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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. 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. 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.” 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. Some state courts elevate the right to education as a fundamental interest, while the United States Supreme Court (the Supreme

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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

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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.
¹¹ See Nicholas Dagostino, Giving the School Bully a Timeout: Protecting Urban Students from Teachers’ Unions, 63 Ala. L. Rev. 177, 195 (2011).
¹³ Id.
¹⁴ Serrano, 5 Cal. 3d at 606.
subsequently challenged state teacher tenure statutes in similar fashion. 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

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

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.” 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.

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

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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.
23 See id.
for the alleged inequality.\textsuperscript{26} In \textit{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.”\textsuperscript{27} According to the court, this analysis uses an approach implicit in the federal test.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{30}

\section*{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.\textsuperscript{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.”\textsuperscript{32} At its core, this article promises persons who are similarly situated are treated equally under the law.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{26} See \textit{Greenberg v. Kimmelman}, 494 A.2d 294, 302 (N.J. 1985).
\item \textsuperscript{27} \textit{Id}.
\item \textsuperscript{28} See \textit{id}.
\item \textsuperscript{29} \textit{Id}.
\item \textsuperscript{30} \textit{Id}.
\item \textsuperscript{31} See \textit{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).
\item \textsuperscript{32} See \textit{C.A. CONST.} art I, § 7(a).
\item \textsuperscript{33} \textit{In re Evans}, 49 Cal. App. 4th 1263, 1270 (Cal Ct. App. 1996).
\end{itemize}
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. When legislative action classifies individuals and is challenged as violating the state’s constitution, California courts have developed a two-tiered standard of review. 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. The state must show that the violation of the right or the classification is necessary to accomplish a compelling interest. California does not recognize a distinction between classifications of race or gender. Instead, the state analyzes these classifications under the same level of scrutiny. All other legislation must bear some rational relationship to a legitimate state purpose, meeting the constitutional floor the U.S. Supreme Court requires.

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

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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*.
41 N.Y. CONST. art I, § 11.
interest. Second, in *Alevy v. Downstate Medical Center*, the New York Court of Appeals explained intermediate scrutiny, or the “sliding scale” test. The court first must ask if the alleged discrimination satisfies a substantial state interest and furthers a legitimate government purpose. 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. Third, similar to the federal analysis, all classifications must at least be rationally related to a legitimate government interest.

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

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43 *Id.* at 635.
45 *Id.*
46 *Id.*
47 *Nyquist*, 408 N.Y.S.2d at 638.
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.
57 See, e.g., id. (holding that education is not a fundamental right in New York).
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.\textsuperscript{61} Key cases from New Jersey, California, and New York are helpful to summarize for purposes of this Comment. Each decision discussed \textit{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.

\textbf{B. The Supreme Court’s View}

There is neither an explicit nor an implicit guarantee to education under the United States Constitution.\textsuperscript{62} The U.S. Supreme Court was confronted with this question in \textit{San Antonio Independent School District v. Rodriguez}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{65} The legislature understood disparities in expenditures harmed the quality of education in rural districts and passed legislation designed to increase funding.\textsuperscript{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.\textsuperscript{67} The remaining funds came directly from the district’s budget by way of local property taxes, calculated as a

\begin{footnotes}
\textsuperscript{62} \textit{Id.} at 35.
\textsuperscript{63} \textit{Id.}.
\textsuperscript{64} \textit{Id.} at 9–10.
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.} at 11–12
\textsuperscript{67} See Rodriguez, 411 U.S. at 11–12.
\end{footnotes}
percentage of residential and commercial property value.\textsuperscript{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.\textsuperscript{69}

The plaintiffs came from Edgewood, the least affluent district in the San Antonio area.\textsuperscript{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.\textsuperscript{71} With the contribution from the Texas state revenue, total expenditures per student for the year were $248.\textsuperscript{72} At trial, plaintiffs introduced the 1967–1968 expenditures of Alamo Heights, the most affluent district in the San Antonio area.\textsuperscript{73} Because of greater property values and state contribution, Alamo Heights was able to supply $594 per pupil.\textsuperscript{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.\textsuperscript{75}

The majority overturned the district court on two separate grounds.\textsuperscript{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.\textsuperscript{77} 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.\(^{78}\) 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.
\(^{86}\) Id. at 480.
Jersey’s public schools received funding from general state revenue and local property taxes.\textsuperscript{87} This resulted in a disparity of dollars spent per pupil, particularly in areas where property values were low.\textsuperscript{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.\textsuperscript{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.\textsuperscript{90} Plaintiffs urged the court to invoke the highest level of scrutiny when evaluating the funding scheme’s violation of this constitutional provision.\textsuperscript{91} The plaintiffs specifically pointed to the Supreme Court’s holding in \textit{Rodriguez} that elevated explicit constitutional guarantees to the level of fundamental rights.\textsuperscript{92} The plaintiffs argued that the holding in \textit{Rodriguez} only bolstered Chief Justice Warren’s unanimous decision in \textit{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.”\textsuperscript{93}

The New Jersey Supreme Court used the \textit{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.\textsuperscript{94} Chief Justice Weintraub explained that the guarantee of an efficient education does not mandate a uniform expenditure plan.\textsuperscript{95} The constitutional guarantee implicitly involves municipal participation, which undoubtedly leads to varying budgets and

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 481.
\item \textit{Id.} at 482.
\item N.J. \textsc{Const.} art. VII § 4.
\item \textit{Robinson}, 623 N.J. at 496.
\item \textit{Id.} at 491.
\item \textit{Id.} at 494 (quoting \textit{Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.}, 347 U.S. 483, 493 (1954)).
\item \textit{See Robinson}, 623 N.J. at 495.
\item \textit{Id.} at 499.
\end{enumerate}
\end{footnotesize}
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. Therefore, the requirement to furnish a service does not automatically elevate the state’s obligation to a fundamental right.

**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. Like New Jersey and Texas, New York’s funding scheme resulted in disparities where property values were low. 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. 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. As mentioned *supra*, however, dedication to a government program does not automatically elevate the level of scrutiny to that of a fundamental right. 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. Strict or intermediate scrutiny is appropriate only when the state action groups persons together by reason of personal

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96 Id. at 493–494.
97 Id. at 499.
98 Id.
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.\textsuperscript{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.\textsuperscript{106}

E. California’s View

California’s view of public education departs from the holdings in \textit{Rodriguez}, \textit{Robinson}, and \textit{Nyquist}.\textsuperscript{107} In \textit{Serrano v. Priest}, California’s public school funding statutes encountered a challenge for violating California’s equal protection clause.\textsuperscript{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.\textsuperscript{109} The plaintiffs argued this violated a fundamental right.\textsuperscript{110}

The California Supreme Court believed the plaintiffs’ claims had legal merit and remanded the proceedings for trial.\textsuperscript{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.\textsuperscript{112} In support of this conclusion, the court pointed to Chief Justice Warren’s decision in \textit{Brown}.\textsuperscript{113} Justice Sullivan explained that the majority in \textit{Brown} espoused two themes when speaking about the importance of education: (1) the importance to individuals and (2) the importance to society.\textsuperscript{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

\textsuperscript{105} \textit{Nyquist}, 453 N.Y.S.2d at 651.
\textsuperscript{106} \textit{Id}.
\textsuperscript{107} \textit{See}, e.g. \textit{Serrano v. Priest} 5 Cal. 3d 584 (Cal. 1971)
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id} at 588.
\textsuperscript{110} \textit{Id} at 589.
\textsuperscript{111} \textit{Id} at 618.
\textsuperscript{112} \textit{Id} at 605–606.
\textsuperscript{113} \textit{Serrano}, 5 Cal. 3d at 606 (citing \textit{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.
\textsuperscript{114} \textit{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.
118 Id.
121 Id.
Though funding is an important aspect of operating state public school systems, it is not the primary influence on education’s quality.\textsuperscript{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.\textsuperscript{123} In comparison, Chatham, New Jersey spends $11,000 per pupil and has a high school graduation rate of virtually 100\%.\textsuperscript{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.\textsuperscript{125} In \textit{Brown}, the Court famously struck down the segregation of children in public schools based on race.\textsuperscript{126} Even if facilities were “tangibly” equal, the psychological effect of separating students based on physical characteristics negatively impacts students’ education.\textsuperscript{127} The Court therefore recognized that environmental factors have an impact on education’s quality.\textsuperscript{128}

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

\begin{footnotes}
\textsuperscript{122} Dagostino \textit{supra} note 11, at 180.
\textsuperscript{123} \textit{Id}.
\textsuperscript{126} \textit{Id}.
\textsuperscript{127} \textit{Id}.
\textsuperscript{128} See \textit{id}.
\textsuperscript{130} \textit{Id} at 631.
\end{footnotes}
Americans, something that the Texas Court of Civil Appeals felt was an appropriate remedy for the plaintiff. The Supreme Court disagreed and ordered the University of Texas to admit the plaintiff to its law school. In its analysis, the Court compared the schools’ facilities. The University of Texas had access to scholarship funds, moot court facilities, and 65,000 volumes in its library. The African American law school had no faculty, almost no volumes in its library, and lacked accreditation. The Court held that the insufficient facilities detracted from the plaintiff’s legal education and therefore violated his constitutional rights. Implicit in its decision, Painter recognizes that facilities and academic materials have an effect on one’s education.

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. 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. According to the same study, an ineffective teacher could result in almost $2.5 million of lost lifetime earnings. 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. If teachers detract from the classroom experience and are protected from termination, then this may have constitutional implications even

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131 Id. at 632.
132 Id. at 636.
133 Id. at 632.
134 Id. at 632–633
136 Id. at 636.
137 See id.
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.\textsuperscript{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.\textsuperscript{143} Contrary to popular belief, tenure for public school teachers is not absolute immunity from being terminated.\textsuperscript{144} As explained in \textit{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.\textsuperscript{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.\textsuperscript{146} Laws regulating the hearing process vary by state; however, the charges an individual teacher may face for termination are less variable.\textsuperscript{147} Therefore, it is possible for a tenured teacher’s position to be terminated.\textsuperscript{148}

B. Efforts at Tenure Reform: The TEACHNJ Act

\begin{flushright}
\textsuperscript{142} See Laura McNeal, \textit{Total Recall: The Rise and Fall of Teacher Tenure}, HOFSTRA LAB. & EMP. L.J. 489, 491–492 (2013).
\textsuperscript{143} \textit{Id.} at 492.
\textsuperscript{144} Cohen, \textit{supra} note 10 at 43.
\textsuperscript{145} \textit{Id.} (citing \textit{Donahoo v. Bd. of Educ.}, 109 N.E.2d 787, 789 (Ill. 1952)).
\textsuperscript{146} \textit{Compare} McNeal \textit{supra} note 142, at 490 (explaining that recent attempts to eliminate tenure have been viewed by many teachers as an attack on the profession), \textit{with} Dagostino \textit{supra} note 11, at 195 (arguing that tenure keeps ineffective teachers in the classroom).
\textsuperscript{147} Cohen, \textit{supra} note 10, at 43 (noting that punishment may include inefficiency, incapacity, unbecoming conduct or other just cause).
\textsuperscript{148} \textit{Id.}
\end{flushright}
The recent economic downturn, shrinking state budgets, and underperforming schools brought tenure reform to the forefront.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{153} The TEACHNJ Act addresses the probationary period and evaluation process for public school teachers in New Jersey.\textsuperscript{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.\textsuperscript{155} The new evaluation system rates teachers as “ineffective,” “partially effective,” “effective,” or “highly effective.”\textsuperscript{156} A panel of experienced teachers and

\textsuperscript{149} See McNeal, \textit{supra} note 142, at 489.
\textsuperscript{150} See \textit{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).
\textsuperscript{151} See Dagostino \textit{supra} note 11, at 180 (explaining that only twenty-two percent of students in Newark, NJ graduate from high school); McNeal, \textit{supra} note 142, at 501–502
\textsuperscript{152} McNeal, \textit{supra} note 142, at 501.
\textsuperscript{154} N.J. STAT. § 18A:6-117.
\textsuperscript{155} \textit{Id}.
\textsuperscript{156} \textit{Id}. 

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administrators completes the evaluations, balancing both subjective and objective factors.\footnote{McNeal, supra note 142, at 502} Once tenure is earned, two consecutive years of an “ineffective” rating result in a loss of tenure.\footnote{Id.} The teacher then must have two consecutive years of “effective” or “highly effective” ratings in order to avoid dismissal.\footnote{Id.} Further, the costs of a dismissal hearing are capped at $7,500.\footnote{Id.} 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.\footnote{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

a. \textit{Vergara v. The State of California}

The same year New Jersey passed the TEACHNJ Act, tenure reformers in California mounted a legal battle in \textit{Vergara v. California}.\footnote{See Vergara v. California, No. BC484642, slip op. at 3 (Cal. Super. Ct. August 27, 2014).} The plaintiffs challenged five statutes from the California Education Code that allegedly violated the equal protection clause of the California Constitution.\footnote{Id.} 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”).\footnote{Id.} The plaintiffs argued that each statute protected ineffective teachers from dismissal, which contributed to a failing education system within their respective school districts.\footnote{Id.} Because education is considered a fundamental
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.\textsuperscript{176}

Judge Treu also found that the Dismissal Statutes violated the equal protection clause of the California Constitution.\textsuperscript{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.\textsuperscript{178} During trial, defense witnesses admitted that was is nearly “impossible” to terminate a tenured teacher’s position under the current statutory scheme.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{184}

\textsuperscript{176} Vergara, No. BC484642, slip op. at 9.
\textsuperscript{177} Id. at 11.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 12.
\textsuperscript{181} Id.
\textsuperscript{182} Vergara, No. BC484642, slip op. at 12
\textsuperscript{183} Id.
\textsuperscript{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.\textsuperscript{185} When school layoffs are necessary, the LIFO Statutes regulates teacher dismissals.\textsuperscript{186} The last-hired teacher is the first dismissed, without consideration of the teacher’s quality or effectiveness.\textsuperscript{187} Judge Treu explained the defendants would need to present a compelling reason for the “\textit{de facto} retention of incompetent [teachers]” in order to defend the LIFO Statutes’ existence.\textsuperscript{188} Judge Treu found the logic of the defendant’s position to be “unfathomable”.\textsuperscript{189} California recognizes education as a fundamental right that requires the highest level of equal protection analysis.\textsuperscript{190} Automatically keeping ineffective teachers in the classroom directly impacts education’s quality, violating students’ constitutional rights.\textsuperscript{191} For these reasons, Judge Treu held the LIFO Statutes failed strict scrutiny analysis.\textsuperscript{192}

\textbf{b. Davids 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.\textsuperscript{193} In Wright \textit{v. New York} and Davids \textit{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.\textsuperscript{194} Similar to the tenure provisions in Vergara, the plaintiffs in Wright and

\begin{footnotesize}
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\item \textsuperscript{185} \textit{Id.} at 13.
\item \textsuperscript{186} \textsc{Cal. Educ. Code} § 44955 (West 2014).
\item \textsuperscript{187} Vergara, No. BC484642, slip op. at 13; Educ. § 44955.
\item \textsuperscript{188} Vergara, No. BC484642, slip op. at 13
\item \textsuperscript{189} \textit{Id.} at 14.
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} See Hernandez, supra note 15.
\end{enumerate}
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Davids 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”).

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. With a trial date currently set for early 2015, plaintiffs will now argue solely under Davids v. New York.

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 Davids must argue in a state that offers education the lowest level of equal protection analysis. Both New York and California have recognized education’s importance and the integral role teachers play in a child’s academic development. 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.

195 Id.
197 Id.
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.
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 Statue forces administrators to evaluate a teacher’s effectiveness in an inadequate time period.\textsuperscript{208} In practice, the statute uses one full academic year as the primary criteria for granting tenure.\textsuperscript{209} Dr. John Deasy, Superintendent of the Los Angeles School District, testified that the mandated time period is insufficient to determine tenure eligibility.\textsuperscript{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.\textsuperscript{211} As mentioned \textit{supra}, administrators use only one full year of evaluations to determine a teacher’s eligibility for tenure.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{214} The high cost of litigation caused by the mandated process discourages administrators from pursuing a dismissal.\textsuperscript{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

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\item \textsuperscript{208} See \textsc{edu}c. \textsc{c}ode §44929.21(b); \textit{Vergara}, No. BC484642, slip op. at 9.
\item \textsuperscript{209} See id.
\item \textsuperscript{210} \textsc{st}udents \textsc{mat}ter, http://studentsmatter.org/our-case/vergara-v-california-case-summary/last-in-first-out-statute/ (last visited December 27, 2014).
\item \textsuperscript{211} \textit{Vergara}, No. BC484642, slip op. at 10.
\item \textsuperscript{212} Id.
\item \textsuperscript{213} See \textsc{edu}c. \textsc{c}ode §§ 44934, 44938(b)(1)--(2); \textit{Vergara}, No. BC484642, slip op. at 11.
\item \textsuperscript{214} \textit{Vergara}, No. BC484642, slip op. at 11--12.
\item \textsuperscript{215} Id.
\end{itemize}
\end{footnotesize}
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

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216 See EDUC. CODE § 44955; Vergara, No. BC484642, slip op. at 13.
217 Vergara, No. BC484642, slip op. at 14.
218 See id.
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. 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.” 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. If the court finds the statutes serve a legitimate government interest, the plaintiffs will ultimately fail.

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. 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. 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.” Because the challenged statutes keep ineffective teachers in the classroom, they

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224 Campaign for Fiscal Equity 828 N.Y.S.2d at 238.
225 Nyquist, 453 N.Y.S.2d at 651.
228 Complaint, supra note 226, at 8.
directly contribute to the legislature’s failure to provide a basic education. Therefore, the plaintiffs’ rights under the New York Constitution are violated.

Plaintiffs argue New York’s Permanent Employment Statutes ensure that ineffective teachers are almost guaranteed tenure. Tenure is conferred to a teacher after two, annual performance evaluations during a three-year probationary period. Administrators use the Annual Professional Performance Review ("APPR") to evaluate performance. Teachers are rated as “Highly Effective,” “Effective,” “Developing,” or “Ineffective.” 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. Plaintiffs argue that the inadequate probationary period and the APPR’s focus on subjective factors result in ineffective teachers earning tenure. An administrator cannot reasonably determine the long-term effectiveness of a teacher within three years, an the focus of teacher evaluations should not be reliant on subjective factors. 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. These results do not support the position that students are being provided a basic education under the standard established in Fiscal Equity. If the plaintiffs can

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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.
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.
242 Id.
244 See Complaint, supra note 226, at 12.
245 Id.
246 Id.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{251} Plaintiffs offered much evidence to suggest the challenged statutes fail to meet the constitutional floor described in Fiscal Equity.\textsuperscript{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.\textsuperscript{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.

\textbf{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

\begin{footnotes}
\item[250] Complaint, supra note 226, at 14.
\end{footnotes}
requirements and the state’s obligation to provide an education.\textsuperscript{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.\textsuperscript{255} The law requires a more thoughtful evaluation of a teacher’s skills and training throughout four years.\textsuperscript{256} The evaluations are regulated by uniform state standards and are administered by various education experts and professionals.\textsuperscript{257} Once tenure is earned, the benefit is not conferred for life.\textsuperscript{258} Teachers who fail to remain effective throughout their careers may lose tenure, however, this does not happen immediately.\textsuperscript{259} The teacher has two years to prove his or her effectiveness in the classroom after tenure is lost.\textsuperscript{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.\textsuperscript{261} Because teachers have the most influence on a student’s education, legislatures must ensure that the most effective teachers remain in the classroom.\textsuperscript{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.\textsuperscript{263} Instituting a

\textsuperscript{254} N.J. STAT. § 18A:6-117.
\textsuperscript{255} Id.; McNeal, \textit{supra} note 142, at 501.
\textsuperscript{256} See \textit{id}.
\textsuperscript{257} N.J. STAT. § 18A:6-117.
\textsuperscript{258} \textit{id}.; McNeal, \textit{supra} note 142, at 501.
\textsuperscript{259} N.J. STAT. § 18A:6-117; McNeal, \textit{supra} note 142, at 501.
\textsuperscript{260} N.J. STAT. § 18A:6-117; McNeal, \textit{supra} note 142, at 501.
\textsuperscript{262} See Complaint, \textit{supra} note 226, at 8.
\textsuperscript{263} \textit{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. 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. 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.

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

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