection clause of the California Constitution.<sup>178</sup>

Judge Treu also found that the Dismissal Statutes violated the equal protection clause of the California Constitution.<sup>179</sup> Plaintiffs presented evidence that a California dismissal hearing may take up to ten years and would cost a school district between \$50,000 and \$450,000.<sup>180</sup> During trial, defense witnesses admitted that it was nearly “impossible” to terminate a tenured teacher’s position under the current statutory scheme.<sup>181</sup> The state argued that a teacher, or any public employee, is entitled to due process during a dismissal hearing, making the Dismissal Statutes necessary.<sup>182</sup>

Judge Treu agreed that due process is a right, but explained that other certified school employees must only be made aware of their dismissal charges and be given the right to respond at a hearing.<sup>183</sup> Judge Treu found no compelling reason to give teachers extra due process protections afforded by the challenged statutes, particularly when the result would keep ineffective teachers employed.<sup>184</sup> While teachers, and other public employees, have a right to due process, this right cannot detract from the fundamental right afforded to California’s students.<sup>185</sup> For these reasons, the court found that the Dismissal Statutes violated the plaintiffs’ fundamental right to an education and the state’s equal protection clause.<sup>186</sup>

Lastly, Judge Treu found that the LIFO Statutes resulted in “classroom disruption” and agreed with the plaintiffs’ argument that the

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<sup>175</sup> *Id.* at \*5.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Vergara*, 2014 WL 6478415, at \*5.

<sup>179</sup> *Id.* at \*6.

<sup>180</sup> *Id.* at \*5.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at \*6.

<sup>184</sup> *Vergara*, 2014 WL 6478415, at \*6.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

provision violated a student's constitutional rights.<sup>187</sup> When school layoffs are necessary, the LIFO Statutes regulate teacher dismissals;<sup>188</sup> the last-hired teacher is the first dismissed, without consideration of the teacher's quality or effectiveness.<sup>189</sup> Judge Treu explained that the defendants would need to present a compelling reason for the "*de facto* retention of incompetent [teachers]" in order to defend the LIFO Statutes' existence.<sup>190</sup> Judge Treu found the logic of the defendant's position to be "unfathomable."<sup>191</sup> California recognizes education as a fundamental right that requires the highest level of equal protection analysis.<sup>192</sup> Automatically keeping ineffective teachers in the classroom directly impacts education's quality, violating students' constitutional rights.<sup>193</sup> For these reasons, Judge Treu held that the LIFO Statutes failed strict scrutiny analysis.<sup>194</sup>

## 2. *Davids v. New York*

Shortly after Judge Treu decided *Vergara*, two separate lawsuits were filed in New York challenging the state's teacher tenure statutes.<sup>195</sup> In *Wright v. New York* and *Davids v. New York*, plaintiffs submitted complaints arguing that certain New York Education Law statutes keep ineffective teachers in the classroom and infringe upon a student's fundamental right to a sound and basic education.<sup>196</sup> Similar to the tenure provisions in *Vergara*, the plaintiffs in *Wright* and *Davids* challenged New York Education Laws: (1) Section 2509, Section 2573, and Section 3012 ("Permanent Employment Statutes"); (2) Section 3020 ("Dismissal Statutes"); and (3) Section 2585 and Section 3013 ("Last-In-First-Out Statutes" or "LIFO Statutes").<sup>197</sup> Because the two lawsuits have similar arguments against the same statutes, Judge Phillip Minardo granted the New York Attorney General's motion to consolidate the cases.<sup>198</sup> Going

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<sup>187</sup> *Id.* at \*6.

<sup>188</sup> CAL. EDUC. CODE § 44955 (West 2014).

<sup>189</sup> *Vergara*, 2014 WL 6478415, at \*6; CAL. EDUC. CODE § 44955.

<sup>190</sup> *Vergara*, 2014 WL 6478415, at \*6.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at \*1.

<sup>193</sup> *Id.* at \*7.

<sup>194</sup> *Id.*

<sup>195</sup> See Hernandez, *supra* note 16.

<sup>196</sup> Complaint at 3, *Wright v. New York*, No. 1500641/2014 (N.Y. Sup. Ct. filed July 28, 2014) ("This suit challenges the constitutionality, in whole or in part, of Education Laws §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020(a) (the 'Challenged Statutes').") [hereinafter *Wright* Compl.]; Complaint at 3, *Davids v. New York*, No. 101105/2014 (N.Y. Sup. Ct. filed July 24, 2014) [hereinafter *Davids* Compl.].

<sup>197</sup> *Wright* Compl. at 3; *Davids* Compl. at 3.

<sup>198</sup> Beth Fertig, *Judge Approves Merger of Teacher Tenure Lawsuits in New York*,

forward, plaintiffs will now argue solely under *Dauids v. New York*.<sup>199</sup>

V. DO THE CHALLENGED TENURE STATUTES VIOLATE A RIGHT TO EDUCATION?

The *Vergara* plaintiffs will have their arguments tested in an upcoming appeal, while the plaintiffs in *Dauids* must argue in a state that provides the lowest level of equal protection analysis to education.<sup>200</sup> Both New York and California have recognized the importance of education and the integral role that teachers play in a child's academic development.<sup>201</sup> The courts, therefore, must determine if the challenged teacher tenure statutes detract from a student's education and survive the state's equal protection analysis.

A. *The California Appellate Court Should Uphold Vergara*

Tenure reform advocates viewed the *Vergara* decision as a victory, while teacher unions across the nation accused Judge Treu of blaming teachers for failing educational institutions.<sup>202</sup> In response to the court's opinion, California Governor Jerry Brown appealed the decision, explaining that "[c]hanges of this magnitude, as a matter of law and policy, require appellate review."<sup>203</sup> As explained *supra*, the California Supreme Court has held that education is a fundamental right.<sup>204</sup> This affords students the highest level of scrutiny under equal protection analysis, requiring that a violation of that right be necessary and narrowly tailored to accomplish a compelling interest.<sup>205</sup> Further, teachers are the most important aspect of a student's education.<sup>206</sup> An effective teacher leads to the heightened possibility of personal and professional success.<sup>207</sup> While teacher tenure is certainly good public policy in order to ensure some level of employment protection and expertise in the profession, there is no compelling reason for that protection to infringe upon a fundamental right,

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WNYC.ORG (Sept. 11, 2014), [http://www.wnyc.org/story/teacher\\_tenure\\_lawsuits\\_proceed\\_to\\_court/](http://www.wnyc.org/story/teacher_tenure_lawsuits_proceed_to_court/).

<sup>199</sup> *Id.*

<sup>200</sup> *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982); Adam Nagourney, *California Governor Appeals Court Ruling Overturning Protections for Teachers*, N.Y. TIMES (Aug. 30, 2014), [http://www.nytimes.com/2014/08/31/us/california-governor-fights-decision-on-teacher-tenure.html?\\_r=0](http://www.nytimes.com/2014/08/31/us/california-governor-fights-decision-on-teacher-tenure.html?_r=0).

<sup>201</sup> *Serrano v. Priest*, 467 P.2d 1241, 1255 (Cal. 1971); *see Vergara v. California*, 2014 WL 6478415, at \*1 (Cal. Super. Ct. Aug. 27, 2014); *Nyquist*, 439 N.E.2d at 366.

<sup>202</sup> Nagourney, *supra* note 200.

<sup>203</sup> *Id.*

<sup>204</sup> *See Serrano*, 467 P.2d at 1255.

<sup>205</sup> *Molar v. Gates*, 159 Cal. Rptr. 239, 246 (Cal. Ct. App. 1979).

<sup>206</sup> *See Lowrey*, *supra* note 140.

<sup>207</sup> *Id.*

particularly when the effects on a student are potentially disastrous. For this reason, the appellate division of the superior court should uphold the decision in *Vergara* and force the California legislature to reform state tenure statutes.

California's Permanent Employment Statute, Dismissal Statutes, and LIFO Statute violate the California Constitution and conflict with tenure's goal of providing a level of expertise within the profession.<sup>208</sup> The plaintiffs' evidence shows that a teacher: (1) is granted tenure after an inadequate amount of time, (2) is afforded due process protection that makes it nearly impossible to be dismissed, and (3) is automatically protected during school layoffs regardless of the teacher's quality or effectiveness.<sup>209</sup> This system provides tenure and termination protection to ineffective teachers.

The Permanent Employment Statute forces administrators to evaluate a teacher's effectiveness in an inadequate time period.<sup>210</sup> In practice, the statute uses one full academic year as the primary criteria for granting tenure.<sup>211</sup> Dr. John Deasy, Superintendent of the Los Angeles School District, testified that the mandated time period is insufficient to determine tenure eligibility.<sup>212</sup> Both the plaintiffs and defendants offered evidence that a three- to five-year probationary period would be better suited to evaluate a teacher's abilities.<sup>213</sup> As previously mentioned, administrators use only one full year of evaluations to determine a teacher's eligibility for tenure.<sup>214</sup> Because of the short timeframe, the Permanent Employment Statute creates a possibility that ineffective teachers are granted tenure. The results ultimately detract from California's education, harm students, and violate the state's equal protection clause.

The Dismissal Statutes discourage administrators from pursuing the termination of an ineffective teacher due to the unnecessarily heightened due process procedures.<sup>215</sup> The plaintiffs submitted evidence that a dismissal proceeding can cost upwards of \$450,000, and defense witnesses

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<sup>208</sup> See McNeal, *supra* note 144, at 491.

<sup>209</sup> See CAL. EDUC. CODE § 44929.21(b) (West 2014); CAL. EDUC. CODE § 44934; CAL. EDUC. CODE § 44938(b)(1)–(2); CAL. EDUC. CODE § 44955; *Vergara v. California*, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014).

<sup>210</sup> See CAL. EDUC. CODE § 44929.21(b); *Vergara*, 2014 WL 6478415, at \*4.

<sup>211</sup> See *supra* note 210.

<sup>212</sup> Motoko Rich, *Deasy Resigns as Los Angeles Schools Chief After Mounting Criticism*, N.Y. TIMES (Oct. 16, 2014), <http://www.nytimes.com/2014/10/17/us/lausd-john-deasy-resigns-superintendent-los-angeles.html>.

<sup>213</sup> *Vergara*, 2014 WL 6478415, at \*5.

<sup>214</sup> *Id.*

<sup>215</sup> See CAL. EDUC. CODE §§ 44934, 44938(b)(1)–(2); *Vergara*, 2014 WL 6478415, at \*5.

testified that the termination of a tenured teacher is “extremely rare.”<sup>216</sup> The high cost of litigation caused by the mandated process discourages administrators from pursuing a dismissal.<sup>217</sup> This only protects ineffective teachers and detracts from education in California.

California also protects ineffective teachers through its LIFO Statutes. When layoffs occur, no weight is given to a teacher’s effectiveness or abilities; rather, seniority is the sole criterion used for dismissals.<sup>218</sup> This could conceivably lead to a situation where a highly effective teacher with ten years of experience is dismissed instead of an ineffective teacher with eleven years of experience. The *Vergara* defendants could not offer a logical reason why such a system should exist.<sup>219</sup> As explained by Judge Treu, the defendants’ position requires them to argue that a competent teacher’s position should be terminated over an ineffective teacher’s position simply because of his or her hire date.<sup>220</sup> As with the Permanent Employment Statute and Dismissal Statutes, the LIFO Statute detracts from the quality of education and violates California’s equal protection clause.

Under California’s strict scrutiny analysis, the defendants fail to show that the challenged statutes are necessary for a compelling state interest.<sup>221</sup> The legislature’s goal to protect teacher employment cannot trump the constitutional obligation to provide all students with an education, particularly when the quality of education is negatively impacted. Granting tenure to ineffective teachers, and preventing their subsequent dismissal, violates a fundamental right and detracts from expertise within the profession. The challenged statutes, therefore, violate the equal protection clause of the California Constitution and directly undermine tenure’s goals. For these reasons, the appellate court should uphold Judge Treu’s decision and declare the statutes as void.

#### *B. The Current New York Statutes Should Be Declared Void*

As mentioned *supra*, the Court of Appeals of New York held in *Nyquist* that education is not a fundamental right.<sup>222</sup> Therefore, an alleged violation under the state’s equal protection clause need only be rationally related to an important government interest to be constitutional.<sup>223</sup> In

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<sup>216</sup> *Vergara*, 2014 WL 6478415, at \*5.

<sup>217</sup> *Id.*

<sup>218</sup> See CAL. EDUC. CODE § 44955; *Vergara*, 2014 WL 6478415, at \*6.

<sup>219</sup> *Vergara*, 2014 WL 6478415, at \*6.

<sup>220</sup> See *id.*

<sup>221</sup> *Molar v. Gates*, 159 Cal. Rptr. 239, 246 (Cal. Ct. App. 1979) (requiring a compelling need to violate a fundamental right).

<sup>222</sup> *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982).

<sup>223</sup> *Id.*

*Campaign for Fiscal Equity v. New York*, the court established the constitutional floor to be met in order for the legislature to meet its obligation to provide an education.<sup>224</sup> Judge Pigott explained that schools must teach “the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.”<sup>225</sup> In order for the plaintiffs in *Dauids* to succeed, they must demonstrate a causal connection between the challenged statutes and a failure to provide students with a sound and basic education.<sup>226</sup> If the court finds that the statutes serve a legitimate government interest, the plaintiffs will ultimately fail.<sup>227</sup>

The plaintiffs in *Dauids* outline tenure’s effect on education in New York and argue that the state’s Permanent Employment Statutes, Dismissal Statutes, and LIFO Statutes violate a student’s right to a sound education.<sup>228</sup> Much like California’s challenged statutes, the plaintiffs offered evidence that the evaluation process for granting tenure is inadequate, that high litigation costs discourage administrators from dismissing ineffective teachers, and that seniority is the only factor considered during school layoffs.<sup>229</sup> Plaintiffs argue that effective teachers are the primary “input” of a sound education, explaining that “students taught by effective teachers are more likely to attend college, . . . earn higher salaries, reside in higher quality neighborhoods, and save for retirement.”<sup>230</sup> Because the challenged statutes keep ineffective teachers in the classroom, they directly contribute to the legislature’s failure to provide a basic education.<sup>231</sup> Therefore, the plaintiffs’ rights under the New York Constitution are violated.<sup>232</sup>

Plaintiffs argue that New York’s Permanent Employment Statutes ensure that ineffective teachers are almost guaranteed tenure.<sup>233</sup> A teacher receives tenure after two annual performance evaluations within a three-year probationary period.<sup>234</sup> Administrators use the Annual Professional

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<sup>224</sup> N.Y. CONST. art. XI, § 1; *Campaign for Fiscal Equity v. New York*, 861 N.E.2d 50 (N.Y. 2006).

<sup>225</sup> *Campaign for Fiscal Equity*, 861 N.E.2d at 52 (quoting *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 2003)).

<sup>226</sup> *Campaign for Fiscal Equity*, 861 N.E.2d at 52.

<sup>227</sup> *Nyquist*, 439 N.E.2d at 366.

<sup>228</sup> *Dauids* Compl., *supra* note 196, at 3.

<sup>229</sup> *Wright* Compl., *supra* note 196, at 7, 14; *Dauids* Compl., *supra* note 196, at 8–15.

<sup>230</sup> *Dauids* Compl., *supra* note 196, at 8.

<sup>231</sup> *Wright* Compl., *supra* note 196, at 3.

<sup>232</sup> *Wright* Compl., *supra* note 196, at 22.

<sup>233</sup> *Wright* Compl., *supra* note 196, at 10 (explaining that in 2007, ninety-seven percent of eligible teachers received tenure).

<sup>234</sup> N.Y. EDUC. LAW §§ 2509, 2573, 3012 (McKinney 2014); *Wright* Compl., *supra* note 196, at 9.

Performance Review (“APPR”) to evaluate performance.<sup>235</sup> Teachers are rated as “Highly Effective,” “Effective,” “Developing,” or “Ineffective.”<sup>236</sup> Student academic growth accounts for twenty percent of a teacher’s rating, while in-class observation and local achievement metrics account for the remaining eighty percent.<sup>237</sup> Plaintiffs argue that the inadequate probationary period and the APPR’s focus on subjective factors result in ineffective teachers earning tenure.<sup>238</sup> An administrator cannot reasonably determine the long-term effectiveness of a teacher within three years, and the focus of teacher evaluations should not be reliant on subjective factors.<sup>239</sup> In 2013, for example, 91.5% of New York teachers were rated as “Highly Effective” or “Effective,” while only 31% of students met standardized test proficiency in English and Mathematics.<sup>240</sup> These results do not support the position that students are being provided a basic education under the standard established in *Fiscal Equity*.<sup>241</sup> If the plaintiffs can show that the Permanent Employment Statutes inadequately rate teachers and directly harm education, the statute will likely fail under the rational basis test.

Plaintiffs also claim that the Dismissal Statutes require a number of unnecessary hurdles to be cleared before a teacher’s employment is terminated, leaving ineffective teachers in the classroom.<sup>242</sup> New York’s public employees are afforded due process rights before being dismissed.<sup>243</sup> An employer must provide notice and the right to respond before the termination is effective.<sup>244</sup> According to the plaintiffs’ complaint, the Dismissal Statutes provide teachers in New York with “super due process” that results in years of expensive litigation.<sup>245</sup> One study cited in the complaint concluded that the average dismissal costs \$313,000 and can last two and a half years.<sup>246</sup> This discourages administrators from even

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<sup>235</sup> *Wright Compl.*, *supra* note 196, at 10.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 10–11.

<sup>238</sup> *Id.* at 11.

<sup>239</sup> *Id.* at 12–13.

<sup>240</sup> Cathy Woodruff, *Why Are Most Teachers Rated Effective When Most Students Test Below Standards?*, N.Y. STATE SCH. BDS. ASSOC. (Dec. 16, 2013), <http://www.nyssba.org/news/2013/12/12/on-board-online-december-16-2013/why-are-most-teachers-rated-effective-when-most-students-test-below-standards/>.

<sup>241</sup> *Campaign for Fiscal Equity v. New York*, 861 N.E.2d 50, 53 (N.Y. 2006).

<sup>242</sup> *See, e.g.*, N.Y. EDUC. LAW § 3020 (McKinney 2014);  *Davids Compl.*, *supra* note 196, at 11.

<sup>243</sup> *See Beck-Nichols v. Bianco*, 987 N.E.2d 233, 242 (N.Y. 2013).

<sup>244</sup> *Id.*

<sup>245</sup> *Davids Compl.*, *supra* note 196, at 11.

<sup>246</sup> *Id.* (citing *Accountability for All*, N.Y. STATE SCH. BDS. ASSOC. 1 (Mar. 2007), [http://www.nyssba.org/clientuploads/gr\\_3020a\\_reform.pdf](http://www.nyssba.org/clientuploads/gr_3020a_reform.pdf)).

attempting to remove a tenured teacher.<sup>247</sup> Because this process results in ineffective teachers remaining in New York classrooms, the statute will most likely fail to meet the constitutional floor established by courts.

Lastly, the plaintiffs argue that the LIFO Statutes protect ineffective teachers from facing dismissal and harm students' right to a sound and basic education.<sup>248</sup> The New York LIFO Statutes require administrators to exclusively consider seniority as the determinant for dismissal when school layoffs are necessary;<sup>249</sup> no consideration is given to teacher quality or effectiveness.<sup>250</sup> As mentioned earlier, tenure's goal is to retain a level of expertise within the profession. The LIFO Statutes do, in fact, offer employment protection to effective teachers who have seniority. This obviously adds to the quality of education in New York. An automatic protection for senior teachers, however, is not the only way to achieve this goal. The defendants in  *Davids*  will need to argue that ineffective teachers with seniority should remain employed over more effective junior teachers during school layoffs.<sup>251</sup> This position is untenable. Because the LIFO Statutes keep ineffective teachers in the classroom, these statutes negatively affect the quality of education and ultimately violate the state constitution.<sup>252</sup>

Although New York offers the right to education the lowest level of equal protection analysis, the court in  *Davids*  should find the Permanent Employment Statutes, Dismissal Statutes, and LIFO Statutes void.<sup>253</sup> Plaintiffs offered ample evidence to suggest that the challenged statutes fail to meet the constitutional floor described in  *Fiscal Equity* .<sup>254</sup> Because education is not a fundamental right, legislation affecting its quality only needs to serve a legitimate government interest; however it still must meet this constitutional floor.<sup>255</sup> While providing job security to teachers adds to the expertise within the profession, the current legislation in New York is not the best way to meet this goal. Keeping ineffective teachers in the classroom only hurts students and does not fulfill the legislature's obligation to provide a sound and basic education. For these reasons, the court in  *Davids*  should find the challenged statutes unconstitutional and

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<sup>247</sup> See  *Davids*  Compl.,  *supra*  note 196, at 12.

<sup>248</sup>  *Id.*  at 13.

<sup>249</sup> N.Y. EDUC. LAW §§ 2585, 3013 (McKinney 2014);  *Davids*  Compl.,  *supra*  note 196, at 13.

<sup>250</sup> See  *supra*  note 249.

<sup>251</sup> See  *Vergara v. California* , 2014 WL 6478415, at \*6 (Cal. Super. Ct. Aug. 27, 2014).

<sup>252</sup>  *Davids*  Compl.,  *supra*  note 196, at 14–15.

<sup>253</sup> Bd. of Educ. v.  *Nyquist* , 439 N.E.2d 359, 366 (N.Y. 1982).

<sup>254</sup>  *Campaign for Fiscal Equity v. New York* , 861 N.E.2d 50, 53 (N.Y. 2006).

<sup>255</sup>  *Allied Stores of Ohio v. Bowers* , 358 U.S. 522, 527 (1959);  *Nyquist* , 439 N.E.2d at 366.

direct the legislature to reform state tenure laws.

*C. Balancing Tenure and Education*

Though it has only been in effect for one full academic year, the TEACHNJ Act is an example of how California and New York can balance job protection, state equal protection requirements, and the state's obligation to provide an education.<sup>256</sup> The law ensures that earning tenure in New Jersey is no longer a rubberstamp process, where the only requirement is surviving a three-year probationary period.<sup>257</sup> The law requires a more thoughtful evaluation of a teacher's skills and training over four years.<sup>258</sup> The evaluations are regulated by uniform state standards and are administered by various education experts and professionals.<sup>259</sup> Once tenure is earned, the benefit is not conferred for life.<sup>260</sup> Teachers who fail to remain effective throughout their careers may lose tenure; however, this does not happen immediately.<sup>261</sup> The teacher has two years to prove his or her effectiveness in the classroom after tenure is lost.<sup>262</sup> This balances the employment interests of teachers and allows the state to provide students with the best possible educators.

New Jersey's approach would most likely pass the constitutional standards of both California and New York while positively contributing to each state's ailing school districts. California and New York approach the constitutional obligation to education differently; however, each state's high court recognizes education's importance.<sup>263</sup> Because teachers have the most influence on a student's education, legislatures must ensure that the most effective teachers remain in the classroom.<sup>264</sup> New Jersey's tenure model serves both California's high constitutional standard and New York's requirement to provide a sound and basic education.<sup>265</sup> Instituting a comprehensive evaluation process and protecting effective teachers only adds to the educational experience, protects students' rights, and fulfills California's and New York's commitment to providing an education to their students.

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<sup>256</sup> N.J. STAT. § 18A:6-117 (West 2012).

<sup>257</sup> N.J. STAT. § 18A:28-5; McNeal, *supra* note 144, at 501.

<sup>258</sup> *See supra* note 257.

<sup>259</sup> N.J. STAT. § 18A:6-112, 119.

<sup>260</sup> *Id.*; McNeal, *supra* note 144, at 501.

<sup>261</sup> N.J. STAT. § 18A:6-117; McNeal, *supra* note 144, at 501.

<sup>262</sup> *See supra* note 261.

<sup>263</sup> *See Serrano v. Priest*, 487 P.2d 1241, 1255 (Cal. 1971); *Bd. of Educ. v. 439 N.E.S.2d* 359, 366 (N.Y. 1982).

<sup>264</sup> *See Davids Compl.*, *supra* note 196, at 8.

<sup>265</sup> *Serrano*, 487 P.2d at 1255; *Campaign for Fiscal Equity v. New York*, 861 N.E.2d 50, 53 (N.Y. 2006).

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COMMENT

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## VI. CONCLUSION

State and federal courts have consistently recognized education's importance to society.<sup>266</sup> While each jurisdiction has differing views of the constitutional obligation to provide an education, New York, New Jersey, and California agree that a certain level of education must be available to all students.<sup>267</sup> Even at the lowest level of equal protection analysis, state courts and legislatures are obligated to ensure that laws bear some rational relationship to a legitimate government interest. When teacher tenure statutes interfere with the classroom experience and create disruption in a student's learning environment, those laws fail both strict scrutiny and rational basis review, and therefore must be changed. For these reasons, the challenged teacher tenure statutes in California and New York should be repealed and a new statutory scheme, like the TEACHNJ Act, should be instituted.

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<sup>266</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973); *Robinson v. Cahill*, 303 A.2d 273, 286 (N.J. 1973).

<sup>267</sup> *Serrano*, 487 P.2d at 1256; *Robinson*, 303 A.2d at 286; *Campaign for Fiscal Equity*, 828 N.E.2d at 53.