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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.¹ 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.² 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.*”³ 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 in 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.⁴ Some state courts elevate the right to education as a fundamental interest⁵, while the United States Supreme Court⁶ (the Supreme

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¹ See *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954).

² *Id.*

³ *Id.* (emphasis added).

⁴ 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).

⁵ *Serrano v. Priest*, 5 Cal. 3d 584, 605 (Cal. 1971) (holding that education is a fundamental right).

⁶ *Rodriguez*, 411 U.S. at 59.

Court) and other state courts have declined to do so.⁷ Because those states and the federal government offer a lower level of equal protection analysis to education, statutes that allegedly detract from its quality must only be rationally related to a legitimate government interest.⁸ These decisions helped shape this country's state and national education policy and, some argue, contributed to a deteriorating experience in the American classroom.⁹

Some of the most controversial legislation surrounding education policy is teacher tenure statutes. Tenure is an employment protection awarded to teachers, the qualifications of which vary by state.¹⁰ 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.¹¹ Overturning these statutes proves to be difficult, especially when state supreme courts offer education the lowest level of equal protection analysis.

In August of 2014, a California district court held that certain state teacher tenure statutes violate the California Constitution.¹² 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.¹³ Because California considers education a fundamental right, state courts must apply the highest level of equal protection analysis.¹⁴ Plaintiffs in New York

⁷ *Robinson v. Cahill*, 62 N.J. 473, 499 (N.J. 1973) (holding that education is not a fundamental right).

⁸ *See, e.g., id* at 499.

⁹ *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).

¹⁰ *See* Arnold Shep Cohen, *Striking a Balance Between Teachers' Employment Rights and Professional Responsibilities*, 154 JUL N.J. LAW 43 (1993). (outlining various state laws regulating teacher tenure, including probationary periods and teacher effectiveness).

¹¹ *See* Nicholas Dagostino, *Giving the School Bully a Timeout: Protecting Urban Students from Teachers' Unions*, 63 Ala. L. Rev. 177, 195 (2011).

¹² *Vergara v. California*, No. BC484642, slip op. at 3 (Cal. Super. Ct. August 27, 2014).

¹³ *Id.*

¹⁴ *Serrano*, 5 Cal. 3d at 606.

subsequently challenged state teacher tenure statutes in similar fashion.¹⁵ With the upcoming appeal of the *Vergara* decision and a trial scheduled in 2015 for *Davids v. New York*, 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 those questions, examine the plaintiffs' 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 the courts to accept the plaintiffs' arguments, overturn the states' teacher tenure statutes 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 analysis. 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).¹⁶ First, laws that affect fundamental rights or classify individuals based on race and national origin

¹⁵ See Javier C. Hernandez, *New York Teachers 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>.

¹⁶ See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

are subject to the highest level of scrutiny.¹⁷ 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.¹⁸ Second, laws that classify individuals based on gender are traditionally analyzed under intermediate scrutiny.¹⁹ This analysis requires the law be substantially related to an important government interest.²⁰ Finally, at a minimum, any statutory classification must be rationally related to a legitimate government interest.²¹ All laws, whether passed by Congress or state legislatures, must meet this constitutional floor.²² Any law that fails to meet this “rational basis” standard violates the Equal Protection Clause and will be overturned.²³

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, or acquiring, possessing, and protecting property and of pursuing and obtaining safety and happiness.”²⁴ While there is no express mention of equal protection, the New Jersey Supreme Court has read this article to grant equal protection under the law.²⁵

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

¹⁷ *See id.* (citing *Harper v. Virginia Bd. of Elections*, 388 U.S. 1, 11 (1967)).

¹⁸ *Id.*

¹⁹ *See id.* (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

²⁰ *Id.*

²¹ *See, e.g., Rodriguez*, 411 U.S. at 17.

²² *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (U.S. 1959).

²³ *See id.*

²⁴ N.J. CONST. art. I, § 1.

²⁵ *See Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006).

for the alleged inequality.²⁶ 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.”²⁷ According to the court, this analysis uses an approach implicit in the federal test.²⁸ 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.”²⁹ 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.³⁰

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.³¹ 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.”³² At its core, this article promises persons who are similarly situated are treated equally under the law.³³

²⁶ See *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985).

²⁷ *Id.*

²⁸ See *id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ 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 U.S. Constitution’s respective equal protection amendments, as it is much more in depth).

³² See C.A. CONST. art I, § 7(a).

³³ *In re Evans*, 49 Cal. App. 4th 1263, 1270 (Cal Ct. App. 1996).

The California Supreme Court has held that the state's equal protection clause possesses independent validity from the Fourteenth Amendment of the United States Constitution.³⁴ When legislative action classifies individuals and is challenged as violating the state's constitution, California courts have developed a two-tiered standard of review.³⁵ 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.³⁶ The state must show that the violation of the right or the classification is necessary to accomplish a compelling interest.³⁷ California does not recognize a distinction between classifications of race or gender.³⁸ Instead, the state analyzes these classifications under the same level of scrutiny.³⁹ All other legislation must bear some rational relationship to a legitimate state purpose, meeting the constitutional floor the U.S. Supreme Court requires.⁴⁰

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.⁴¹ 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.⁴² First, strict scrutiny is appropriate in New York for an alleged discrimination based on suspect classification or violation of a fundamental

³⁴ See, e.g., *Gay Law Students Assn. v. Pacific Telephone and Telegraph Co.*, 24 Cal. 3d. 458, 469 (Cal. 1979).

³⁵ See, *Molar v. Gates*, 98 Cal. App. 3d. 1, 13 (Cal. Ct. App. 1979).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See, e.g., *Sail'er Inn Inc. v. Kirby*, 5 Cal. 3d. 1 (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).

³⁹ *Id.*

⁴⁰ *Molar*, 98 Cal. App. 3d. at 13.

⁴¹ N.Y. CONST. art I, § 11.

⁴² See *Bd. of Educ., Levittown Union Free Schl. Dist., Nassau Cnty. v. Nyquist*, 408 N.Y.S.2d 606, 634 (N.Y. 1978).

interest.⁴³ Second, in *Alevy v. Downstate Medical Center*, the New York Court of Appeals explained intermediate scrutiny, or the “sliding scale” test.⁴⁴ The court first must ask if the alleged discrimination satisfies a substantial state interest and furthers a legitimate government purpose.⁴⁵ If the interest is served by the discrimination or violation of rights, the court must then answer if the objectives could be achieved by less offensive means.⁴⁶ Third, similar to the federal analysis, all classifications must at least be rationally related to a legitimate government interest.⁴⁷

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.⁴⁸ While some argue that the United States Department of Education has taken strides towards creating a national education policy,⁴⁹ state constitutions, particularly New Jersey, California, and New York, require their respective legislatures provide free schooling to all children.⁵⁰ 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.⁵¹ These include mechanisms for funding each school district, education standards for student advancement, and evaluation criteria for teacher and administrative job performance.⁵² These statutes show that

⁴³ *Id.* at 635.

⁴⁴ *See Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 336 (N.Y. 1976).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Nyquist*, 408 N.Y.S.2d at 638.

⁴⁸ *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 7 (1973).

⁴⁹ *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).

⁵⁰ CAL. CONST. art. IX, §1; N.J. CONST. art. VIII, § 4; N.Y. CONST. art XI, § 1.

⁵¹ *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).

⁵² *See CAL. EDUC. CODE § 44830* (West 2009) (outlining the employment qualifications for public school teachers); *see also* N.J. STAT. ANN. § 18A:7F-44; *see also* N.Y. EDUC. LAW § 3220 (McKinney 2008) (requiring all students to participate in physical fitness exams during the academic year).

education policy is, very much so, a state and local concern. When individuals believe this legislation detracts from the state's educational experience, the laws are challenged as violating the state's guarantee of an education.⁵³

Legal precedent in this area evaluates if government benefits or programs are elevated to fundamental rights. States provide many services that its citizens need, some of which are mandated by the state constitution.⁵⁴ For example, the New York Constitution requires the state legislature maintain a public welfare system in support of the needy.⁵⁵ 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.⁵⁶ 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.⁵⁷ 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.⁵⁸ 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.⁵⁹ In New Jersey, California, and New York, the public school system is primarily funded by general revenue raised through property and income taxes.⁶⁰ Those

⁵³ See, e.g., *Rodriguez* 411 U.S. 1 (challenging the constitutionality of the education funding system in Texas).

⁵⁴ See N.Y. CONST. art XVII §1 (requiring the New York State Legislature to provide public support to the needy).

⁵⁵ *Id.*

⁵⁶ Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist, 453 N.Y.S.2d 643, 651 (N.Y. 1982).

⁵⁷ See, e.g., *id.* (holding that education is not a fundamental right in New York).

⁵⁸ *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (U.S. 1959).

⁵⁹ See, e.g., *Robinson v. Cahill*, 62 N.J. 473 (N.J. 1973) (challenging the constitutionality of the education funding system used in New Jersey).

⁶⁰ CAL. CONST. art. XVI, § 8 (requiring that state revenue be set aside for public school funding); N.J. STAT. ANN. § 18A:7F; N.Y. EDUC. LAW § 3602 (McKinney 2014) (requiring public money be made available to each school district from state and local revenue).

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 protection.⁶¹ Key cases from New Jersey, California, and New York are helpful to summarize for purposes of this Comment. Each decision discussed *infra* 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.⁶² The U.S. Supreme Court was confronted with this question in *San Antonio Independent School District v. Rodriguez*.⁶³ At trial, plaintiffs argued that the Texas public education financing system, through the Texas Minimum Foundation School Program (Program), violated the Equal Protection Clause.⁶⁴ The Program was designed in response to the development of industrial cities and population shifts, which resulted in many rural Texas communities lacking sufficient funding for public schools.⁶⁵ The legislature understood disparities in expenditures harmed the quality of education in rural districts and passed legislation designed to increase funding.⁶⁶ The Program supplied funds to school districts from general state revenue, which financed each district with roughly eighty percent of the annual school budget.⁶⁷ The remaining funds came directly from the district's budget by way of local property taxes, calculated as a

⁶¹ *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6–8 (1973).

⁶² *Id.* at 35.

⁶³ *Id.*

⁶⁴ *Id.* at 9–10.

⁶⁵ *Id.*

⁶⁶ *Id.* at 11–12.

⁶⁷ *See Rodriguez*, 411 U.S. at 11–12.

percentage of residential and commercial property value.⁶⁸ 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.⁶⁹

The plaintiffs came from Edgewood, the least affluent district in the San Antonio area.⁷⁰ 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.⁷¹ With the contribution from the Texas state revenue, total expenditures per student for the year were \$248.⁷² At trial, plaintiffs introduced the 1967–1968 expenditures of Alamo Heights, the most affluent district in the San Antonio area.⁷³ Because of greater property values and state contribution, Alamo Heights was able to supply \$594 per pupil.⁷⁴ The federal district court concluded 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.⁷⁵

The majority overturned the district court on two separate grounds.⁷⁶ Writing for the majority, Justice Powell explained that 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.⁷⁷ It was unclear to the majority if the Program discriminated against all poor people,

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 12–13.

⁷² *Id.*

⁷³ *See Rodriguez*, 411 U.S. at 12–13.

⁷⁴ *Id.* at 11–12.

⁷⁵ *Id.* at 16.

⁷⁶ *Id.* at 18.

⁷⁷ *Id.* at 23–25.

all people with lower property values, or the ten percent of Texas school districts surveyed for purposes of trial.⁷⁸ The Court therefore concluded the financing system did not disadvantage a suspect class.⁷⁹

The majority then held that education is not a fundamental right that requires a higher level of scrutiny.⁸⁰ Justice Powell explained that education is vital in a free society, both to individual citizens and the country as a whole.⁸¹ 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.”⁸² Fundamental rights are afforded by a guarantee in the Constitution, while economic and social rights call for a lower level of scrutiny under equal protection analysis.⁸³ Because it is not explicitly nor implicitly guaranteed in the Constitution, the Court concluded that education is not a fundamental right.⁸⁴

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.⁸⁵ In *Robinson v. Cahill*, plaintiffs challenged the constitutionality of New Jersey’s public school financing plan.⁸⁶ Much like Texas’ Program, New

⁷⁸ *Id.* at 26–27.

⁷⁹ *See Rodriguez*, 411 U.S. at 28.

⁸⁰ *Id.* at 29.

⁸¹ *Id.* at 30.

⁸² *Id.*

⁸³ *See id.* at 34–35.

⁸⁴ *Id.*

⁸⁵ *See Robinson v. Cahill*, 62 N.J. 473 (N.J. 1973).

⁸⁶ *Id.* at 480.

Jersey's public schools received funding from general state revenue and local property taxes.⁸⁷ This resulted in a disparity of dollars spent per pupil, particularly in areas where property values were low.⁸⁸ The plaintiffs argued this inequality violated a student's fundamental right to an education, asking the court to overturn the funding scheme on the basis of the Liberty Clause.⁸⁹

In addition to the guarantee of equal protection through the Liberty Clause, the New Jersey Constitution requires the legislature supply a "thorough and efficient" public school system to all children.⁹⁰ Plaintiffs urged the court to invoke the highest level of scrutiny when evaluating the funding scheme's violation of this constitutional provision.⁹¹ The plaintiffs specifically pointed to the Supreme Court's holding in *Rodriguez* that elevated explicit constitutional guarantees to the level of fundamental rights.⁹² The plaintiffs argued that the holding in *Rodriguez* only bolstered Chief Justice Warren's unanimous decision in *Brown*, where the Court 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."⁹³

The New Jersey Supreme Court used the *Rodriguez* decision as a guide in its analysis and held the funding disparities neither violated a fundamental right nor invoked the highest level of scrutiny under the Liberty Clause.⁹⁴ Chief Justice Weintraub explained that the guarantee of an efficient education does not mandate a uniform expenditure plan.⁹⁵ The constitutional guarantee implicitly involves municipal participation, which undoubtedly leads to varying budgets and

⁸⁷ *Id.*

⁸⁸ *Id.* at 481.

⁸⁹ *Id.* at 482.

⁹⁰ N.J. CONST. art. VII § 4.

⁹¹ *Robinson*, 623 N.J. at 496.

⁹² *Id.* at 491.

⁹³ *Id.* at 494 (quoting *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 493 (1954)).

⁹⁴ *See Robinson*, 623 N.J. at 495.

⁹⁵ *Id.* at 499.

expenditures.⁹⁶ While involvement at the state level is constitutionally mandated, the funding disparities that result from the statutory scheme are not “irrational” and do not invoke a higher level of scrutiny.⁹⁷ Therefore, the requirement to furnish a service does not automatically elevate the state’s obligation to a fundamental right.⁹⁸

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, Levittown Union Free School Dist., Nassau County. v. Nyquist* line of cases.⁹⁹ Like New Jersey and Texas, New York’s funding scheme resulted in disparities where property values were low.¹⁰⁰ 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.¹⁰¹ Justice Jones explained that public education is one of the most important services the state performs, a notion expressly manifested in the New York State Constitution.¹⁰² As mentioned *supra*, however, dedication to a government program does not automatically elevate the level of scrutiny to that of a fundamental right.¹⁰³ Other constitutionally mandated programs, such as public assistance to the needy, are also highly important but do not call for a higher level of scrutiny.¹⁰⁴ Strict or intermediate scrutiny is appropriate only when the state action groups persons together by reason of personal

⁹⁶ *Id.* at 493–494.

⁹⁷ *Id.* at 499.

⁹⁸ *Id.*

⁹⁹ *Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist*, 408 N.Y.S.2d 606, 634 (N.Y. 1978), *modified by Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist*, 443 N.Y.S.2d 843 (N.Y. 1981), *modified by Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist*, 453 N.Y.S.2d 643 (N.Y. 1982).

¹⁰⁰ *See Nyquist*, 453 N.Y.S.2d at 645.

¹⁰¹ *Id.* at 651–652.

¹⁰² N.Y. CONST. art XI §1; *Nyquist*, 453 N.Y.S.2d at 651.

¹⁰³ *Nyquist*, 453 N.Y.S.2d at 651.

¹⁰⁴ N.Y. CONST. art XVII §1; *Nyquist* 453 N.Y.S.2d at 651.

characteristics, such as race or gender.¹⁰⁵ 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.¹⁰⁶

E. California's View

California's view of public education departs from the holdings in *Rodriguez, Robinson, and Nyquist*.¹⁰⁷ In *Serrano v. Priest*, California's public school funding statutes encountered a challenge for violating California's equal protection clause.¹⁰⁸ Similar to challenges in New York 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.¹⁰⁹ The plaintiffs argued this violated a fundamental right.¹¹⁰

The California Supreme Court believed the plaintiffs' claims had legal merit and remanded the proceedings for trial.¹¹¹ Writing for the majority, Justice Sullivan held that the right to public education in California is a fundamental interest, requiring a higher level of scrutiny for an alleged violation.¹¹² In support of this conclusion, the court pointed to Chief Justice Warren's decision in *Brown*.¹¹³ 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.¹¹⁴ Both of these themes directly impact the success of America's democracy, and are supported by the language in California's Constitution: "A general diffusion

¹⁰⁵ *Nyquist*, 453 N.Y.S.2d at 651.

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g.* *Serrano v. Priest* 5 Cal. 3d 584 (Cal. 1971)

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 588.

¹¹⁰ *Id.* at 589.

¹¹¹ *Id.* at 618.

¹¹² *Id.* at 605–606.

¹¹³ *Serrano*, 5 Cal. 3d at 606 (citing *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954)); Interestingly, Chief Justice Earl Warren served as Governor of California from 1943–1953.

¹¹⁴ *Serrano*, 5 Cal. 3d at 606.

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.”¹¹⁵ Because of the “distinctive and priceless” role education serves in our society, the majority held that the right to education is a fundamental interest that requires the highest level of scrutiny and protection.¹¹⁶

F. What Really Affects a Student’s Education?

The plaintiffs in the preceding cases attacked education funding plans in Texas, New Jersey, California, and New York.¹¹⁷ With the exception of California, the courts largely rejected plaintiffs’ arguments that education deserves heightened constitutional protection.¹¹⁸ The courts held that disparities in funding do not violate a fundamental right, while recognizing education’s significance to society.¹¹⁹ As mentioned *supra*, education’s importance is exemplified by this country’s commitment of time, money, and effort in educating every child. Even though it is not considered a fundamental right in every state, this commitment compels legislatures to ensure that laws governing education policy meet the required level of equal protection, even if that level is the “constitutional floor.”¹²⁰ Laws that fail to meet the standard and detract from a student’s education must therefore be overturned.¹²¹

¹¹⁵ CAL. CONST. art. IX, § 1; *Serrano*, 5 Cal. 3d at 608.

¹¹⁶ *Serrano*, 5 Cal. 3d at 608–609.

¹¹⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano*, 5 Cal. 3d 584; *Robinson v. Cahill*, 62 N.J. 473 (N.J. 1973); *Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist*, 453 N.Y.S.2d 643 (N.Y. 1982).

¹¹⁸ *Id.*

¹¹⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973); *Robinson v. Cahill*, 62 N.J. 473, 493 (N.J. 1973); *Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist*, 453 N.Y.S.2d 643, 651 (N.Y. 1982).

¹²⁰ *See Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (U.S. 1959).

¹²¹ *Id.*

Though funding is an important aspect of operating state public school systems, it is not the primary influence on education's quality.¹²² For example, some statistics show that Newark, New Jersey spends about \$22,000 per pupil, while only twenty-two percent of students graduate high school.¹²³ In comparison, Chatham, New Jersey spends \$11,000 per pupil and has a high school graduation rate of virtually 100%.¹²⁴ 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.¹²⁵ In *Brown*, the Court famously struck down the segregation of children in public schools based on race.¹²⁶ Even if facilities were "tangibly" equal, the psychological effect of separating students based on physical characteristics negatively impacts students' education.¹²⁷ The Court therefore recognized that environmental factors have an impact on education's quality.¹²⁸

The Supreme Court also held that facilities and materials play an important role in education's quality.¹²⁹ In *Sweatt v. Painter*, the plaintiff was denied admission to the University of Texas Law School based on his race.¹³⁰ Texas operated a law school solely for African

¹²² Dagostino *supra* note 11, at 180.

¹²³ *Id.*

¹²⁴ NJ SCHOOL PERFORMANCE REPORT, SCHOOL DISTRICT OF THE CHATHAMS (2014), *available at* <http://www.state.nj.us/education/pr/2013/27/270785010.pdf>.

¹²⁵ *See* *Brown v. Bd. of Education of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 493 (1954).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *See* *Sweatt v. Painter*, 339 U.S. 629 (1950).

¹³⁰ *Id.* at 631.

Americans, something that the Texas Court of Civil Appeals felt was an appropriate remedy for the plaintiff.¹³¹ The Supreme Court disagreed and ordered the University of Texas to admit the plaintiff to its law school.¹³² In its analysis, the Court compared the schools' facilities.¹³³ The University of Texas had access to scholarship funds, moot court facilities, and 65,000 volumes in its library.¹³⁴ The African American law school had no faculty, almost no volumes in its library, and lacked accreditation.¹³⁵ The Court held that the insufficient facilities detracted from the plaintiff's legal education and therefore violated his constitutional rights.¹³⁶ Implicit in its decision, *Painter* recognizes that facilities and academic materials have an effect on one's education.¹³⁷

While funding, environmental factors, facilities and materials all play a vital role in a public school, effective teachers are the most important aspect of an education.¹³⁸ 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 nearly twice as likely to attend college.¹³⁹ According to the same study, an ineffective teacher could result in almost \$2.5 million of lost lifetime earnings.¹⁴⁰ 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.¹⁴¹ If teachers detract from the classroom experience and are protected from termination, then this may have constitutional implications even

¹³¹ *Id.* at 632.

¹³² *Id.* at 636.

¹³³ *Id.* at 632.

¹³⁴ *Id.* at 632–633

¹³⁵ *Painter* 339 U.S. at 632–633.

¹³⁶ *Id.* at 636.

¹³⁷ *See id.*

¹³⁸ *See, e.g.,* Ann Lowrey, *Big Study Links Good Teacher to Lasting Gain*, N.Y. TIMES, January 6, 2012, <http://www.nytimes.com/2012/01/06/education/big-study-links-good-teachers-to-lasting-gain.html?pagewanted=all>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Dagostino *supra* note 11, at 195.

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.¹⁴² 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.¹⁴³ Contrary to popular belief, tenure for public school teachers is not absolute immunity from being terminated.¹⁴⁴ As explained in *Donahoo v. Board of Education*, the goal of tenure is to ensure the best teachers continue service and are protected from termination based on arbitrary or capricious reasons.¹⁴⁵ 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.¹⁴⁶ Laws regulating the hearing process vary by state; however, the charges an individual teacher may face for termination are less variable.¹⁴⁷ Therefore, it is possible for a tenured teacher's position to be terminated.¹⁴⁸

B. Efforts at Tenure Reform: The TEACHNJ Act

¹⁴² See Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, HOFSTRA LAB. & EMP. L.J. 489, 491–492 (2013).

¹⁴³ *Id.* at 492.

¹⁴⁴ Cohen, *supra* note 10 at 43.

¹⁴⁵ *Id.* (citing *Donahoo v. Bd. of Educ.*, 109 N.E.2d 787, 789 (Ill. 1952)).

¹⁴⁶ Compare McNeal *supra* note 142, 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).

¹⁴⁷ Cohen, *supra* note 10, at 43 (noting that punishment may include inefficiency, incapacity, unbecoming conduct or other just cause).

¹⁴⁸ *Id.*

The recent economic downturn, shrinking state budgets, and underperforming schools brought tenure reform to the forefront.¹⁴⁹ Many states passed legislation modifying teacher evaluations, extending the probationary period before teachers become tenure-eligible, and eliminating the highly controversial “last-in, first-out” seniority system utilized for school layoffs.¹⁵⁰ New Jersey was not immune to these problems, and Republican Governor Chris Christie felt that tenure reform would help improve some of the state’s ailing school districts.¹⁵¹ 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 1909.¹⁵²

In 2012, New Jersey passed the New Jersey’s Teacher Effectiveness and Accountability for the Children of New Jersey (the “TEACHNJ Act”) for the 2013–2014 academic year.¹⁵³ The TEACHNJ Act addresses the probationary period and evaluation process for public school teachers in New Jersey.¹⁵⁴ 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.¹⁵⁵ The new evaluation system rates teachers as “ineffective,” “partially effective,” “effective,” or “highly effective.”¹⁵⁶ A panel of experienced teachers and

¹⁴⁹ See McNeal, *supra* note 142, at 489.

¹⁵⁰ See *id.* (detailing Michigan’s new law that created a four-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).

¹⁵¹ See Dagostino *supra* note 11, at 180 (explaining that only twenty-two percent of students in Newark, NJ graduate from high school); McNeal, *supra* note 142, at 501–502

¹⁵² McNeal, *supra* note 142, at 501.

¹⁵³ See Teacher Effectiveness and Accountability for the Children of New Jersey Act, N.J. STAT. § 18A:6-117 (West 2012).

¹⁵⁴ N.J. STAT. § 18A:6-117.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

administrators completes the evaluations, balancing both subjective and objective factors.¹⁵⁷ Once tenure is earned, two consecutive years of an “ineffective” rating result in a loss of tenure.¹⁵⁸ The teacher then must have two consecutive years of “effective” or “highly effective” ratings in order to avoid dismissal.¹⁵⁹ Further, the costs of a dismissal hearing are capped at \$7,500.¹⁶⁰ 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 law’s passage.¹⁶¹

C. Legal Challenges Brought Against Teacher Tenure

a. *Vergara v. The State of California*

The same year New Jersey passed the TEACHNJ Act, tenure reformers in California mounted a legal battle in *Vergara v. California*.¹⁶² The plaintiffs challenged five statutes from the California Education Code that allegedly violated the equal protection clause of the California Constitution.¹⁶³ The statutes included California Education Code: (1) §44929.21(b) (the “Permanent Employment Statute”); (2) §44934 and §44938(b)(1)-(2) (“Dismissal Statutes”); and (3) §44955 (“Last-In, First-Out Statutes” or “LIFO Statutes”).¹⁶⁴ The plaintiffs argued that each statute protected ineffective teachers from dismissal, which contributed to a failing education system within their respective school districts.¹⁶⁵ Because education is considered a fundamental

¹⁵⁷ McNeal, *supra* note 142, at 502

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; Dagostino *supra* note 11, at 194 (explaining that in some states, a legal battle for teacher dismissal costs an average of \$500,000).

¹⁶² *See Vergara v. California*, No. BC484642, slip op. at 3 (Cal. Super. Ct. August 27, 2014).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

right in California the plaintiffs believed the statutes failed under the strict scrutiny analysis and violated the guarantee of equal protection under the California Constitution.¹⁶⁶

Arguing before Judge Treu, the plaintiffs presented evidence that the Permanent Employment Statute disadvantaged both students and competent teachers.¹⁶⁷ As mandated by the statute, teachers are informed of their tenure status at the end of a two-year probationary period.¹⁶⁸ In practice, the decision must be communicated by March 15 of the second year, three months before the end of the academic term.¹⁶⁹ This requires administrators make the actual decision well before the March 15 deadline.¹⁷⁰ 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.¹⁷¹ The inconsistency can, and has, resulted in a district's having a tenured teacher without state credentials.¹⁷² Plaintiffs also presented evidence that if there was any doubt of a teacher's ability, time constraints forced administrators to make a tenure decision without adequate opportunity for the teacher to prove competence.¹⁷³

Judge Treu held that this statute unfairly affected both students and teachers.¹⁷⁴ 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.¹⁷⁵ Judge Treu found that the state failed its

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 9.

¹⁶⁸ *Vergara*, No. BC484642, slip op. at 9.

¹⁶⁹ *Id.*; CAL. EDUC. CODE § 44929.21 (West 2014).

¹⁷⁰ *Vergara*, No. BC484642, slip op. at 9.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

burden and held the Permanent Employment Statute violated the equal protection clause of the California Constitution.¹⁷⁶

Judge Treu also found that the Dismissal Statutes violated the equal protection clause of the California Constitution.¹⁷⁷ Plaintiffs presented evidence that a California dismissal hearing may take up to ten years and will cost a school district between \$50,000 and \$450,000.¹⁷⁸ During trial, defense witnesses admitted that it is nearly “impossible” to terminate a tenured teacher’s position under the current statutory scheme.¹⁷⁹ The state argued that a teacher, or any public employee, is entitled to due process during a dismissal hearing, making the Dismissal Statutes necessary.¹⁸⁰

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.¹⁸¹ Judge Treu found no compelling reason to give teachers extra due process protections afforded by the challenged statutes, particularly when the result keeps ineffective teachers employed.¹⁸² 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.¹⁸³ 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.¹⁸⁴

¹⁷⁶ *Vergara*, No. BC484642, slip op. at 9.

¹⁷⁷ *Id.* at 11.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 12.

¹⁸¹ *Id.*

¹⁸² *Vergara*, No. BC484642, slip op. at 12

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Lastly, Judge Treu found the LIFO Statutes resulted in extreme “classroom disruption” and agreed with the plaintiffs’ argument that the provision violated a student’s constitutional rights.¹⁸⁵ When school layoffs are necessary, the LIFO Statutes regulates teacher dismissals.¹⁸⁶ The last-hired teacher is the first dismissed, without consideration of the teacher’s quality or effectiveness.¹⁸⁷ Judge Treu explained 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.¹⁸⁸ Judge Treu found the logic of the defendant’s position to be “unfathomable”.¹⁸⁹ California recognizes education as a fundamental right that requires the highest level of equal protection analysis.¹⁹⁰ Automatically keeping ineffective teachers in the classroom directly impacts education’s quality, violating students’ constitutional rights.¹⁹¹ For these reasons, Judge Treu held the LIFO Statutes failed strict scrutiny analysis.¹⁹²

b. *Dauids v. The State of New York*

Shortly after Judge Treu decided *Vergara*, two separate lawsuits were filed in New York challenging the state’s teacher tenure statutes.¹⁹³ In *Wright v. New York* and *Dauids v. New York*, plaintiffs submitted complaints arguing that thirteen 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.¹⁹⁴ Similar to the tenure provisions in *Vergara*, the plaintiffs in *Wright* and

¹⁸⁵ *Id.* at 13.

¹⁸⁶ CAL. EDUC. CODE § 44955 (West 2014).

¹⁸⁷ *Vergara*, No. BC484642, slip op. at 13; Educ. § 44955.

¹⁸⁸ *Vergara*, No. BC484642, slip op. at 13

¹⁸⁹ *Id.* at 14.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See *Hernandez*, *supra* note 15.

¹⁹⁴ Complaint at 10–11, *Wright v. New York*, No. 1500641/2014 (N.Y. Sup. Ct. filed July 28, 2014); Complaint at 4–5, *Dauids v. New York*, No. 0101105/2014 (N.Y. Sup. Ct. filed July 24, 2014).

Dauids challenged New York Education Laws: (1) §2509, §2573, and §3012 (“Permanent Employment Statutes”); (2) §3020 (“Dismissal Statutes”); and (3) §2585 and §3013 (“Last-In, First-Out Statutes” or “LIFO Statutes”).¹⁹⁵ 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.¹⁹⁶ With a trial date currently set for early 2015, plaintiffs will now argue solely under *Dauids v. New York*.¹⁹⁷

V. Do the Challenged Tenure Statutes Violate a Right to Education?

The plaintiffs in *Vergara* will have their arguments tested in an upcoming appeal, while the plaintiffs in *Dauids* must argue in a state that offers education the lowest level of equal protection analysis.¹⁹⁸ Both New York and California have recognized education’s importance and the integral role teachers play in a child’s academic development.¹⁹⁹ 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. California 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.²⁰⁰ In

¹⁹⁵ *Id.*

¹⁹⁶ Beth Fertig, *Judge Approves Merger of Teacher Tenure Lawsuits in New York*, WNYC.ORG, (September 11, 2014), http://www.wnyc.org/story/teacher_tenure_lawsuits_proceed_to_court/.

¹⁹⁷ *Id.*

¹⁹⁸ Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist, 453 N.Y.S.2d 643, 651 (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.

¹⁹⁹ *Serrano v. Priest*, 5 Cal. 3d 584, 605 (Cal. 1971); *see Vergara v. California*, No. BC484642, slip op. at 7 (Cal. Super. Ct. August 27, 2014); *Nyquist*, 453 N.Y.S.2d at 651.

²⁰⁰ Nagourney, *supra* note 198.

response to the court’s opinion, California Governor Jerry Brown appealed the decision, explaining, “[c]hanges of this magnitude, as a matter of law and policy, require appellate review.”²⁰¹ As explained *supra*, the California Supreme Court has held that education is a fundamental right.²⁰² This affords students the highest level of scrutiny under equal protection analysis, requiring a violation of that right be necessary and narrowly tailored to accomplish a compelling interest.²⁰³ Further, teachers are the most important aspect of a student’s education.²⁰⁴ An effective teacher leads to the heightened possibility of personal and professional success.²⁰⁵ 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, 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 teacher 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.²⁰⁶ 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.²⁰⁷ This creates a system where ineffective teachers are granted tenure and are protected from termination.

²⁰¹ *Id.*

²⁰² *See Serrano*, 5 Cal. 3d at 605.

²⁰³ *Molar v. Gates*, 98 Cal. App. 3d. 1, 13 (Cal. Ct. App. 1979).

²⁰⁴ *See Lowrey*, *supra* note 138.

²⁰⁵ *Id.*

²⁰⁶ *See McNeal*, *supra* note 142, at 491–492

²⁰⁷ *See* CAL. EDUC. CODE §44929.21(b) (West 2014); CAL. EDUC. CODE §44934(West 2014); CAL. EDUC. CODE §44938(b)(1)-(2) (West 2014); CAL. EDUC. CODE § 44955 (West 2014); *Vergara*, No. BC484642, slip op. at 9–13

The Permanent Employment Statute forces administrators to evaluate a teacher's effectiveness in an inadequate time period.²⁰⁸ In practice, the statute uses one full academic year as the primary criteria for granting tenure.²⁰⁹ Dr. John Deasy, Superintendent of the Los Angeles School District, testified that the mandated time period is insufficient to determine tenure eligibility.²¹⁰ 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.²¹¹ As mentioned *supra*, administrators use only one full year of evaluations to determine a teacher's eligibility for tenure.²¹² 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.²¹³ The plaintiffs submitted evidence that a dismissal proceeding can cost upwards of \$450,000, and defense witnesses testified that the termination of a tenured teacher is "extremely rare."²¹⁴ The high cost of litigation caused by the mandated process discourages administrators from pursuing a dismissal.²¹⁵ This only protects ineffective teachers and detracts from education in California.

The LIFO Statutes are another example of California's protection of ineffective teachers. When layoffs occur, no weight is given to a teacher's effectiveness or abilities; rather, seniority is

²⁰⁸ See EDUC. CODE §44929.21(b); *Vergara*, No. BC484642, slip op. at 9.

²⁰⁹ See *id.*

²¹⁰ STUDENTS MATTER, <http://studentsmatter.org/our-case/vergara-v-california-case-summary/last-in-first-out-statute/> (last visited December 27, 2014).

²¹¹ *Vergara*, No. BC484642, slip op. at 10.

²¹² *Id.*

²¹³ See EDUC. CODE §§ 44934, 44938(b)(1)–(2); *Vergara*, No. BC484642, slip op. at 11.

²¹⁴ *Vergara*, No. BC484642, slip op. at 11–12.

²¹⁵ *Id.*

the sole criterion used for dismissals.²¹⁶ This conceivably could 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 defendants could not offer a logical reason why such a system should exist.²¹⁷ 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 simply because of his or her hire date.²¹⁸ As with the Permanent Employment Statute and Dismissal Statutes, the LIFO Statute detracts from the quality of education and violates equal protection in California.

Under California's strict scrutiny analysis, the defendants fail to show the challenged statutes are necessary for a compelling state interest.²¹⁹ 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 subsequent protection from dismissal, violates a fundamental right and detracts from expertise within the profession. The challenged statutes, therefore, violate the equal protection clause of California's Constitution and directly undermine tenure's goals. For these reasons, the appellate court should uphold Judge Treu's decision and overturn the statutes.

B. The Current NY Statutes Should Be Overturned

As mentioned *supra*, the Court of Appeals of New York held in *Nyquist* that education is not a fundamental right.²²⁰ Therefore, an alleged violation under the state's equal protection clause need only be rationally related to an important government interest.²²¹ In *Campaign for Fiscal*

²¹⁶ See EDUC. CODE § 44955; *Vergara*, No. BC484642, slip op. at 13.

²¹⁷ *Vergara*, No. BC484642, slip op. at 14.

²¹⁸ See *id.*

²¹⁹ *Molar v. Gates*, 98 Cal. App. 3d 1, 13 (Cal. Ct. App. 1979) (requiring a compelling need to violate a fundamental right).

²²⁰ *Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist*, 453 N.Y.S.2d 643, 651 (N.Y. 1982).

²²¹ *Id.*

Equity v. New York, the court established the constitutional floor that needs to be met in order for the legislature to meet its obligation to provide an education.²²² 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.”²²³ In order for the plaintiffs in *Davids* to succeed, they must demonstrate a causal connection between the challenged statutes and a failure to provide students with a sound and basic education.²²⁴ If the court finds the statutes serve a legitimate government interest, the plaintiffs will ultimately fail.²²⁵

The plaintiffs in *Davids* 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.²²⁶ 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.²²⁷ Plaintiffs argue that effective teachers are the primary “input” of a sound education, explaining that “students taught by an effective teacher are more likely to attend college, earn higher salaries, reside in higher quality neighborhoods, and save for retirement.”²²⁸ Because the challenged statutes keep ineffective teachers in the classroom, they

²²² N.Y. CONST. art XI §1; *Campaign for Fiscal Equity v. New York*, 828 N.Y.S.2d 235 (N.Y. 2006).

²²³ *Campaign for Fiscal Equity* 828 N.Y.S.2d at 238 (quoting *Campaign for Fiscal Equity v. New York*, 769 N.Y.S.2d 106 (N.Y. 2003)).

²²⁴ *Campaign for Fiscal Equity* 828 N.Y.S.2d at 238.

²²⁵ *Nyquist*, 453 N.Y.S.2d at 651.

²²⁶ Complaint at 3, *Davids v. New York*, No. 0101105/2014 (filed July 24, 2014).

²²⁷ Complaint at 7, *Wright v. New York*, No. 1500641/2014 (filed July 28, 2014); Complaint *supra* note 226, at 8–13.

²²⁸ Complaint, *supra* note 226, at 8.

directly contribute to the legislature’s failure to provide a basic education.²²⁹ Therefore, the plaintiffs’ rights under the New York Constitution are violated.²³⁰

Plaintiffs argue New York’s Permanent Employment Statutes ensure that ineffective teachers are almost guaranteed tenure.²³¹ Tenure is conferred to a teacher after two, annual performance evaluations during a three-year probationary period.²³² Administrators use the Annual Professional Performance Review (“APPR”) to evaluate performance.²³³ Teachers are rated as “Highly Effective,” “Effective,” “Developing,” or “Ineffective.”²³⁴ 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.²³⁵ Plaintiffs argue that the inadequate probationary period and the APPR’s focus on subjective factors result in ineffective teachers earning tenure.²³⁶ 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.²³⁷ In 2012, 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.²³⁸ These results do not support the position that students are being provided a basic education under the standard established in *Fiscal Equity*.²³⁹ If the plaintiffs can

²²⁹ Complaint, *supra* note 227, at 6

²³⁰ Complaint, *supra* note 227, at 6.

²³¹ Complaint, *supra* note 227, at 9 (explaining that in 2007, 97% of eligible teachers received tenure).

²³² N.Y. EDUC. LAW §§ 2509, 2573, 3012 (McKinney 2014); Complaint, *supra* note 227, at 9.

²³³ Complaint, *supra* note 227, at 10.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 11.

²³⁷ *Id.* at 12–13.

²³⁸ Cathy Woodruff, *Why Are Most Teachers Rated Effective When Most Students Test Below Standards?*, N.Y. STATE SCHOLL BOARDS ASSOCIATION (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/>.

²³⁹ Campaign for Fiscal Equity v. New York, 828 N.Y.S.2d 235, 238 (N.Y. 2006).

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.²⁴⁰ New York's public employees are afforded due process rights before being dismissed.²⁴¹ An employer must provide notice and the right to respond before the termination is effective.²⁴² According to the plaintiffs' complaint, the Dismissal Statutes provide teachers in New York with "super due process" that results in years of expensive litigation.²⁴³ One study cited in the complaint concluded that the average dismissal costs \$313,000 and can last two and a half years.²⁴⁴ This discourages administrators from even attempting to remove a tenured teacher.²⁴⁵ Because this 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.²⁴⁶ The New York LIFO Statutes require administrators to only consider seniority as the determinant for dismissal when school layoffs are necessary.²⁴⁷ No consideration is given to teacher quality or effectiveness.²⁴⁸ As mentioned earlier, tenure's goal is to retain a level of expertise within the profession. The LIFO Statutes also offer employment protection to effective teachers who have seniority. This obviously

²⁴⁰ See, e.g., NY EDUC. LAW §3020 (McKinney 2014); Complaint, *supra* note 226, at 11.

²⁴¹ See Beck-Nichols v. Bianco, 964 N.Y.S.2d 456, 465 (N.Y. 2013).

²⁴² *Id.*

²⁴³ Complaint, *supra* note 226, at 11.

²⁴⁴ *Id.* (citing N.Y. STATE SCH. BDS. ASSOC., ACCOUNTABILITY FOR ALL (March 2007), http://www.nyssba.org/clientuploads/gr_3020a_reform.pdf).

²⁴⁵ See Complaint, *supra* note 226, at 12.

²⁴⁶ Complaint, *supra* note 226, at 13.

²⁴⁷ N.Y. EDUC. LAW §§ 2585, 3013 (McKinney 2014); Complaint, *supra* note 226, at 13.

²⁴⁸ *Id.*

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 junior effective teachers during school layoffs.²⁴⁹ This position is untenable. Because the LIFO Statutes keep ineffective teachers in the classroom, the quality of education is negatively affected and ultimately violates the state constitution.²⁵⁰

Though New York offers the right to education the lowest level of equal protection analysis, the court in *Davids* should overturn the Permanent Employment Statutes, Dismissal Statutes, and LIFO Statutes.²⁵¹ Plaintiffs offered much evidence to suggest the challenged statutes fail to meet the constitutional floor described in *Fiscal Equity* .²⁵² Because education is not a fundamental right, legislation affecting its quality needs only to serve a legitimate government interest; however it still must meet this constitutional floor.²⁵³ 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 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

²⁴⁹ See *Vergara v. California* , No. BC484642, slip op. at 13 (Cal. Super. Ct. August 27, 2014).

²⁵⁰ Complaint, *supra* note 226, at 14.

²⁵¹ Bd. of Educ., *Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist* , 453 N.Y.S.2d 643, 651 (N.Y. 1982).

²⁵² *Campaign for Fiscal Equity v. New York* , 828 N.Y.S.2d 235, 238 (N.Y. 2006).

²⁵³ *Allied Stores of Ohio v. Bowers* , 358 U.S. 522, 527 (U.S. 1959); *Nyquist* , 453 N.Y.S.2d at 651.

requirements and the state's obligation to provide an education.²⁵⁴ 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.²⁵⁵ The law requires a more thoughtful evaluation of a teacher's skills and training throughout four years.²⁵⁶ The evaluations are regulated by uniform state standards and are administered by various education experts and professionals.²⁵⁷ Once tenure is earned, the benefit is not conferred for life.²⁵⁸ Teachers who fail to remain effective throughout their careers may lose tenure, however, this does not happen immediately.²⁵⁹ The teacher has two years to prove his or her effectiveness in the classroom after tenure is lost.²⁶⁰ 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.²⁶¹ Because teachers have the most influence on a student's education, legislatures must ensure that the most effective teachers remain in the classroom.²⁶² New Jersey's tenure model serves both California's high constitutional standard and New York's requirement to provide a "sound and basic" education.²⁶³ Instituting a

²⁵⁴ N.J. STAT. § 18A:6-117.

²⁵⁵ *Id.*; McNeal, *supra* note 142, at 501.

²⁵⁶ *See id.*

²⁵⁷ N.J. STAT. § 18A:6-117.

²⁵⁸ *Id.*; McNeal, *supra* note 142, at 501.

²⁵⁹ N.J. STAT. § 18A:6-117; McNeal, *supra* note 142, at 501.

²⁶⁰ N.J. STAT. § 18A:6-117; McNeal, *supra* note 142, at 501.

²⁶¹ *See Serrano v. Priest* 5 Cal. 3d 584, 605 (Cal. 1971); *Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cnty. v. Nyquist*, 453 N.Y.S.2d 643, 651 (N.Y. 1982).

²⁶² *See Complaint*, *supra* note 226, at 8.

²⁶³ *Serrano*, 5 Cal. 3d at 605; *Campaign for Fiscal Equity v. New York*, 828 N.Y.S.2d 235, 238 (N.Y. 2006).

comprehensive evaluation process and protecting effective teachers only adds to the educational experience, protects student's rights, and fulfills California's and New York's commitment to providing an education to their students.

VI. Conclusion

State and federal courts have consistently recognized education's importance to society.²⁶⁴ While each jurisdiction has differing views of the constitutional obligation to provide an education, New York, New Jersey and California agree that there is a level of education that must be available to all students.²⁶⁵ 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 overturned and a new statutory scheme, like the TEACHNJ Act, should be instituted.

²⁶⁴ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973); see *Robinson v. Cahill*, 62 N.J. 473, 499 (N.J. 1973).

²⁶⁵ *Serrano*, 5 Cal. 3d at 606; *Robinson*, 623 N.J. at 499; *Campaign for Fiscal Equity* 828 N.Y.S.2d at 238.