"FIRED? I CAN'T GET FIRED. I'VE GOT TENURE"*: TEACHERS' UNIONS, TENURE, AND A FAILURE TO EDUCATE

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* *The Unbreakable Kimmy Schmidt: Kimmy Goes to School* (Universal Television 2015).

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INTRODUCTION

> [E]ducation is perhaps the most important function of state and local governments. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . . [I]t 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.[1]

In the United States, many trends seem to start on the West Coast and migrate towards the East Coast. Arguably no state has a greater trend-setting legacy than California—politically, socially, and culturally, what is vogue in America frequently originates in California.[2] While not everything that comes out of California is beneficial to the nation at-large—the Kardashians, for example—a fierce and polarizing legal battle that recently concluded in the Golden State could be the catalyst for a tectonic shift in how the United States approaches public education.[3] In June 2014, Superior Court Judge Rolf M. Treu issued a "tentative decision"[4] in the highly publicized case, *Vergara v. California* ("*Vergara I*").[5] The case in *Vergara I* was based on the premise that California's "employment rules leave so many ineffective teachers on the job that some students – many of them low-income and minority – fail to receive the education guaranteed by the state constitution."[6] Specifically, the challenged statutes were the

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1. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

2. *See* Tom Elias, *Even in Hard Times, California is a Trendsetter*, DAILY BREEZE (Sept. 14, 2011, 12:01 AM), http://www.dailybreeze.com/general-news/20110914/tom-elias-even-in-hard-times-california-is-a-trendsetter (exploring California's legacy as a cultural trendsetter, particularly with respect to demographics, social movements and politics); Melissa McNamara, *California Is a Political Trendsetter*, CBSNEWS (Oct. 30, 2006, 5:24 PM), http://www.cbsnews.com/news/california-is-a-political-trendsetter/ (discussing California's innovative and novel political policies addressing issues such as greenhouse gas emissions, prescription drug discounts and minimum wage).

3. *See* Vergara v. State, 209 Cal. Rptr. 3d 532 (Ct. App. 2016).

4. *See* CAL. CT. R. 3.1590 (2016).

5. Vergara v. State (*Vergara I*), No. BC484642, 2014 WL 6478415, at *7 (Cal. Super. Ct. Aug. 27, 2014) (finding challenged statutes unconstitutional and staying all injunctions pending appellate review).

6. Adrienne Lu, *Teacher Tenure and Dismissal on Trial*, HUFFINGTON POST (Apr. 1, 2014, 12:34 PM), http://www.huffingtonpost.com/2014/04/01/teacher-tenure-on-trial_n_5069967.html.

"Permanent Employment Statute,"[7] the "Dismissal Statutes,"[8] and the "'Last-in, First-Out' ("LIFO") Layoff Statute".[9] The Superior Court's decision in *Vergara I* was ultimately reversed on appeal,[10] and the Supreme Court of California thereafter denied a petition to review the case;[11] however, while judicially crafted tenure reform may be stymied in California, its legacy has spread across the country.[12]

In 1954, the Supreme Court of the United States, in *Brown v. Board of Education*, held that the separation of public educational facilities by race was inherently unequal and, thus, students subject to such segregated conditions were denied equal protection of the law under the Fourteenth Amendment of the U.S. Constitution.[13] The principle of *equality* in education, in terms of constitutionality, however, is wholly different than the *quality* of an educational experience.[14] The decision in *Vergara I* attempted to bridge the gap between equality and quality in the realm of public education.[15]

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7. *Vergara v. California*, STUDENTS MATTER, http://studentsmatter.org/case/vergara/ (last visited Nov. 16, 2016) ("The permanent employment law forces administrators to either grant or deny permanent employment to teachers after an evaluation period of less than 16 months . . . .").

8. *Id.* ("The process for dismissing a single ineffective teacher involves a borderline infinite number of steps, requires years of documentation, costs hundreds of thousands of dollars and still, rarely ever works.").

9. *Id.* ("The 'LIFO' law forces school districts to base layoffs on seniority alone, with no consideration of teachers' performance in the classroom.").

10. Vergara v. State (*Vergara II*), 209 Cal. Rptr. 3d 532, 538 (Ct. App. 2016), *review denied*, (Aug. 22, 2016).

11. *Id.* at 558.

12. For further discussion, see Stephen Chang, Note, *Towards Moderate Teacher Tenure Reform in California: An Efficiency-Effectiveness Framework and the Legacy of* Vergara, 104 CAL. L. REV. 1503, 1504 (2016), wherein the author perceptively states of *Vergara*:

> You spend thousands of hours and millions of dollars litigating a case that is supposed to change the very future of education in your state. The judge finds that the constitutional violation you allege has deprived children of an equal educational opportunity. You've won the case, but the real battle is only just beginning.

13. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

14. *See Vergara I*, No. BC484642, 2014 WL 6478415, at *1 (Cal. Super. Ct. Aug. 27, 2014).

15. *Id.* (acknowledging that the court is "directly faced with issues that compel it to apply . . . constitutional principles to the quality of the education experience" (emphasis omitted)).

In order to address issues concerning the disparate quality of educational experiences among different geographic and, quite frequently, socioeconomic districts, one omnipresent (and arguably omnipotent) force must be recognized—teachers' unions. Teachers' unions are present and impactful in every state, and according to some metrics, "legislators generally rank[] their state's teacher union as the most active and effective lobbying entity in the state capitol."[16] It is obvious, therefore, that America's teachers' unions play a role in causing and perpetuating educational issues in the United States.[17] That does not mean, however, they cannot aid in the process of reform.

This Note expounds on *Vergara I* and the fundamental issues affecting the quality of students' educational experiences in American public schools. Part I delves into what happened in California and its implications nationally. Part II examines the possibility of *Vergara I* spurring "copycat" litigation in the mid-Atlantic states—namely, New York, Maryland and Connecticut, as those states represent microcosmic case studies apposite to potentially broader litigation—and gauges the probability of success under those states' respective constitutions.[18] Specifically, this Note offers a formula for predicting potential judicial triumph.

Finally, Part III offers a roadmap for reconsideration regarding the manner by which America's local governments implement and conduct compulsory public education. This Note proposes that if teachers' unions, facing the threat of further litigation, will not yield regarding permanent employment, then it is time for governors, together with their respective legislatures, to act outside of unions' purviews to eliminate the constitutional and moral violations resulting from antiquated, union-tainted legislation.

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16. Michael Hartney & Patrick Flavin, *From the School House to the Statehouse: Teacher Union Political Activism and U.S. State Education Reform Policy,* 11 ST. POL. & POL. Q. 251, 252 (2011).

17. *See* Heather Kays, *The Top Five Reasons Teachers Unions Need to Change*, AM. SPECTATOR (Aug. 5, 2015, 8:00 AM), http://spectator.org/articles/63684/top-five-reasons-teachers-unions-need-change (arguing that LIFO, mandatory dues, union misrepresentation, inability to remove ineffective teachers and self-interested political spending have perpetuated issues in education and have stripped parents, policymakers and teachers of their relative power over education policies). *But see Democratic Debate Recap*, GUARDIAN, https://www.theguardian.com/us-news/live/2016/mar/06/democratic-debate-in-flint-and-maine-caucus-results-live (last updated July 14, 2017) (quoting Hillary Clinton, responding to whether unions protect bad teachers, "We need to eliminate that criticism," because "[a] lot of people have been blaming and scapegoating teachers").

18. This Note will address the flawed decisions of the California Court of Appeal and the Supreme Court of California, *infra* Sections I.E, I.F. Therefore, success in this context is based upon the trial court's decision.

Of note and great importance, is the fact that this Note was written in and around Newark, New Jersey. Newark is a city where the public school system is failing its students.[19] In 2014, for example, Newark's high school graduation rate was sixty-nine percent, compared to eighty-nine percent statewide.[20] Even more disturbing, the nearby township of Montclair had graduation rates around ninety-three percent.[21] The disparity in the quality of education in Newark and other urban areas nationally is real and concerning.[22] This Note seeks to unmask the institutional issues that have led to a systematic failure in the way we teach our children. Hopefully, reform is on the horizon.

I. *VERGARA V. STATE*

In 2012, nine California public school students, through their parental representatives, challenged five statutory elements of the

19. Under the New Jersey State Constitution, "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art. 8, § 4, ¶ 1. For a thoughtful analysis of the origins and interpretations of that clause see Peter Mazzei, *A New Light on New Jersey's "Thorough and Efficient" Education Clause*, 38 RUTGERS L.J. 1087 (2007).

20. ADVOCATES FOR CHILDREN OF N.J., NEWARK KIDS COUNT 43 (2015), http://acnj.org/downloads/2015_03_10_newark_kids_count.pdf.

21. N.J. DEPT. OF EDUC., N.J. SCHOOL PERFORMANCE REPORT—MONTCLAIR 7 (2013), www.nj.gov/education/pr/2013/13/133310050.pdf.

22. Newark Mayor Ras Baraka and New Jersey Governor Chris Christie have diverging opinions on how to best address the necessary improvement of Newark's public schools. Governor Christie, for example, has approved more than forty new charter schools in the state, calling them a "salvation for families, especially in failing urban districts." Adam Clark, *Charter Schools Are 'Salvation for Families,' Christie Says*, NJ.COM (Mar. 4, 2016, 7:25 AM), http://www.nj.com/education/2016/03/charter_schools_are_salvation_for_families_christi.html. Mayor Baraka, conversely, stated that the Governor's "approval of the expansion of Newark charter schools is a terrible decision, unfortunate, irresponsible and damaging to the city's public schools." Ras Baraka, *Baraka in His Own Words: Christie's Terrible Charter School Decision*, OBSERVER (Mar. 3, 2016, 9:21 AM), http://observer.com/2016/03/baraka-in-his-own-words-christies-terrible-charter-schools-decision/. Baraka is a former high school principal who, upon his election in 2014, sought to impose a "total rejection of the school reform policies embraced by his predecessor Cory Booker, Gov. Chris Christie, and their philanthropic patron Mark Zuckerberg, whose $100 million donation has reshaped the city's educational landscape." Dana Goldstiein, *Who Gets to Control Newark Schools?*, SLATE (May 21, 2014, 2:05 PM), http://www.slate.com/articles/life/education/2014/05/newark_mayor_ras_baraka_tries_to_wrest_control_of_the_city_s_schools_from.single.html.

California Education Code.[23] The statutes drawing the ire of the plaintiffs were (1) the "Permanent Employment Statute,"[24] (2) the "Dismissal Statutes,"[25] and (3) the "Last-in-first-out Statute (hereinafter, LIFO)."[26] The plaintiffs alleged in their complaint that the prenominated statutes violate the equal protection clause of the California Constitution.[27] The crux of the plaintiffs' allegations was that the "challenged statutes result[ed] in grossly ineffective teachers obtaining and retaining permanent employment, and that [those] teachers [we]re disproportionately situated in schools serving predominately low-income and minority students."[28] Subsequently, California's two largest teachers' unions—California Teachers Association ("CTA") and California Federation of Teachers ("CFT")—filed a motion to intervene as defendants in the action.[29] The California Superior Court, in rendering its decision, addressed each of the challenged statutes individually. The resulting rulings, however, were, at the time, uniform—the court found that all three statutes were unconstitutional under the equal protection clause of the California Constitution.[30] One day after the judge in *Vergara I* issued his tentative decision, California Governor Jerry Brown, and then State Attorney General Kamala Harris, filed an appeal arguing that "[c]hanges of this magnitude, as a matter of law and policy, require appellate review" by a higher court.[31]

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23. *Vergara I*, No. BC484642, 2014 WL 6478415, at *2 (Cal. Super. Ct. Aug. 27, 2014). *But see Issues & Action: Vergara v. State of California*, CAL. TEACHERS ASS'N, http://www.cta.org/vergara (last visited Nov. 16, 2017) ("[*Vergara* is] a meritless lawsuit brought by Students Matter, an organization created by Silicon Valley multimillionaire David Welch and a private public relations firm for the sole purpose of filing th[e] suit.").

24. CAL. EDUC. CODE § 44929.21(b) (West 2015).

25. *Id.* §§ 44934, 44938(b), 44944.

26. *Id.* § 44955.

27. Complaint at 20, *Vergara I*, 2014 WL 6478415 (No. BC484642). *But see Issues & Action*, *supra* note 23.

28. *Vergara I*, 2014 WL 6478415, at *2.

29. Defendant's Motion to Intervene at iv, *Vergara I*, 2014 WL 6478415 (No. BC484642) (arguing that the CTA and CFT are entitled to intervene because they represent teachers who have a "strong, immediate and concrete interest in defending provisions of the [California] Education Code that both protect the quality of public schools and provide important employment benefits to . . . teachers").

30. *Vergara I*, 2014 WL 6478415, at *7.

31. Adam Nagourney, *California Governor Appeals Court Ruling Overturning Protections for Teachers*, N.Y. TIMES (Aug. 30, 2014), http://www.nytimes.com/2014/08/31/us/california-governor-fights-decision-on-teacher-tenure.html. Governor Brown's decision to appeal the decision in *Vergara I* became an issue during his 2014 reelection campaign. *See* David Siders, *Neel Kashkari Rips Jerry Brown's Ties to California Teachers Association*, SACRAMENTO BEE (Sept. 3, 2014, 3:56 PM), http://www.sacbee.com/news/

While the State of California, the CTA, and CFT appealed the decision, Students Matter,[32] the organization backing the nine plaintiffs in *Vergara I*,[33] felt emboldened and considered additional lawsuits in states like "New York, Connecticut, Maryland, Oregon, New Mexico, Idaho and Kansas as well as other states with powerful unions where legislatures have defeated attempts to change teacher tenure laws."[34]

A. *Pertinent Case Law Addressing Equal Protection Challenges to Public Education*

The significance of *Brown v. Board of Education* has been written about, studied and commented on ad nauseam, and the minutiae of the *Brown* decision are outside the scope of this Note. The most high-profile case in educational litigation since *Brown* was *San Antonio Independent School District v. Rodriguez*.[35] In that case, the Supreme Court was tasked with addressing whether Texas's statutory scheme of unequal education expenditures operated to disadvantage children of a suspect class—that is, low-income students.[36] Justice Powell wrote the opinion for the Court and—in denying the application of strict scrutiny—held: (1) Texas provided a sufficient "quantum" of education.[37] That is, "no charge . . . could be made that the system fail[ed] to provide each child with an opportunity to acquire . . . basic minimal skills . . . ."[38] And (2)

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politics-government/capitol-alert/article2608539.html. His opponent, Neel Kashkari, released a video after the appeal with text reading, "Jerry Brown and the teachers union: 40 years of violating the civil rights of poor and minority kids." *Id.*

32. *Students Matter* is a non-profit created by technology entrepreneur, David Welch. *See* David Callahan, *Meet the Tech Entrepreneur Putting Teacher Tenure on Trial*, HUFFINGTON POST (Feb. 3, 2014, 3:12 PM), http://www.huffingtonpost.com/david-callahan/meet-the-tech-entrepreneu_b_4718858.html ("Welch is an electrical engineer by training, with a Ph.D. from Cornell University. He's spent the past 30 years working in the field of fiber optics, and started his own Silicon Valley company, Infinera in 2001, manufacturing optical telecommunications systems."). Welch is the main funder of *Students Matter*, but it should be noted that "[t]here is no record that Welch has ever made a campaign contribution to either [political] party." *Id.*

33. *Id.*

34. Jennifer Medina, *Judge Rejects Teacher Tenure for California*, N.Y. TIMES (Jun. 10, 2014), http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html?_r=1.

35. 411 U.S. 1 (1973).

36. *Id.* at 4–5.

37. *Id.* at 36–37.

38. *Id.* at 37.

"[e]ducation . . . is not among the rights afforded explicit protection under our Federal Constitution."[39]

Rodriguez was a close decision, 5–4, and while the majority certainly leaves more to be desired,[40] Justice Marshall's dissent offers the high-watermark for Supreme Court adjudication on education. Justice Marshall, in contravention with the majority, argued that a state could not constitutionally vary the quality of education it offers its children.[41] Marshall concluded that the majority inappropriately delved into an analysis of due process, whereas he believed the facts in question showed, "discriminatory state action in violation of the Equal Protection Clause."[42] The majority opinion, juxtaposed with Marshall's dissent, leaves open the possibility of further litigation concerning educational opportunities.[43]

Unlike the U.S. Supreme Court in *Rodriguez*, the California Supreme Court took a diametrically different approach in assessing the fundamentality of education in *Serrano v. Priest*.[44] In *Serrano*, the plaintiffs alleged that California's school financing scheme created, "substantial disparities in the quality and extent of availability of educational opportunities . . . among the several school districts of the State."[45] The court found that education in California was a "fundamental interest."[46] The court stated that if, on remand, the plaintiffs' allegations regarding disparate qualities of education throughout the state were correct then the "financial system must fall and the statutes comprising it must be found unconstitutional."[47]

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39. *Id.* at 35.

40. *See* Geoffrey R. Stone, *How a 1973 Supreme Court Decision Has Contributed to Our Inequality*, DAILY BEAST (May 15, 2014, 5:45 AM), http://www.thedailybeast.com/articles/2014/05/15/how-a-1974-supreme-court-decision-has-contributed-to-our-inequality.html ("[Forty] years later, . . . the legacy of the Supreme Court's failure in *Rodriguez* plagues our nation to this day.").

41. *Rodriguez*, 411 U.S. at 70–71 (Marshall, J., dissenting).

42. *Id.* at 90. Justice Marshall further referred to the majority opinion as, "a retreat from our historic commitment to equality of educational opportunity." *Id.* at 71.

43. *See* Robert E. Lindquist & Arthur E. Wise, *Developments in Education Litigation: Equal Protection*, 5 J.L. & EDUC. 1, 19–23 (1976) (discussing alternative litigation strategies in the wake of *Rodriguez*).

44. 487 P.2d 1241 (1971); *see also* Stephen R. Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano v. Priest *and Its Progeny*, 120 U. PA. L. REV. 504, 504 (1972) ("The *Serrano* result has been popularly hailed as rightly egalitarian and a significant, if not the significant, step in the struggle for better education in urban areas.").

45. *Serrano*, 487 P.2d at 1244 (quoting the plaintiffs' complaint).

46. *Id.* at 1255.

47. *Id.* at 1263.

Thereafter, on remand, the court ruled that because education was a fundamental interest, strict scrutiny would apply and, therefore, "the equal protection provisions inherent in the California Constitution mandated that the State '. . . provide for uniformity and equality of treatment to all pupils of the State.'"[48] The decision in *Serrano* became an essential basis for rulings in subsequent cases, including *Vergara I*.[49] Because California employs "strict scrutiny" when questions surrounding education are involved, the state must establish that statutes serve a compelling interest, and that the laws are necessary to further said interest.[50]

Finally, in *Butt v. State*,[51] the California Supreme Court went a step further in their adjudication of public education concerns. Specifically, the court in *Butt* held that because education was a fundamental interest, the state is mandated to rectify inter-district disparities within the system of public schools.[52] Therefore, following *Butt*, the onus fell on California to monitor and avoid the operation of a public school system that denied superior education equality to students of a particular district.[53]

B. California's Education Statutory Scheme

To understand the statutory schematic prescribed by the California Education Code, and central to the plaintiffs' complaint in *Vergara I*, it is necessary to delve, albeit concisely, into the relevant aspects of each statute and their implications. First, California's Employment Statute, provides that "[e]very employee . . . after having been employed by the district for three complete consecutive school years . . . shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district."[54] Second, California's

48. Lindquist & Wise, *supra* note 43, at 31 (alteration in original) (quoting Memorandum Opinion Re Intended Decision at 51 (slip opinion), Serrano v. Priest, No. 938,254 (Super. Ct. Cal. Apr. 10, 1974)).

49. *See Vergara I*, No. BC484642, 2014 WL 6478415, at *4 (Cal. Super. Ct. Aug. 27, 2014).

50. *Id.*

51. 842 P.2d 1240 (Cal. 1992).

52. *Id.* at 1249.

53. *See* Michael E. Garner, *Digest of Recent Judicial Decisions*, 15 J. JUV. L. 343, 347 (1994) (discussing how the State of California is now required by the Equal Protection Clause of the California Constitution to ensure all students receive basic educational equality).

54. CAL. EDUC. CODE § 44929.21(b) (West 2015).

three "Dismissal Statutes" [55] provide additional and, arguably, burdensome protections, "on top of the reasonable due process protections already guaranteed to every public employee by the California Constitution." [56] Finally, California's LIFO statute, or "Reduction in [the] [N]umber of [E]mployees" statute stipulates "the services of no permanent employee may be terminated . . . while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certified and competent to render." [57] Put simply, California's "LIFO" statute requires school administrators to make "teacher retention decisions based" entirely on seniority without any consideration of teacher effectiveness.[58]

C. Evidence and Testimony Relied Upon by The Superior Court in Vergara

Unsurprisingly, the plaintiffs in *Vergara I* relied heavily on expert reports and testimony to substantiate—in quantitative figures—the long-term impact of ineffective teachers on their pupils. Judge Treu, in his ruling, opined that the "[e]vidence . . . elicited [at] trial of the specific effect of grossly ineffective teachers on students . . . shocks the conscience."[59]

California has the largest public school system in the United States.[60] However, more than half of public school students test below proficiency, [61] and a mere twenty-three percent of students test at "college ready" in mathematics.[62] In effect, as one plaintiff lamented,

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55. *Id.* §§ 44938(b), 44944.

56. *Dismissal*, STUDENTS MATTER, http://studentsmatter.org/our-case/vergara-v-california-case-summary/dismissal-statutes/ (last visited Nov. 16, 2017).

57. EDUC. § 44955.

58. Bhavini Bhakta, *California's Pink-Slip Shuffle*, L.A. TIMES (Dec. 16, 2012), http://articles.latimes.com/2012/dec/16/opinion/la-oe-bhakta-teaching-20121216 ("LIFO is the functional equivalent of an NBA team being forced to fire LeBron James because a bench warmer on the team has more years in the league.").

59. *Vergara I*, No. BC484642, 2014 WL 6478415, at *4 (Cal. Super. Ct. Aug. 27, 2014).

60. CHEN-SU CHEN ET AL., U.S. DEP'T OF EDUC., NCES 2011-350, DOCUMENTATION TO THE COMMON CORE OF DATA STATE NONFISCAL SURVEY OF PUBLIC ELEMENTARY/SECONDARY EDUCATION: SCHOOL YEAR 2009-10, at B-21 to B-22 (2011), https://nces.ed.gov/ccd/pdf/STNONFIS091agen.pdf.

61. Doug Erickson, *On New State Test, Less Than Half of Public School Students Proficient or Advanced in Math and Language Arts*, WIS. ST. J. (Oct. 19, 2016), http://host.madison.com/wsj/news/local/education/on-new-state-test-less-than-half-of-public-school/article_3a51a055-b481-5c14-bc3d-c0509c08a306.html.

62. CAL. STATE UNIV., *Early Assessment Program (EAP)*, http://eap2010.ets.org/ViewReport.asp (click "View Report") (last visited Nov. 16, 2017).

"[b]eing a kid in the California [education] system . . . is a lot like the lottery." [63] Consequently, the plaintiffs submitted evidence that indicated that nationally, a single year in a classroom with an ineffective teacher could cost students $1.4 million in lifetime earnings per classroom.[64] The statistics specific to California are just as stark. For example, a report published by the *Los Angeles Times* examining students whose teachers were in the top ten percent in effectiveness and the bottom ten percent found that the "fortunate students ranked 17 percentile points higher in English and 25 points higher in math."[65]

The plaintiffs' complaint in *Vergara I* was explicit in its reliance on the economic impact ineffective teachers have on students as a reason for deeming the statutes unconstitutional.[66] Specifically, the complaint alleged that teacher quality affects student success more than any other in-school factor.[67] As a result, therefore, the plaintiffs contended that "[i]t would . . . be in the interest of all California public school students to ensure that grossly ineffective teachers are not hired into the California public school system and, if hired, are promptly dismissed upon discovery of their grossly ineffective performance," [68] thereby invoking the notions of permanent employment and ease of dismissal.

Even more disturbing, with respect to the aforementioned economic statistics, is the disparate impact on poor and minority students. In Los Angeles County, for example, "Latino and African-American students are 48 and 35 percent more likely than white students to be assigned to a teacher in the bottom quartile of effectiveness."[69] Moreover, Latino

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63. ReasonTV, *How a 14 Year Old Helped Bring Down Teacher Tenure in California*, YOUTUBE (Jan. 29, 2015), https://youtu.be/ByokhwFTKW4?t=46.

64. Raj Chetty et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 AM. ECON. REV. 2633, 2675 (2014); *see also* Emily Badger, *Why a California Judge Just Ruled That Teacher Tenure Is Bad for Students*, WASH. POST: WONKBLOG (June 10, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/06/10/a-california-judge-just-ruled-that-teacher-tenure-is-bad-for-students/ (explaining that the data looked at "2.5 million students, grades three through eight, in a 'large urban school district' between 1989 and 2009, and compared their math and English test scores to later tax records as adults").

65. Jason Felch, Jason Song & Doug Smith, *Who's Teaching L.A.'s Kids*, L.A. TIMES (Aug. 14, 2010), http://articles.latimes.com/2010/aug/14/local/la-me-teachers-value-20100815. Felch, Song, and Smith further suggest "the most effective teachers often go unrecognized, [and] the keys to their success rarely studied[, while i]neffective teachers often face no consequences and get no extra help." *Id.*

66. Complaint, *supra* note 27, at 9.

67. *Id.*

68. *Id.* at 10.

69. *Trial Tracker: Trial Day 9*, STUDENTS MATTER, http://studentsmatter.org/tracker/

and African American students are sixty-eight percent and forty-three percent, respectively, more likely than white students "to be taught by a teacher in the bottom five percent of effectiveness."[70] "Deficits due to teacher quality for African-American students relative to white students amounts to 1.08 months of schooling lost every year."[71] "Latino students lose out on the equivalent of 1.55 months of schooling every year."[72]

The impact of California's tenure scheme is not limited to the economic damage that ineffective teachers inflict upon their students in a given year, however. For example, LIFO laws have equally "conscious shocking" quantitative statistics. California's LIFO statute disproportionately affects low-income students, as low-income students are more likely to be in school districts with less experienced teachers.[73] The impact of teacher turnover naturally affects the continuity of a student's education and "can make it impossible for teachers and administrators to plan, implement a coherent curriculum, and sustain positive working relationships."[74]

Arguably, more astounding than any statistic purporting to demonstrate the impacts of poorly performing teachers on students, are the facts submitted by plaintiffs regarding the onerous task of dismissing an ineffective teacher—a process so fraught with administrative and legal blockades it effectively renders the end goal an unattainable fiction.[75] The first hurdle that must be cleared, should a district desire to dismiss an ineffective teacher, is financial—teacher

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vergara/2014/02/07/3753/ (last visited Nov. 16, 2017).

70. *Id.*; *see also* Carrie Hahnel & Orville Jackson, *Learning Denied: The Case for Equitable Access to Effective Teaching in California's Largest School District*, EDUC. TR. (Jan. 12, 2012), https://edtrust.org/resource/learning-denied-the-case-for-equitable-access-to-effective-teaching-in-californias-largest-school-district/ (finding that in the Los Angeles Unified School District a low income student is sixty-six percent more likely to have an underperforming math teacher).

71. Press Release, Students Matter, Expert Witness Testimony in Vergara v. California Shows Teacher Effectiveness is Measurable and Predictable 2 (Feb. 6, 2014), http://studentsmatter.org/wp-content/uploads/2014/02/SM_Day9_EndofDayPressRelease_02.06.14.pdf.

72. *Id.*; *see also* BRYAN HASSEL & EMILY HASSEL, PUBLIC IMPACT, OPPORTUNITY AT THE TOP 3 (2010), http://www.opportunityculture.org/images/stories/opportunity_at_the_top-public_impact.pdf ("[S]tudents with the best teachers learned about 6 months more material than their peers with bottom-tier instructors." (emphasis omitted)).

73. CARRIE HAHNEL ET AL., EDUC. TR., VICTIMS OF THE CHURN 3, 5 (2011), http://1k9gl1yevnfp2lpq1dhrqe17-wpengine.netdna-ssl.com/wp-content/uploads/2013/10/ETW-Victims-of-the-Churn-Report.pdf ("In fact, one report predicted that seniority-based layoffs could cause the highest poverty schools in 15 California school districts to lose 30 percent more teachers than wealthier schools.").

74. *Id.* at 5.

75. Complaint, *supra* note 27, at 4.

dismissals are expensive.[76] In 1995, the cost of dismissing a teacher ranged from $10,000 to $30,000; however, with frequent appeals expenditures often rose to $300,000.[77] Because firings are so expensive and time consuming, it comes as no surprise that teachers are fired at an alarmingly low rate; for example, the Los Angeles Unified School District ("LAUSD") is made up of approximately 30,000 tenured teachers, however, on average it only fires twenty-one teachers a year.[78]

To fully grasp the folly of attempting to fire a teacher one need only review an example of one of LAUSD's reasons for termination. Recently, LAUSD wanted to fire a teacher for keeping a stash of marijuana, pornography, and cocaine in his desk.[79] The commission, however, deemed termination "too harsh."[80] Accordingly, the plaintiffs' complaint alleged, not hyperbolically, that the "hurdles result in a labyrinthine dismissal process requiring investigations, hearings, union grievances, administrative appeals, court challenges, and re-hearings—all of which can and often do take multiple years and cost hundreds of thousands, or even millions, of dollars."[81]

D. Tentative Decision

The Superior Court in *Vergara I* recognized that the holdings in *Brown*, *Serrano*, and *Butt* would be instructive, but not determinative, as those cases—while addressing educational equality—did not address principles of educational quality.[82] What the court did note regarding the three previous cases is that they established that "the Constitution

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76. *Id.*

77. UNDERSTANDING CALIFORNIA'S SCHOOL IMPROVEMENT ISSUES: A HANDBOOK, JAMES G. IRVINE FOUNDATION 122 (1998); *see also* Beth Barrett, *LAUSD's Dance of the Lemons*, L.A. WEEKLY (Feb. 11, 2010, 4:30 AM), http://www.laweekly.com/news/lausds-dance-of-the-lemons-2163764. Barrett found that in a sample of seven teachers among the district's 33,000 teachers, LAUSD officials spent $3.5 million trying to fire teachers for poor classroom performance. *Id.* Ultimately, just four were fired and litigation lasted for five years each. *Id.* Furthermore, the remaining three were either reinstated or paid substantial settlements. *Id.*

78. Jason Song, *Firing Teachers Can Be a Costly and Tortuous Task*, L.A. TIMES (May 3, 2009), http://articles.latimes.com/2009/may/03/local/me-teachers3/ (further noting that the Long Beach and San Diego school districts fire about six and two teachers per one thousand, respectively).

79. *Id.*

80. *Id.*

81. Complaint, *supra* note 27, at 13–14.

82. *See Vergara I*, No. BC484642, 2014 WL 6478415, at *1 (Cal. Super. Ct. Aug. 27, 2014).

of California is the ultimate guarantor of . . . meaningful [and] basically equal educational opportunity being afforded to the students of [California]."[83] Thereafter, the court took the opportunity to explain some of the economic implications of "grossly ineffective teachers."[84] Judge Treu then reasoned that because the challenged statutes offended a fundamental right and, moreover, they disproportionately burdened poor and minority students, the statutes needed to be analyzed under "strict scrutiny."[85]

1. Permanent Employment Statute

With respect to the "Permanent Employment Statute," the court found that the tight timeframe necessary to render a decision regarding a candidate's employment status resulted in harried and ill-informed tenure decisions.[86] The judge ruled that the statutory prescribed two-year window to make a decision as to a teacher's tenure was unfair to both the teachers and the students. [87] Furthermore, the court admonished California for being one of just five states with such a short evaluation period.[88] Ultimately, Judge Treu held that the plaintiffs met their burden and deemed the "Permanent Employment Statute" unconstitutional under the equal protection clause of the Constitution of California.[89]

2. Dismissal Statutes

Next, the court addressed the ease of dismissal statutes.[90] The court was unequivocally sympathetic to the plaintiffs' plight that the temporal and economic constraints associated with commencing termination of an ineffective or ill-behaved teacher made the end-goal of dismissal illusory. [91] Nonetheless, the court did not ignore the defendant's contrary contentions as devoid of merit. Rather, the court

83. *Id.* at *3.

84. *Id.* at *4; *see also infra* Part III.

85. *Vergara I*, 2014 WL 6478415, at *4 (defining strict scrutiny as requiring the defendants to establish that the state "has a compelling interest which justifies the [statutes, and] that the distinctions drawn by the law[s] are necessary to further their purpose" (first alteration altered) (second alteration in original) (emphasis omitted)).

86. *See id.* at *5.

87. *Id.* at *4–5.

88. *See id.* at *5.

89. *Id.*

90. *Id.*

91. *See id.* (noting expert testimony elicited at trial suggests "dismissals are 'extremely rare' . . . because administrators believe it to be 'impossible' to dismiss a tenured teacher").

recognized that the states raised a "legitimate issue of due process."[92] That said, the court opined that the current statutes create a system of "über due process,"[93] and, moreover, the court was "confident that the independent judiciary of [California wa]s no less dedicated to the protection of . . . due process rights of teachers than it [wa]s of protecting the rights of children to constitutionally mandated equal educational opportunities."[94] Accordingly, the court found that the state did not carry its burden necessary for the dismissal statutes to survive strict scrutiny.[95]

3. LIFO Statute

Of all the challenged statutes, the court examined the LIFO statute most pithily. The court submitted,

> Distilled to its basics, the State[s'] . . . position requires them to defend the proposition that the state has a compelling interest in the *de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetent ones. The logic of this position is unfathomable and therefore constitutionally unsupportable.[96]

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92. *Id.*

93. *Id. But see* Eric Posner, *More on The California Teachers* Case, ERIC POSNER: BLOG (June 11, 2014), http://ericposner.com/more-on-the-california-teachers-case/ ("One of the reasons that employers–and not just public schools . . . –offer job security is that employees value it so much," and, therefore, "[t]hey're willing to accept a lower salary in return for job security." Accordingly, "[i]f California is no longer allowed to offer job security, it will either need to pay teachers more . . . or hire fewer teachers.").

94. *Vergara I*, 2014 WL 6478415, at *6.

95. *Id.*

96. *Id.* at *6; *see also* Campbell Brown, Vergara v. California*: The Most Important Case You've Never Heard of*, DAILY BEAST (May 29, 2014, 5:45 AM), http://www.thedailybeast.com/articles/2014/05/29/vergara-v-california-the-most-important-court-case-you-ve-never-heard-of.html ("The absurdity of [LIFO] was driven home when a Teacher of the Year in California was forced out during layoffs because others had more time on the job."); *cf.* Larry Sand, *Sentenced to LIFO?*, CITY J. (May 16, 2014), http://www.city-journal.org/2014/cjc0516ls.html (arguing that LIFO has caused a drop in students interested in pursuing educational careers in California, as between 2008 and 2013 California experienced a forty percent drop in teachers with less than six years' experience and enrollment in college teaching programs fell by forty-one percent).

The court also took the opportunity to note that California's LIFO scheme was in the "distinct minority among other states that have addressed th[e] issue."[97]

In its conclusion, the court found all the statutes unconstitutional, but, wary of an expected appeal, the court stayed all injunctions pending appellate review.[98]

E. Issues on Appeal

The defendants filed a Notice of Appeal on August 29, 2014, just two days after the issuance of the final judgment by the Superior Court.[99] The defendants' argument for reversal was that the trial court failed to apply the appropriate legal governing standard to the challenged statutes,[100] as the plaintiffs submitted a "facial challenge."[101] Accordingly, the defendants submitted that the fundamental question posed to the court was whether the challenged statutes could be constitutionally applied by examining the *text* of the statutes and not their *application* to particular circumstances.[102]

Furthermore, the defendants disputed the trial court's application of strict scrutiny, insisting that the appropriate standard of review was rational basis.[103] Applying such a standard here, the defendants suggested, would lead to the inevitable conclusion that the California Legislature appropriately balanced a litany of policy considerations in establishing the state's tenure system.[104]

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97. *Vergara I*, 2014 WL 6478415, at *7 (noting that twenty states provide that seniority may be considered among the factors required in employment retention and nineteen states leave layoff criteria entirely to the district's discretion).

98. *See id.* at *7.

99. *See* Defendants Notice of Appeal at 2, *Vergara II*, 209 Cal. Rptr. 3d 532 (Ct. App. 2016) (No. BC484642).

100. Appellants' Opening Brief at 37, *Vergara II*, 209 Cal. Rptr. 3d 532 (No. BC484642), 2015 WL 4977005.

101. *Id.* The defendants argued that in California, a plaintiff may challenge a statute "as applied or on its face." *Id.* Here, the defendants stated that the plaintiffs "elected to attempt to meet the standards for a facial challenge." *Id.* And, "[i]n contrast to an as-applied claim, '[a] facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual.'" *Id.* (second alteration in original) (quoting *In re* Taylor, 343 P.3d 867, 879 n.9 (Cal. 2015)).

102. *See id.* at 37–38 ("The fundamental question in a facial challenge is 'whether the statute can constitutionally be applied.'" (quoting Arcadia Unified Sch. Dist. v. State Dep't of Educ., 825 P.2d 438, 448 (Cal. 1992)).

103. *Id.* at 40.

104. *Id.* at 40–41. The defendants argued that the

> Legislature made a policy judgment that it was important for districts to have some period of time in which to dismiss teachers without cause, allowing them

The defendants further argued that strict scrutiny under a "fundamental rights" theory was inappropriate[105] because to win on a fundamental rights theory a plaintiff must establish that the law discriminated against an identifiable class of people, [106] and demonstrate that the "challenged state action itself denies a group of people a constitutionally protected right or interest."[107] Here, according to the defendants, the cognizable class presented by the plaintiffs was merely any student, who at any given time, was assigned to a poor performing teacher, and, moreover, "the challenged teacher employment statutes have, at most, a highly attenuated connection to any child's classroom experience."[108]

The plaintiffs, in their response, agreed that facial challenges require a court to consider "the text of the [challenged statute] itself, not its application to the particular circumstances of an individual."[109] However, here, the plaintiffs countered that the defendants conspicuously disregarded that the challenge was to the entirety of California's tenure scheme without focus on the manner in which the laws affected the plaintiffs in particular.[110] And, therefore, they proved the challenged statutes were facially unconstitutional "because they 'inevitably' violate the fundamental rights of an unlucky subset of California's students every year."[111]

The plaintiffs further averred that the evidence at trial clearly demonstrated the laws have a real and appreciable impact on California students' fundamental right to education and disproportionately

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quickly and efficiently to eliminate newly hired, underperforming teachers, but that it was also desirable to afford teachers who were retained after this period some protection against at-will dismissal by local administrators, in order to attract and retain qualified teachers.

Id.; *see also* John Fensterwald, *Court of Appeal to Hear Arguments in Vergara Lawsuit Next Month*, EDSOURCE (Jan. 15, 2016), http://edsource.org/2016/court-of-appeal-to-hear-arguments-in-vergara-lawsuit-next-month/93485 (noting that the CTA joined the State's appeal averring that there was no reason "for invalidating the entire integrated statutory scheme as facially unconstitutional, especially given the undisputed evidence that many school districts make reasoned tenure, dismissal, and (layoff) decisions").

105. Appellants' Opening Brief, *supra* note 100, at 43.

106. *Id.*

107. *Id.* at 46 (citations omitted).

108. *Id.* at 48.

109. Respondents' Brief at 69, *Vergara II*, 209 Cal. Rptr. 3d 532 (Ct. App. 2016) (No. BC484642), 2015 WL 4977005 (quoting Tobe v. City of Santa Ana, 892 P.2d 1145, 1152 (Cal. 1995)).

110. *See id.* at 77–80.

111. *Id.* at 70 (citation omitted).

harmed minority and low-income students.[112] Plaintiffs asserted that the defendants' argument "conflate[ed] fundamental rights and suspect class claims," as California has typically acknowledged, "equal protection claims are properly asserted where a law '*either* creates classifications *or* affects a fundamental right.'"[113]

F. Appellate Decision and Supreme Court Review

Unfortunately for the plaintiffs in *Vergara I*, and for the students of California more broadly, on April 4, 2016, the California Court of Appeal reversed Judge Treu's tentative decision.[114] The opinion ("*Vergara II*"), written by Roger W. Boren, the presiding justice of the Second District, Division Two of the California Courts of Appeals, essentially adopted the gravamen of the defendants and their amici's position in holding that (i) students assigned to grossly ineffective teachers were not a sufficiently identifiable group for purposes of equal protection;[115] and (ii) the statutes did not inevitably cause low-income and minority students to be disproportionately assigned to grossly ineffective teachers in violation of equal protection.[116]

In rendering its decision, the appellate court stated that its review of the challenged statutes was "limited to the particular constitutional challenge that plaintiffs decided to bring," and because the plaintiffs brought a facial equal protection challenge, they challenged the statutes *themselves* and not their *implementation*.[117] To that end, the court concluded that the plaintiffs

> failed to establish that the challenged statutes violate equal protection, primarily because they did not show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students. Although the statutes may lead to the hiring and retention of more ineffective teachers than a hypothetical alternative system would, the statutes do not address the assignment of teachers; instead, administrators—not the statutes—ultimately determine where teachers within a district are assigned to teach. Critically, plaintiffs failed to show that the statutes themselves make any certain group of students

112. *Id.* at 103.
113. *Id.* at 77 (second quoting Moreno v. Draper, 83 Cal. Rptr. 82, 86 (Ct. App. 1990)).
114. *Vergara II*, 209 Cal. Rptr. 3d 532, 538 (Cal. Ct. App. 2016).
115. *Id.*
116. *Id.*
117. *Id.*

more likely to be taught by ineffective teachers than any other group of students.[118]

Vergara II was essentially couched on the premise that it was the school and education *administrators* and not the *statutes* that ultimately decided where teachers were assigned throughout the state, and within any given school district.[119] After the issuance of the appellate court's decision, the plaintiffs' lead counsel, Theodore Boutrous of Gibson Dunn, stated: "Time and time again, the court has intervened when the state's laws and policies deprive our children, particularly our most vulnerable children, of their constitutional rights. The laws at issue in *Vergara* harm thousands of California students every year and are disastrous for low-income and minority communities."[120] Mr. Boutrous continued, stating that the plaintiffs would petition the California Supreme Court to review the decision.[121]

In August 2016, a split, 4–3 California Supreme Court voted to deny the plaintiffs' petition for review of *Vergara II*.[122] The majority did not issue an opinion justifying their denial.[123] However, and notably, "[t]wo of the three dissenting justices . . . Goodwin Liu and Mariano-Florentino Cuéllar, were ardent advocates for the rights of minority children as law professors before [being] nominated . . . to the court."[124] Justice Liu's dissenting opinion admonished the Court of Appeal for finding that the group presented by the plaintiffs was not "an identifiable class of persons sufficient to maintain an equal protection challenge" because "to claim an equal protection violation, group members must have some pertinent common characteristic other than the fact that they are assuredly harmed by a statute."[125] More fundamentally, Justice Liu asserted, "Because the questions presented ha[d] obvious statewide importance, and because they involve[d] a

118. *Id.*

119. *See id.* at 556.

120. Mike Szymansk, *Just In: Vergara Appeal Filed to California Supreme Court*, LA SCH. REP. (May 24, 2016), http://laschoolreport.com/vergara-appeal-filed-to-california-supreme-court/.

121. *Id.*

122. *Vergara II*, 209 Cal. Rptr. 3d at 558; John Fensterwald, *California High Court Lets Ruling Stand on Teacher Tenure, School Funding Lawsuits*, EDSOURCE (Aug. 22, 2016) [hereinafter Fensterwald, *California High Court*], https://edsource.org/2016/state-supreme-court-declines-to-hear-vergara-inadequate-funding-cases/568350.

123. *Vergara II*, 209 Cal. Rptr. 3d at 558.

124. Fensterwald, *California High Court*, *supra* note 122.

125. *Vergara II*, 209 Cal. Rptr. 3d at 560 (Liu, J., dissenting) (citations omitted).

significant legal issue on which the Court of Appeal likely erred, this Court should grant review."[126]

Justice Cuéllar's dissenting opinion is acutely congruent with the position of this Note, in that it plainly states: "Nothing in California's Constitution or any other law supports the Court of Appeal's reasoning. When a fundamental right has been appreciably burdened, [California courts] apply strict scrutiny. The appellate court did not."[127] The California Supreme Court's decisions in *Butt* and *Serrano* quite clearly establish the above standard.[128] The Court of Appeal inexplicably found, and the dissent rightly criticized, that litigants will not be able to raise equal protection claims based upon a fundamental right even if that right is "unquestionably burdened," because under the Court of Appeal's decision, "if that burden is imposed at random rather than on a discrete and identifiable group, then no relief is available under the equal protection provisions of [the] state Constitution."[129] The Court of Appeal's ruling conflates fundamental rights and suspect class claims.[130] Such a conflation is frustrating and dastardly, because, as previously stated, California has typically acknowledged, "equal protection claims are properly asserted where a law '*either* creates classifications *or* affects a fundamental right.'"[131] Thus, while the Court of Appeal's decision is final, it is flawed; therefore it should not act as a deterrent to further litigation throughout the country.[132]

II. POSSIBLE MID-ATLANTIC PROGENY

In the wake of the initial decision in *Vergara I*, Students Matter acknowledged that the organization was considering filing similar suits in New York, Connecticut, and Maryland, among other states.[133] Unlike California, not all states are equally primed for success in litigation.[134]

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126. *Id.* at 559.

127. *Id.* at 564 (Cuéllar, J., dissenting) (internal citations omitted).

128. *See* Butt v. State, 842 P.2d 1240, 1249 (Cal. 1992); Serrano v. Priest, 487 P.2d 1241, 1249 (Cal. 1971).

129. *Vergara II*, 209 Cal. Rptr. 3d at 564.

130. *See id.* at 553 (majority opinion).

131. Respondents' Brief, *supra* note 109, at 77; *see also supra* Section I.E.

132. *See Vergara II*, 209 Cal. Rptr. 3d at 560 (Liu, J., dissenting).

133. Jennifer Medina, *Judge Rejects Teacher Tenure for California*, N.Y. TIMES (June 10, 2014), http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html.

134. *See* M. Rebecca Cooper, Note, *Alaska and* Vergara v. California*: Evaluating the Constitutionality of Teacher Tenure in Alaska*, 32 ALASKA L. REV. 395, 420 (2015) ("A copycat challenge to Alaska's tenure system would have to overcome significant hurdles to have any chance of success. Unlike California, Alaska does not currently have

In *Vergara* "copycat" cases, the calculus for victory seemingly depends upon a triad of factors: (1) the power and influence wielded by a state's teachers' union; [135] (2) quantitative statistical discrepancies demonstrating educational inequality among school districts of varying demographics; [136] and (3) state jurisprudence deeming education a fundamental right.[137] While the former two factors are not devoid of influence and authority, the latter factor is paramount to any potential success in an equal protection claim challenging teacher tenure laws.[138] Absent recognition of education as a fundamental right guaranteed by the state, challengers are left couching their equal protection claims based upon federally prescribed floors of constitutionality that merely mandate rational basis analysis.[139] Accordingly, examining three states, with three varying constitutional classifications of education, can help provide insight into the potential success of *Vergara*'s progeny.[140]

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jurisprudence that has declared education to be a fundamental right for equal protection purposes.").

135. *See* Eileen Fitzgerald & Linda Conner Lambeck, *Connecticut Could Be Next in Teacher Tenure Wars*, NEWSTIMES, http://www.newstimes.com/local/article/Connecticut-could-be-next-in-teacher-tenure-wars-5551640.php (last updated June 13, 2014, 11:56 PM) (quoting a State Senator's concerns that Connecticut's "courts and . . . General Assembly makeup may be more pro-union oriented than other states. As a result, tenure rules are difficult to change.").

136. Lyndsey Layton, *Campbell Brown Takes on Teacher Tenure in New York*, WASH. POST (July 28, 2014), https://www.washingtonpost.com/local/education/campbell-brown-takes-on-teacher-tenure-in-new-york/2014/07/28/135010e4-16a1-11e4-9e3b-7f2f110c6265_story.html (noting that a case similar to *Vergara I* filed in New York, "argues that poor, minority students are more likely than more affluent peers to be taught by weak teachers").

137. *See* Cooper, *supra* note 134, at 420.

138. *See, e.g.*, Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959).

139. *Id.* ("[T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'"); *see also* Michael J. Dejianne, Comment, *The Right to Education: Reconciling Teacher Tenure and the Current State of Public Education*, 46 SETON HALL L. REV. 333, 339 (2015).

140. *See Allied Stores*, 358 U.S. at 527.

A. New York State

Following the plaintiffs' initial success in *Vergara I*, a New York-based advocacy group, Partnership for Educational Justice,[141] founded by Campbell Brown,[142] initiated a similar suit.[143] Much like *Vergara*, *Wright v. State* challenges New York's seniority-based "last-in, first-out" layoff triage, the probationary timetable for teachers to be awarded tenure, and the high-hurdled due process requirements that have made it, "nearly impossible to fire ineffective or even dangerous teachers."[144]

1. New York's Teachers' Union

The fight against the plaintiffs in *Wright* has brought two powerful teachers' unions to join forces.[145] Specifically, the United Federation of Teachers ("UFT") and New York State United Teachers ("NYSUT") were granted the right to intervene on behalf of the defense.[146] The president of the NYSUT vowed that the organization would mount a vigorous defense of the legal status quo arguing that tenure is "a critical safeguard to ensuring all students have an effective teacher, protecting academic freedom and providing educators an environment in which they do not live in constant fear of unfair firing."[147]

For her involvement, Brown has drawn the ire of those connected with New York's teachers' unions and has found herself the victim of their ad hominem rhetoric.[148] Regardless, Brown avers, "the union is

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141. *Our Mission*, PARTNERSHIP FOR EDUC. JUST., http://edjustice.org/about/mission/ (last visited Nov. 16, 2017) (advertising their mission as seeking to "help communities advocate for common-sense policy changes that will give more students a chance to attend great schools").

142. *About Campbell Brown*, CAMPBELL BROWN, http://www.campbellbrown.com/about/ (last visited Nov. 16, 2017) (noting that Brown "is the founder and editor-in-chief of The Seventy Four," has "written for the New York Times" (among other publications), and also serves on the board of directors of Success Academy Charter Schools); *see also* Eliza Shapiro, *Campbell Brown Tearfully Files Tenure Suit*, POLITICO (July 28, 2014), http://www.capitalnewyork.com/article/city-hall/2014/07/8549776/campbell-brown-tearfully-files-tenure-suit ("Brown's group will 'provide the families and students with organizational and financial support as they take on the entrenched educational politics.'").

143. Complaint at 1, Wright v. State, No. 650450/2014 (filed July 28, 2014).

144. Shapiro, *supra* note 142.

145. *See* Diane Lore, *In Historic Battle over Teacher Tenure, 2 Powerful Unions Join Fight to Keep State Laws in Place*, STATEN ISLAND LIVE (Oct. 8, 2014, 1:53 PM). http://www.silive.com/news/index.ssf/2014/10/post_958.html.

146. *Id.*

147. *Id.*

148. *See* Ross Barkan, *Brown v. The Lords of Education: Campbell Brown's Next Fight*, OBSERVER (Nov. 11, 2014, 11:36 PM), http://observer.com/2014/11/brown-vs-the-lords-of-

gonna lose this battle."[149] Taking on the New York and national teachers' unions will not be an easy fight for Brown and the plaintiffs. However, a 2012 study conducted by the Thomas Fordham Institute assessed the power of every state's teachers' union based upon a series of metrics.[150] New York's teachers' unions ranked ninth among the fifty states—or in the first tier—in terms of influence and power.[151] The study's analysis of the power of New York's unions does not bode well for those attempting to curb their might. Specifically, the study notes that New York's unions have vast resources and have been "more involved in politics than those in many other states."[152] They therefore "rank[] as one of the strongest [unions] in the country."[153] The strength of New York's unions—politically, financially, etc.—certainly acts as a headwind to the fight against the challenged statutes, but the unions' power is not dispositive.

2. Demographic Achievement Gap

As mentioned in Part I of this Note, critical to the California Superior Court's ruling in *Vergara I* was that the evidence presented at trial demonstrated that the challenged statutes disproportionately affected poor and minority students.[154] In New York, the plaintiffs will need to show similar statistical discrepancies, if for no other reason than to submit a real and identifiable class of people disproportionally affected by the statutes necessary for a rudimentary equal protection claim.[155]

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education-campbell-browns-next-fight/ (noting that labor affiliated organizations have taken to sponsoring a webpage referring to Brown as "Right-Wing. Elitist. Wrong" and further referring to her as an opportunist who lacks the requite knowledge to opine on the issues of schools, teachers and New York).

149. *Id.*

150. *See generally* AMBER M. WINKLER ET AL., HOW STRONG ARE U.S. TEACHER UNIONS?: A STATE BY STATE COMPARISON (2012), http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/20121029-Union-Strength-Full-Report_7_0.pdf (comparing five broad metrics quantifying teachers' union's power—resources and membership, involvement in politics, scope of bargaining, state policies, and perceived influence. Those metrics were broken down further to show the various elements imputed for each metric.).

151. *Id.* at 253.

152. *Id.*

153. *Id.* at 254.

154. *See supra* Section I.C.

155. *See supra* Section I.F.

The plaintiffs in *Wright* allege that "[t]eacher quality affects student success more than any other in-school factor" and "[h]igh-quality instruction from effective teachers helps students overcome the traditional barriers demographics impose, and may have the greatest positive effect on low-performing students and minorities."[156] When pressed to provide quantitative evidence, the plaintiffs in *Wright* will be able to establish, quite clearly, that students of color and low socioeconomic status are more likely to be assigned ineffective teachers. For example, in 2014, state-mandated teacher evaluations showed that "64 percent of teachers in wealthy districts earned the highest rating of 'highly effective,' compared to 38 percent of teachers in poor districts. And while only 1 percent of teachers in the wealthy districts were rated 'ineffective' or 'developing,' that number [wa]s 12 percent for poor districts."[157] Here, the application of the challenged statutes clearly suggests discriminatory effects. The issue, however, is unions and legislatures are more likely to label the evaluation standards as ineffective, than the objectively ineffective teachers.[158]

3. Jurisprudence on Education

The California Supreme Court has held that education is a fundamental right.[159] In New York, to the probable vexation of the plaintiffs in *Wright*, the law is not as clear—in fact it is decidedly ambiguous. The plaintiffs stress that "New York's Constitution guarantees all children in the State a sound basic education."[160] However, absent from their analysis is how that term has been judicially interpreted. New York's jurisprudence on the matter is muddled.[161] The instructive case is *Campaign for Fiscal Equity, Inc. v. State*.[162] In *Campaign*, the New York Court of Appeals reiterated that sound basic education is "the basic literacy, calculating, and verbal

156. Complaint, *supra* note 143, at 8 (citation omitted).

157. Jessica Bakeman, *Why Do New York's Poor Schools Have Lower-Rated Teachers?*, POLITICO (Sept. 8, 2014, 5:42 AM), http://www.capitalnewyork.com/article/albany/2014/09/8551986/why-do-new-yorks-poor-schools-have-lower-rated-teachers.

158. *Id.* (quoting a former state senator stating, "The road blocks [for education reform] are your traditional special interests that are involved in education, i.e., teachers' unions and their grassroots supporters, who say, 'give us more money, and everything will be better[.]'").

159. Butt v. State, 842 P.2d 1240, 1249 (Cal. 1992).

160. Complaint, *supra* note 143, at 2.

161. *See* Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 419 (2000) ("New York courts have cast serious doubt on whether the New York Constitution's educational article is enforceable against local school systems.").

162. 801 N.E.2d 326 (N.Y. 2003).

skills necessary to enable children to eventually function productively as civic participants."[163] However, the court was explicit in noting that New York does not guarantee "an education that approaches the national norm."[164]

The New York Court of Appeals, presented with the opportunity to deem education a fundamental right, declined to do so.[165] That said, however, the court did not unequivocally hold that education was not, and will never be deemed a fundamental right, as other states have.[166] The court's analysis follows similar logic to that of the Supreme Court in *San Antonio Independent School District v. Rodriguez.*[167] Further evidence tending to diminish the plaintiffs' prospects of success can be found in *Board of Education, Levittown Union Free School District v. Nyquist.*[168] In that case the New York Supreme Court, the state's appellate division, held that strict scrutiny is applicable only in cases with "classifications such as race, national origin, . . . or classifications that impinge upon a 'fundamental interest,'" not including education.[169] Here, it is unlikely that the plaintiffs would meet the stiff burden necessitating strict scrutiny.

In sum, despite the vigor of the plaintiffs and their advocates, it is unlikely that the court will disrupt the status quo implemented by the unions and their allies in Albany. Simply stated, the plaintiffs "must argue in a state that provides the lowest level of equal protection analysis to education."[170] It seems, therefore, that the institutional, political, and judicial burdens are too steep for success at this juncture.

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163. *Id.* at 330 (quoting Campaign for Fiscal Equality, Inc. v. State, 655 N.E.2d 661, 655 (N.Y. 1995)).

164. *Id.* at 339; *see also* Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982) ("[E]xpress articulation in [New York's] State Constitution, does not automatically entitle it to classification as a 'fundamental constitutional right' triggering a higher standard of judicial review for purposes of equal protection analysis.").

165. *Campaign*, 801 N.E.2d at 339.

166. *See, e.g.*, Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758, 786 (Md. 1983) (holding explicitly that education is not a fundamental right).

167. *See* Dejianne, *supra* note 139, at 340–41.

168. 443 N.Y.S.2d 843 (App. Div. 1981), *modified by* 439 N.E.2d 359 (N.Y. 1982).

169. *Id.* at 854 (footnotes omitted).

170. *See* Dejianne, *supra* note 139, at 352; *see also Nyquist*, 439 N.E.2d at 366 (holding that where a concern in question is a "matter of significant interest . . . [the court] employ[s] the rational basis test as the proper standard for review").

B. Connecticut

Unlike New York, a *Vergara* copycat suit has not (yet) been initiated in Connecticut; however, more so than New York, the conditions seem ripe for successful litigation. Of course, hurdles would have to be overcome—namely union power—but judicial precedent weighs in favor of potential plaintiffs challenging Connecticut's tenure laws.

Following the decision in *Vergara I*, Jennifer Alexander, the chief executive officer of ConnCan, an organization that supports education reform, stated: "The *Vergara* case exposed the fact that children have unequal access to quality teachers in California. This problem exists in Connecticut as well."[171] Echoing Alexander's sentiment are members of the Connecticut Parents Union like Gwen Samuels, who is betting on a *Vergara* copycat: "It has to come to Connecticut. It is just a matter of when. I think it will happen very soon."[172]

Unsurprisingly, the relentless and boundless influence of teachers' unions is present in Connecticut.[173] A Connecticut representative of the National Education Association referred to the *Vergara* lawsuits as an attempt "by millionaires . . . to undermine the teaching profession and push their own ideological agenda on public schools and students while working to privatize public education."[174] A local union representative, however, offered a more substantive rebuke of the differences between California and Connecticut, noting a challenge to Connecticut's tenure scheme would likely be unsuccessful, because in Connecticut it takes four years to earn tenure, as opposed to just two in California.[175] However, as Samuels avers, similar to California, "tenure, seniority, [and] last in, first out" still govern Connecticut schools.[176]

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171. Fitzgerald & Lambeck, *supra* note 135.

172. *Id.*

173. The Connecticut Parents Union ("CTPU") has the goal of remaking the State's entire public education system. *See* Educ. Action Grp., *Connecticut Parents Union Preparing for K–12 Reform 'War' with Teacher Union Leadership*, BREITBART (Feb. 15, 2012), http://www.breitbart.com/big-government/2012/02/15/connecticut-parents-union-preparing-for-k-12-reform-war-with-teacher-union-leadership. The CTPU is planning to aggressively take on Connecticut's teachers' unions, stating that the next "legislative session is going to be all about education reform" and "[i]t's going to be all-out war." *Id.*

174. Fitzgerald & Lambeck, *supra* note 135.

175. *Id.* (noting that the four year wait to obtain tenure is the longest in the nation).

176. *Id.* The Connecticut tenure law provides, *inter alia*, that tenure means "[t]he completion of forty school months of full-time continuous employment for the same board of education." CONN. GEN. STAT. ANN. § 10-151(a)(6)(A) (West 2015). "The contract of employment . . . shall be continued from school year to school year." *Id.* § 10-151(d). Moreover, in the event of

1. Connecticut's Teachers' Union

Connecticut state senator, Toni Boucher, suggested that a court challenge in Connecticut would have a tougher go than in California, because Connecticut's "courts and . . . General Assembly makeup may be more pro-union oriented than other states. As a result, tenure rules are difficult to change." [177] Utilizing the same study and metrics assessing union influence, it is easy to see why Connecticut's government institutions are beholden to the power of unions. According to the aforementioned Thomas B. Fordham study, Connecticut's union strength ranks seventeenth in the nation, or in the second tier.[178] The study notes "Connecticut boasts the highest teacher union membership in the nation. Its unions enjoy a broad scope of bargaining and favorable state policy environment."[179] In Connecticut, like New York, the teachers' union holds a significant amount of power locally and in Hartford. However, recently Connecticut's liberal Democratic Governor, Dannel Malloy—who was endorsed by Connecticut's two largest teachers' unions during his reelection campaign—has shown a willingness to buck and veto union-backed legislation. [180] Governor Malloy's willingness to spurn unions offers the real, albeit faint, prospect that the court will also heed to such a trend.

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elimination of the position to which the teacher was appointed or loss of a position to another teacher, if no other position exists to which such teacher may be appointed if qualified, provided such teacher . . . shall be appointed to a position held by a teacher who has not attained tenure . . . .

Id.

177. Fitzgerald & Lambeck, *supra* note 135.

178. WINKLER ET AL., *supra* note 150, at 97.

179. *Id.*; *see also* Megan Desombre, *What About the Undue Influence of the Teachers Union*, EDUC. BRIDGEPORT! (May 20, 2015), http://educationbridgeport.com/what-about-the-undue-influence-of-the-teachers-union (explaining that Connecticut's two largest teachers' unions had spent almost $1 million in lobbying during the first five months of 2015).

180. *See Teachers Union Lobbies Lawmakers to Override Malloy's Veto*, ST. SENATOR LEN FASANO (July 10, 2015), http://ctsenaterepublicans.com/2015/07/teachers-union-lobbies-lawmakers-to-override-malloys-veto-ct-news-junkie/.

2. Demographic Achievement Gap

Connecticut has the United States' largest achievement gap between minority students and their peers.[181] While data is lacking regarding whether Connecticut's achievement gap is due to a disproportionate amount of ineffective teachers being placed in low-income school districts, national data suggests that it is.[182] Moreover, the actions taken by Connecticut's chief executive tend to suggest the same. During Governor Malloy's 2012 "State of the State" he took the opportunity to question whether the tenure scheme was reasonable, noting that teachers could achieve tenure by just showing up to work.[183] However, Malloy's reform-minded rhetoric may have spoiled any hopes of legitimate and comprehensive tenure reform. Two years after his "State of the State," the Governor's "relationship with public-school teachers remains . . . problematic, as Malloy has expressed regret, though has made no outright apology, for asserting that teachers can get tenure for showing up."[184]

3. Jurisprudence on Education

The starkest distinguishing characteristic between Connecticut and New York regarding education is statewide jurisprudence. In *Horton v. Meskill*, [185] the Supreme Court of Connecticut asserted, without equivocation, "that, in Connecticut, elementary and secondary education is a fundamental right."[186] Such a holding is analogous to *Butt* in California. [187] The court further explained that because

181. Jacqueline Rabe Thomas, *Nation's Report Card: CT Continues to Show Largest Achievement Gap*, CT MIRROR (Nov. 8, 2013), http://ctmirror.org/2013/11/08/nations-report-card-ct-continues-show-largest-achievement-gap. For example, at Braeburn Elementary School in West Hartford, "92 percent of students were proficient in math, while the percentages for reading and writing were 88 and 93, respectively. But Braeburn's low-income students fared less well: 79 percent reached proficiency in math, while 63 and 69 percent did so in reading and writing, respectively." Sarah Butrymowicz, *Connecticut's Achievement Gap Not Just an Inner City Issue*, CT MIRROR (Mar. 15, 2011), http://ctmirror.org/2011/03/15/connecticuts-achievement-gap-not-just-inner-city-issue.

182. CHEN-SU CHEN ET AL., *supra* note 60, at 64–70.

183. Peter Applebome, *Malloy Urges New Tenure Rules For Teachers*, N.Y. TIMES (Feb. 8, 2012), http://www.nytimes.com/2012/02/09/nyregion/malloy-calls-for-new-teacher-tenure-rules-in-hartford-speech.html (quoting Governor Malloy, "[T]enure is too easy to get and too hard to take away").

184. Mark Pazniokas, *Malloy Works to Appease Teachers in 2014*, CT MIRROR (Jan. 6, 2014), http://ctmirror.org/2014/01/06/malloy-works-appease-teachers-2014.

185. 376 A.2d 359 (Conn. 1977).

186. *Id.* at 374.

187. Butt v. State, 842 P.2d 1240, 1243 (Cal. 1992); *see also supra* Section I.A.

education is a fundamental right, equal enjoyment of that right is subject to strict judicial scrutiny.[188]

The court in *Horton* additionally indicated that Connecticut's Constitution mandates "'appropriate legislation' to provide free public elementary and secondary schools in the state."[189] Such a broad and benevolent judicial interpretation leads one to believe that a complaint similar to *Vergara I*, tailored to Connecticut, would likely succeed and, indeed, that may be the case. [190] However, more recently the Connecticut Supreme Court has muddied the clarity of its past adjudication. In *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, the Supreme Court of Connecticut held that the fundamental right within the "state constitution encompasses a minimum qualitative standard that guarantees students the right to 'suitable educational opportunities.'"[191] The court opined that the state Constitution required "an education suitable to give [students] the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting, and to prepare them to progress to institutions of higher education."[192]

Despite some ambiguity, the synthesis of *Horton* and *Rell* suggests that the quality of education in Connecticut must meet a standard that permits all of Connecticut's students to progress into institutions of higher education, [193] and infringement thereof will result in strict judicial scrutiny. [194] Together, these cases, if presented with the appropriate evidence, suggest that Connecticut's courts could rule similarly to the superior court in California.

C. Maryland

In the wake of the superior court's decision in *Vergara I*, the editorial board of Maryland's most widely circulated newspaper, *The Baltimore Sun*, suggested that it was time to consider teacher tenure

188. *Horton*, 376 A.2d at 374.
189. *Id.* at 361 (citation omitted) (quoting CONN. CONST. art. VIII, § 1).
190. *See Vergara I*, No. BC484642, 2014 WL 6478415, at *7 (Cal. Super. Ct. Aug. 27, 2014); *see also supra* Section I.D.
191. 990 A.2d 206, 227 (Conn. 2010).
192. *Id.*; *see also id.* at 263 (Palmer, J., concurring in the judgment) ("The right established under [the state Constitution] requires only that the legislature establish and maintain a minimally adequate system of free public schools.").
193. *Rell*, 990 A.2d at 227.
194. *Horton*, 376 A.2d at 374.

reform in Maryland.[195] The editorial conceded that in 2010 Maryland enacted "modest reform," by extending the probationary period for teachers to earn tenure, but that it had no clear impact because "tenure remain[ed] essentially automatic after completion of the third year of teaching."[196] The editorial suggested that "the best argument for tenure is that it should be a reward to keep highly qualified and competent instructors in the classroom," but when achieving tenure is a foregone certainty at the conclusion of a teacher's third year, the benefit is pointless.[197] The article concluded by cautioning that if reforms were not enacted, the existing law could be challenged in court.[198] Shortly thereafter, Kalman Hettleman, a former member of the Baltimore School Board and former State Human Resources Secretary, offered a cautionary rebuke of the initial decision in *Vergara I* in the *Baltimore Sun*, stating that those "who care about public education should . . . be troubled. The role of teachers' unions has been misrepresented and undervalued. And that is particularly true in large urban school districts like Baltimore."[199]

The fault lines in Maryland have been drawn. And reform-minded education advocates and litigators might look at Maryland's tenure scheme and see it as an archetypical example for the pressing need for a *Vergara* copycat suit. However, aside from a stark achievement gap, the posited factors gauging potential litigatory success in *Vergara*-like suits yield a near perfect storm of barriers that will likely stymie any chance of success if a suit is brought.

1. Maryland's Teachers' Union

The Maryland State Education Association ("MSEA") is a powerful force in the Old Line State's politics and government.[200] Moreover, Maryland's teachers' union has been able to buck the national trend of

195. Editorial, *Time to Talk Teacher Tenure*, BALT. SUN (Aug. 23, 2014), http://www.baltimoresun.com/news/opinion/editorial/bs-ed-tenure-20140823-story.html.

196. *Id.*

197. *Id.*

198. *Id.*

199. Kalman R. Hettleman, *Teachers Unions: An Endangered Species*, BALT. SUN (Aug. 29, 2014), http://articles.baltimoresun.com/2014-08-29/news/bs-ed-teachers-unions-20140829_1_teachers-unions-national-education-association-american-federation. Hettleman further argued that "tenure is a convenient whipping-boy for conservative ideologues who want to bust teachers unions altogether," and that "teachers unions contribute in essential ways to the effectiveness of school systems." *Id.*

200. *See* MD. STATE EDUC. ASS'N, http://www.marylandeducators.org (last visited Sept. Nov. 16, 2017).

declining union membership.[201] Applying the aforementioned metrics measuring union power, Maryland ranks twenty-third overall in union power among the states.[202] However, the study notes that "Maryland teacher unions are among the strongest in the nation[,] . . . are effective in warding off proposals with which they disagree, and . . . need not compromise to see their preferred policies enacted at the state level."[203] That is not to say that Maryland's union has never been rebuffed by politicians or the electorate.

In 2010, for example, liberal governor Martin O'Malley, in conjunction with the Maryland General Assembly, enacted the Education Reform Act, which "increased the pre-tenure probationary period" and added student growth into teacher evaluations, despite union opposition.[204] Nevertheless, the initial goals of the legislation were clearly curbed due to union influence.[205] More recently, MSEA endorsed Democrat Anthony Brown for governor[206] only to see their political foe, Republican Larry Hogan, capture the governorship.[207] While the evidence suggests that Maryland's teachers' union is not a juggernaut of the Connecticut teachers' unions' ilk, it still boasts broad power and influence over the state's public institutions and would certainly weigh to the detriment of a possible *Vergara* copycat case.

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201. Allison Bourg, *Teacher Unions Remain Powerful Force in Maryland*, FREDERICK CTY. TEACHERS ASS'N (Apr. 10, 2014), http://myfcta.mseaeducators.org/news/teacher-unions-remain-powerful-force-in-maryland-2 ("In 2009, 71,000 teachers belonged to the [MSEA]. Five years later, it's about 73,000.").

202. WINKLER ET AL., *supra* note 150, at 181.

203. *Id.* at 182.

204. *Id.* at 183.

205. *See* Editorial, *Maryland's New Education Reform Is Only a Start*, WASH. POST (Apr. 18, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/17/AR2010041702505.html ("[I]t's distressing that union interests were able to water down [the bill's] worthy initiatives.").

206. Press Release, Md. State Educ. Ass'n, Maryland State Education Association Endorses Anthony Brown for Maryland's Next Governor (Oct. 19, 2013), http://www.marylandeducators.org/press/maryland-state-education-association-endorses-anthony-brown-maryland's-next-governor.

207. *Official 2014 Gubernatorial General Election Results for Governor/Lt. Governor*, ST. BOARD OF ELECTIONS, http://elections.state.md.us/elections/2014/results/General/gen_results_2014_2_003-.html (last updated Dec. 2, 2014, 3:17 PM); *see also* Mike Collins, *Right Stuff: Unions are Nervous as Hogan Takes Office*, CAP. GAZETTE (Jan. 20, 2015, 8:49 AM), http://www.capitalgazette.com/opinion/columns/ph-ac-ce-guest-column-use-this-one-20150120-story.html (stating that MSEA, upon the inauguration of Hogan, "launched a pre-emptive strike with a petition drive and radio advertisements urging the legislature and governor to protect its special interest").

2. Demographic Achievement Gap

While union influence will act as a hindrance to any *Vergara*-based lawsuit offered in Maryland, plaintiffs initiating a suit will have little issue demonstrating a vast racial and socioeconomic achievement gap in Maryland. In 2005, in Montgomery County, for example, African-American and Hispanic students underperformed compared to White students across all grade levels.[208] At the statewide level, Maryland's achievement gap is among the worst in the nation. [209] What is particularly concerning about Maryland's achievement gap is that from 2003 to 2013 the disparity widened despite overall gains in state administered examinations assessing student performance—suggesting that poor and minority students are being excluded from educational advancements.[210]

While demonstrating a nefarious achievement gap in Maryland will be relatively effortless, there is one issue that could complicate the presentation of statistics suggesting general inadequacy of Maryland public schools: Maryland has been hailed at the national level for its statewide education system. [211] Regardless, while Maryland may be recognized as having a strong public education system in totality, lifting the superficial veil of overall success reveals a clear and undisputed chasm between the achievement of white students and their poor and minority peers. It would be hard for courts to deny this overt fact, though an achievement gap is hardly dispositive when it comes to educational lawsuits.

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208. KAREN L. MAPP ET AL., PUB. EDUC. LEADERSHIP PROJECT, RACE, ACCOUNTABILITY, AND THE ACHIEVEMENT GAP (A) 1 (2006), http://pelp.fas.harvard.edu/files/hbs-test/files/pel043p2.pdf.

209. Press Release, MarylandCAN, New Data Reveal Maryland's Achievement Gaps Still Among Worst in Nation (Nov. 7, 2013) (on file with 50CAN) ("The gap in average math scores between black and white fourth-graders in Maryland is fifth-worst in the nation, and in reading the gap is ninth-worst . . . .").

210. Mark Newgent, *Education Disparities Remain Despite Maryland's Test Score Gains*, RED MD. (Nov. 13, 2014, 6:10 AM), http://redmaryland.com/2014/11/educationdisparities-remain-despite-marylands-test-score-gains/ ("Maryland ranked second to last in the nation, just ahead of Michigan, with only 10 percent of students in large cities scoring proficient or better on the 2013 [National Assessment of Educational Progress] fourth-grade reading assessment.").

211. Liz Bowie, *Maryland Slips from First to Third in National Education Ranking*, BALT. SUN (Jan. 8, 2015, 12:45 AM), http://www.baltimoresun.com/news/maryland/education/bs-md-maryland-number-three-20150108-story.html.

3. Jurisprudence on Education

Maryland's jurisprudence is likely to act as a lethal agent preventing any hopes of possibly reforming Maryland's tenure laws through the judicial process. In 1983, the Court of Appeals of Maryland—Maryland's court of last resort—held in *Hornbeck v. Somerset County Board of Education* that "education is not a fundamental right for purposes of equal protection analysis" under the Maryland Declaration of Rights.[212] In *Hornbeck,* the court likened education to personal security, fire protection, and health care—government services that while important, do not necessitate the application of strict scrutiny.[213] The court noted that even if education were a fundamental right, absent a significant deprivation of that right, strict scrutiny would not be applied.[214] The court further concluded that wealth or lack thereof was not a suspect classification triggering strict scrutiny.[215]

For a *Vergara* case to succeed in Maryland, therefore, plaintiffs would be dependent on the lowest level of scrutiny, rational basis, thus rendering the prospects of success an unattainable myth as "rational basis review grants statutes a presumption of constitutionality, which plaintiffs can overcome only with clear and convincing evidence that the statute's classification is 'essentially arbitrary.'" [216] The decision in *Hornbeck*, albeit in dicta, offers one lone element of encouragement, as the court did suggest that the state had a duty "to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child."[217] However, it is unlikely that a passing statement of mere dicta will serve as an adequate basis for a plaintiff's legal argument in a *Vergara*-esque case.

In Maryland, the inability of potential plaintiffs to raise the level of scrutiny when assessing the constitutionality of the state's tenure scheme will likely sully any hope of successful litigation. Unlike, New York, where the court has left unanswered the question of whether education is a fundamental right, the court in Maryland has adopted a

212. 458 A.2d 758, 786 (Md. 1983).
213. *Id.*; *see also* Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982).
214. *Hornbeck*, 458 A.2d at 782–83.
215. *Id.*
216. Andrew E. Goldsmith, *The Bill for Rights: State and Local Financing of Public Education and Indigent Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 89, 124 (2005).
217. *Hornbeck*, 458 A.2d at 780.

hard line, explicitly holding the negative, rendering successful legal challenges within the realm of education a difficult task.

III. RECONSIDERING PUBLIC EDUCATION LAWS

Where students, parents, and advocates, as plaintiffs, cannot sue to achieve education reform, it is incumbent upon the legislature to act on their behalf. However, union interest groups have been proven quite adept at quashing many of the policies typical among proponents of education reform. Therefore, "teacher reform proposals will only gain traction when state policymakers sense an acute demand among a significant majority of the public for a departure from the status quo."[218] The electorate, recognizing deficiencies in education, must coalesce and aggressively advocate for reform oriented policies to counter the influence teachers and their unions wield over state policymakers.

In California, despite the State's appeal of the superior court's decision in *Vergara I,* Republican legislators decided to expedite the process of reforming the state's tenure scheme. [219] Republican Assemblyman Rocky Chavez introduced a *Vergara*-influenced bill in April 2015.[220] The bill aimed to remedy the constitutional violations present in California's tenure scheme, while simultaneously ameliorating the demographic and socioeconomic achievement gap in California.[221] Chavez's bill would have extended the probationary period to three years for awarding tenure and require positive evaluations for each of those years as a prerequisite for being considered for tenure.[222] The bill addressed two of the concerns highlighted in the *Vergara* litigation; however, the issue of LIFO was addressed separately.[223] Therefore, concurrent with Chavez's bills, Assemblywoman Catharine Baker introduced a bill that would have repealed California's LIFO statute. [224] The bill proposed, *inter alia,* that school districts and

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218. Michael T. Hartney & Patrick Flavin, *The Political Foundations of the Black–White Education Achievement Gap,* 42 AM. POL. RES., no. 1, at 3, 8 (2014).

219. John Fensterwald, *Republicans' Bill Would Change Teacher Tenure, Layoff Laws,* EDSOURCE (Mar. 5, 2015) [hereinafter Fensterwald, *Republicans' Bill*], http://edsource.org/2015/republicans-bills-would-change-teacher-tenure-layoff-laws/75999 (noting that Democrats, who control both houses of the California legislature, are "watching the appeals process play out before deciding whether to change laws").

220. Assemb. B. 1248, 2015–2016 Leg., Reg. Sess. (Cal. 2015).

221. Fensterwald, *Republicans' Bill, supra* note 219.

222. *Id.* The bill further provides that a "teacher deemed to be ineffective in two consecutive annual evaluations would lose tenure status and once again be placed under probation." *Id.*

223. *See* Assemb. B. 1044, 2015-2016 Leg., Reg. Sess. (Cal. 2015).

224. *Id.*

teachers' unions would be tasked with negotiating new criteria, other than mere seniority, for layoff procedures.[225] Unfortunately, the bills proposed in the wake of the Superior Court's decision in *Vergara I* were essentially dead on arrival in the Democrat-dominated California Assembly. The force behind killing the bills was quite obvious—influence and pressure wielded by California's two predominant teachers' unions.[226]

It has become abundantly clear in California that attempts at enacting education reform are being stalled by teachers' unions and those beholden to their political strength—namely Democrat officeholders.[227] However, teachers' unions' support of Democrats, and subsequent expectation of reciprocal support, is not unique to California—it pervades from state-to-state to offices as high as the presidency.[228] That is not to say, however, there are no Democrats in

225. Fensterwald, *Republicans' Bill*, *supra* note 219 ("Seniority could still be one factor, but the bill would require that a 'significant' component be based on a teacher's 'evaluation rating.'").

226. *See* Jeremy B. White, *Democrats Kill Republican Bills on Teacher Tenure, Firing*, SACRAMENTO BEE (Apr. 29, 2015, 4:00 PM), http://www.sacbee.com/news/politics-government/capitol-alert/article19903074.html ("Representatives of the CTA and the California Federation of Teachers union testified against the bills . . . , as did long lines of working teachers."); *see also* John Hrabe, *Sacramento Report: What the Hell Are We Doing?*, VOICE SAN DIEGO (May 1, 2015), https://www.voiceofsandiego.org/topics/news/sacramento-report-what-the-hell-are-we-doing/ ("Opposition from the state's teacher's union was enough to kill the bill . . . .").

227. *See* Chris Megerian, *Unions Remain a Crucial Backer of Gov. Jerry Brown's Campaign*, L.A. TIMES (Oct. 23, 2014, 3:00 AM), http://www.latimes.com/local/politics/la-me-pol-brown-unions-20141023-story.html ("Unions have contributed about $3 million to [Governor Jerry Brown's] reelection account . . . ."); *see also Legislature Too Beholden to Teachers Union*, OLSEN ON THE ISSUES (Kristin Olsen, Cal.), Oct. 2012 (criticizing Democrats for blocking a bill that would have expedited the process of dismissing teachers in cases of sexual abuse because legislators, "believe making unions happy is more important than the very safety of our students"); Stephanie Simon, *Union Power on the Ballot*, POLITICO (Oct. 29, 2014, 5:08 AM), http://www.politico.com/story/2014/10/union-power-california-superintendent-112279 (noting the prodigious sums of money being poured in by California's teachers' unions for their candidate in the race for California superintendent of public instruction).

228. "Of the National Education Association's $30 million in federal campaign contributions since 1990, 93 percent has gone to Democrats or the Democratic Party. Of the $26 million in federal campaign contributions by the American Federation of Teachers, 99 percent has gone to Democrats or the Democratic Party." Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 CATO J. 155, 155 (2010); *see also* Lauren Camera, *Teachers' Unions to Spend More Than Ever in State, Local Elections*, EDUC. WEEK (Oct. 22, 2014), http://www.edweek.org/ew/articles/2014/10/21/10campaign

favor of appreciable education reform.[229] Regardless, it is undeniable that teachers' unions' political spending stifles education reform to the benefit of their members and the detriment of students.[230]

Therefore, in order to enact measurable education reform, it is necessary for policymakers to act outside the purview of teachers' unions. As such, Republican governors and Republican-controlled legislatures,[231] as well as a select class of urban mayors,[232] are uniquely primed to pursue educational reforms. The question remains, however,

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finance.h34.html (noting that the two major national teachers' unions were expected to spend heavily with the intention of "unseating Republican governors and flipping control of conservative state legislatures").

229. *See* DEMOCRATS FOR EDUC. REFORM, http://dfer.org/ (last visited Nov. 16, 2017) ("We are Democrats leading a political reform organization that cultivates and supports leaders in our party who champion America's public school-children."); *see also* Molly Ball, *Why Do Liberals Hate Cory Booker?*, ATLANTIC (Aug. 23, 2013), http://www.theatlantic.com/politics/archive/2013/08/why-do-liberals-hate-cory-booker/278992/ ("Booker's major substantive difference with many progressives is on education policy.").

230. As Coulson, *supra* note 228, at 166, notes:

> The NEA and AFT spend large sums on political lobbying so that public school districts maintain their monopoly control of more than half a trillion dollars in annual U.S. K-12 education spending. That monopoly, in turn, offers a more than 40 percent average compensation premium over the private sector, along with greater job security. And since both the U.S. and international research indicate that achievement and efficiency are generally higher in private sector—and particularly *competitive market*—education systems, the public school monopoly imposes an enormous cost on American children and taxpayers.

See also Lindsey Burke, *Creating a Crisis: Unions Stifle Education Reform*, HERITAGE FOUND. (July 20, 2010), http://www.heritage.org/research/reports/2010/07/creating-a-crisis-unions-stifle-education-reform.

231. *See, e.g.*, John Hanna, *Analysis: Kansas Poised to End K–12 Teacher Tenure*, WASH. TIMES (Apr. 13, 2014), http://www.washingtontimes.com/news/2014/apr/13/analysis-kansas-poised-to-end-k-12-teacher-tenure/ (finding that the Republican Kansas Governor Sam Brownback was "certain to resist pressure to veto a proposal that would end tenure for public school teachers"); Andy Sher, *Gov. Haslam Signs Tenure Bill into Law*, TIMES FREE PRESS (Apr. 12, 2011), http://www.timesfreepress.com/news/local/story/2011/apr/12/gov-haslam-signs-tenure-bill-law/47231/ (describing the politics behind tenure reform in Tennessee with "[m]ost Democrats oppos[ing] the measure" while Republican legislators and the Republican governor approved of the bill); *see also New Republican Governors Mark 100 Days*, REPUBLICAN GOVERNORS ASS'N (Apr. 27, 2011), http://www.rga.org/new-republican-governors-mark-100-days/ (cataloging the education reform initiatives taken by newly elected G.O.P. governors).

232. *See* Nicholas Dagostino, Note, *Giving the School Bully a Timeout: Protecting Urban Students From Teachers' Unions*, 63 ALA. L. REV. 177, 218 (2011) ("Liberal mayors of large urban cities are better able to politically overcome union resistance because their constituents see first-hand just how bad the schools are, and there are enough voters with other interests to overcome the unions' political power.").

as to what that legislation should look like.[233] The United States' federal system, to its credit, furnishes "a single courageous state [to], if its citizens choose, serve as a laboratory; and try novel social and economic experiments."[234] As a result, the state of teacher tenure schemes varies among the several states and territories[235]—with some jurisdictions setting the pace as legislative innovators whose policies should be envied and, ideally, replicated.[236] Oftentimes, policymakers see tenure reform as an end in and of itself, however, that is a

233. Dejianne offers one legislative avenue for states to take. Dejianne, *supra* note 139, at 359. Specifically, the author suggests that states adopt an approach similar to that of New Jersey in 2012—the TEACHNJ Act, N.J. STAT. ANN. § 18A:6-117 (West 2012). *Id.* Advocacy for such a law in a comment centered on *Vergara* and its progeny, however, is borderline preposterous. The author commends the law as eliminating tenure as a "rubberstamp process" while also requiring "a more thoughtful evaluation of a teacher's skills and training over four years. The evaluations are regulated by uniform state standards and are administered by various education experts and professionals." *Id.* at 358. And that is true. However, conspicuously absent from the author's analysis of the law (and the law itself, frankly) is any reform regarding LIFO. The plaintiffs and the court in *Vergara I* railed adamantly against California's LIFO laws, stating the logic behind the laws was "unfathomable and . . . constitutionally unsupportable." *Vergara I*, No. BC484642, 2014 WL 6478415, at *6 (Cal. Super. Ct. Aug. 27, 2014); *see also supra* note 96 and accompanying text. New Jersey's education reforms in 2012, however, explicitly failed to address New Jersey's LIFO laws. In fact, New Jersey State Senator Joe Kyrillos recognized this fact when, in light of the ruling in *Vergara I*, he announced that he would re-introduce "legislation [that] would eliminate in New Jersey last-in, first-out or 'LIFO' protections." Jeremy Rosen, *Kyrillos to Re-Introduce Full Tenure Reform, in Light of Landmark Ruling in California*, SENATOR JOE KYRILLOS (June 11, 2014), http://www.senatenj.com/index.php/kyrillos/kyrillos-to-re-introduce-full-tenure-reform-in-light-of-landmark-ruling-in-california/18063. Accordingly, a central tenet of any legislation attempting to enact or bolster *Vergara*-style reform must be LIFO reform.

234. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* U.S. CONST. amend. X.

235. *See* EDUC. COMM'N OF THE STATES, TEACHER TENURE OR CONTINUING CONTRACT LAWS 2–31 (2011) (cataloging and comparing teacher tenure policies throughout the United States).

236. *See generally* CAROL INNERST, COMPETING TO WIN: HOW FLORIDA'S A+ PLAN HAS TRIGGERED PUBLIC SCHOOL REFORM (2000), https://www.edreform.com/wp-content/uploads/2013/03/Competing-to-Win-FL-report-2000.pdf (discussing education reform in Florida); MATTHEW LADNER & LINDSEY M. BURKE, CLOSING THE RACIAL ACHIEVEMENT GAP: LEARNING FROM FLORIDA'S REFORMS 1–14 (Heritage Found., Backgrounder rev. 2010), http://thf_media.s3.amazonaws.com/2010/pdf/bg2468.pdf ("In 1999, Florida enacted a series of far-reaching K–12 education reforms that have increased academic achievement for all students and substantially narrowed the racial achievement gap."); Thomas Dee & James Wyckoff, *Incentives, Selection, and Teacher Performance: Evidence from IMPACT* (Nat'l Bureau of Econ. Research, Working Paper No. 19529, 2013), http://www.nber.org/papers/w19529.pdf.

shortsighted miscalculation.[237] The best policies will enact tenure reform accompanied with merit pay incentives and loosened or eliminated seniority rights.[238]

Looking at the states as "laboratories of democracy," model tenure reform could come in the form of a hybrid between Florida's A+ Plan for Education and Washington, D.C.'s IMPACT Plan.[239] These plans, if successfully combined and implemented, provide a prescription to the legal and practical concerns stressed by the Superior Court in *Vergara I*—that is, permanent employment and excessive due process for teachers, gratuitous hiring and firing practices based solely upon seniority, and racial and socioeconomic achievement gaps.[240]

Florida's A+ Plan for Education, enacted in 1999 under Governor Jeb Bush, "ranks as perhaps the greatest public policy success story of the past decade."[241] Under the plan, Florida enacted provisions that hold schools more accountable for student performance,[242] grant teachers payment incentives for "student gains,"[243] while also effectively eliminating tenure.[244] Absent from Florida's late 1990s education initiative, however, was a loosening of seniority protections, thus, elements of Washington, D.C.'s IMPACT Plan act as an appropriate legislative complement. In 2010, Michelle Rhee, the former Chancellor of Public Schools of Washington, D.C., orchestrated an agreement between the District Council and the D.C. teachers' union "that weakened teachers' seniority protection, in return for 20 percent raises and bonuses of $20,000 to $30,000 for teachers who meet certain

237. *See* Matthew M. Chingos, *Ending Teacher Tenure Would Have Little Impact on its Own*, BROOKINGS INST. (Sept. 18, 2014), https://www.brookings.edu/research/ending-teacher-tenure-would-have-little-impact-on-its-own/.

238. *See id.*

239. *See* INNERST, *supra* note 236, at 4–5; Dee & Wyckoff, *supra* note 236, at 26–29.

240. *See supra* Section I.D.

241. FOUND. FOR EXCELLENCE IN EDUC., FLORIDA'S EDUCATION REVOLUTION 2 (2013), http://www.excelined.org/wp-content/uploads/Floridas-Education-Revolution-Summary-2013.pdf.

242. *Id.* at 4 ("State officials grade schools using an objective and transparent A through F grading scale based upon the proficiency and learning gains of students as measured by the Florida Comprehensive Assessment Test (FCAT).").

243. LADNER & BURKE, *supra* note 236, at 2, 10 ("Florida's performance pay system rewards teachers who achieve student gains . . . . It also provides bonuses for teachers who increase the number of students who pass Advanced Placement (AP) courses.").

244. *Individual State Profile – Florida: Teacher Tenure 2014*, EDUC. COMM'N STATES, http://ecs.force.com/mbdata/mbstprofexc?Rep=TTP&st=Florida (last visited Sept. 1, 2017) ("Because all teachers are awarded an annual contract regardless of probationary status, Florida has essentially eliminated tenure.").

standards, including rising test scores," [245] as one aspect of her ambitious overhaul of the District's public school system.

Synthesizing Florida's A+ Plan for Education and Washington, D.C.'s IMPACT Plan appropriately address the statutory provisions that led to California's constitutional crisis of multi-tiered education—as their combined effects promoted improved education standards and mitigated racial and socioeconomic achievement gaps. For example, when Jeb Bush took office in Florida, the state had a high school graduation rate of just fifty-two percent.[246] In the wake of the A+ Plan, however, that rate increased by twenty-five percentage points.[247] More importantly, Florida is one of the only states in the country that is truly closing the achievement gap between whites and minorities. [248] Furthermore, in Washington, D.C., moving from a seniority-based tenure program to one based upon incentives has had a marked impact on teacher performance and retention.[249]

The results of these plans address the concerns of students and parents, as well as teachers and their unions. Under a fusion of the A+

245. Tamar Lewin, *School Chief Dismisses 241 Teachers in Washington*, N.Y. TIMES (July 23, 2010), http://www.nytimes.com/2010/07/24/education/24teachers.html. It should be noted that Rhee "initially proposed teacher salary raises of up to $40,000 financed by private foundations in exchange for teachers giving up tenure." LELAN DUNAVANT ET AL., RHEE-BUILDING DCPS: AN ORGANIZATIONAL THEORY CASE STUDY 4 (2012).

246. Allison Nielsen, *Florida Celebrates 15 Years of A+ Plan for Education*, SUNSHINE ST. NEWS (July 2, 2014, 6:00 PM), http://www.sunshinestatenews.com/story/florida-celebrates-15-years-plan-education.

247. *Id.* (noting that Florida is still five points below the national average, despite the dramatic increase).

248. *See* FOUND. FOR EXCELLENCE IN EDUC., *supra* note 241, at 3 ("Florida's Hispanic students are now reading as well or better than the statewide average of *all students* in 21 states . . . ."); *Jeb Bush Speaks Out*, EDUC. NEXT (Nov. 12, 2014), http://educationnext.org/jeb-bush-speaks-interview/ ("In the 1990s, . . . almost half [of Florida's] 4th graders read below a basic level. For [Florida's] low-income kids, the number was more than 60 percent. [By] 2013 . . . , Florida's low-income 4th graders were tops in the nation for reading achievement."); *see also Florida Minority Students Closing the Achievement Gap*, RICK SCOTT (Dec. 5, 2013), http://www.flgov.com/2013/12/05/florida-minority-students-closing-the-achievement-gap/.

249. Dee & Wyckoff, *supra* note 236, at 28 ("Overall, the evidence . . . indicates high-powered incentives linked to multiple indicators of teacher performance can substantially improve the measured performance of the teaching workforce."); Brooke Donald, *Incentive Plan for Washington Teachers Drives Performance Gains, Stanford, Virginia Researchers Say*, STANFORD (Oct. 17, 2013), http://news.stanford.edu/news/2013/october/dee-teacher-assessments-101713.html ("[The IMPACT Plan] appears to have caused hundreds of teachers in the district to improve their performance markedly while also encouraging some low-performing teachers to voluntarily leave the district's classrooms . . . .").

plan and the Impact plan, increased student performance and a decreased achievement gap are not incongruent with union desires for rewards, retention, and security for effective teachers. This is a result that should be praised by parents, teachers, and policymakers alike, not scathingly hailed as a scheme designed to attack educators.[250]

CONCLUSION

"An investment in knowledge pays the best interest,"[251] and all of America's students deserve an equal opportunity to thrive in school and flourish in life. In California, nine plaintiffs, heeding such sentiment, took to the courts to recoup the fundamental right to education that anachronistic laws unjustifiably denied. The Superior Court in *Vergara I* correctly decided that the consequence of California's tenure scheme was tantamount to an institutionally imposed two-tiered educational system, thus violating the equal protection clause of the California Constitution. Moving beyond the borders of the Golden State, it appears that the probability of similar legal success depends upon several conditions—chief among those being the constitutional obligation for public education in a given state.

It has become apparent that, in the realm of public education, momentum favors reform. There are reform-minded policies in practice today that can and should be replicated across the United States, even if tailored to the unique contours of a given jurisdiction. What is paramount is that stakeholders demand reform. Where the calculus is ripe for litigation—litigate. Where the environment is right for legislation—legislate. Where neither litigation nor legislation appears viable—advocate. The stakes surrounding education are too great to relent to the self-serving priorities of special interest groups.

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250. *Compare* Dagostino, *supra* note 232, at 218 (describing New Jersey's attempts at education reform as an alliance with "Governor Chris Christie (Republican) working closely with [former] Newark Mayor Cory Booker (Democrat) to reform the Newark city schools" (citation omitted)), *with* Justin Schwarm, Note, *Reform of New Jersey's Public Schools: Towards Regionalization*, 62 RUTGERS L. REV. 1063, 1067 (2010) (describing Chris Christie's attempts at education reform as an "outright attack[] on the teachers' unions").

251. *In re* Marriage of David H.B. & Linda E.B., No. 2–15–0772, 2015 WL 9485761, at *19 (Ill. App. Ct. Dec. 28, 2015) (quoting Benjamin Franklin).