

Saving Students From Ineffective Teachers: The Vergara Decision and It's Potential Constitutional Implications

Michael Lynch

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SAVING STUDENTS FROM INEFFECTIVE TEACHERS: THE *VERGARA* DECISION AND ITS POTENTIAL CONSTITUTIONAL IMPLICATIONS

MICHAEL LYNCH*

I. INTRODUCTION

Imagine what it would feel like to be hungry—starving. After making it through an entire day without a morsel, you finally get the opportunity to eat late in the evening. You are relieved and grateful when you realize that your neighborhood grocery store is still open for a bit longer.

You enter the store and begin walking through the aisles looking for all of the ingredients you need to create a satisfying meal. You walk up to an employee and ask for assistance in finding an item, but he only stares at you and does not speak. You ask once again, in a louder voice, but he still does nothing to help you find your item. You approach other employees, hoping they will assist you, but no one is able to help you. Despite not finding the item you need, you are grateful for the food in your shopping cart and decide to check out.

You begin placing items near the register, but the employee does not complete the transaction . . . she looks at you and tells you that she cannot ring you up because she does not know how to do that. You walk out of the store tired, frustrated and still starving.

Fortunately, this is not typical of how most experience grocery stores. Customers are able to rely on store employees to assist them when needed. Some customers may need more help than others, and the employees do their best to assist all their customers. As a result, almost all people who enter grocery stores are able to successfully purchase food. However, education

* St. John's University School of Law J.D. Candidate, 2016.

statutes in some states protect teachers who are as ineffective as the hypothetical grocery store employees described above. In too many schools across the United States, students are walking through the doors, sitting in classrooms, but leaving without an education. They are leaving schools starved.

Ineffective teachers can set their students back immeasurably, and have a substantial negative effect on students' lifetime earnings.¹ Successful teachers can have deep positive impacts and they admittedly deserve a degree of job security, but some states have enacted employment protections that make it prohibitively time consuming and expensive to remove poor teachers.² These protections are even more burdensome in low-income districts that do not have the time and resources needed to fire ineffective teachers.³ As a result, there is a disproportionately large number of ineffective teachers in low-income school districts.⁴

Recently, in *Vergara v. California*,⁵ the California Superior Court examined the state constitutionality of several teacher employment protection statutes. The plaintiffs claimed that the California state laws were preventing the dismissal of severely inadequate teachers.⁶ Additionally, ineffective teachers were "disproportionately situated in schools serving predominately low-

¹ See Karen Weise, *One Year With a Bad Teacher Costs Each Student \$50,000 in Lifetime Earnings*, BLOOMBERG BUSINESSWEEK (Jun. 12, 2014), <http://www.businessweek.com/articles/2014-06-12/one-year-with-a-bad-teacher-costs-each-student-50-000-in-lifetime-earnings>.

² See Evan Thomas & Pat Wingert, *Why We Can't Get Rid of Failing Teachers*, NEWSWEEK, Mar. 15, 2010, at 25 ("In most states, after two or three years, teachers are given lifetime tenure. It is almost impossible to fire them."). See also Susan Edelman & Michael Gartland, *It's Nearly Impossible to Fire Tenured Teachers*, NY POST (Jun. 14, 2014), <http://nypost.com/2014/06/14/tenured-teachers-they-cheat-they-loaf-they-cant-be-fired/> (criticizing the difficult process required to dismiss a tenured teacher New York State).

³ In New York City, the average cost to remove a tenured teacher is \$250,000. See Frank Eltman, *Firing Tenured Teachers Isn't Just Difficult, it Costs You*, USA TODAY (Jun. 30, 2008), http://usatoday30.usatoday.com/news/education/2008-06-30-teacher-tenure-costs_N.htm; see also *Should Teachers Get Tenure?*, PROCON.ORG, <http://teachertenure.procon.org/> (last updated Apr. 4, 2016) (Procon.org is a nonprofit public charity "[p]romoting critical thinking, education, and informed citizenship by presenting controversial issues in a straightforward, nonpartisan, primarily pro-con format").

⁴ See Rose Garrett, *What is Teacher Tenure*, EDUCATION.COM (Jun. 24, 2013), <http://www.education.com/magazine/article/what-is-teacher-tenure/> (citing the results of a survey conducted by The New Teacher Project (TNP) in which 81 percent of public school administrators said there is a poor-performing tenured teacher in their school).

⁵ No. BC484642, 2014 WL 2598719 (Cal. Super. Jun. 10, 2014).

⁶ *Id.* at *2.

income and minority students.”⁷ Because of the inequality across race and income in the distribution of effective teachers, the plaintiffs argued that the challenged statutes violated the Equal Protection Clause of the California Constitution.⁸ Specifically, the plaintiffs asserted that the statutes infringed on “their fundamental rights to equality of education by adversely affecting the quality of the education they are afforded by the state.”⁹

In its decision, the court found all of the challenged statutes to be unconstitutional.¹⁰ Using the “strict scrutiny” level of analysis, the court found that California did not prove that the challenged statutes were “necessary” in the furtherance of a “compelling interest” pursued by the state.¹¹ In the final line of the decision, the court encouraged the California legislature to pass new statutes that would provide “each child in this state with a basically equal opportunity to achieve a quality education.”¹² Implicit in this holding is the conclusion that some students in California were not receiving a minimally quality education.

This Note does not scrutinize the Superior Court’s analysis of California Constitutional law; instead, this Note contemplates a federal challenge to California teacher employment protection statutes. Unlike the California Constitution, the United States Constitution does not literally include, and has not been interpreted to include, a fundamental right to a quality education.¹³ However, the Supreme Court in *San Antonio Independent School District v. Rodriguez* opened the door to constitutional challenges to educational statutes under the Equal Protection Clause of the 14th Amendment if the plaintiffs possessed two distinct characteristics: (1) their financial status prevented them from paying for a desired benefit; and (2) they suffered “an absolute deprivation of a meaningful opportunity to enjoy that benefit.”¹⁴ Therefore, for the students in Vergara to be successful in federal court, they would have to prove (1) that

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *7.

¹¹ *Id.* at *4-5.

¹² *Id.* at *7.

¹³ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1955).

¹⁴ See *Rodriguez*, 411 U.S. at 20.

grossly ineffective teachers are located in predominantly low-income neighborhoods where it is too costly to remove them and (2) that their presence in the low-income school districts has created “an absolute deprivation of a meaningful opportunity” to receive an education.

Part II of this Note discusses the *Vergara* opinion in greater depth and examines the legal precedent discussed to assess the likelihood of a Supreme Court challenge in the future. Part III of this Note examines some of the relevant empirical data related to the interplay between race, income, and teacher performance. Examples from across the country are used to explore whether overly protective employment statutes have a disproportionately negative impact on minority students. Next, part IV will take a look at the Supreme Court’s reluctance to recognize education as a fundamental right, and the barriers to a federal constitutional challenge to the California laws. However, in Part V, this Note argues that the *Vergara* case demonstrates a sufficiently egregious deprivation of educational benefits to allow for a federal Equal Protection Claim to succeed. In this part, the *Rodriguez* “loophole” is explained and the idea of “denial of education” is developed and applied to the facts of the *Vergara* case. Finally, in Part VI, this Note suggests modifications to teacher employment statutes that would break the stronghold of grossly ineffective teachers on low-income school districts and honor the Constitution’s Equal Protection Clause.

II. *VERGARA V. CALIFORNIA*

In *Vergara v. California*¹⁵, the plaintiffs were nine Los Angeles Unified School District students who claimed that California’s teacher employment protection statutes were allowing inadequate and grossly ineffective teachers to remain in the classroom in violation of California’s Constitution.¹⁶ Because of these overly protective laws, incapable teachers stifled student achievement yet survived district initiated layoffs, while promising newer teachers were dismissed regardless of their superior ability.¹⁷ In

¹⁵ No. BC484642, 2014 WL 2598719 (Cal. Super. Jun. 10, 2014).

¹⁶ *Id.* at *2.

¹⁷ *Id.* at *6.

addition, school districts were unable to terminate tenured teachers because California law made it virtually impossible to fire even the worst performing teachers.¹⁸

The students challenged five statutes in the California Education Code.¹⁹ First, the “Permanent Employment Statute” required teachers to be evaluated for tenure within two years of being hired.²⁰ Because of administrative considerations and red tape, tenure decisions for new teachers were made less than sixteen months after beginning work.²¹ Second, the students challenged three “Dismissal Statutes” that made removal of grossly ineffective teachers time consuming and expensive.²² The entire process can take between two and ten years and can cost districts between \$50,000 to \$450,000 to remove a tenured teacher.²³ Finally, the students argued that the “Last-in-First-Out” (“LIFO”) statute violated the California Constitution.²⁴ The LIFO statute requires that the last-hired teacher is the first person fired when layoffs occur, regardless of teacher effectiveness.²⁵

Both sides agreed that the most important component of students’ development and learning is quality teaching.²⁶ According to the testimony of the plaintiffs’ expert witness, Dr. Thomas Kane,²⁷ one grossly ineffective math teacher in Los Angeles can set students back a year behind peers taught by an average quality math teacher.²⁸ Another expert witness, Dr. Raj

¹⁸ *Id.* at *5.

¹⁹ CAL. EDUC. CD. 44929.21(b) (“Permanent Employment Statute”); CAL. EDUC. CD. 44934; CAL. EDUC. CD. 44938(b)(1) and (2); CAL. EDUC. CD. 44944 (“Dismissal Statutes”); CAL. EDUC. CD. 44955 (“Last-In-First Out (LIFO)”).

²⁰ CAL. EDUC. CODE § 44929.21(b) (Deering 2016).

²¹ *Vergara v. California Trial by the Numbers*, STUDENTS MATTER, http://studentsmatter.org/wp-content/uploads/2014/06/SM_Trial-By-Numbers_06.09.141.pdf (last visited Sept. 15, 2016).

²² *Vergara*, 2014 WL 2598719, at *2.

²³ *Id.* at *5.

²⁴ *Id.* at *2.

²⁵ CAL. EDUC. CODE § 44955 (Deering 2016).

²⁶ *Id.* at *4.

²⁷ Dr. Thomas Kane is a professor of Education and Economics at the Harvard Graduate School of Education and also the Faculty Director of the Harvard Center for Education Policy and Research. *Defense Witness Concedes That the Probationary Period Should Be Three to Five Years*, STUDENTS MATTER (Mar. 18, 2014), http://studentsmatter.org/wp-content/uploads/2014/03/SM_Day28_EndofDayPressRelease_03.18.14.pdf.

²⁸ See STUDENTS MATTER, *supra* note 21.

Chetty,²⁹ estimated that a single grossly ineffective teacher causes a student to lose \$50,000 in potential lifetime earnings.³⁰ As evidence of the disproportionate racial distribution of teacher quality, Dr. Kane testified that in the Los Angeles Unified School District, African American students were 43 percent more likely than white students to be taught by an ineffective teacher.³¹ Dr. Kane also stated that Latino students are 68 percent more likely to have an ineffective teacher.³²

The plaintiffs produced some striking facts and statistics related to teacher dismissals in the Los Angeles Unified School District. In 2010, the district laid off hundreds of its most promising math and English teachers because of the seniority-based layoff statute.³³ In contrast, only 2.2 of the 275,000 public school teachers in California are dismissed each year for poor performance.³⁴ The dismissal procedure for a tenured teacher is time consuming and expensive for local school districts.³⁵ The plaintiffs presented evidence of a survey conducted of 68 superintendents, 159 principals, and 391 teachers in California.³⁶ 90 percent of superintendents, 89 percent of principals, and 62 percent of teachers agreed that students would be better served if the dismissal procedure were “easier.”³⁷ A survey conducted by the National Council on Teacher Quality revealed that 34 percent of principals in the Los Angeles Unified School District did not

²⁹ STUDENTS MATTER, *supra* note 27, at 2. Dr. Raj Chetty is an economics professor at Harvard University who uses economic theory to design government policies.

³⁰ STUDENTS MATTER, *supra* note 21, at 2. *See, e.g.*, Michael Hiltzik, *Why that ruling against teacher tenure won't help your schoolchildren*, L.A. TIMES (June 11, 2014), <http://www.latimes.com/business/hiltzik/la-fi-mh-why-that-ruling-20140611-column.html#page=1>.

³¹ *Id.* Teachers in the bottom 5% of teacher performance according to California education statistics are considered “ineffective.”

³² *Id.*

³³ *See* Jason Felch et al., *When layoffs come to L.A. schools, performance doesn't count*, L.A. TIMES (December 4, 2010), <http://articles.latimes.com/2010/dec/04/local/la-me-1205-teachers-seniority-20101204>. Of the teachers laid off, 190 ranked in the top fifth in raising scores in math and English and more than 400 ranked in the top 40%. *Id.*

³⁴ STUDENTS MATTER, *supra* note 21.

³⁵ STUDENTS MATTER, *supra* note 21.

³⁶ 2013 *California Educators Survey Results*, STUDENTS MATTER, http://studentsmatter.org/wp-content/uploads/2014/03/SM_Research-Now-Poll-Results_03.05.14.pdf (last visited Sept. 9, 2016).

³⁷ *Id.*

attempt to remove an ineffective teacher because the process was unlikely to result in a dismissal.³⁸

More disturbing is the fact that schools located in the poorest areas of Los Angeles were disproportionately hurt by the seniority-based layoffs because most new teachers were hired in those districts.³⁹ For instance, nearly 10 percent of the teachers in South Los Angeles schools were laid off, which was almost double the rate in other areas of Los Angeles.⁴⁰ Overall, of the sixteen schools that lost at least 25 percent of their teachers, 15 were located in the low-income communities of South or Central Los Angeles.⁴¹ Moreover, removing ineffective teachers in low-income school districts is sometimes too costly, which further contributes to the disproportionate number of ineffective teachers in those districts.⁴² According to Los Angeles Superintendent Dr. John Deasy, it costs between \$250,000 to \$450,000 to dismiss a tenured teacher.⁴³ Troy Christmas, Oakland Unified School District Superintendent, estimated the cost of tenured-teacher dismissal at approximately \$50,000 to \$400,000.⁴⁴

The plaintiffs claimed that the teacher employment protection statutes had a disproportionately negative impact on low-income minority students, and consequently denied those students equal protection of their state constitutional right to an education.⁴⁵ The California equal protection clause states: “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.”⁴⁶ The Plaintiffs supported their Equal Protection argument by citing two other sections of the California Constitution, which identify education as “essential to the preservation of the rights and liberties of the people” and demand “common” and “free” schools.⁴⁷

³⁸ *Teacher Quality Roadmap, Improving Policies and Practices in LAUSD*, NATIONAL COUNCIL ON TEACHER QUALITY (2011), available at http://studentsmatter.org/wp-content/uploads/2012/09/SM_LAUSD-teacher-quality-roadmap_10.26.11.pdf.

³⁹ Felch et al., *supra* note 33.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² STUDENTS MATTER, *supra* note 21.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Vergara v. California*, 2014 WL 2598719, at *7 (Cal. Super.).

⁴⁶ CAL. CONST. art. I, § 7.

⁴⁷ CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall

In reaching its decision, the California court relied upon three seminal California education cases. In 1971, California students appealed a dismissal of their lawsuit alleging that the California education financing system had a disproportionately negative impact on poor students and violated the Equal Protection clause of the California Constitution.⁴⁸ On appeal, the California Supreme Court recognized education as a “fundamental interest which cannot be conditioned by wealth,” and used strict scrutiny in analyzing the constitutionality of the financing system.⁴⁹ The court found sufficient evidence to sustain the allegations that the California school finance system was “not necessary to the attainment of any compelling state interest” and that it disproportionately denied students’ right to education on the basis of wealth in violation of the California Constitution.⁵⁰ The court reversed the trial court’s dismissal and remanded the case for further proceedings.⁵¹

Five years later, *Serrano v. Priest* (“Serrano II”) was argued on the merits in the California Supreme Court.⁵² The court held that the finance system violated the Equal Protection clause because it gave “high-wealth districts a substantial advantage” over low-wealth districts.⁵³ Furthermore, the court held that the California Constitution guarantees all students “equality of educational opportunity,” and California laws must provide students with “substantially equal opportunities for learning.”⁵⁴ However, the court concluded that the financing system did not violate the Equal Protection clause of the Fourteenth Amendment because the Supreme Court did not recognize education as a fundamental right warranting strict scrutiny.⁵⁵

In 1991, parents in a California school district filed for temporary and permanent injunctive relief against the state to

encourage by all suitable means the promotion of intellectual, scientific ... improvement”); CAL. CONST. art. IX § 5 (“The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district . . .”).

⁴⁸ *Serrano v. Priest*, 5 Cal. 3d 584, 590 (1971) (Serrano I).

⁴⁹ *Id.* at 589.

⁵⁰ *Id.* at 614-15.

⁵¹ *Id.* at 619.

⁵² 18 Cal. 3d 728 (1976).

⁵³ *Id.* at 748.

⁵⁴ *Id.* at 747-48.

⁵⁵ *Id.* at 762.

prevent a massive budget shortfall from closing schools six weeks early.⁵⁶ The trial court granted a preliminary injunction requiring the state to keep schools open until the end of the school year or “provide the students with a substantially equivalent educational opportunity.”⁵⁷ The California Supreme Court upheld the preliminary injunction, finding that the state “has broad responsibility to ensure basic educational equality under the California Constitution.”⁵⁸ As part of that responsibility, “California constitutional principles required State assistance to correct basic ‘interdistrict’ disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.”⁵⁹

The *Vergara* court applied the constitutional principles announced in *Serrano I*, *Serrano II*, and *Butt* in its analysis of the plaintiffs’ claim. However, as the court put it, “[prior education] cases addressed the issue of a lack of equality of education based on the discrete facts raised therein, here this Court is directly faced with issues that compel it to apply these constitutional principles to the quality of the educational experience.”⁶⁰ Adhering to precedent, the court held that California’s teacher protection statutes “impose[d] a real and appreciable impact on students’ fundamental right to equality of education and that they impose[d] a disproportionate burden on poor and minority students.”⁶¹

Critiquing each statute individually, the court identified specific defects that caused the statutes to violate the California Constitution. The court pointed out that the Permanent Employment Statute required only a “brief period” of time to evaluate teachers for tenure offers and that that period was “not nearly enough time” for the school districts to make an informed decision on hiring. As a result, districts offered tenure to teachers who would not receive tenure had more time been allowed for

⁵⁶ See *Butt v. California*, 842 P.2d 1240, 1243 (Cal. 1992).

⁵⁷ *Id.* at 1244.

⁵⁸ *Id.* at 1249.

⁵⁹ *Id.*

⁶⁰ *Vergara v. California*, No. BC484642, 2014 WL 2598719 at *2 (Cal. Super. Jun. 10, 2014).

⁶¹ *Id.* at *4.

evaluation.⁶² California failed to present a “compelling” state interest to support the constitutionality of the brief period of evaluation in the Permanent Employment Statute, therefore, the statute was held unconstitutional under the Equal Protection clause.⁶³

The court referred to the statutory requirements in California’s Dismissal Statutes as “uber due process.”⁶⁴ The court first noted that the dismissal process for tenured teachers was far more burdensome than the dismissal process for other state employees of school districts.⁶⁵ Although the court recognized that “teachers should be afforded reasonable due process when their dismissals are sought” the current system is “so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory.”⁶⁶ Because ineffective teachers cannot be removed efficiently, there was a “direct, real, appreciable, and negative impact on a significant number of California students.”⁶⁷ Again, the state failed to prove a compelling interest to support the dismissal statutes and the court found them unconstitutional.⁶⁸

Lastly, the court found the LIFO statute unconstitutional because it impacted poor minority students most significantly and allowed them to bear the brunt of staffing inequalities.⁶⁹ To supporting its holding, the court pointed to evidence suggesting that a “disproportionate number of under qualified, inexperienced, out-of-field, and ineffective teachers and administrators” worked in struggling schools attended by poor and minority students.⁷⁰ Furthermore, the court called LIFO a “lose-lose” system where

⁶² *Id.* at *5. The court also pointed out that, under then-existing law, some qualified teachers may not have adequate time to demonstrate their effectiveness. *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Vergara, 2014 WL 2598719, at *5; Vivian Ekchian, Chief Labor Negotiator for the Los Angeles Unified School District, testified that the dismissal of a classified employee through the Skelly due process costs only \$3,400. *Dismissal Statutes*, STUDENTS MATTER, available at <http://studentsmatter.org/our-case/vergara-v-california-case-summary/dismissal-statutes/>.

⁶⁶ Vergara, 2014 WL 2598719, at *6.

⁶⁷ *Id.* at 4.

⁶⁸ *Id.* at 6.

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 7.

qualified teachers are fired and ineffective teachers remain in the classroom.⁷¹

The California Superior Court found the teacher protection statutes unconstitutional by relying on the analysis formulated in *Serrano I, II*, and *Butt*. However, the court conspicuously opened its decision by quoting the historic Supreme Court case, *Brown v. Board of Education*.⁷² The court focused specifically on the following language from the Supreme Court opinion:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁷³

This excerpt elaborates on the *Brown* Court's view that "education is perhaps the most important function of state and local governments."⁷⁴ Although the *Vergara* court did not base its decision on the rule developed in *Brown*, it was nevertheless influenced by the Supreme Court's reasoning pertaining to denial of equal educational opportunities. Indeed, it is possible that the choice to open with the language from *Brown* was a nod to the potential national implications of the decision. For that to be true, other states with potentially unconstitutional teacher employment protection statutes must similarly deny students equal educational opportunities.

III. STATISTICS RELATED TO TEACHER EMPLOYMENT PROTECTION STATUTES AND THEIR DISPROPORTIONATE IMPACT ON LOW-INCOME MINORITY STUDENTS ACROSS THE UNITED STATES

Because a quarter of all African Americans live in poverty, young African American students are most at risk of having one or more ineffective teachers.⁷⁵ Generally, low-income school

⁷¹ Vergara, 2014 WL 2598719, at *6.

⁷² 347 U.S. 483 (1954).

⁷³ *Id.* at 493.

⁷⁴ *Id.*

⁷⁵ Suzanne Macartney et al., Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place:2007-2011, AMERICAN COMMUNITY SURVEY BRIEFS, U.S.

districts have higher concentrations of grossly ineffective teachers while higher-income school districts have fewer poor-performing teachers.⁷⁶ In some of these school districts, state laws require teacher tenure decisions be made before the teacher has two years of classroom experience.⁷⁷ However, some argue that this window of evaluation is too short and that the minimal period necessary for an accurate evaluation of teacher effectiveness is two full academic years.⁷⁸ Due to the confined evaluation period, almost all teachers are offered tenure because there is not enough data to determine whether the teachers' methods are helping the students learn or not.⁷⁹

Mississippi is one state where teachers are offered tenure before they have two years of classroom experience.⁸⁰ Mississippi has the largest population of African Americans of any state in the United States⁸¹ and also has the second lowest average high school graduation rate (63.8 percent in 2009-2010).⁸² Similarly, in South Carolina, teachers are also offered tenure before they have two years of classroom experience.⁸³ In South Carolina, the African American population is among the largest in the United States⁸⁴

CENSUS BUREAU (Feb. 2013), *available at* <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf>.

⁷⁶ Christina Sepe & Marguerite Roza, Ctr. on Reinventing Pub. Educ., *The Disproportionate Impact of Seniority-Based Layoffs on Poor, Minority Students* (2010), *available at* <http://files.eric.ed.gov/fulltext/ED516845.pdf> ("Higher-poverty schools generally contain more novice, lower-paid teachers, and conversely, lower-poverty schools tend to cluster more experienced, higher-paid teachers").

⁷⁷ *Permanent Employment Statute*, STUDENTS MATTER, <http://studentsmatter.org/our-case/vergara-v-california-case-summary/permanent-employment-statute/> (asserting that 5 states require 2 years or less of teaching experience before earning tenure: California, Montana, Mississippi, South Carolina, and New Hampshire).

⁷⁸ Heather Peske and Katie Haycock, *Teacher Inequality, How Poor and Minority Students Are Shortchanged on Teacher Quality*, San Jose University, June 2006 at 8, *available at* <http://edtrust.org/wp-content/uploads/2013/10/TQReportJune2006.pdf> ("Most research suggests that teachers are considerably more effective after completing two years on the job").

⁷⁹ Garret, *supra* note 4 ("Less than 1% of teachers evaluated were found to be unsatisfactory, according to the TNTP study").

⁸⁰ *Permanent Employment Statute*, STUDENTS MATTER, <http://studentsmatter.org/our-case/vergara-v-california-case-summary/permanent-employment-statute/>.

⁸¹ U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS, *THE BLACK POPULATION: 2010* (Sept. 2011), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

⁸² *Digest of Education Statistics*, National Center for Education Statistics, Institute of Education Sciences, http://nces.ed.gov/programs/digest/d12/tables/dt12_124.asp.

⁸³ STUDENTS MATTER, *supra* note 80.

⁸⁴ US CENSUS BUREAU, *supra* note 81.

and the high school graduation rate is below 70 percent.⁸⁵ California, Montana, and New Hampshire also require two years or less of teaching experience before earning tenure.⁸⁶ Of those states, only Montana and New Hampshire have average high school graduation rates above 80 percent.⁸⁷ But unlike Mississippi and South Carolina, Montana and New Hampshire have among the lowest populations of African American students in the country.⁸⁸

Once a teacher receives tenure, some states make it almost impossible to remove that teacher. Due to costly and time-consuming dismissal processes, low-income districts find it extremely difficult to remove an ineffective performing teacher. In New York City, since 2013, of 133 educators taken to trial, the Department of Education successfully dismissed 37.6 percent of those teachers, but in 77 cases, employees were found guilty and received lesser penalties.⁸⁹ In contrast, higher-income districts can afford time-consuming dismissal processes and they are less likely to lose a qualified teacher to another district.⁹⁰

Additionally, grossly ineffective teachers are often pooled in low-income school districts. Low-income districts lose effective teachers to higher-income districts when positions open up, which contributes to this disparity.⁹¹ State laws or district policies that require all dismissals be based on seniority also contribute to this pattern.⁹² In the states where staffing decisions are based solely on seniority, effective teachers are often released while grossly

⁸⁵ Digest of Education Statistics, *Public High School Graduation Rates (2009-2010)*, National Center for Education Statistics, <https://nces.ed.gov/pubs2011/2011015.pdf> (stating the percentage was 68.2% in 2009-2010).

⁸⁶ STUDENTS MATTER, *supra* note 80.

⁸⁷ National Center for Education Statistics, *supra* note 82 (Montana: 81.9%, New Hampshire: 86.3%).

⁸⁸ US CENSUS BUREAU, *supra* note 81, at 9 (Montana: .8%, New Hampshire: 1.7%).

⁸⁹ Susan Edelman & Michael Gartland, *It's nearly impossible to fire tenured teachers*, NEW YORK POST (June 14, 2014, 10:47 pm), <http://nypost.com/2014/06/14/tenured-teachers-they-cheat-they-loaf-they-cant-be-fired/>.

⁹⁰ *Id.*

⁹¹ Benjmain A. Lindy, *The Impact of Teacher Collective Bargaining Laws on Student Achievement: Evidence from A New Mexico Natural Experiment*, 120 YALE L.J. 1130, 1173 (2011).

⁹² *See id.*; *see also* Alysha Stein-Manes, *Putting Every Student First: The State Constitutionality of "Last-in, First-Out" Seniority Protections When Economic Layoffs Disproportionately Impact Poor and Minority Students*, 23 B.U. PUB. INT. L.J. 389, 402 (2014) (arguing that in districts where seniority governs hiring and layoffs, teachers with more experience choose open position in wealthier, low-minority communities).

ineffective teachers are protected.⁹³ Twelve states currently make decisions regarding teacher layoffs based solely on seniority.⁹⁴ Of those twelve states, only four (33 percent) have an average high school graduation rate above 80 percent.⁹⁵ In contrast, twenty states prohibit seniority from being the primary criterion considered in layoff decisions.⁹⁶ Of those twenty states, nine (45 percent) have average high school graduation rates above 80 percent.⁹⁷

Although there is not enough evidence to support a clear national correlation between overly protective teacher employment statutes and poor student performance, the *Vergara* decision has opened up the conversation among education reform advocates outside of California. However, because California has recognized education as a fundamental right guaranteed by the state, the *Vergara* plaintiffs' argument can only be replicated in states with a similar state constitutional assurance and equally restrictive employment statutes. In one of those states, New York, a copycat case was filed shortly after the *Vergara* decision came down and the case is expected to be decided sometime in 2016.⁹⁸

Perhaps the mention of *Brown* in the *Vergara* decision was a nod to the potential for a federal Equal Protection challenge, or maybe

⁹³ Alysha Stein-Manes, *Putting Every Student First: The State Constitutionality of "Last-in, First-Out" Seniority Protections When Economic Layoffs Disproportionately Impact Poor and Minority Students*, 23 B.U. PUB. INT. L.J. 389, 402 (2014).

⁹⁴ ALASKA STAT. § 14.20.177 (2015); CAL. EDUC. CODE § 44955 (Deering 2016); HAW. REV. STAT. § 302A-609 (2016); KY. REV. STAT. ANN. § 161.800 (LexisNexis 2016); MINN. STAT. § 122A.40 (2016); N.J. STAT. ANN. § 18A:28-10 (West 2016); N.Y. EDUC. LAW § 2510 (Consol. 2016); OR. REV. STAT. § 342.934 (2016); 24 PA. CONST. STAT. § 11-1125.1 (2016); 16 R.I. GEN. LAWS § 16-13-6 (2016); W. VA. CODE ANN. § 18A-2-2 (LexisNexis 2016); WIS. STAT. § 118.23 (2016).

⁹⁵ *Public High School Graduation Rates*, *supra* note 85 (naming Minnesota, Wisconsin, New Jersey, Pennsylvania).

⁹⁶ *Vergara v. California: Last In, First Out Statute*, STUDENTS MATTER, (2016), <http://studentsmatter.org/case/vergara/last-in-first-out-statute/> (noting Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Maine, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, Washington).

⁹⁷ *Public High School Graduation Rates*, *supra* note 85 (naming Idaho, Illinois, Maine, Massachusetts, Missouri, New Hampshire, Ohio, Tennessee, Virginia).

⁹⁸ Diane C. Lore, *Staten Island Judge Rules New York Teacher Tenure Lawsuit Can Proceed*, SILIVE.COM, (Oct. 23, 2015, 8:48 PM), http://www.silive.com/news/index.ssf/2015/10/staten_island_judge_rules_new_1.html. On October 23, 2015, Justice Philip Minardo of the NYS Supreme Court denied a motion for summary judgment made by the NYS Teachers Union and ruled that the copy-cat case would be heard in State Appellate Court in 2016. *Id.*

it was included only to reaffirm the basis for California's commitment to equal public education. Given the tremendous importance of education and the national attention paid to this historic trial court decision in California, it may well be a question of when, not if, the *Vergara* case or a case based on the same principles makes it to the Supreme Court. Still, a question of national significance remains: Could the *Vergara* plaintiffs, or similarly situated students, mount a federal challenge to overly protective teacher protection statutes?

IV. THE SUPREME COURT AND EDUCATION AS A FUNDAMENTAL RIGHT

A. *Supreme Court Precedent on Education and Equal Protection*

Although the *Vergara* decision involves a California court interpreting California law, the court conspicuously chose to begin its decision by echoing the Supreme Court's landmark reasoning in *Brown v. Board of Education*. In that decision, the Court held that education facilities separated by race are inherently unequal and deny students Equal Protection under the Fourteenth Amendment⁹⁹ of the U.S. Constitution.¹⁰⁰ In reaching its decision, the Court came close to recognizing education as a fundamental right by calling education "perhaps the most important function of state and local government," and stating "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."¹⁰¹

In subsequent decisions, the Supreme Court further restricted the right to education. Almost twenty years later in *San Antonio Independent School District v. Rodriguez*, the Court heard a case that challenged Texas's system of financing public education through reliance on local property taxes.¹⁰² This system created

⁹⁹ U.S. CONST. amend. XIV § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

¹⁰⁰ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

¹⁰¹ *Id.* at 493.

¹⁰² 411 U.S. 1 (1973).

great disparities in expenditures for education across school districts.¹⁰³ The plaintiffs, poor minority students residing in low property tax districts, claimed this system violated the Equal Protection clause of the Fourteenth Amendment.¹⁰⁴

The Court applied only intermediate scrutiny¹⁰⁵ to the students' Equal Protection claim and stated that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."¹⁰⁶ The Court made clear that education is neither a fundamental right contained in the Constitution, nor a right that is implicitly protected.¹⁰⁷ Furthermore, the Court rejected the students' argument that their claim deserved a heightened level of judicial analysis because they were a protected class who suffered a "peculiar disadvantage" resulting from the school financing system.¹⁰⁸ Thus, the Court held that the Texas system "may not be condemned simply because it imperfectly effectuates the State's goals."¹⁰⁹ In addition, the Court recognized that "reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others," but that "the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system."¹¹⁰

The Court's decision in *Rodriguez*, and its impact on the quality of education across the country, was tested less than a decade later in 1982 in *Plyler v. Doe*.¹¹¹ There, the Court heard another challenge under the Equal Protection clause again by plaintiffs from Texas.¹¹² Undocumented residents in a Texas school district alleged that a Texas statute was unconstitutional because it precluded state education funds from going to a local school

¹⁰³ *Id.* at 11.

¹⁰⁴ *Id.* at 1.

¹⁰⁵ *Id.* at 55 ("The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest").

¹⁰⁶ *Id.* at 35.

¹⁰⁷ *Id.* at 33.

¹⁰⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

¹⁰⁹ *Id.* at 51.

¹¹⁰ *Id.* at 50-51.

¹¹¹ 457 U.S. 202, 203 (1982).

¹¹² *Id.* at 205.

district that served children who were not “legally admitted” into United States, and it allowed school districts to deny enrollment to those children.¹¹³ Texas rebutted the plaintiff’s argument by stating that the statute served the purposes of discouraging illegal immigration, avoiding burdens on public schools, and preserving education resources for those likely to stay in the state.¹¹⁴

Ultimately, the Court reaffirmed the *Rodriguez* Court’s decision that education is not a fundamental right guaranteed by the Constitution.¹¹⁵ Thus, strict scrutiny was not utilized, and Texas did not have to show a “compelling necessity” for the disproportionate irregularities in the education system offered to its population.¹¹⁶ However, the Court paid particular attention to the indispensability of a quality public education:

The deprivation of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement.¹¹⁷

Because of the severe consequences¹¹⁸ caused by the deprivation of education, the discriminatory nature of the Texas statute could only be considered rational if it furthered some “substantial goal” of the state.¹¹⁹ Therefore, the Supreme Court held that Texas’s concern over illegal immigration did not give the state the authority to deprive children of an education.¹²⁰

The *Plyler* decision gave education advocates new fodder for challenges under the Equal Protection clause of the Constitution

¹¹³ *Id.*

¹¹⁴ *Id.* at 203.

¹¹⁵ *Id.* at 223.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 202-03.

¹¹⁸ *Id.* at 230 (“It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”).

¹¹⁹ *Id.* at 224.

¹²⁰ *Id.* at 224-25.

when it could be shown that students experienced a “deprivation of education.”¹²¹ In reaching this decision, the Court resurrected the rationale it used in another education case, *Lau v. Nichols*,¹²² which was decided the year following *Rodriguez*. There, Chinese-speaking students brought a claim under section 601 of the Civil Rights Act of 1964, which prohibits any entity receiving federal assistance from discriminating against certain groups.¹²³ The students argued that the San Francisco school system’s policy of providing non-English language instruction to approximately 1,800 students of Chinese ancestry who did not speak English violated the statute.¹²⁴

The Court did not consider an Equal Protection claim,¹²⁵ but did find for the plaintiffs on their Civil Rights Act claim after it determined that California’s imposed standards did not provide equality of treatment.¹²⁶ The Court explained that equality is not achieved “merely by providing students with the same facilities, textbooks, teachers, and curriculum,” because students who do not understand English are “effectively foreclosed from any meaningful education.”¹²⁷ Subsequently, the Court in *Plyler* transformed the *Lau* decision’s “effective foreclosure”¹²⁸ reasoning for Civil Rights Act violations into its “deprivation of education”

¹²¹ *Id.* at 205.

¹²² *Lau v. Nichols*, 414 U.S. 563 (1974).

¹²³ “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C.A. § 2000d (West).

¹²⁴ *Lau*, 414 U.S. at 563.

¹²⁵ The plaintiffs in the *Lau* case were discouraged by the Court’s decision in *Rodriguez* and made the strategic decision to drop their Equal protection claim after it became clear that the Supreme Court would not consider education a fundamental right. ROSEMARY SALOMONE, *TRUE AMERICAN* 126 (2010).

¹²⁶ *Lau*, 414 U.S. at 566.

¹²⁷ *Id.*

¹²⁸ The concept of “effective foreclosure” was actually introduced by Judge Hufstедler in his dissent from the majority opinion in the 9th Circuit’s decision in *Lau*. Interestingly, this description was used to support his belief that the California law was unconstitutional (“Access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. They are functionally deaf and mute. Their plight is not a matter of constitutional concern, according to the majority opinion, because no state action or invidious discrimination is present. The majority opinion says that state action is absent because the state did not directly or indirectly cause the children’s ‘language deficiency’, and that discrimination is not invidious because the state offers the same instruction to all children. Both premises are wrong.”). *Lau v. Nichols*, 483 F.2d 791, 805 (9th Cir. 1973), rev’d, 414 U.S. 563 (1974) (Hufstедler, J., dissenting).

reasoning for Equal Protection claims. Because Supreme Court precedent suggests physical exclusion may not be required for all violations of the Equal Protection clause, it may be possible for a state to violate the Fourteenth Amendment by allowing ineffective teachers to remain in the classroom.

B. The “Rodriguez Loophole”

As discussed above, the Supreme Court has not recognized education as a fundamental right, but it has consistently affirmed the responsibility of the states to ensure that their public education system is not depriving students of minimal educational opportunities.¹²⁹ Arguably, the egregious deprivation of educational benefits suffered by the plaintiffs in *Vergara* fall into this category of exceptional situations where a strict scrutiny analysis¹³⁰ of education statutes is appropriate. Not only has the *Vergara* decision sent shockwaves through California,¹³¹ but also other states with similar employment statutes are contemplating similar challenges.¹³²

The *Rodriguez* “loophole” was created in that decision’s dicta and was later more intricately defined in *Plyler*. The *Rodriguez* majority did not find that Texas’s poor minority students experienced “an absolute denial of educational opportunities” based solely upon “relative differences in spending levels.”¹³³ Therefore, the Court held that “no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”¹³⁴ This reasoning implies that if students did experience an “absolute

¹²⁹ See *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“education prepares individuals to be self-reliant and self-sufficient participants in society”).

¹³⁰ Education statutes that are shown to have a disproportionate discriminatory effect are constitutional only if they utilize “rational” means in achieving a “substantial goal of the State.” *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

¹³¹ Mark E. Brossman, Scott A. Gold, and Donna Lazarus, *Court Finds California Teacher Tenure Laws Unconstitutional*, 28 No. 26 WESTLAW J. EMP., 1 (2014).

¹³² See *id.* at 3 (“Although the court’s decision reaches only California public schools, the *Vergara* case may be the first of many court and legislative challenges to tenure”); see also A New Battle for Equal Education: In California, a Judge Takes on Teacher Tenure, N.Y. TIMES (June 11, 2014), <http://www.nytimes.com/2014/06/12/opinion/in-california-a-judge-takes-on-teacher-tenure>.

¹³³ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

¹³⁴ *Id.*

denial of educational opportunities” that prevented them from enjoyment of their rights of speech and of full participation in the political process,¹³⁵ those students would have a valid equal protection claim.

The *Plyler* Court further expanded this “loophole” by first reinforcing the importance of education using strong language. The Court identified several detrimental consequences associated with the denial of education including “the stigma of illiteracy” that follow students for the rest of their lives, the denial of “the ability to live within the structure of our civic institutions,” and, ultimately, the foreclosure of “any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”¹³⁶ Not only does the denial of education to an isolated group impact our politics and culture, but it also runs contrary to the equality of opportunity the Equal Protection clause guarantees.¹³⁷

The Court viewed the Equal Protection clause as the mechanism that abolishes “governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”¹³⁸ Thus, by depriving a disfavored group of educational opportunities, states are also denying “the means” by which that group may improve its standing among the entire population.¹³⁹ Given the extraordinary negative effects accompanying the denial of education, the *Plyler* Court determined that any statutes that cause such a denial must be rationally related to a “substantial goal” pursued by the state.¹⁴⁰

¹³⁵ The Supreme Court has often viewed quality education as a necessity to participation in the political process. *See Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence”); *see also Ambach v. Norwick*, 441 U.S. 68, 77 (“public schools . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system”).

¹³⁶ *Plyler*, 457 U.S. at 223.

¹³⁷ *See id.* at 221-22.

¹³⁸ *Id.* at 222.

¹³⁹ *Id.*

¹⁴⁰ *See id.* at 224.

V. *RODRIGUEZ, PLYLER, AND LAU* AND THE POTENTIAL IMPLICATIONS FOR *VERGARA*

The *Vergara* plaintiffs based their Equal Protection claim on the California Constitution's recognition of education as a fundamental right. However, this argument would fail in federal court because the Supreme Court has not recognized education as a federal fundamental right deserving of strict scrutiny. Therefore, any eventual federal challenge to California's teacher employment protection statutes will have to follow the route created by *Rodriguez, Plyler, and Lau*. Such a challenge will force federal courts to apply the constitutional principles developed in the cases of *equality* of educational opportunity to the examination of the *quality* of educational experience provided to certain students.

The first step for the *Vergara* plaintiffs in developing their Equal Protection claim is to argue that students in the Los Angeles Unified School District have had their educational opportunities "denied"¹⁴¹ or "effectively foreclosed."¹⁴² The *Vergara* case is a remarkable example of an education challenge because it asked the court to find a correlation between teacher quality and the denial of equal educational opportunities.¹⁴³ The *Vergara* court concluded that the most important factor in a student's educational success is the quality of the teaching he or she receives.¹⁴⁴ The court found that the evidence tying grossly ineffective teachers to student performance and learning

¹⁴¹ Plyler, 457 U.S. at 222 ("The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.")

¹⁴² Lau, 414 U.S. at 566 ("Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.")

¹⁴³ Haley Sweetland Edwards, *The War on Teacher Tenure*, TIME (Oct. 30 2014), <http://time.com/3533556/the-war-on-teacher-tenure> ("Bad teachers 'substantially undermine' a child's education. That, [Judge] Treu wrote, not only 'shocks the conscience' but also violates the students' right to a 'basic equality of educational opportunity' as enshrined in California's constitution.")

¹⁴⁴ See *Vergara*, No. BC484642 2014 WL 2598719 at *4 (Cal.Super. June 10, 2014).

regression was not only compelling but that it “shock[ed] the conscience.”¹⁴⁵

The California Superior Court was not engaging in exaggerated hyperbole. The plaintiffs provided evidence that students are not only less likely to succeed when taught by a single grossly ineffective teacher, but that those students end up significantly behind their peers and may never recover.¹⁴⁶ By demonstrating a strong connection between teacher effectiveness and student performance, the plaintiffs convinced the court to gauge teacher quality by evaluating student success in the classroom.¹⁴⁷

For instance, Dr. Kane¹⁴⁸ testified that students in the Los Angeles Unified School District who were taught by a teacher in the bottom 5 percent of competence lost approximately 9.54 months of learning in English Language Arts compared to students with average quality teachers.¹⁴⁹ Students taught by grossly ineffective teachers lose approximately 11.73 months of learning in Mathematics in comparison to their peers.¹⁵⁰ Dr. Chetty¹⁵¹ conducted a study that revealed that one grossly ineffective teacher costs a classroom of 28 children a total of \$1.4 million in lifetime earnings.¹⁵² Just like the Chinese-speaking students in *Lau* who did not learn because they were taught only in English, the plaintiffs in *Vergara* did not learn because of grossly ineffective teachers.¹⁵³ Beatriz Vergara, the named plaintiff, described three of her teachers as apathetic, verbally abusive or simply ineffective.¹⁵⁴ In describing her math teacher, she testified that “[i]t was always loud in there, and [he] would

¹⁴⁵ *Id.*

¹⁴⁶ *Evidence, Findings of Fact: The Importance of Teachers*, STUDENTSMATTER.ORG, available at <http://studentsmatter.org/case/vergara/importance-of-teachers/>.

¹⁴⁷ *Id.* School districts assess teacher effectiveness using many methods, including: standardized tests, other objective measures of student performance, systemic and replicable teacher observations, and student surveys.

¹⁴⁸ See STUDENTSMATTER, *supra* note 27.

¹⁴⁹ STUDENTSMATTER, *supra* note 21.

¹⁵⁰ *Id.*

¹⁵¹ See *supra* note 29.

¹⁵² *Id.*

¹⁵³ See *Lau*, 414 U.S. at 563 (“The failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who do not speak English, or to provide them with other adequate instructional procedures, denies them a meaningful opportunity to participate in the public educational program”).

¹⁵⁴ See Haley Sweetland Edwards, *supra* note 143.

even sleep during class,” and that “[h]e didn’t even teach, and he couldn’t control his class. I couldn’t hear anything because of how loud it was.”¹⁵⁵ Therefore, students were able to prove that grossly ineffective teachers denied them significant educational opportunities and they may never overcome the disadvantages created by those teachers.

After demonstrating adequate evidence of denial of educational opportunities, the next step in an Equal Protection claim is to prove that the presence of grossly ineffective teachers has an unequal effect on students. In addition to the immediate educational losses, the students face a variety of other disadvantages that will hold them back for the rest of their lives.¹⁵⁶ The court’s decision made clear that grossly ineffective teachers overwhelmingly disadvantage poor minority students.¹⁵⁷ The plaintiffs again presented quite strong evidence in support of this portion of their claim. The court relied heavily on one piece of evidence, a 2007 study performed by the California Department of Education, which concluded:

Unfortunately, the most vulnerable students, those attending high-poverty, low-performing schools, are far more likely than their wealthier peers to attend schools having a disproportionate number of underqualified, inexperienced, out-of-field, and ineffective teachers and administrators. Because minority children disproportionately attend such schools, minority students bear the brunt of staffing inequalities.¹⁵⁸

In addition to the 2007 study, the plaintiffs introduced empirical evidence demonstrating the significant achievement gaps between white students and African-American and Latino students in

¹⁵⁵ *Id.*

¹⁵⁶ STUDENTS MATTER, *supra* note 146, (“Teacher effectiveness influences long-term student outcomes, including the likelihood that a child will attend university, the quality of the university that the child will attend, the amount of the child’s future earnings, the likelihood of the child becoming pregnant as a teenager, the quality of the neighborhood in which the child will live, and the amount the child will save for retirement.”).

¹⁵⁷ Vergara v. California, No. BC484642, 2014 WL 2598719, at *5 (Cal. Super. Ct. June 10, 2014) (“Plaintiffs have proven, by a preponderance of the evidence, that the Challenged Statutes impose a real and appreciable impact on students’ fundamental right to equality of education and that they impose a disproportionate burden on poor and minority students.”).

¹⁵⁸ *Id.* at *7–8 (quoting CAL. DEP’T OF EDUC., Evaluating Progress Toward Equitable Distribution (2007)).

California.¹⁵⁹ The evidence included measurements of high school graduation rates within four years, high school dropout rates, and proficiency in English-Language Arts and mathematics.¹⁶⁰ A strikingly similar achievement gap exists between low-income students and non-low-income students in California.¹⁶¹ It was not a coincidence, the plaintiffs argued, that ineffective and grossly ineffective teachers are disproportionately located in areas with minority-majority and low-income school districts.¹⁶² Accordingly, the plaintiffs were able to prove the disparate educational and lifetime impact the teacher employment protection statutes have on poor minority students.

However, the inquiry does not end once the plaintiffs demonstrate that the statutes deny educational opportunities and have a disparate impact on poor and minority students. California may overcome strict scrutiny analysis by providing evidence that the statutes are a “rational means” of achieving a “substantial goal” of the State.¹⁶³ At the *Vergara* trial, the statutes were examined under California’s strict scrutiny standard, which requires the state to identify a “compelling interest” served by each statute and the statutes are necessary to further that interest.¹⁶⁴ Throughout the trial, California struggled to identify compelling state interests served by the Permanent Employment Statute, the Dismissal Statutes, and the LIFO statute. Ultimately, the defendants argued that the statutes served the state’s compelling interest in preserving the due process rights of its teachers.¹⁶⁵

Advocates of generous teacher tenure laws argue such systems prevent school districts from firing teachers based on salary, personal beliefs, biased students, or administrator evaluations,

¹⁵⁹ STUDENTS MATTER, *Findings of Fact: Disparate Impact on Low-Income and Minority Students* (August 27, 2014), <http://studentsmatter.org/evidence/#findings-of-fact-disparate-impact-on-low-income-and-minority-students>.

¹⁶⁰ *See id.*

¹⁶¹ *Id.*

¹⁶² *Id.* (ineffective teachers tend to “accumulate” in low-income and minority districts because it is costly, time-consuming, and burdensome to dismiss tenured teachers under the Dismissal Statutes and ineffective teachers in moderate income and white districts are commonly transferred into these districts).

¹⁶³ *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

¹⁶⁴ *Vergara v. California*, 2014 WL 2598719, at *1 (Cal. Super.).

¹⁶⁵ *See Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975) (holding that a teacher’s position is a property right and due process attaches when disciplinary action is considered).

and allow teachers to focus on teaching rather than job security.¹⁶⁶ Additionally, the state has a compelling interest in attracting qualified teachers and less generous tenure systems would hinder recruitment.¹⁶⁷ In evaluating the state interest served by the Permanent Employment Statute, the court took issue with the very limited time period for teacher evaluations for tenure offers.¹⁶⁸ The court remarked, “both students and teachers are unfairly, unnecessarily, and for no legally cognizable reason disadvantaged by the current Permanent Employment Statute.”¹⁶⁹ As for the Dismissal Statutes, California argued that it had a compelling interest in protecting its teachers’ right to due process in the termination process.¹⁷⁰

The court agreed that teachers are entitled to due process protections, but rejected California’s overly protective statutes as examples of *uber* due process.¹⁷¹ Finally, the court held California’s interest in its LIFO policy was the least supportable of all its teacher employment statutes. In criticizing California’s “unfathomable and therefore constitutionally unsupportable position,” the court found that there was no “compelling interest in the *de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetent ones.”¹⁷² A federal challenge would substitute the “compelling interest” standard for the *Plyler* “substantial goal” requirement. Such a substitution does little to alter the burden of proof required to overcome the disproportional negative impact LIFO has on students. Thus, it is likely that the justifications asserted in the California Superior Court would not qualify as serving a “substantial goal” of the state.

Simply applying the reasoning of the California Superior Court to Supreme Court precedent does not accurately predict a federal

¹⁶⁶ See Eltman, *supra* note 3.

¹⁶⁷ *Id.* Other arguments include: tenure prevents hired paid teachers from being fired in favor of less expensive new teachers, tenure helps innovation in the profession, teacher tenure is an accomplishment achieved after several positive evaluations, tenure allows teachers to teach controversial material, tenure encourages careful hiring decisions.

¹⁶⁸ *Supra* note 5, at 5.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (“The evidence this Court heard was that it could take anywhere from two to almost ten years and cost \$50,000 to \$450,000 or more to bring these cases to conclusion under the Dismissal Statutes”).

¹⁷² *Id.* at 6.

challenge. Additional research into the potential correlation between teacher employment protection statutes and the disproportionate denial of education is necessary to provide better evidence of the connection. However, the evidence presented in *Vergara* suggests that a very real problem exists in schools where grossly ineffective teachers cannot be fired. The court found the evidence formidable and attributed the denial of equal educational opportunities to ineffective teachers. As the court stated, grossly ineffective teachers have “a direct, real, appreciable, and negative impact on a significant number of California students.”¹⁷³ Even if the trial court’s decision is reversed and a federal challenge to California’s teacher protection statutes is never pursued, the California legislature should rewrite its laws to better ensure equality in educational opportunities.

VI. CONSTITUTIONAL ALTERNATIVES TO THE CALIFORNIA STATUTES

Until the *Vergara* case completes the appeals process, the California legislature has no reason to alter the teacher employment protection statutes that were found unconstitutional by the trial court. However, if the Superior Court’s decision on the unconstitutionality of the statutes is ultimately upheld, or if a federal challenge is brought and succeeds, the California education system will have to rewrite its statutes to comply with the California and U.S. Constitutions. U.S. Secretary of Education Arne Duncan referred to the decision as a “mandate” and encouraged states to “build a new framework” to fix the problems in public education.¹⁷⁴ Fortunately, the revisions necessary to exclude grossly ineffective teachers from teaching positions can be tailored to fit the problems that exist in each individual state.¹⁷⁵

¹⁷³ *Vergara v. California*, NO. BC484642, 2014 WL 2598719, at *4 (Cal. Super. June 10, 2014), *rev’d* 246 Cal.App. 4th 619 (2016).

¹⁷⁴ See Press Release, Arne Duncan, U.S. Secretary of Education, Statement from U.S. Secretary of Education Arne Duncan Regarding the Decision in *Vergara v. California* (June 10, 2014), <http://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-regarding-decision-vergara-v-califo>.

¹⁷⁵ States can look to other states for ideas on a range of issues related to education reform. Supreme Court Justice Louis Brandeis used the phrase Laboratories of democracy to describe how a “state may, if its citizens choose, serve as a laboratory; and try

In 2012, a bi-partisan effort in the New Jersey legislature enacted massive reforms to the state's public teacher employment statutes to ensure effective teachers in all classrooms.¹⁷⁶ The evaluation period for tenure decisions was increased from three to four years.¹⁷⁷ Additionally, a tenured teacher who receives poor performance evaluations for two consecutive years can be dismissed.¹⁷⁸ If a tenured teacher is dismissed, the new laws limit the appeals process to 105 days.¹⁷⁹ New Jersey's reforms are not a template for improving teacher quality, but they are informative when considering revisions to education systems in different states.

In the *Vergara* opinion, Judge Rolf M. Treu offered more examples of constitutional alternatives to the statutes challenged in *Vergara*. Regarding the Permanent Employment Statute, the court focused on evidence showing that 32 states have a three year evaluation period before tenure offers are made, and nine states have four or five year periods.¹⁸⁰ The court also pointed to California's own experts who agreed that between three to five years would be a better time period to make the tenure decision; this would benefit both the students and teachers.¹⁸¹ Other experts corroborate this view and suggest that a minimum of two years of classroom experience is needed before a teacher can be properly evaluated.¹⁸² Therefore, an alteration to the current California Employment Statute that allows for a minimum of two full years of academic experience before an offer of tenure would ensure it passes constitutional requirements.

novel social and economic experiments without risk to the rest of the country." See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

¹⁷⁶ Rachel Monahan, *Christie gets tough on tenure*, N.Y. DAILY NEWS, Aug. 6, 2012, <http://nydailynews.com/new-york/education/new-jersey-gov-chris-christie-tough-teacher-tenure-new-law-requires-educators-work-years-reach-status.article-1.1130359>.

¹⁷⁷ See *id.* Teachers must also receive positive evaluations two years in a row before a tenure offer can be extended.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *Vergara v. California*, No. BC484642, 2014 WL 2598719, at *5 (Cal. Super. June 10, 2014), *rev'd* 246 Cal.App. 4th 619 (2016).

¹⁸¹ See *id.*

¹⁸² Heather Peske & Kati Haycock, *Teaching Inequality: How Poor and Minority Students Are Shortchanged on Teacher Quality* 8 (The Education Trust, 2006), <http://edtrust.org/wp-content/uploads/2013/10/TQReportJune2006.pdf> ("The evidence is incontrovertible that experience makes teachers more effective. Most research suggests that teachers are considerably more effective after completing two years on the job").

In revising the Dismissal statutes, the principal goal should be to limit the time and money required to terminate an ineffective teacher so that all districts are capable of making those decisions when required. School districts are forced to lay-off employees for many reasons including budget insufficiencies, declines in student populations, and changes to existing educational programs.¹⁸³ Thus, circumstances arise where teachers must be let go. However, teachers are guaranteed the right to Due Process in termination proceedings.¹⁸⁴ However, the *Vergara* court was correct in describing the current dismissal procedures as *uber* due process.¹⁸⁵ To effectively balance due process considerations and the need to efficiently remove grossly ineffective teachers from the classroom, the California legislature can revise the Dismissal Statutes to treat teachers like other public school employees.

The *Vergara* court found that California school districts face far fewer hurdles in terminating other school district classified employees.¹⁸⁶ However, school district classified employees and teachers (certified employees) have equal due process rights under the California Constitution.¹⁸⁷ The evidence presented by the plaintiffs demonstrated that the process of terminating other public school employees, other than teachers, is far less time consuming and expensive, but also weakens job security.¹⁸⁸ Striking the proper balance between protection of teachers' due process rights and school districts' interests in removing ineffective teachers is a delicate endeavor and will be subject to much contention. At a minimum, teachers should receive a formal hearing and be afforded an appellate review by the state court system to determine whether the evidence supporting the

¹⁸³ Evidence, Findings of Fact: LIFO Statute, STUDENTS MATTER, available at <http://studentsmatter.org/evidence/#findings-of-fact-the-lifo-statute>.

¹⁸⁴ See *State College v. Roth*, 408 U.S. 564 (1972) (finding that there is no requirement that teachers be offered tenure, but once they are offered tenure, 14th Amendment Due Process considerations become attached to that employment.).

¹⁸⁵ See *Vergara v. California*, No. BC484642, 2014 WL 2598719 at *2 (Cal. Super. Jun. 10, 2014); see also *Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975) (holding that the California Constitution mandates that teachers be accorded certain due process procedures before discipline becomes effective).

¹⁸⁶ See *Vergara v. California*, No. BC484642, 2014 WL 2598719 at *5 (Cal. Super. Jun. 10, 2014).

¹⁸⁷ See *Skelly*, 15 Cal.3d at 215.

¹⁸⁸ See *Vergara v. California*, No. BC484642, 2014 WL 2598719 at *5 (Cal. Super. Jun. 10, 2014).

termination is sufficient.¹⁸⁹ Ultimately, California's new statutory framework for teacher dismissals must allow even the poorest school district to remove a teacher in a timely and cost-effective manner.

The most contentious yet most problematic California education statute that will have to be brought into conformity with constitutional requirements is the LIFO statute. Basing layoffs on seniority is a poor method for any school district to use because there is no correlation between teacher effectiveness and seniority level.¹⁹⁰ Furthermore, the current system in California calculates seniority based on the number of years the teacher has been in the district and not the teacher's overall experience as a teacher.¹⁹¹ The financial impact on all California school districts is also significant because seniority-based layoffs lead to the newest, lowest-paid teachers being dismissed, and the tenured, higher-paid (possibly ineffective) teachers being kept.¹⁹²

Seniority should not be the sole determining factor in making layoff decisions. Instead, California should adopt a system that weighs teacher effectiveness against other considerations such as seniority and potential for success. There are many methods to evaluate teacher effectiveness. The value-added approach gauges teacher effectiveness by evaluating the students' improvements on standardized math and English tests.¹⁹³ This method of evaluation was incorporated into the Common Core Standards Initiative and has proven tremendously controversial.¹⁹⁴ Testing should gauge student growth and not hold students to a specific standard based on grade level. For instance, a sixth grade English teacher, who improves a student's reading level from third grade

¹⁸⁹ *Id.* at *6.

¹⁹⁰ See STUDENTS MATTER, *supra* note 183.

¹⁹¹ *Id.*

¹⁹² See *The Case Against Quality-Blind Teacher Layoffs, Why Layoff Policies that Ignore Teacher Quality Need to End Now*, THE NEW TEACHER PROJECT (Feb. 2011), http://tntp.org/assets/documents/TNTP_Case_Against_Quality_Blind_Layoffs_Feb2011.pdf; see also Felch, *supra* note 33, at 1.

¹⁹³ See Felch, *supra* note 33, at 1.

¹⁹⁴ See generally Common Core State Standards Initiative, *Frequently Asked Questions*, Common Core State Standards (2016), <http://www.corestandards.org/about-the-standards/frequently-asked-questions/>; cf. Jesse Rothstein, Teacher Quality in Educational Production: Tracking, Decay, and Student Achievement, 125 THE QUARTERLY JOURNAL OF ECONOMICS 75, 210 (2010) (finding the assumptions in the value-added method of evaluation to be substantially incorrect).

to fifth grade will be penalized in evaluations based on grade level performance. Therefore, testing would more accurately reflect teacher effectiveness if it were conducted at the beginning and end of the year using tests of equal difficulty.

A more effective method of evaluation places some emphasis on testing but also utilizes student evaluations and classroom observations.¹⁹⁵ Ideally, teacher evaluations, processes, and testing methods will be determined and implemented by the local school districts because the creators will be closest to the teachers, familiar with the community, and directly accountable to the public.¹⁹⁶ Furthermore, school district officials can be held accountable when residents are dissatisfied with the educational outcomes they are receiving.

VII. CONCLUSION

The California Superior Court's decision in *Vergara v. California* may be remembered as a pivotal point in education jurisprudence. However, its full implications are not yet clear. *Vergara* held that poor minority students are being denied access to educational opportunities in states with education statutes similar to those currently in effect in California. The decision should be considered a call to reform teacher employment protection statutes in California and other states where education laws make it possible for grossly ineffective teachers to remain in classrooms. Public education reform depends on how effective state legislatures are at addressing the problem of grossly ineffective teachers. Without evaluating the quality of the delivery of educational benefits, changes to curriculum and testing standards are futile. If students are being denied equal access to educational opportunities because of grossly ineffective teachers, this area of litigation is sure to grow over the coming years.

Proof of the correlation between teacher effectiveness and student performance is key to future federal challenges.

¹⁹⁵ See generally, *Teacher Evaluation 2.0*, THE NEW TEACHER PROJECT (2010), <http://tntp.org/assets/documents/Teacher-Evaluation-Oct10F.pdf>.

¹⁹⁶ See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

Moreover, determining how to accurately gauge teacher effectiveness is sure to be another source of contention in future litigation. However, the *Vergara* plaintiffs were able to introduce an overwhelming amount of evidence demonstrating how grossly ineffective teachers are depriving their students of educational opportunities. Such striking evidence is appealing for a potential federal challenge by the same plaintiffs or similarly situated plaintiffs.

Additionally, the national attention created by the *Vergara* decision has inflamed passions among labor unions and education reform advocates. Education is one of the most important functions of state government, and diverse parties have differing views on how to improve public education. The passionate advocates on both sides and importance of the issue make it more likely for *Vergara* or a similar case to be brought in federal court. *Rodriguez* and *Plyler* hinted at the Supreme Court's willingness to at least consider a non-physical denial as a violation of equal protection. If California's current system ultimately prevails in state court, it is not certain whether *Vergara* will be brought into federal court. For now, California's current teacher employment laws are in limbo as the case is pending appeal.¹⁹⁷ Similar suits, like the one brought in New York, may be brought in other states as well. Regardless of the California Supreme Court's decision, the trial court's decision in *Vergara* was consequential and helped refocus the education reform debate on the impact and constitutionality of overly protective teacher employment protection statutes.

¹⁹⁷ See *Vergara v. California: Timeline*, STUDENTS MATTER (2016), <http://studentsmatter.org/case/vergara/timeline/>.