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## Squeezing Public Schools' Lemons: Theorizing an Adequacy Challenge to Teacher Tenure

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# Squeezing Public Schools' Lemons: Theorizing an Adequacy Challenge to Teacher Tenure

Peter M. Szeremeta\*

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\* J.D. Candidate May 2017, Washington and Lee University School of Law. I would like to thank my family for their unwavering support and editorial insights on this Note. I would further like to thank Professor Hu for her counsel on the constitutional law questions presented in this Note. I would also like to thank the following educators: Dwight Ho-Sang, Claudine Miles, Nate Snyder, Margaret Dantzler, and Vivian Pyles. These stellar instructors greatly informed my own experience as a teacher and showed me firsthand the power that an educator can have on the trajectory of a young person's life. Lastly, I would like to dedicate this Note to my mother, Caroline Szeremeta, who was always my dearest advisor and my most profound role model.

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### *I. Introduction*

Tupac Shakur once analogized the urban minority student to a rose growing in concrete.<sup>1</sup> As applied to education, the roses represent successful, college-educated members of society. The U.S. public education system's objective is to produce as many roses as possible, despite the inevitability that not all students will blossom into roses.<sup>2</sup>

This is where the concrete factors in. While all schools aim to produce as many roses as possible, the growing conditions in many schools more closely resemble concrete than fertile garden soil.<sup>3</sup> Concrete-like conditions embody deficiencies in many areas deemed necessary for student educational achievement, such as school funding, technological resources, and teacher quality.<sup>4</sup>

The contrast between concrete schools and garden schools forms a symbolic backdrop for the widening of the achievement gap in the United States. The “achievement gap” refers to the growing disparity between the educational experiences of white and minority students.<sup>5</sup> Despite increased integration in the decades

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1. See TUPAC SHAKUR, *THE ROSE THAT GREW FROM CONCRETE* 3 (2009) (reciting the difficulties that minority children face).

2. See *Overview and Mission Statement*, U.S. DEPT' EDUC., <http://www2.ed.gov/about/landing.jhtml> (last visited Sept. 30, 2016) (stating that the Department of Education's mission is to “promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access”) (on file with the Washington and Lee Law Review).

3. See Jeff M.R. Duncan-Andrade, *Note to Educators: Hope Required When Growing Roses in Concrete*, 79 HARV. EDUC. REV. 181, 181–94 (2009) (noting the difficulty of growing young people in “concrete”).

4. See *id.* (explaining that “the quality of our teaching, along with the resources and networks we connect our students to” are the cracks in the concrete that allow students to grow).

5. See Catherine E. Lhamon, “*Dear Colleague*” Letter, U.S. DEPT' EDUC. OFF. OF C.R. 3–4 (Oct. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> (describing on average the many differences

following *Brown v. Board of Education*,<sup>6</sup> recent studies indicate that re-segregation has steadily become the norm in public schools since the 1980s.<sup>7</sup> In nearly every significant category of academic achievement, black and Latino students lag behind their white counterparts.<sup>8</sup> This holds true for elementary and middle school standardized test scores,<sup>9</sup> SAT scores,<sup>10</sup> and high school graduation rates.<sup>11</sup>

From *Brown* to the present day, the achievement gap has prompted students to pursue legal challenges to educational inequality under the umbrella of equal protection.<sup>12</sup> Most

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between white and black students, from percentage of students enrolled in AP classes, to quality educational facilities).

6. 347 U.S. 483 (1954).

7. See ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 31 (2003) (finding that “over 70% of black students attend predominantly minority schools,” defined as schools with 50–100% minority student populations); see also Nikole Hannah-Jones, *School Districts Still Face Fights—and Confusion—on Integration*, ATLANTIC (May 2, 2014), <http://www.theatlantic.com/education/archive/2014/05/lack-of-order-the-erosion-of-a-once-great-force-for-integration/361563/> (last visited Sept. 30, 2016) (stating that over 300 school districts are still under active desegregation orders) (on file with the Washington and Lee Law Review).

8. See Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 41 (2006) (noting that black and Latino students predominantly attend “minority, low-income, urban schools”).

9. See U.S. DEP'T OF EDUC., NCES 2015-018, SCHOOL COMPOSITION AND THE BLACK-WHITE ACHIEVEMENT GAP 3 (2015), [https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school\\_composition\\_and\\_the\\_bw\\_achievement\\_gap\\_2015.pdf](https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf) (referencing the results of the National Assessment of Educational Progress (NAEP) Grade 8 mathematics test, in which black students scored, on average, thirty-one points lower than white students did).

10. See THE COLLEGE BD., SAT PERCENTILE RANKS FOR 2013 COLLEGE-BOUND SENIORS 1 (2013), <http://media.collegeboard.com/digitalServices/pdf/research/SAT-Percentile-Ranks-By-Gender-Ethnicity-2013.pdf> (finding that, among SAT test-takers in 2013, the mean cumulative score of an African-American student was 1278, compared to the mean score of 1576 for a white student).

11. See Gary Orfield et al., *Losing Our Future: How Minority Youths Are Being Left Behind by the Graduation Rate Crisis*, THE CIVIL RIGHTS PROJECT, <https://civilrightsproject.ucla.edu/research/k-12-education/school-dropouts/losing-our-future-how-minority-youth-are-being-left-behind-by-the-graduation-rate-crisis/orfield-losing-our-future-2004.pdf> (last visited Sept. 30, 2016) (presenting national high school graduation rates from 2001 that list the graduation rates for Blacks and Hispanics at 50.2% and 53.2%, respectively, compared to 74.9% for White) (on file with the Washington and Lee Law Review).

12. See John Dayton & Anne Dupre, *School Funding Litigation: Who's*

challenges have centered on quantitative disparities between concrete and garden schools, such as unequal levels of funding.<sup>13</sup> Quantitative school-funding challenges are an obvious starting point for legal challenges to educational inequality. One can measure a district's amount of per-pupil funding and easily identify district-wide funding disparities.<sup>14</sup> These challenges allege the following syllogism: greater funding leads to greater resources; greater resources result in superior educational opportunities; therefore more funding necessarily leads to greater educational outcomes.<sup>15</sup> Notwithstanding the importance of adequate funding, education achievement statistics in states that have won funding challenges suggest that money might not be the variable best suited to transform the concrete into a rose garden.<sup>16</sup>

Recent studies indicate that teacher effectiveness is the most significant determining factor behind a student's quality of education.<sup>17</sup> This growing recognition of the importance of teacher

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*Winning the War?*, 57 VAND. L. REV. 2351, 2358 (2004) (asserting that *Brown* sparked the "modern revolution in school funding equity").

13. See *id.* at 2354 (noting that after the California Supreme Court struck down unequal school funding in *Serrano v. Priest*, most states have experienced similar forms of school funding litigation).

14. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 12–13 (1973) (comparing the per-pupil funding of San Antonio school districts while also factoring in those districts' racial makeup).

15. See, e.g., *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1244 (Cal. 1971) (asserting that funding disparities are directly responsible for the wide gap in quality of educational opportunities).

16. See *infra* note 17 and accompanying text (citing studies which describe the immense value of effective teaching).

17. See, e.g., Raj Chetty, John N. Friedman & Jonah E. Rockoff, *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 AM. ECON. REV. 2633, 2675 (2011) (using value-added analysis to determine that an ineffective teacher decreases the lifetime earning capacity of a single classroom by \$1.4 million); Thomas J. Kane, Andrew Bacher-Hicks & Douglas O. Staiger, *Validating Teacher Effect Estimates Using Changes in Teacher Assignments in Los Angeles* 12–13 (Nat'l Bureau of Econ. Research, Working Paper No. 20657, 2014) (finding substantially higher levels of student achievement with teachers in the seventy-fifth percentile); Steven G. Rivkin, *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417, 419 (2005) ("The results reveal large differences among teachers in their impacts on achievement and show that high quality instruction throughout primary school could substantially offset disadvantages associated with low socioeconomic background.").

effectiveness prompted the lawsuit in *Vergara v. California*.<sup>18</sup> In *Vergara*, nine student plaintiffs argued that their quality of education was so poor that it violated their equal protection rights under the California constitution.<sup>19</sup> Instead of challenging funding, the *Vergara* plaintiffs attacked California's teacher tenure statutes, alleging that these laws operated to secure permanent employment for grossly ineffective teachers.<sup>20</sup> While acknowledging that the problem of strict teacher tenure affects students statewide, the *Vergara* complaint also alleged that the tenure laws' deleterious effects are most acute in schools serving predominantly minority students.<sup>21</sup>

In an unprecedented decision, Judge Rolf Treu invalidated California's teacher tenure statutes.<sup>22</sup> The decision predictably received instant rebuke from teacher unions,<sup>23</sup> but high-profile education figures like former U.S. Secretary of Education Arne Duncan lauded *Vergara*'s implications.<sup>24</sup> Judge Treu relied on

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18. See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*3–4 (Cal. Super. Ct. Aug. 27, 2014) (recognizing the “growing body of research” that recognizes teacher quality as the paramount factor in student development).

19. See 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?\\_r=0](http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html?_r=0) (last visited Sept. 30, 2016) (providing background information on the *Vergara* plaintiffs) (on file with the Washington and Lee Law Review).

20. See Amended Complaint for Declaratory and Injunctive Relief at 1, *Vergara v. State*, No. BC484642, 2014 WL 6478415 [hereinafter *Vergara* Complaint] (asserting that the tenure statutes force school administrators to act without their students' best interests in mind when making employment and dismissal decisions).

21. See *id.* (claiming that tenure statutes “make the quality of education provided to school-age children in California a function of race . . . in violation of the equal protection provisions of the California Constitution”).

22. See *Vergara*, 2014 WL 6478415, at \*7 (finding that each tenure statute could not meet strict scrutiny).

23. See *Issues and Action: Vergara v. State of California*, CAL. TCHRS. ASS'N, <http://www.cta.org/Vergara> (last visited Sept. 30, 2016) (asserting that the *Vergara* complaint focused on the “wrong problems” and that Judge Treu's holding circumvented the legislative process) (on file with the Washington and Lee Law Review).

24. See Press Release, Arne Duncan, U.S. DEPT' EDUC., Statement from U.S. Secretary of Education Arne Duncan Regarding the Decision in *Vergara v. California* (June 10, 2014) <http://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-regarding-decision-vergara-v-califo> (last visited Sept. 30, 2016) (“This decision presents an opportunity . . . to build a new framework for the teaching profession that protects students' rights to equal

precedent from the Supreme Court of California to find that the California constitution provides each student with the fundamental right to an equal education.<sup>25</sup> Reviewing each tenure provision under strict scrutiny, Judge Treu found that the government interest behind each tenure provision was not sufficiently compelling to withstand constitutional challenge.<sup>26</sup>

Judge Treu also found that schools with predominantly minority populations employ the greatest number of grossly ineffective teachers.<sup>27</sup> By referencing this disproportionate burden on minority students, Judge Treu seemed to indicate that the tenure laws could have also been struck down on a disparate impact theory.<sup>28</sup> Because the tenure laws do not explicitly discriminate against minority students, plaintiffs would need to prove that the tenure laws nonetheless impose a discriminatory effect on minority students.<sup>29</sup> While the parties to *Vergara* dispute the applicable standard for disparate impact, under either interpretation plaintiffs would have to show that California's grossly ineffective teachers are disproportionately staffed in predominantly minority schools.<sup>30</sup>

The *Vergara* ruling—though only a trial court decision—captured national attention because of its potential to open a new era of education litigation.<sup>31</sup> While previous lawsuits focused on

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educational opportunities.”) (on file with the Washington and Lee Law Review).

25. See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*3 (Cal. Super. Ct. Aug. 27, 2014) (claiming that the California constitution is the “ultimate guarantor of a meaningful, basically equal educational opportunity”).

26. See *id.* at \*5 (finding that the defense could not even present a “legally cognizable reason” to support the Permanent Employment Statute).

27. See *id.* at \*7 (finding that, because minority children disproportionately attend the low-income, low-performing schools in which grossly ineffective teachers are largely staffed, “minority children bear the brunt of staffing inequalities”).

28. See *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (describing laws imposing disparate impact as those which are not intended to discriminate but that nonetheless bear disproportionately adverse effects on minorities).

29. See *id.* at 586 (finding evidence of statistical disparities in the pass rate of the firefighter’s captain exam in New Haven, Connecticut).

30. See *id.* (interpreting those statistical disparities as evidence of adverse racial impact because the pass rate for whites on a firefighter’s captain exam was nearly double that of minority candidates).

31. See Joshua Lewis, ‘*Vergara*’ Decision Signals the Start of a Third Wave of Education Reform, WASH. POST (Aug. 14, 2014), <https://www.washingtonpost.com/opinions/vergara-decision-signals-the-start-of->

school inputs such as funding, *Vergara* challenged teacher effectiveness—a qualitative factor managed and apportioned within the schoolhouse gates.<sup>32</sup>

Recently, the California Court of Appeal overturned Judge Treu's ruling and the Supreme Court of California denied plaintiffs' petition for review.<sup>33</sup> The appellate court found that Judge Treu skipped a crucial threshold step in his equal protection analysis: determining whether plaintiffs outlined a sufficiently "identifiable class of persons" to sustain an equal protection challenge.<sup>34</sup> In the appellate court's view, the subset of individuals harmed by grossly ineffective teachers changed each year, such that the only defining characteristic between these students was that they all once had the misfortune of sharing a classroom with a poor teacher.<sup>35</sup> While the *Vergara* plaintiffs petitioned the Supreme Court of California for review, in August 2016 the court denied review by a 4–3 vote.<sup>36</sup>

Given *Vergara*'s initial success, and subsequent reversal on appeal, this Note examines the question of whether similar teacher tenure challenges are viable in other states. If so, does an equal protection argument like that employed in *Vergara* represent the strongest formulation for a tenure challenge? Or should plaintiffs employ adequacy theory and base their challenges to ineffective teaching on the state's constitutional obligation to provide an adequate level of education?

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a-third-wave-of-education-reform/2014/08/14/4abe128a-1f28-114-ae54-cfe1f974f8a\_story.html?utm\_term=.a5ec72e842b7 (last visited Sept. 30, 2016) (discussing the ramifications of the *Vergara* ruling) (on file with the Washington and Lee Law Review).

32. See *id.* (proclaiming that *Vergara* "makes it acutely clear that placing such a teacher in front of every child is the single greatest responsibility of our education system").

33. See *Vergara v. State*, 202 Cal. Rptr. 3d. 262 (Cal. Ct. App. 2016).

34. *Id.* at 284–85.

35. See *id.* at 284 (noting that to claim an equal protection violation, "group members must have some pertinent common characteristic" other than shared violation of a fundamental right).

36. See Emma Brown, *California Supreme Court Decision Leaves State's Teacher Tenure Law in Place*, WASH. POST (Aug. 22, 2016), <https://www.washingtonpost.com/news/education/wp/2016/08/22/california-supreme-court-decision-leaves-states-teacher-tenure-law-in-place/> (last visited Sept. 30, 2016) (describing the decision to deny review) (on file with the Washington and Lee Law Review).



Answering these questions first requires examining the history of school funding litigation within the United States, including the California precedent upon which Judge Treu relied on in *Vergara*. Part II analyzes the three stages of educational reform litigation. It introduces the equal-protection based “equality” arguments of Stages One and Two. Additionally, Part II discusses the evolution of Stage Three “adequacy” arguments, which derive their cause of action from the text of state constitutional education clauses.

Part III explores the background of the *Vergara* suit. Part III also analyzes the evidentiary foundation behind the principal theory of *Vergara*, which at its most general formulation is that tenure laws burden the educational opportunities of students. To do this, Part III dissects each specific tenure provision challenged in *Vergara*.

Part IV presents *Vergara*’s legal arguments. *Vergara* cites both the California constitution’s Equal Protection Clause and its education clause to make dual equal protection arguments. First, Part IV analyzes the claim in *Vergara* that the tenure provisions burden students’ fundamental right to education. Second, Part IV assesses the independent equal protection claim that the tenure provisions disproportionately burdened low-income and minority students. To assess the viability of a disparate impact claim to teacher tenure, Part IV weighs both the evidence of discriminatory effect, as well as whether this proof is legally sufficient.

Part V builds on *Vergara* and the history of school funding litigation to formulate the ideal legal theory for future teacher tenure challenges. First, Part V argues that tenure challenges will be more successful if brought under state constitutional provisions. Part V then grapples with the chief criticism of *Vergara*—that tenure challenges are flawed because of an evidentiary lack of causation. Critics of *Vergara* claim that the evidence cited by Judge Treu does not prove that teacher tenure laws are responsible for ineffective teachers in the classroom.<sup>37</sup> Part V contends that because of the qualitative nature of teacher effectiveness, the *Vergara* plaintiffs met their burden of proof to show causation. Finally, Part V recommends that plaintiffs adopt adequacy theory

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37. See *infra* note 275 and accompanying text (criticizing Judge Treu for summarily accepting plaintiffs’ evidence of causation).

for future teacher tenure challenges. As evidenced by the recent reversal of *Vergara* on appeal, and the subsequent denial of review by the Supreme Court of California, equality arguments have several weaknesses that will prevent them from becoming consistently successful in other states.<sup>38</sup>

## II. *The History of School Finance Litigation*

Most education reform litigation aimed at bridging the achievement gap has targeted public school funding systems.<sup>39</sup> While states retain ultimate authority for funding public schools, most states have delegated this responsibility to local governments.<sup>40</sup> At the local level, funding formulas are often based on property tax revenue.<sup>41</sup> This type of funding formula inevitably creates large disparities between property-wealthy and property-poor districts.<sup>42</sup> To legally challenge these disparities, plaintiffs have alleged a direct link between disparities in funding and disparities in the “quality and extent” of educational opportunities.<sup>43</sup> Metaphorically, this argument holds that funding inequalities are what prevent concrete from developing into rose gardens.

Commentators generally divide the history of school reform litigation into three stages.<sup>44</sup> The first stage immediately followed

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38. See *infra* note 275 and accompanying text (analyzing the weaknesses of equality challenges to teacher tenure).

39. See Dayton & Dupre, *supra* note 12, at 2353–54 (noting that, after the California Supreme Court struck down unequal school funding in *Serrano v. Priest*, most states have experienced similar forms of school-funding litigation).

40. See *id.* at 2355–57 (describing the basis for school funding disputes).

41. See *id.* (noting how local governments implement property taxes to supplement any school funding granted by the state).

42. See Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 8 (2002) (noting that in Arizona, for example, disparities in “assessed valuation per pupil between the wealthiest and the poorest districts . . . are greater than 7,000 to 1”).

43. See *Serrano I*, 487 P.2d 1241, 1244 (Cal. 1971) (alleging that the funding in plaintiffs' school district is substantially inferior to the funding available to many other districts in California).

44. See, e.g., William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 600–04 (1994) [hereinafter *The Third Wave*] (establishing a three-wave temporal framework for education reform litigation); Peter Enrich, *Leaving*

the Court's historic ruling in *Brown v. Board of Education*.<sup>45</sup> During this first stage, plaintiffs initiated school-funding arguments grounded in the U.S. Constitution's Equal Protection Clause.<sup>46</sup> First-stage arguments continued until 1973, when the Court refused to classify education as a fundamental right in *San Antonio Independent School District v. Rodriguez*.<sup>47</sup> Moving to new legal ground, plaintiffs initiated a second stage of litigation by bringing similar equal protection arguments under state constitutional equal protection clauses.<sup>48</sup> While some school-funding challenges succeeded in the second stage,<sup>49</sup> most states followed *Rodriguez* and refused to recognize education as a fundamental right under their own equal protection clauses.<sup>50</sup>

The third stage of school funding litigation has shifted away from the equality arguments of the first two stages.<sup>51</sup> In the third

*Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 104 (1995) (same).

45. 347 U.S. 483 (1954).

46. See U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

47. 411 U.S. 1 (1973).

48. See *The Third Wave*, *supra* note 44, at 601–03 (discussing the cases that characterized the second wave).

49. See, e.g., *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 953 (Cal. 1976) (noting that the equal protection provisions of the California constitution possess an "independent vitality" in recognizing education as a fundamental right, notwithstanding *Rodriguez*); *Robinson v. Cahill*, 303 A.2d 273, 297–98 (N.J. 1973) (finding that reliance on local taxation produced educational disparities that clearly fell short of the New Jersey constitutional mandate of "thorough and efficient schools"); *Horton v. Meskill*, 376 A.2d 359, 374–75 (Conn. 1977) (invalidating a property tax funding scheme that abridged students' fundamental right to education); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (same).

50. See, e.g., *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979) (rejecting the contention that the Pennsylvania constitutional mandate of "thorough and efficient" schools required uniformity of funding); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1151 (Okla. 1987) (refusing to classify education as a fundamental right); *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 789–90 (Md. 1983) (expressing concern that the recognition of education as a fundamental right would force the court to recognize several other important state-provided services as "fundamental"); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982) (stating that the importance of education as a state governmental concern does not inherently implicate fundamental right classification).

51. See *The Third Wave*, *supra* note 44, at 603–05 (observing that plaintiffs within the third stage focused on "differences in quality of education delivered, rather than on the resources available to the districts").

stage, plaintiffs base their claims on state constitution education clauses.<sup>52</sup> These claims do not focus on attaining equality of expenditures for all schools.<sup>53</sup> Rather, the “adequacy” arguments in the third stage allege that learning conditions within a school do not meet the minimum standard of quality guaranteed in the education clause.<sup>54</sup>

#### *A. Stage One: Federal Equal Protection Claims*

Plaintiffs hoping to equalize disparities in school conditions believed that *Brown* provided them with a textual basis for contending that education was a fundamental right under the U.S. Constitution.<sup>55</sup> After all, *Brown* declared education to be “perhaps the most important function of state and local governments” and a right “which must be made available to all on equal terms.”<sup>56</sup> If these plaintiffs could cast education as a fundamental right, they then could challenge school funding laws under strict scrutiny, a heightened standard of review that most funding statutes could not meet.<sup>57</sup> In *Serrano I*,<sup>58</sup> the Supreme Court of California accepted education as a fundamental right and became the first

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52. See *id.* at 603 (discussing the third-stage reliance on state equal protection clauses).

53. See *id.* (limiting the importance of comparing financial resources on a school-by-school basis).

54. See *id.* (stating that quality is no longer measured in financial terms, but rather by the actual caliber of education provided). To illustrate the contrast between minimum standards established in state education clauses, compare N.Y. CONST. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”), with CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.”).

55. See Enrich, *supra* note 44, at 116 (referring to the language of *Brown* as an “invitation to pursue this clearly stated right to equal educational opportunity into settings other than segregation”).

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

57. See Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1331–35 (1992) (evaluating the differences between reviewing a claim under strict scrutiny and the more deferential rational basis test).

58. *Serrano v. Priest* (*Serrano I*) 487 P.2d 1241 (Cal. 1971).

court to invalidate school funding under the Fourteenth Amendment.<sup>59</sup>

Before *Serrano I*, extensive disparities in per-pupil funding existed among California's public school districts.<sup>60</sup> For example, in California from 1968 to 1969, the per-pupil funding in the property-poor district of Baldwin Park was \$577.49, as compared to the \$1,231.72 expended per student in the property-wealthy Beverly Hills district.<sup>61</sup> The *Serrano I* plaintiffs alleged that these funding disparities resulted in substantial educational inequalities.<sup>62</sup> The Supreme Court of California, seizing upon the promising language in *Brown*, declared education to be a fundamental interest and applied the resulting strict scrutiny standard to the school-funding system.<sup>63</sup> The court found that the funding laws invidiously discriminated against the poor and, as such, could not withstand constitutional challenge under the Equal Protection Clause.<sup>64</sup>

*Serrano I* sparked copycat suits in several states, many of which similarly struck down school-funding laws.<sup>65</sup> But, with *Rodriguez* in 1973, the Supreme Court effectively negated any education funding argument that alleged a violation of the federal Equal Protection Clause.<sup>66</sup> The facts of *Rodriguez* are very similar to those of *Serrano I* in that *Rodriguez* concerned gross disparities

59. See *id.* at 1244 (finding that California's funding scheme "invidiously" discriminates against the poor, in violation of the Fourteenth Amendment).

60. See *id.* (noting that the heavy dependence on property taxes created "resultant wide disparities in school revenue").

61. See *id.* at 1248 (comparing per-pupil funding across several California school districts).

62. See *id.* at 1244 (noting that certain school districts receive substantially less funding per pupil due to much smaller property tax bases).

63. See *id.* at 1255–57 (emphasizing the "indispensable role" that education plays in modern society).

64. See *id.* at 1244 (finding that California's funding scheme violated the equal protection clause of both the U.S. Constitution and California constitution).

65. See, e.g., *Robinson v. Cahill*, 287 A.2d 187, 217 (N.J. 1972) (citing *Serrano I* in declaring education a fundamental right that must be made available to all on equal terms); *Van Duzart v. Hatfield*, 334 F. Supp. 870, 877 (D. Minn. 1971) (analogizing the Minnesota funding scheme to California's and finding the *Serrano I* court's reasoning to be "completely persuasive").

66. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 15–17 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.").

within Texas's public school funding scheme.<sup>67</sup> The Court reaffirmed *Brown* and recognized the significance of education, but noted that the appropriate inquiry for determining a fundamental right is not the importance of a given service.<sup>68</sup> Finding no explicit or implicit constitutional basis for classifying education as a fundamental right, the Court applied the weaker rational basis test and upheld Texas's funding scheme.<sup>69</sup>

*Rodriguez* further recognized an important limitation of equality-based challenges.<sup>70</sup> The Court noted the lack of "logical limitations" if it were to hold that the Equal Protection Clause guaranteed an equal right to education—mainly, that the argument could be expanded to demand equal funding and resources with respect to other state-provided services.<sup>71</sup> The defense in *Serrano I* raised a similar argument, contending that recognition of equal education under the Equal Protection Clause would mandate similar state protections to "all tax-supported public services."<sup>72</sup> The *Rodriguez* Court further cautioned against the potential ramifications of invalidating local property taxes as a permissible means of funding education.<sup>73</sup> If property taxes

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67. See *id.* (describing the difference in per-pupil spending between the lesser affluent Edgewood District (\$356 per student) and the more affluent Alamo Heights District (\$594 per student)).

68. See *id.* at 30 (noting the "historic dedication to public education," yet rejecting the notion that the Court could grant fundamental rights classification based on the importance of a State-provided service).

69. See *id.* at 35 (rejecting the argument that the Constitution impliedly guarantees education because education is a fundamental pre-requisite to other constitutionally guaranteed rights, such as the right to vote and the right to exercise First Amendment freedoms).

70. See *id.* at 37 (noting that even if education was a fundamental right, the relative differences in spending levels would not constitute interference with a fundamental right for equal protection purposes).

71. See *id.* (questioning how it would be possible to distinguish education from other "significant personal interests in the basics of decent food and shelter").

72. See *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1262 (Cal. 1971) (rejecting defense counsel's argument that this would "spell the destruction of local government" and finding that education retains a certain "uniqueness among public activities").

73. See *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1, 54 (1973) (contending that it has never been within the Court's purview to invalidate "statewide measures for financing public services merely because the burdens or benefits fall unevenly depending upon the relative wealth of the political

create unconstitutional inequalities in education, then it might also be just as impermissible in the context of other locally provided services, such as public utility facilities and public hospitals.<sup>74</sup> These concerns continued to trouble state courts as plaintiffs brought equality arguments under state equal protection clauses in the second stage.<sup>75</sup>

### *B. Stage Two: State Equal Protection Claims*

The *Rodriguez* Court concluded that education is “not among the rights afforded explicit protection under our Federal Constitution,”<sup>76</sup> notably omitting that all state constitutions guarantee the right to education.<sup>77</sup> The Court further stated that reforms to state taxation and education were matters best reserved for state legislatures.<sup>78</sup> Following this cue, post-*Rodriguez* education reform litigation shifted to equality arguments based on state constitutions’ equal protection clauses.<sup>79</sup> Many plaintiffs buttressed their equal protection claim by arguing that state education clauses also provided the textual basis to regard education as a fundamental right.<sup>80</sup>

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subdivisions in which citizens live”).

74. See *id.* at 58 (reserving the right to reform state taxation and education to state legislative bodies).

75. See, e.g., *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 785 (Md. 1983) (noting that “police, fire, welfare, health care and other social services” are equally as fundamental as education); *Robinson v. Cahill*, 303 A.2d 273, 283 (N.J. 1973) (hesitating to decide a school funding challenge on New Jersey’s Equal Protection Clause because of the potential obligation to then sustain other challenges to other state-provided services).

76. *Rodriguez*, 411 U.S. at 35.

77. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991) (observing that each state’s education clause “generally requires the state legislature to establish some system of free public schools”).

78. See *Rodriguez*, 411 U.S. at 58 (asserting that solutions to funding disparities in schools must ultimately “come from the lawmakers and from the democratic pressures of those who elect them”).

79. See *The Third Wave*, *supra* note 44, at 601–03 (describing the mixed success of plaintiffs in the second stage).

80. See Joseph S. Patt, *School Finance Battles: Survey Says? It’s All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 559–61 (1999) (describing the methodology of legal arguments within the second stage).

Despite this stronger textual basis, plaintiffs experienced only mixed success in the second stage.<sup>81</sup> In light of the *Rodriguez* ruling, *Serrano* came back to the Supreme Court of California in 1976 for renewed consideration.<sup>82</sup> The Supreme Court of California recognized that *Rodriguez* “undercut” the ruling of *Serrano I*, but only to the extent that *Serrano I* held that the funding statutes violated the Fourteenth Amendment.<sup>83</sup> In *Serrano II*,<sup>84</sup> the California Supreme Court acknowledged the sameness of the state and federal equal protection clauses, but found that the state clause possessed “an independent vitality” that demanded a separate analysis.<sup>85</sup> As such, the holding of *Rodriguez* had no bearing on the Supreme Court of California’s decision to interpret its state constitutional provisions as recognizing education as a fundamental interest.<sup>86</sup>

In large part, state courts faced with funding challenges adopted the Supreme Court’s conceptual framework for analyzing federal equal protection claims.<sup>87</sup> As in *Serrano II*—when a state court interpreted its own constitution as recognizing education as a fundamental right—state courts applied strict scrutiny and invalidated school funding laws.<sup>88</sup> If a state court found that

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81. See Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. EDUC. & L.J. 1, 10–11 (arguing that equality arguments are, “at best, only a semi-successful method of . . . advancement of education” and that most equality arguments in the second stage “continued in the unsuccessful ruts of *Rodriguez*”).

82. See *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 930–31 (Cal. 1976) (discussing the holding of *Serrano I* and the subsequent enactment of legislative changes to California’s education funding scheme).

83. See *id.* at 949 (explaining that the holding of *Serrano I* depended on both the U.S. Constitution and the California constitution).

84. *Serrano v. Priest* (*Serrano II*) 557 P.2d 929 (Cal. 1976).

85. See *id.* at 950 (noting that U.S. Supreme Court decisions defining fundamental rights “are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law”); see also *Horton v. Meskill*, 376 A.2d 359, 371 (Conn. 1977) (discussing the implications of *Rodriguez* while fully recognizing the “independent vitality” of the provisions of the Connecticut constitution).

86. See *Serrano II*, 557 P.2d at 950–51 (adhering to the ruling of *Serrano I* under the California constitution).

87. See Palfrey, *supra* note 42, at 17 (finding that state courts largely mirrored the requirements for strict scrutiny that applied in federal equal protection cases).

88. See, e.g., *Horton*, 376 A.2d at 373–74 (interpreting the state



education was not a fundamental right, then the state could argue for rational basis review.<sup>89</sup> Under rational basis, the state usually contended that local control over schools satisfied a legitimate government objective.<sup>90</sup> Applying the rational basis test generally resulted in the court upholding a school-funding statute.<sup>91</sup>

Despite initial success in cases like *Serrano II*, most state courts began to rule against equality arguments as the second stage progressed.<sup>92</sup> In assessing the potential for challenges to teacher tenure, it is necessary to consider why equality arguments faltered as recourse for those seeking to improve educational conditions.<sup>93</sup> State courts treated equality arguments with great trepidation, wary of their illusory simplicity.<sup>94</sup> This wariness arose as courts attempted to identify the “appropriate dimension for comparison” in remedying unequal education.<sup>95</sup> Many might

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constitutional provision for the right to education to be so “basic and fundamental” that any law burdening education should be subject to strict scrutiny); *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980) (same).

89. See Palfrey, *supra* note 42, at 17 (observing that, where education was not treated as a fundamental right, a state only had to demonstrate that the funding scheme was rationally related to a legitimate state objective).

90. See *id.* (remarking that courts usually found local control to be a legitimate state objective).

91. *But cf.* *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 154 (Tenn. 1993) (rejecting the premise that local control was rationally related to the school funding scheme).

92. See, e.g., *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982) (following *Rodriguez*’s reasoning by noting that the high priority of education does not automatically trigger strict scrutiny); *Lujan v. Bd. of Educ.*, 649 P.2d 1005, 1017–18 (Colo. 1982) (noting that, despite the guarantee in the Colorado constitution of a “thorough and uniform system of free public schools,” fundamental rights are not solely defined through an implicit or explicit textual basis); *Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432, 436 (N.C. Ct. App. 1987) (confining constitutional language mandating “equal opportunities . . . for all students” to issues of racial segregation); *McDaniel v. Thomas*, 285 S.E.2d 156, 168 (Ga. 1981) (finding that the Georgia education system met the minimum standards promised by the Georgia constitution); *Hornbeck v. Bd. of Educ.*, 458 A.2d 758, 786 (Md. 1983) (concluding that education is not a fundamental right for equal protection purposes under the Maryland constitution).

93. See Enrich, *supra* note 44, at 144 (discussing the many inadequacies of equality arguments).

94. See *id.* (noting that most presume that the simplicity of an equality argument is one of its greatest strengths).

95. *Id.* at 145.

presume that in a challenge to unequal school funding, the obvious metric for determining equality would be funding.<sup>96</sup> Yet, the evidence concerning the correlative relationship between school funding and quality of education is hazy at best.<sup>97</sup> For example, states in which education litigants have won funding challenges, like California and New Jersey,<sup>98</sup> continue to have similar disparities in white-black student achievement as states, such as New York and Ohio,<sup>99</sup> where litigants have been unsuccessful.<sup>100</sup>

### *C. Stage Three: Hybrid Adequacy Claims*

While the U.S. Constitution does not contain any express provision guaranteeing the right to education,<sup>101</sup> almost every state constitution has an education clause that, at minimum, directs the state legislature to maintain a free system of public schools.<sup>102</sup> With the advent of the third stage in 1989,<sup>103</sup> school-funding litigants began to depend on the textual mandate of these state

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96. See *id.* at 147 (explaining that actual funding provided to schools “retains the virtue of easy quantification”).

97. See *id.* at 154–55 (arguing that the substantial progress some states have made in equalizing school budgets “has proven insufficient to put the educational opportunities of disadvantaged children on a par with those of their better-off peers”).

98. See, e.g., *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1265 (Cal. 1971) (invalidating the “constitutionally defective” financing scheme); *Robinson v. Cahill*, 303 A.2d 273, 298 (N.J. 1973) (same).

99. See, e.g., *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 366–67 (N.Y. 1982) (finding that preserving local control of education to be a legitimate state interest); *Bd. of Educ. v. Walter*, 390 N.E.2d 813, 824 (Ohio 1979) (same).

100. See ALAN VANNEMAN ET AL., U.S. DEP’T OF EDUC., NCES 2009-455, *ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS* 21 fig. 11 (2009) (giving each state’s black-white achievement gap a score, in which higher scores represent wider gaps). California and New Jersey each scored a thirty-five, whereas New York and Ohio scored thirty-two and thirty-three, respectively. *Id.*

101. See *McUsic*, *supra* note 77, at 312 (noting the theoretical difficulties state courts face when interpreting rights that are guaranteed in both the state and federal constitutions).

102. See *id.* at 311 (discussing the slight variations among textual guarantees amongst state education clauses).

103. See *The Third Wave*, *supra* note 44, at 603 (stating that the third wave began with plaintiffs’ victories in Kentucky, Montana, and Texas).

constitutional education clauses.<sup>104</sup> Instead of alleging that unequal funding amounted to a violation under the state equal protection clause, third-stage plaintiffs contended that increased funding was necessary to ensure that the quality of education in their district met the adequacy standard set out in the education clause.<sup>105</sup>

This profound strategy shift provided several significant advantages over the equality-based arguments of the first and second stages.<sup>106</sup> Most notably, education clauses provide an unambiguous textual basis to address deficiencies in public schools.<sup>107</sup> Courts addressing school-funding challenges can measure the facts of the case against the mandate of the education clause.<sup>108</sup> Furthermore, reliance on equal protection clauses in the second stage forced courts to grapple with federalism concerns and the potential for spillover challenges to other state-provided services.<sup>109</sup> The third stage's new focus on education clauses alleviated these concerns because education clauses are singularly targeted at education.<sup>110</sup>

Adequacy arguments under education clauses are also more conducive to judicial intervention.<sup>111</sup> Second-stage equality

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104. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190 (Ky. 1989) (restating plaintiffs' argument that the funding scheme was inadequate under Kentucky's education clause).

105. See *The Third Wave*, *supra* note 44, at 603 (noting that, in third-stage suits, school systems are struck down not because of financial inequalities, but because of disparities in the quality of education).

106. See *Enrich*, *supra* note 44, at 166 (extolling the virtues of adequacy arguments).

107. See *id.* (noting the convenience this textual basis provides to third-stage litigants, as education clauses are plainly addressed to the status of public schools).

108. See *id.* (explaining that third-stage arguments are "addressed to a single, specific sphere of governmental responsibility").

109. See *McUsic*, *supra* note 77, at 314 (claiming that the slippery slope created by equal protection arguments hampered plaintiffs' success in the second stage).

110. See *The Third Wave*, *supra* note 44, at 603 (noting that the use of education clauses under the third stage has fewer implications for other areas of law than would a decision grounded in either state or federal equal protection clauses).

111. See *Enrich*, *supra* note 44, at 167 (explaining that courts are more prone to accept adequacy arguments because of the universal importance society places on education).

arguments evoked leveling concerns—the fear that, by comparing one district's resources to another, an underfunded district could only be improved at the expense of nearby wealthier districts.<sup>112</sup> In contrast, adequacy arguments do not engage in comparative fact-finding and only seek to enforce the constitutional standard of educational adequacy.<sup>113</sup>

When addressing a third-stage argument, a court must first decide if the suit is an adequacy suit or an equality suit.<sup>114</sup> In many third-stage cases, plaintiffs consolidate challenges to both the state education clause and the state equal protection clause into the same action.<sup>115</sup> Equality suits, presented on their own, require an equal protection analysis similar to that of the first and second stages.<sup>116</sup> When presented in conjunction with an adequacy argument, however, the two arguments are often mutually reinforcing.<sup>117</sup>

Courts must also define the specific obligations imposed on the state based on the clause's specific language.<sup>118</sup> Each state utilizes different diction and phrasing in its education clause, resulting in education quality standards that vary by state.<sup>119</sup> Some education

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112. See *id.* at 168 (referring to such comparative analysis as a zero-sum game).

113. See Palfrey, *supra* note 42, at 21 (noting that, under the third wave, a very low-performing school district could engender a claim despite having relatively high per-pupil expenditures).

114. See *The Third Wave*, *supra* note 44, at 608–09 (claiming that all third wave cases to date have been quality suits).

115. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190 (Ky. 1989) (detailing plaintiff's complaint that the unequal funding scheme violated the guarantee of an efficient system of schools, as well as the guarantee of equal protection of the laws); *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684, 691 (Mont. 1989) (declining to address plaintiff's equal protection claim after finding the funding scheme unconstitutional under Montana's education clause).

116. See *The Third Wave*, *supra* note 44, at 605 (claiming that the equal protection analysis will often be dominated by the determination of whether the state court holds education to be a fundamental right).

117. See Enrich, *supra* note 44, at 107 (discussing how the presence of the education clause allows state courts to justify determining that the state equal protection clause provides for greater educational rights than the federal Equal Protection Clause).

118. See *The Third Wave*, *supra* note 44, at 610 (describing the obligation to determine the specific quality standard set forth in an education clause).

119. See William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19, 23 (1993) [hereinafter

clauses require the minimum, exemplified by New York's constitutional directive to "provide for the maintenance and support of a system of free common schools."<sup>120</sup> In contrast, some state education clauses assert heightened standards of quality, as evidenced by Georgia's constitutional mandate that "the provision of an adequate public education for the citizens shall be a primary obligation of the State."<sup>121</sup>

Professor Ratner's proposed classification model generally separates states into four categories based on the strength of the language in the education clause.<sup>122</sup> States in the Category One, like New York, have education clauses that oblige the legislature to provide for free public schools but provide no additional standard of quality.<sup>123</sup> Category Two education clauses add a quality standard.<sup>124</sup> The Category Two quality standard generally

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*The Role of Language*] (suggesting that language can be the determinative factor in predicting whether a state court will regard education to be a fundamental right).

120. N.Y. CONST. art. XI, § 1.

121. GA. CONST. art. VIII, § 1.

122. See Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–17 (1985) (differentiating each grouping of states by their respective commitments to education).

123. See, e.g., ALA. CONST. art. XIV, § 256 (imposing a general legislative duty to "establish, organize, and maintain a . . . system of public schools"); ALASKA CONST. art. VII, § 1 (same); HAW. CONST. art. IX, § 1 (same); KAN. CONST. art. VI, § 1 (same); LA. CONST. art. VIII, § 1 (same); N.M. CONST. art. XII, § 1 (same); NEB. CONST. art. VII, § 1 (same); N.Y. CONST. art. XI, § 1 (same); S.C. CONST. art. XI, § 3; OKLA. CONST. art. XIII, § 1 (same); UTAH CONST. art. X, § 1 (same); VT. CONST. ch. 2, § 68 (same); CONN. CONST. art. VIII, § 1 (same); MASS. CONST. ch. 5, § 2 (same); N.C. CONST. art. IX, § 2 (providing further that "equal opportunities shall be provided for all students"); TENN. CONST. art. XI, § 12 (recognizing further the "inherent value of education").

124. See, e.g., ARK. CONST. art. XIV, § 1 (providing for an "efficient system of public schools"); OHIO CONST. art. VI, § 3 (same); PA. CONST. art. III, § 14 (same); MD. CONST. art. VIII, § 1 (same); DEL. CONST. art. X, § 1 (same); KY. CONST. § 183 (same); MINN. CONST. art. XIII, § 1 (same); TEX. CONST. art. VII, § 1 (same); W. VA. CONST. art. XII, § 1 (same); COLO. CONST. art. IX, § 2 (providing for a "uniform system of free public schools"); ARIZ. CONST. art. XI, § 1 (same); IDAHO CONST. art. IX, § 1 (same); WIS. CONST. art. X, § 3 (same); N.D. CONST. art. VIII, § 1; (same); OR. CONST. art. VIII, § 3 (same); MONT. CONST. art. X, § 1 (stating that "it is the goal . . . to establish a system of education which will develop the full educational potential of each person"); VA. CONST. art. VIII, § 1 (imposing a legislative duty to "ensure that an educational program of high quality is established and continually maintained").

requires that the system of public schools be either “efficient” or “thorough.”<sup>125</sup> Category Three clauses provide even stronger quality standards and often establish specific purposes for the establishment of common schools.<sup>126</sup> The strongest education clauses belong to Category Four. These clauses describe education as a “paramount” or “fundamental” duty of the state.<sup>127</sup>

Looking to the future viability of tenure challenges, what may be more important than the text of a state’s education clause is how a state court interpreted that clause during a previous funding challenge.<sup>128</sup> Plaintiffs can advance equal protection challenges to tenure with greater confidence in states that have previously recognized education to be a fundamental right.

### *III. Vergara and the System of Teacher Tenure in California*

In May 2012, Beatriz Vergara and eight other California students challenged the constitutionality of five teacher tenure provisions in California’s Education Code.<sup>129</sup> The lawsuit alleged

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125. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 189 (Ky. 1989) (finding that Kentucky’s school funding scheme violated the education clause mandate for an “efficient system of common schools”); *Abbott v. Burke*, 575 A.2d 359, 367 (N.J. 1990) (describing the New Jersey legislature’s “absolute” obligation to provide a “thorough and efficient” educational system).

126. See, e.g., IND. CONST. art. VIII, § 1 (stating that knowledge and learning are “essential to the preservation of a free government” and that “it shall be a duty of the General Assembly to encourage . . . moral, intellectual, scientific, and agricultural improvement”); IOWA CONST. art. IX, § 2 (same); NEV. CONST. art. XI, § 2 (same); R.I. CONST. art. XII, § 1 (same); S.D. CONST. art. VIII, § 1 (same); WYO. CONST. art. VII, § 1 (same); CAL. CONST. art. IX, § 1 (same); MICH. CONST. art. VIII, § 2 (same); MO. CONST. art. IX, § 1(a) (same).

127. See, e.g., GA. CONST. art. VIII, § 1 (stating that “provision of an adequate public education . . . shall be a primary obligation”); ILL. CONST. art. X, § 1 (providing that “a fundamental goal . . . is the educational development of all persons”); ME. CONST. art. VIII, § 1; N.H. CONST. pt. 2, art. 83 (stating that it is the “duty of the legislators . . . to cherish the interest of literature and the sciences”); WASH. CONST. art. IX, § 1 (mandating that it is the “paramount duty of the state to make ample provision for the education of all children”); FLA. CONST. art. IX, § 1 (same).

128. See Enrich, *supra* note 44, at 185 (summarizing the outcomes of funding challenges in over thirty-five different states).

129. See Vergara Complaint, *supra* note 20, at 3 n.1 (listing the challenged statutes). The challenged provisions are California Education Code § 44929.21, subdivision (b), § 44934, § 44938, subdivisions (b)(1) and (2), § 44944, and

that California's teacher tenure system acted to ensure permanent employment of grossly ineffective teachers.<sup>130</sup> The complaint further alleged that these grossly ineffective teachers substantially impair students' quality of education throughout California.<sup>131</sup> To fully understand the *Vergara* suit, it is imperative to consider what exactly plaintiffs meant by a "grossly ineffective" teacher. The common perception of an ineffective teacher is one who monotonously lectures, who is not well versed in his or her content area, or who does not have mastery of teaching techniques.<sup>132</sup> This common interpretation, however, did not encompass the type of teacher challenged in the suit.<sup>133</sup>

Beatriz Vergara testified at trial of a former teacher who derisively called her a "cholo"<sup>134</sup> and who told other Latino students that they would end up cleaning houses for a living.<sup>135</sup> On the more passive side of the grossly ineffective spectrum, student plaintiffs from other California schools testified of teachers who

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§ 44955.

130. See *id.* (asserting that the challenged statutes preclude school administrators from considering the best interests of their students in making teacher personnel decisions).

131. See *id.* at 4 (claiming that the negative impact of grossly ineffective teachers infringes upon California students' fundamental right to education).

132. See Bruce Torff & David N. Sessions, *Principals' Perceptions of the Causes of Teacher Ineffectiveness*, 97 J. EDUC. PSYCHOL. 530, 530 (2005) (noting that the "capacities of teaching expertise have been broadly categorized as . . . content knowledge and pedagogical knowledge").

133. See Vergara Complaint, *supra* note 20, at 10 (defining a grossly ineffective teacher as one in the bottom 5% of all educators); see also Respondents' Brief at 2, Vergara v. State, No. B258589 (Cal Ct. App. June 24, 2015) [hereinafter Respondents' Brief] (referring to grossly ineffective teachers as those who cannot, or will not teach).

134. See *Cholo*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/cholo> (last visited Sept. 30, 2016) (defining "cholo" as disparaging term used for a boy of Mexican descent, or for a Mexican-American youth belonging to a street gang) (on file with the Washington and Lee Law Review).

135. See Mark Harris, *Vergara Sisters Recall Teachers Who Inspired Them to Join Lawsuit*, L.A. SCH. REP. (Feb. 11, 2014, 6:01 PM), <http://laschoolreport.com/vergara-sisters-recall-teachers-who-inspired-them-to-join-lawsuit/> (last visited Sept. 30, 2016) (noting further Ms. Vergara's testimony as to her eighth grade science teacher) (on file with the Washington and Lee Law Review). Ms. Vergara testified as to her eighth grade science teacher, "I was scared to ask her questions because she would insult me. She always made fun of students, calling one girl a stick figure and whore." *Id.*

slept in class, who neglected teaching duties to do crossword puzzles, and who permitted students to smoke marijuana.<sup>136</sup> The persistent use of the descriptor “grossly ineffective” represents a significant tactical move for the plaintiffs. By employing “grossly ineffective” as a term of art, the plaintiffs attempted to create a concrete and specific subset of teachers that became the target of the lawsuit.<sup>137</sup> These grossly ineffective teachers had ironclad job security under California law, despite their poor job performance allegedly “destroy[ing] students’ educational opportunities.”<sup>138</sup>

The trouble with the phrase “educational opportunities,” however, is that it is an abstraction. Few would deny that bad teachers have detrimental effects on their students—yet, the question is what exactly do these effects amount to, and what specific opportunities do they foreclose?<sup>139</sup> Historically it has been difficult to quantify effective teaching and to predict the specific costs that a grossly ineffective teacher imposes on his or her students.<sup>140</sup> This explains why the *Vergara* plaintiffs sought to portray teacher effectiveness as a variable that can be measured.<sup>141</sup>

Instead of making an abstract claim that an ineffective teacher causes slower reading growth or less proficiency with multiplication, the *Vergara* plaintiffs cited to studies that quantified the precise impact of a grossly ineffective teacher.<sup>142</sup> For

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136. See *id.* (describing plaintiffs’ testimony at trial).

137. See Respondents’ Brief, *supra* note 133, at 23 n.6 (responding to appellants’ contention that the trial court never defined “grossly ineffective” by claiming that even appellants’ own witnesses used the phrase and agreed that a grossly ineffective teacher “is someone whose students consistently fail to *learn* the academic materials”).

138. Vergara Complaint, *supra* note 20, at 18.

139. See 2 Eric A. Hanushek & Steven G. Rivkin, *Teacher Quality*, in HANDBOOK OF THE ECONOMICS OF EDUCATION 1052, 1065–66 (2006) (framing the field of study that examines teacher quality by focusing on “outcome-based measures of teacher effectiveness”).

140. See *id.* at 1066 (reviewing studies of outcome-based measures of teacher effectiveness and concluding that there are several difficulties that “must be overcome in order to estimate the variation of overall teacher effects”).

141. See Respondents’ Brief, *supra* note 133, at 19–20 (asserting that plaintiffs’ evidence “went far beyond the basic and indisputable premise that teachers matter,” and that plaintiffs proved that “teacher effectiveness . . . can be assessed and measured”).

142. See *id.* (presenting “voluminous evidence” of the ability to quantify



example, Dr. Raj Chetty testified at trial to a finding in his study that “replacing a teacher whose current VA . . . is in the bottom 5 percent with an average teacher would increase the mean present value of students’ lifetime income by \$250,000 per classroom over a teacher’s career.”<sup>143</sup> Dr. Kane, the head researcher behind the Measures of Effective Teaching (MET) Project, similarly testified that students in the Los Angeles Unified School District (LAUSD) who have a “bottom 5% teacher for a single year lose between nine and twelve months of learning.”<sup>144</sup> These statistics demonstrate the first link of the *Vergara* argument, which is that grossly ineffective teachers harm students.<sup>145</sup> To form the second link—that tenure provisions employ and retain grossly ineffective teachers—it is crucial to understand how each tenure provision operates.<sup>146</sup>

#### A. Permanence Provision

Under Section 44929.21(b) of the California Education Code, probationary teachers are granted “permanent employee” status after having been employed for two consecutive school years.<sup>147</sup> The provision also mandates that school administrators inform teachers whether they have received permanent status by March 15 of their second year.<sup>148</sup> This creates a probationary period of

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teacher effectiveness).

143. See Chetty, *supra* note 17, at 2635 (concluding that “good teachers create substantial economic value and that test score impacts are helpful in identifying such teachers”). VA, or value-added, refers to the impact teachers make on their student’s test scores. *Id.*

144. Respondents’ Brief, *supra* note 133, at 21–22.

145. See *supra* note 142 and accompanying text (emphasizing the need to show the specific harms of ineffective teaching).

146. See *infra* Part III.A–C (discussing how the tenure provisions work individually and collectively to secure the employment of grossly ineffective teachers).

147. See CAL. EDUC. CODE § 44949.21(b) (2015) (“Every employee of a school district . . . who, after having been employed by the district for two complete consecutive school years . . . shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district.”).

148. See *id.* (noting also that in the event that the school board neglects to give the teacher notice regarding his or her permanent status, the teacher will nonetheless be deemed reelected for the next school year).

only sixteen months, a low figure that even includes the summer months when school is not in session.<sup>149</sup>

The *Vergara* plaintiffs alleged that this brief probationary period does not give school administrators the necessary time to evaluate a teacher's skill level.<sup>150</sup> Numerous principals testified at trial that two years is insufficient to make a well-informed judgment of a teacher's ability.<sup>151</sup> A study by the National Council on Teacher Quality found that, in California, the brief probationary period renders a teacher's effectiveness to be a "nominal" consideration in the evaluation and tenure review process.<sup>152</sup> Additionally, this brief period creates an awkward timing scenario in which many teachers receive permanent tenured status before fully completing their two-year certification program.<sup>153</sup> As a result, thousands of teachers receive permanent status in California that may have been otherwise rejected had the probationary period been even one year longer.<sup>154</sup>

### *B. Dismissal Provisions*

Once a teacher receives permanent status, that teacher can only be dismissed for one of the causes enumerated in Section

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149. See Respondents' Brief, *supra* note 133, at 25 (noting that this sixteen month period is insufficient to make well-informed tenure decisions).

150. See *id.* at 26 (referencing the limited amount of "classroom evaluation data, student and parent input, and student achievement data that can be collected over such a short period").

151. See *id.* (citing former LAUSD Superintendent John Deasy, who testified at trial that "there is no way that 16 months is a sufficient amount of time").

152. NAT'L COUNCIL ON TEACHER QUALITY, TEACHER QUALITY ROADMAP: IMPROVING POLICIES AND PRACTICES IN LAUSD 33-34 (2010), [http://www.nctq.org/p/publications/nctq\\_laUSD.pdf](http://www.nctq.org/p/publications/nctq_laUSD.pdf) (showing that 97% of nontenured teachers received satisfactory evaluations in 2009-2010, which is essentially the same figure as the percentage of tenured teachers who receiving satisfactory ratings).

153. See CALIF. DEPT OF EDUC., GREATNESS BY DESIGN: SUPPORTING OUTSTANDING TEACHING TO SUSTAIN A GOLDEN STATE 43 (2012) [hereinafter *Greatness by Design*], <http://www.cde.ca.gov/eo/in/documents/greatnessfinal.pdf> (framing the conflicts posed by the current timeline for granting tenure in California).

154. See *id.* ("The net result is that ineffective and grossly ineffective teachers earn tenure every year in California, even though a longer probationary period would alleviate the problem.").

44932.<sup>155</sup> Among the potential causes for dismissal are egregious misconduct, immoral conduct, and unsatisfactory performance.<sup>156</sup> To an outsider, it would appear that administrators could readily dismiss grossly ineffective teachers on the grounds of unsatisfactory performance.<sup>157</sup> Further reading of the statutory scheme, however, reveals the complex web of procedures to navigate before a teacher can be dismissed due to unsatisfactory performance.<sup>158</sup>

First, Section 44938(b) prevents the school district from filing charges of unsatisfactory performance unless the teacher has received written notice of the charges.<sup>159</sup> This written notice must specify the exact nature of the teacher's unsatisfactory performance, including a description of "specific instances of behavior" with "such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge."<sup>160</sup> The practical effect of the particularity requirement is that administrators must often spend months detailing specific events that evince a teacher's unsatisfactory performance.<sup>161</sup>

Once written notice has been given, a teacher has up to ninety days to try and remedy the factual basis for the charges of unsatisfactory performance.<sup>162</sup> Further, the ninety-day

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155. See CAL. EDUC. CODE § 44932 (2015) (listing the only causes for which a permanent employee may be dismissed).

156. See *id.* (citing other grounds for dismissal, including conviction of a felony, dishonesty, or persistent refusal to obey state school laws).

157. See Beth Barrett, *LAUSD's Dance of the Lemons*, L.A. WEEKLY (Feb. 11, 2010), <http://www.laweekly.com/news/lausds-dance-of-the-lemons-2163764> (last visited Sept. 30, 2016) (describing a first-grade teacher in LAUSD who received three notices of unsatisfactory performance before ultimately accepting an \$80,000 settlement payment to leave) (on file with the Washington and Lee Law Review).

158. See *infra* notes 159–175 and accompanying text (navigating the statutory requirements for dismissing a teacher).

159. See CAL. EDUC. CODE § 44938(b)(1) (2015) (requiring also that the written notice include an evaluation pursuant to § 44660).

160. *Id.*

161. See Respondents' Brief, *supra* note 133, at 11 (noting testimony at trial which asserted that extensive evidence of a teacher's incompetence is required, or "else there is virtually no possibility that the teacher's dismissal will be upheld").

162. See CAL. EDUC. CODE § 44938(b)(1) (2015) (allowing the employee the opportunity to "overcome the grounds for the charge").

remediation period applies to all dismissal proceedings for unsatisfactory performance—the law does not provide the school board with the latitude to determine that a given teacher is incapable of remediation.<sup>163</sup> If, after this ninety-day period, the school board decides to continue with its initial decision to terminate, the board may issue formal charges of unsatisfactory performance.<sup>164</sup> Similar to the initial notice, the charges themselves must “specify instances of behavior,” “state the statutes and rules the employee is alleged to have violated,” and “set forth the facts relevant to each charge.”<sup>165</sup> After receiving these formal charges, a teacher has an additional thirty days to decide whether to request a hearing.<sup>166</sup> If the teacher does request a hearing, the hearing must occur within six months of the request.<sup>167</sup>

The hearing’s procedural requirements also afford substantial safeguards for teachers.<sup>168</sup> Section 44944.05 provides several discovery requirements, including disclosure of witness names and witness statements, as well as disclosure of relevant documents and tangible items.<sup>169</sup> Presiding over the hearing is a Commission on Professional Competence (CPC).<sup>170</sup> Both the school board and the teacher each get to select one member to the CPC, who serve along with an independently appointed Administrative Law

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163. *See id.* § 44938(c) (2015) (distinguishing unsatisfactory performance from unsatisfactory conduct).

164. *See id.* § 44934(b) (2015) (providing that a majority vote of the school district’s governing board should precede the filing of charges).

165. *Id.* § 44934(c) (2015).

166. *See id.* § 44934(b) (2015) (adding that suspension proceedings under § 44934(b) may only be initiated if the school district’s governing board has not adopted a collective bargaining agreement).

167. *See id.* § 44944(b)(1)(A) (2015) (providing that only extraordinary circumstances as determined by an administrative law judge will justify a continuance for a hearing date beyond six months of the employee’s initial request).

168. *See, e.g., id.* § 44944(c)(2) (allowing the employee to select one member of the three-person review panel that renders the final decision).

169. *See id.* § 44944.05(A) (2015) (mandating discovery disclosures “within 45 days of the date of the employee’s demand for a hearing”).

170. *See id.* § 44944(c)(1) (2015) (granting the parties the alternative option to waive their right to a CPC hearing and instead conduct a single hearing with an administrative law judge).

Judge.<sup>171</sup> After the hearing, the CPC must render a final written decision that contains findings of fact, determinations of the issues, and a final disposition.<sup>172</sup> If the CPC decides to dismiss the teacher, then the costs are split between the school district and the state.<sup>173</sup> However, if the CPC decides against dismissal, then the school district bears the entire cost of the proceeding.<sup>174</sup> As a final safeguard, any teacher dismissed after a CPC hearing has the right to appeal to California Superior Court.<sup>175</sup>

To summarize, administrators wishing to fire a teacher for unsatisfactory performance must navigate the following steps: (1) compile months of particularized evidence of unsatisfactory performance; (2) give the teacher notice of findings; (3) allow the teacher ninety days to remedy performance; (4) issue formal charges declaring the intention to dismiss the teacher; (5) allow the teacher thirty days to request a hearing; (6) if the teacher requests the hearing, schedule the hearing within six months of the request; and (7) ensure that the school district has the requisite funds to pay for at least half of the hearing's cost.<sup>176</sup> As to cost, former Los Angeles School Superintendent John Deasy estimated at the *Vergara* trial that it can cost anywhere "between \$250,000 and \$450,000" to dismiss a tenured teacher for unsatisfactory performance.<sup>177</sup> School administrators wanting to

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171. See *id.* § 44944(c)(2) (2015) (noting that the administrative law judge is the chairperson of the committee).

172. See *id.* § 44944(d)(1) (2015) (declaring that the CPC must rule for either outright dismissal, suspension without pay, or that neither dismissal nor suspension is necessary).

173. See *id.* § 44944(f)(1) (2015) (noting that this cost includes the cost of the administrative law judge).

174. See *id.* § 44944(f)(2) (2015) (including payment for "travel, meals, and lodging" for committee members, as well as "reasonable attorney's fees incurred by the employee").

175. See *id.* § 44945 (2015) (providing that this appeal can be petitioned for by either the employee or the school district governing board).

176. See *supra* notes 159–175 and accompanying text (detailing the step-by-step process for firing a teacher due to unsatisfactory performance).

177. See Frederick M. Hess, *No Shortcut to School Reform*, U.S.A. TODAY (June 11, 2014, 4:44 PM), <http://www.usatoday.com/story/opinion/2014/06/11/school-reform-vergara-california-teacher-tenure-column/10321765/> (last visited Sept. 30, 2016) (observing that teacher tenure laws "pre-date the advent of equal employment laws or modern hiring practices") (on file with the Washington and Lee Law Review).

fire a grossly ineffective teacher will often neglect to pursue this laborious and costly dismissal process and will either deal with the teacher, or more commonly, attempt to facilitate that teacher's transfer to another school.<sup>178</sup>

### *C. Last-In, First-Out*

California law permits layoffs of permanent employees due to various conditions, including lower student enrollment, curriculum modifications, and budgetary constraints.<sup>179</sup> California law further directs the evaluation criteria that administrators must adhere to when deciding which teachers to layoff.<sup>180</sup> Section 44955(b) states in pertinent part that "the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render."<sup>181</sup> Known colloquially as "Last-In, First-Out" (LIFO), this system of seniority-based layoffs protects senior teachers regardless of actual teaching ability.<sup>182</sup> The *Vergara* plaintiffs alleged that this "model of irrationality" forces school administrators to make personnel decisions without taking into account the students' best interests.<sup>183</sup>

Seniority-based layoffs have at least two specific harmful effects on students. First, senior teachers command higher salaries than junior teachers.<sup>184</sup> When seniority-based layoffs occur due to

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178. See Barrett, *supra* note 157 (citing evidence that LAUSD has paid thirty-two tenured teachers more than \$1.5 million to leave the district).

179. See CAL EDUC. CODE § 44955(b) (2015) (noting that the school district governing board has the authority to initiate layoffs).

180. See *id.* (providing that "the governing board shall determine the order of termination solely on the basis of needs of the district").

181. *Id.*

182. See *Greatness by Design*, *supra* note 153, at 14 (fearing the "extensive layoffs of excellent teachers who may be lost to the profession if they cannot soon return").

183. See Respondents' Brief, *supra* note 133, at 39 (describing the testimony at trial of a young teacher who won a "Teacher of the Year" award, but was nevertheless fired the same year due to the seniority-based layoff scheme).

184. See LOS ANGELES UNIFIED SCH. DISTRICT, 2015–2016 SALARIES FOR TEACHERS WITH REGULAR CREDENTIALS (2015), <http://achieve.lausd.net/cms/lib08/>

budget shortfalls, this means that a school must dismiss a greater number of junior teachers to compensate for this deficit.<sup>185</sup> Within the school, the practical effect of this is that class sizes increase, which hampers students' educational experience.<sup>186</sup> The *Vergara* plaintiffs focused heavily on the second harmful effect of LIFO: the consequences of excluding teacher effectiveness from the criteria driving the layoff process.<sup>187</sup> Often, LIFO provisions force the firing of younger and more effective teachers, while at the same time safeguarding the employment of grossly ineffective teachers who have seniority.<sup>188</sup> As with each of the statutes, the plaintiffs claimed that the harms that the LIFO provision imposed are significant and quantifiable.<sup>189</sup>

#### IV. The Legal Arguments of Vergara

Analyzing *Vergara's* legal argument reveals several similarities to the primary legal argument behind many school-funding challenges.<sup>190</sup> Challenges to teacher tenure and to unequal

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CA0100043/Centricity/Domain/280/Salary%20Tables/T%20Annual%20Table\_1-6.pdf (listing the salary scale for teachers in Los Angeles).

185. See DANA GOLDBABER & RODDY THEOBALD, CENTER FOR EDUC. DATA & RES., MANAGING THE TEACHER WORKFORCE IN AUSTERE TIMES: THE IMPLICATIONS OF TEACHER LAYOFFS 6 (2010), [http://www.cedr.us/papers/working/CEDR%20WP%202011-1.2%20Teacher%20Layoffs%20\(6-15-2011\).pdf](http://www.cedr.us/papers/working/CEDR%20WP%202011-1.2%20Teacher%20Layoffs%20(6-15-2011).pdf) (discussing the implications of seniority-based layoffs).

186. See Sam Dillon, *Tight Budgets Mean Squeeze in Classroom*, N.Y. TIMES (Mar. 6, 2011), <http://www.nytimes.com/2011/03/07/education/07classrooms.html> (last visited Sept. 30, 2016) (noting the correlative link between budgetary constraints and increased class sizes) (on file with the Washington and Lee Law Review).

187. See Vergara Complaint, *supra* note 20, at 17 (alleging that students suffer when high-performing junior teachers are dismissed in favor of low-performing senior teachers).

188. See *id.* (noting that the LIFO statute also hinders recruitment of new teachers because it creates the culture in which schools can fire new teachers regardless of performance).

189. See Respondents' Brief, *supra* note 133, at 39 (citing a study which found "84 percent of teachers laid off under a seniority-based system are *more* effective than *all* the teachers who would be laid off under an effectiveness-based layoff system").

190. See, e.g., *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 952 (Cal. 1976) (concluding that the California school financing system negatively affects students' fundamental right to education); *Vergara v. State*, No. BC484642, 2014

school funding both seek to redress the inferior quality of education in underachieving schools.<sup>191</sup> Just as school-funding cases challenged the constitutionality of property tax formulas, *Vergara* challenged the constitutionality of teacher tenure provisions.<sup>192</sup> The meaningful difference between the two is that *Vergara* substituted teacher ineffectiveness for money as the variable most responsible for the inadequate education that many students receive.<sup>193</sup>

The core legal claim of *Vergara* is that the tenure provisions violated California's Equal Protection Clause.<sup>194</sup> Because the plaintiffs based their claim in the state equal protection clause, and not its federal counterpart, the challenge to tenure in *Vergara* is most analogous to a second-stage funding challenge.<sup>195</sup> Structurally, the equal protection claim in *Vergara* has two independent pillars. First, the plaintiffs alleged that the tenure provisions unconstitutionally burden the fundamental right to equal educational opportunity, as guaranteed by the California constitution.<sup>196</sup> Second, the plaintiffs argued that the tenure

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WL 6478415, at \*4 (Cal. Super. Ct. Aug. 27, 2014) (finding that the challenged tenure provisions bear an appreciable burden on students' fundamental right to education).

191. See *The Third Wave*, *supra* note 44, at 597–98 (discussing the motivations behind school financing challenges).

192. See *Vergara* Complaint, *supra* note 20, at 1 (alleging that the tenure provisions “perpetrate and widen the very achievement gap that education is supposed to eliminate”).

193. Compare *Robinson v. Cahill*, 303 A.2d 273, 277 (N.J. 1973) (accepting the proposition that “the quality of educational opportunity does depend in substantial measure upon the number of dollars invested”), with *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*3–4 (Cal. Super. Ct. Aug. 27, 2014) (claiming that effective teachers are a critical component to a student’s “in-school educational experience”).

194. See *Vergara* Complaint, *supra* note 20, at 5 (alleging that the tenure provisions create arbitrary and unjustifiable distinctions that prevent children of the same age and ability from receiving “substantially equal access to education”).

195. See *Palfrey*, *supra* note 42, at 16 (finding that the analytical scheme used in the state equal protection claims of the second stage largely resembles that of the federal equal protection cases in the first stage).

196. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).



provisions have a disparate impact on minority students.<sup>197</sup> The alleged discriminatory effect of the tenure provisions is that the majority of grossly ineffective teachers work in underachieving schools that disproportionately serve minority populations.<sup>198</sup> The plaintiffs contended that these two equal protection arguments, if proven either individually or collectively, merit strict scrutiny review.<sup>199</sup>

### *A. Education as a Fundamental Right*

To contend that state action has burdened a fundamental right, plaintiffs must first establish that the right they are asserting is, in fact, fundamental.<sup>200</sup> Fundamental rights are those guaranteed by constitutional text,<sup>201</sup> or those that are so “deeply rooted” in history and tradition to be regarded as fundamental.<sup>202</sup> The *Vergara* plaintiffs relied on California precedent to prove that education is a fundamental right.<sup>203</sup> From *Serrano I* all the way to *Vergara*, California courts have highly regarded the “fundamental importance of education.”<sup>204</sup> California courts have further

197. See Respondents’ Brief, *supra* note 133, at 44 (alleging that the harms imposed by the tenure provisions “are magnified for the most vulnerable students—minority children . . . most in need of the opportunities that education is meant to provide”).

198. See *id.* at 46 (claiming that African-American and Latino students in Los Angeles “are 43% and 68% more likely, respectively, to be taught by teachers in the bottom 5% of effectiveness compared to white students”).

199. See *Romer v. Evans*, 517 U.S. 620, 637 (1996) (stating that if a law “neither burdens a fundamental right nor targets a suspect class” then the law will be upheld if it passes rational basis review).

200. See *Harper*, 383 U.S. at 670 (recognizing the right to vote as “too fundamental to be burdened or conditioned”).

201. See *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1, 17 (1973) (stating that fundamental rights are those “explicitly or implicitly provided” in the Constitution).

202. See *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (noting that fundamental rights are drawn from the “respect for the teachings of history (and), solid recognition of the basic values that underlie our society” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965))).

203. See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*1–2 (Cal. Super. Ct. Aug. 27, 2014) (addressing the factual histories and the holdings of both *Serrano* and *Butt*).

204. See *Serrano v. Priest (Serrano I)*, 487 P.2d 1241, 1258 (Cal. 1971) (“We are convinced that the distinctive and priceless function of education in our

interpreted the state's education clause as imposing a stringent legislative duty to provide equal education.<sup>205</sup> Judge Treu regarded the California courts' consistent pro-education position to be firm evidence that the Supreme Court of California established education as a fundamental right within the state.<sup>206</sup>

Once plaintiffs show that the challenged state law burdens the exercise of a fundamental right, the law can only meet strict scrutiny review if the state can demonstrate a "compelling state interest" justifying the law.<sup>207</sup> This compelling state interest must also be "narrowly drawn" to be the least restrictive means possible.<sup>208</sup> The *Vergara* opinion addresses each tenure provision individually, concluding in each instance that the provision has a negative and appreciable impact on educational quality.<sup>209</sup> As to the permanent employment statute, Judge Treu accepted the evidence on the negative consequences of the brief probationary period.<sup>210</sup> Judge Treu agreed that this brief period precluded an informed decision as to a teacher's skill, and stated that he could not even find a "legally cognizable reason" behind the statute.<sup>211</sup>

Reviewing the dismissal provisions, Judge Treu once again agreed with the plaintiffs' argument, finding that the dismissal process was too costly and too complex to work efficiently.<sup>212</sup> Judge Treu noted the estimate at trial that 1–3% of all teachers in

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society warrants, indeed compels, our treating it as a 'fundamental interest.'").

205. See *Butt v. State*, 842 P.2d 1240, 1249 (Cal. 1992) (finding that this legislative duty accords California citizens greater rights against state-maintained educational discrimination than does the U.S. Constitution).

206. See *Vergara*, 2014 WL 6478415, at \*3–4 ("In *Serrano I and II* and *Butt*, . . . an overarching theme is paradigmized: the Constitution of California is the ultimate guarantor of a meaningful, basically equal educational opportunity being afforded to the students of this state.").

207. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

208. See *id.* (noting that courts striking down state laws on abortion have scrutinized the state's purported interest in "protecting health and potential life").

209. See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*2 (Cal. Super. Ct. Aug. 27, 2014) (finding that plaintiffs "met their burden of proof on all issues presented").

210. See *id.* at \*5 (concluding that this brief period results in teachers "being reelected" who may have been refused permanent status had the probationary period been longer).

211. *Id.*

212. See *id.* at \*6 (finding that the sophistication of the dismissal procedures rendered an "efficient, yet fair dismissal of a grossly ineffective teacher illusory").

California are grossly ineffective.<sup>213</sup> Considering the impracticality of the dismissal process, Judge Treu proclaimed that it “cannot be gainsaid that the number of grossly ineffective teacher has a direct, real, appreciable, and negative impact on a significant number of California students.”<sup>214</sup> Finally, Judge Treu found that the LIFO provision poses a “lose-lose situation” for students, in that seniority-based layoffs often force students to miss out on the “junior/efficient teacher” while also leaving the senior/ineffective one in place.<sup>215</sup>

After noting the burden imposed by each tenure provision, Judge Treu also addressed whether the State could put forth a compelling interest in advancing the tenure provisions.<sup>216</sup> This analysis was very brief—at the outset of the opinion, Judge Treu noted that the cumulative effect of plaintiffs’ evidence was sufficient to “shock the conscience.”<sup>217</sup> The dismissal provision garnered the most analysis regarding a potentially compelling state interest.<sup>218</sup> The State contended that the procedural protections were necessary to afford teachers with due process.<sup>219</sup> Instead, Judge Treu found that the dismissal provision as constituted resembled “über due process.”<sup>220</sup> Because the

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213. See *id.* at \*4 (comparing this percentage rate to the roughly 275,000 active teachers in California and finding that this results in a numerical range of grossly ineffective teachers from 2,750 to 8,250).

214. See *Vergara*, 2014 WL 6478415, at \*4 (noting that this negative and appreciable impact extends well into the future for however long these teachers retain their employment).

215. See *id.* at \*6–7 (observing that the LIFO provision does not contain a waiver or exception for those junior teachers that prove themselves to be effective).

216. See *id.* at \*4 (adding that the State must also demonstrate that the distinctions drawn by the tenure statutes are “necessary to further their purpose” (quoting *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1249 (1971))).

217. See *id.* at \*4 (adding that plaintiffs’ cumulative body of evidence was “compelling”).

218. See *id.* at \*5–6 (responding to the “entirely legitimate issue of due process” raised by the State).

219. See Appellants’ Brief at 13, *Vergara v. State*, No. B258589 (Cal Ct. App. May 1, 2015) [hereinafter Appellants’ Brief] (referring to grossly ineffective teachers as those who cannot, or will not, teach). “The statutory dismissal process serves critical legislative purposes by ensuring that districts provide adequate procedural protections to tenured teachers facing dismissal, including protections required by due process.” *Id.*

220. See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*5 (Cal.

procedural protections far exceeded what due process required, Judge Treu found that harm imposed on students by the dismissal statutes outweighed any state interest in added protections.<sup>221</sup>

### *B. The Disparate Impact of the Tenure Provisions*

#### *1. Evidence of Discriminatory Effect*

The other side to the *Vergara* plaintiffs' equal protection claim was the allegation that the tenure provisions discriminated against low-income and minority students.<sup>222</sup> An equal protection claim alleging discrimination often arises when a law draws distinctions based on a suspect classification, such as race or gender.<sup>223</sup> There are generally two ways to establish a suspect classification. First, some laws explicitly draw impermissible distinctions between different groups of people.<sup>224</sup> Second, even if a law is facially neutral, a court may invalidate that law if its effect is to discriminate unfairly against one or more suspect classes.<sup>225</sup> Given the facial neutrality of the tenure provisions, the *Vergara* plaintiffs employed the latter argument of effects-based discrimination.<sup>226</sup>

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Super. Ct. Aug. 27, 2014) (discussing the balancing test for procedural due process that applies to other California state employees).

221. See *id.* at \*6 (expressing confidence that California courts are just as dedicated to protecting due process rights of teachers as they are to safeguarding the rights of students to equal educational opportunities).

222. See *Vergara* Complaint, *supra* note 20, at 1 (acknowledging that grossly ineffective teachers harm students statewide, but alleging that "the problem is worse" for students attending disproportionately minority and low-income schools).

223. See Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938 (1991) (noting that a suspect class is a group of individuals deserving of added protections because of a history of discrimination against that group).

224. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (striking down Virginia's miscegenation statutes because they drew impermissible distinctions solely according to race).

225. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (noting that for a statute to be invalidated on disparate impact grounds, plaintiffs must demonstrate proof of racially discriminatory intent or purpose).

226. See Respondents' Brief, *supra* note 133, at 71 (citing to *Serrano I*, where the California Supreme Court invalidated the facially neutral school funding

Analyzing how the tenure provisions act in concert to disproportionately burden the educational opportunities of minorities is thus crucial to substantiating a disparate impact claim.<sup>227</sup> The most influential mechanism through which the tenure provisions disadvantage minority students is through the “Dance of the Lemons.”<sup>228</sup> A lemon is a grossly ineffective teacher who, because of the early award of tenure and the complexity and cost of the dismissal procedures, a school cannot reasonably fire.<sup>229</sup> Because dismissal is not a practical option, school administrators often transfer their lemons.<sup>230</sup> Due to their ineffectiveness, these unwanted lemons dance from school to school, negatively affecting the educational growth of each classroom they land in.<sup>231</sup> Each of the challenged tenure provisions in *Vergara* perpetuates a different stage of the lemon dance, and the cumulative effect is that most lemons end up teaching in low-income schools that serve predominantly minority populations.<sup>232</sup>

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statute because it had the effect of discriminating based on wealth).

227. See *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1250 (Cal. 1971) (noting the facial neutrality of the property tax formula but emphasizing the importance of considering the effects of the formula as “a practical matter”).

228. See Barrett, *supra* note 157 (describing the administrative tactics that keep the lemon dance churning, such as paying ineffective tenured teachers to leave or transferring these teachers to “unsuspecting schools”).

229. See *id.* (describing what type of teacher constitutes a “lemon” teacher). Barrett documents the story of Roque Burio, a former science teacher at San Pedro High School in LAUSD. *Id.* Burio was ineffective as a teacher—in his first four years teaching, he received five “below-standard” teaching evaluations. *Id.* Burio’s approach to the classroom was “inquiry-based” learning, which his principal translated to mean “teachers do not teach.” *Id.* The article cites one bizarre lab experiment in which Burio told students to document behavior of live animals, yet did not bring any animals to class for observation. *Id.* Instead, Burio told his students to look at pictures of animals in books and complete the assignment that way. *Id.* Burio’s principal spent six years attempting to train Burio, conducting weekly observations and providing him with personal mentors. *Id.* Ultimately unable to fire Burio, LAUSD paid him \$50,000 to “quietly leave.” *Id.*

230. See *id.* (explaining that lemon teachers are either transferred or “repeatedly and fruitlessly” retained).

231. See *id.* (referencing the example of a teacher who was paid \$40,000 to stop teaching in LAUSD, but who is still actively listed in LAUSD’s substitute teacher pool).

232. See Respondents’ Brief, *supra* note 133, at 99 (alleging that the lemon dance exacerbates “the achievement gap” and concentrates “teacher layoffs in schools serving high-need communities”).

The permanence and dismissal provisions also have the combined effect of producing lemons. The brief probationary period before awarding tenure increases the likelihood that more grossly ineffective teachers will receive permanent status.<sup>233</sup> Faced with a lemon teacher, school administrators would much rather transfer that lemon than initiate an expensive, multi-year dismissal proceeding.<sup>234</sup> A report from the California Department of Education (CDE) itself admits that this transfer mechanism is the most “practical course of action at the individual school level.”<sup>235</sup>

The lemon dance’s discriminatory effects emerge when one looks at which schools have the majority of teacher vacancies. The CDE Report found that “poorly performing teachers generally are removed from higher-income or higher-performing schools and placed in low-income and low-performing schools,”<sup>236</sup> adding that because “minority children disproportionately attend such schools, minority students bear the brunt of staffing inequities.”<sup>237</sup> The lemon dance has downward movement—lemons can only be transferred to schools with vacancies, which statistically tend to be low-income schools with high minority populations.<sup>238</sup> The *Vergara* plaintiffs alleged that, because the tenure provisions create and protect the lemons, the provisions bear responsibility for the discriminatory impact these lemons have on the educational quality of low-income and minority students.<sup>239</sup>

The final piece to understanding the discriminatory impact of the lemon dance lies with the role of the LIFO provision. In

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233. See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*5 (Cal. Super. Ct. Aug. 27, 2014) (noting that California is only one of five states that has a probationary period of two years or less).

234. See *supra* note 178 and accompanying text (detailing the labyrinth of procedures administrators must navigate to dismiss a teacher for unsatisfactory performance).

235. See CALIF. DEP’T OF EDUC., EVALUATING PROGRESS TOWARD EQUITABLE DISTRIBUTION OF EFFECTIVE EDUCATORS 46 (2007) [hereinafter CDE REPORT] (finding that dismissal proceedings are rarely initiated due to the reluctance of administrators).

236. *Id.* at 46.

237. *Id.* at 5.

238. See *id.* at 46 (finding that nearly half of school administrators in LAUSD’s Western district admitted to trying to hide their openings to avoid hiring “excessed teachers”).

239. See *supra* note 232 and accompanying text (describing how the lemon dance disproportionately affects low-income and minority students).

California, the LIFO provision mandates that, in the event of layoffs, seniority determines which teachers retain their jobs.<sup>240</sup> Again, this would appear to affect all schools uniformly. Low-income, minority schools, however, are the schools with the “highest concentration of teachers with the lowest seniority.”<sup>241</sup> The overall impact is that when layoffs occur, the LIFO provision ensures that the schools with the highest percentage of vacancies will be these low-income, underachieving schools.<sup>242</sup> Two immediate consequences arise: (1) low-income, high-minority schools more commonly experience teacher turnover;<sup>243</sup> and (2) the need created by these vacancies guarantees other lemons a place to teach.<sup>244</sup>

## 2. Legal Theory of Disparate Impact

Whether a disparate impact challenge to teacher tenure is successful largely depends on the applicable legal standard for proving disparate impact.<sup>245</sup> In *Vergara*, the State advocated the Supreme Court’s position as set forth in *Washington v. Davis*,<sup>246</sup> which held that along with discriminatory effect, plaintiffs must also demonstrate a discriminatory motive or purpose behind the passage of the law.<sup>247</sup> Discriminatory purpose obviously exists

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240. See *supra* Part III.C (explaining the operation of the LIFO statute).

241. See Vergara Complaint, *supra* note 20, at 18 (citing the California Committee on Education Excellence, which found that the “State of California has created a pattern of disparities . . . that not only limits the opportunities for these students, but reinforces and enlarges the existing social inequalities confronting them”).

242. See Respondents’ Brief, *supra* note 133, at 49 (citing a study which analyzed actual teacher layoff data in LAUSD and found that “schools in the highest quartile of poverty are 65% more likely than other schools to have a teacher laid off under the LIFO Statute”).

243. See CDE REPORT, *supra* note 235, at 19 (noting the harmful effects that high teacher turnover has on school achievement).

244. See Barrett, *supra* note 157 (describing the cyclical nature of the Lemon Dance).

245. Compare Respondents’ Brief, *supra* note 133, at 96 (“California courts do not require a showing of discriminatory intent in the face of disparate impact.”), with Appellants’ Brief, *supra* note 219, at 66 (alleging that the discriminatory intent requirement “applies to claims under the California Constitution”).

246. 426 U.S. 229 (1976).

247. See *id.* at 239 (describing the methods by which discriminatory purpose

when the law is facially discriminatory.<sup>248</sup> The tenure provisions, however, are facially neutral—they speak solely to the issue of teacher employment and do not draw any ostensible classifications.<sup>249</sup> The Supreme Court did not foreclose finding discriminatory purpose behind a facially neutral law.<sup>250</sup> The Court instead imposed a high burden by requiring plaintiffs to show a clear racial pattern “unexplainable on grounds other than race.”<sup>251</sup>

The *Vergara* plaintiffs contend that demonstrating the discriminatory impact of the tenure provisions is sufficient to render the provisions unconstitutional.<sup>252</sup> Regardless of “whatever the federal rule might be,” the plaintiffs assert that a showing of disparate impact under California law does not require proof of discriminatory purpose.<sup>253</sup> In *Serrano II*, the Supreme Court of California distinguished California’s equal protection provisions, noting that they “are possessed of an independent vitality.”<sup>254</sup> The State cited to the Supreme Court of California’s decision in *Hardy v. Stumpf*<sup>255</sup> to refute this argument.<sup>256</sup> In *Hardy*, the results of a

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can be proven).

248. See *supra* note 224 and accompanying text (discussing how laws that facially distinguish between suspect classes automatically invoke heightened scrutiny).

249. See Respondents’ Brief, *supra* note 133, at 95 (conceding that the tenure provisions are facially neutral, but contending that strict scrutiny applies because of the disproportionate harmful effects imposed).

250. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977) (finding that plaintiffs can show discriminatory purpose by looking to the historical background of the law, or to the administrative history behind the law).

251. See *id.* (observing that cases where such a pattern can be shown are “rare”).

252. See *supra* note 245 and accompanying text (citing plaintiffs’ argument that disparate impact does not require a showing of discriminatory purpose in California).

253. See Respondents’ Brief, *supra* note 133, at 96 (fortifying the claim by referencing the California Supreme Court’s guarantee in *Serrano II* that the California constitution demands an analysis independent of the federal standard).

254. See *Serrano II*, 557 P.2d 929, 950 (1976) (stating that this independent vitality exists despite the fact that the text of both equal protection clauses is substantially the same).

255. 21 Cal.3d 1 (Cal. 1978).

256. See Appellants’ Brief, *supra* note 219, at 66 (alleging that *Hardy* established a requirement of discriminatory purpose for disparate impact cases).



physical agility test for police department applicants showed that a disproportionately greater percentage of men passed than women.<sup>257</sup> In rejecting the plaintiff's equal protection claim, the Supreme Court of California quoted *Washington's* language that "standing alone, disproportionate impact does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny."<sup>258</sup>

*Butt v. State*,<sup>259</sup> decided after *Hardy*, provides further pivotal insight into the standard for disparate impact in California.<sup>260</sup> The *Vergara* plaintiffs maintained that *Butt* is more dispositive than *Hardy* because *Butt* pertained to educational discrimination and was decided more recently.<sup>261</sup> The *Butt* court first noted that the California constitution grants greater rights against educational discrimination than does federal law.<sup>262</sup> Then, the court stated that "[d]espite contrary federal authority, California constitutional principles require State assistance to correct basic 'interdistrict' disparities in the system of common schools, *even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.*"<sup>263</sup>

In the *Vergara* opinion, Judge Treu devoted very little analysis to the plaintiffs' disparate impact argument. Judge Treu found that the evidence was "clear" that the tenure provisions had a disproportionate burden on low income and/or minority students, but made no mention of the potential requirement of a discriminatory purpose.<sup>264</sup> In reversing Judge Treu, the California

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in California).

257. See *Stumpf*, 21 Cal.3d at 6 (noting that eighty-five percent of men passed the test, compared to just fifteen percent of women).

258. *Id.* at 8.

259. 842 P.2d 1240 (Cal. 1992).

260. See *id.* at 1250 (emphasizing "the State's ultimate responsibility for maintaining a nondiscriminatory common school system").

261. See Respondents' Brief, *supra* note 133, at 98–99 (noting that *Butt* reaffirmed *Serrano* and was decided well after *Hardy*).

262. See *Butt*, 842 P.2d at 1249 (noting that these greater rights stem from the "uniquely fundamental personal interest" in education that exists in California).

263. *Id.* (emphasis added).

264. See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*7 (Cal. Super. Ct. Aug. 27, 2014) (claiming that the "substantial evidence" shown at trial "makes it clear" that the tenure provisions have a discriminatory effect on

Court of Appeal relied on a lack of causation, finding that any statistical evidence of ineffective teachers disproportionately working in minority schools was the result of school administrators' decision-making, and not the tenure statutes.<sup>265</sup> In future tenure challenges, the critical issue will be whether the court requires proof of discriminatory purpose. When state courts decide to follow *Washington* and require discriminatory intent, the disparate impact challenge to tenure will likely fail.<sup>266</sup>

### V. Framing the Ideal Legal Challenge to Teacher Tenure

In framing the ideal challenge to teacher tenure, the initial hurdle plaintiffs face is deciding whether to bring the challenge under state or federal law.<sup>267</sup> Using the three stages of school funding as a guide, the most effective arguments will be under state constitutional provisions.<sup>268</sup> In large part, this is because the Supreme Court has blocked many of the legal paths that plaintiffs might take to sustain a tenure challenge under federal law.<sup>269</sup> *Rodriguez* denied education status as a fundamental right,<sup>270</sup> whereas *Washington* required proof of discriminatory purpose to show disparate impact.<sup>271</sup>

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minority students).

265. See *Vergara v. State*, 202 Cal. Rptr. 3d 262, 286 (Cal. Ct. App. 2016) (finding that the evidence at trial “firmly demonstrated that staffing decisions, including teacher assignments, are made by administrators”).

266. See, e.g., *Kim v. Workers' Comp. Appeals Bd.*, 87 Cal. Rptr. 2d 382, 382 (Cal. Ct. App. 1999) (rejecting an equal protection challenge to a workers' compensation cap because of the absence of discriminatory purpose).

267. See *supra* Part II.A–B (discussing plaintiffs' strategic decision to bring a funding suit under the U.S. Equal Protection Clause or state constitutional equal protection clauses).

268. See *supra* Part II.B–C (describing plaintiffs' successes under state constitutional provisions).

269. See *infra* notes 270–271 and accompanying text (discussing how *Rodriguez* and *Washington* made it difficult for plaintiffs to bring tenure challenges under the U.S. Constitution).

270. See *supra* note 69 and accompanying text (discussing the *Rodriguez* court's reasoning for denying education classification as a fundamental right).

271. See *supra* note 247 and accompanying text (describing the *Washington* court's requirement for showing discriminatory purpose).

State education clauses ultimately provide plaintiffs with the strongest arguments, regardless of whether plaintiffs formulate their claim as an equality challenge or an adequacy challenge. Under an equality argument, the education clause provides a direct textual basis for plaintiffs to assert that education is a fundamental right.<sup>272</sup> As in *Vergara*, plaintiffs can argue under a state's equal protection clause that strict scrutiny applies, leading to the invalidation of tenure laws.<sup>273</sup> Under an adequacy argument, plaintiffs can use the heightened standard of quality set forth in the education clause to argue that the quality of education in public schools' is constitutionally inadequate.<sup>274</sup>

#### *A. Demonstrating Causation*

Suggesting the ideal format for a tenure challenge first requires grappling with the chief criticism of the *Vergara* lawsuit—that plaintiffs' evidence is insufficient because it fails to prove a direct causal relationship between the tenure statutes and ineffective teachers.<sup>275</sup> Demonstrating causation is necessary to a successful challenge regardless of whether the lawsuit is an equal protection claim or an adequacy claim.<sup>276</sup> Judge Treu, possibly due to the brevity of his analysis, has been criticized for facially accepting plaintiffs' arguments regarding causation without

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272. See, e.g., *Butt v. State*, 842 P.2d 1240, 1248–50 (1992) (explaining the constitutional demand of the education clause and how California courts' judicial interpretation of the education clause has established education as a fundamental right in California).

273. See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*2 (Cal. Super. Ct. Aug. 27, 2014) (describing the plaintiffs' equal protection claim).

274. See *supra* Part II.C (discussing the adequacy arguments of the third stage of school funding litigation).

275. See Brief for Erwin Chemerinsky & Catherine L. Fisk as Amici Curiae Supporting Appellants, *Vergara v. State*, No. B258589 (Cal. Ct. App. June 24, 2015) [hereinafter Amicus Brief for Appellants] (criticizing Judge Treu's opinion for his lack of analysis regarding the causal effect of the tenure statutes).

276. See, e.g., *Butt*, 842 P.2d at 1256 (upholding the trial court's determination that a school district's decision to cancel the last six weeks of school "would cause educational disruption sufficient to deprive District students of basic educational equality"); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 198 (Ky. 1989) (finding that in an adequacy funding challenge, plaintiffs "showed a definite correlation between the money spent per child on education and the quality of education received").

providing a more thorough review of the evidence.<sup>277</sup> Professor Black asserts that the *Vergara* challenge to tenure is meritorious enough to survive facial pleading stages, yet fails to reach the level of a constitutional violation because “the research certainly does not speak to whether tenure has a positive or negative effect on individual teachers.”<sup>278</sup> As an amicus for the State on appeal, Professor Chemerinsky similarly contended that plaintiffs “failed to adequately demonstrate that the tenure, dismissal, and layoff statutes were the *cause* of any educational disparities.”<sup>279</sup>

This Note urges a more realistic lens through which to view causation. The way in which courts must measure causation in the tenure context is fundamentally different from the way causation has been measured in school funding cases.<sup>280</sup> This difference is because of the qualitative nature of gauging teacher effectiveness, as opposed to the strictly quantitative measurement of school funding.<sup>281</sup> Courts reviewing funding challenges can create side-by-side numerical comparisons of a school district’s property values and corresponding tax rates.<sup>282</sup> A court in a funding challenge therefore has a clear evidentiary basis to show how

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277. See, e.g., Michael Hiltzik, *Teacher Tenure Case: Another Sign the Judge’s Ruling Deserves an F*, L.A. TIMES (June 12, 2014), <http://www.latimes.com/business/hiltzik/la-fi-mh-teacher-tenure-trial-20140612-column.html> (last visited Sept. 30, 2016) (lambasting Judge Treu’s “single-minded determination to blame the ills of the California educational system entirely on due-process protection for teachers”) (on file with the Washington and Lee Law Review).

278. Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75, 129 (2016).

279. See Amicus Brief for Appellants, *supra* note 275, at 9–10 (alleging that Judge Treu’s entire finding of causation consisted of one “block quote” from the CDE Report).

280. See, e.g., *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1248 (Cal. 1971) (calculating per-pupil expenditures across several school districts in Los Angeles County). For example, the court found that from 1968–1969, Baldwin Park Unified School District spent \$577.49 per pupil, Pasadena Unified School District spent \$840.19 per pupil, and Beverly Hills Unified School District expended \$1,231.72 per pupil. *Id.*

281. Eric A. Hanushek, *Teacher Quality*, in *TEACHER QUALITY 3* (Lance T. Izumi et. al. eds., 2002) (observing a wide range of differences exist among teachers and that “these differences are not captured by common measures of teachers (qualifications, experience, and the like)”).

282. See *id.* at 1252 n.15 (creating a table comparing school spending rates with tax rates across twelve different school districts).

property tax formulas cause significant disparities in per-pupil funding among school districts.<sup>283</sup> Teacher effectiveness, due to its qualitative nature, cannot be as readily subjected to such direct quantification.<sup>284</sup>

To demonstrate the difficulty of proving the same degree of causation as the funding cases, it is helpful to hypothetically conceive of what the ideal data set would look like in the tenure context. For example, to show the quantitative effect of the dismissal provision, school administrators would need to keep a running tally of each time they would have fired a teacher for unsatisfactory performance but refrained from doing so due to the dismissal provision's complexity and cost. Similarly, principals would need to document each time they laid off a more effective junior teacher due to the requirements of the LIFO provision.

In petitioning the Supreme Court of California for review, the *Vergara* plaintiffs noted the need for a similar lens through which to view causation.<sup>285</sup> Citing Supreme Court of California precedent, the *Vergara* plaintiffs argued that “a court may not overlook the probable impact of a law when analyzing its constitutionality.”<sup>286</sup> Courts should take into account “the realities of the world in which those laws operate,” and recognize that, because of their proximity to the classroom, school principals and administrators represent the strongest source of evidence as to the effects of California’s teacher tenure laws.<sup>287</sup> When, as in *Vergara*, the evidence presented shows that the effects of tenure laws impose systematic and appreciable harm upon students’ learning opportunities, courts should find requisite causation to establish a constitutional violation.

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283. *See id.* at 1247–48 (stating that the source of funding disparities between school districts is “unmistakable” in justifying the invalidation of the property tax funding scheme).

284. *See id.* at 11 (concluding that “teacher quality cannot be readily linked to teacher characteristics”).

285. *See* Petition for Review at 19–21, *Vergara v. State*, No. B258589 (Cal. Sup. Ct. May 24, 2016) [hereinafter *Petition for Review*] (emphasizing the need to examine the statutes’ disparate impact “in light of the real-world conditions in which these statutes operate”).

286. *Id.* at 20 (quoting *Parr v. Mun. Court*, 479 P.2d 353, 356 (Cal. 1971)).

287. *See infra* notes 288–298 and accompanying text (reviewing the substantial evidence presented at trial from school administrators and principals).

At trial, both the State and the *Vergara* plaintiffs produced school administrators who testified as to the tenure provisions' systematic and harmful effects on students throughout California.<sup>288</sup> With regards to the permanence statute, various California administrators, as well as former LAUSD Superintendent John Deasy, all testified that the 16-month probationary period before awarding tenure was far too brief.<sup>289</sup> The State's witness, Dr. David Berliner, similarly testified that a three to five year probationary period would be preferable.<sup>290</sup>

The evidence produced at trial regarding the effects of the dismissal statutes was even more startling. Plaintiffs produced testimony from the former chief human resources officer for LAUSD, who testified that she was not aware of any performance-based dismissal proceeding that finished in less than two years.<sup>291</sup> Multiple school principals stated that the costs of initiating dismissal proceedings ranged from \$50,000–\$450,000.<sup>292</sup> Witnesses from both sides agreed that the net result of the time and cost of dismissing a teacher is such that administrators rarely elect to initiate dismissal proceedings.<sup>293</sup> The statistics bear this assertion out. Between 2003 and 2013, only twenty-two teachers in the entire state of California were dismissed for unsatisfactory performance.<sup>294</sup> This represents “only 0.0008% of the nearly 300,000 teachers” working across the state.<sup>295</sup> As to the LIFO provision, plaintiffs presented significant evidence regarding the

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288. See Respondents' Brief, *supra* note 133, at 35 (describing testimony of State witnesses who agreed that the complexity of the dismissal provision causes administrators to view the chances of dismissing a tenured teacher as “impossible”).

289. See *id.* at 26 (finding that this time period was too short of a time period to properly evaluate a teacher's skill).

290. See *id.* at 27 (acknowledging that this lengthened probationary period would benefit both students and teachers).

291. See *id.* at 31–32 (noting further that the State did not produce evidence of one single “CPC hearing that took less than 2 years”).

292. See *id.* (noting that the State did not produce evidence of even one CPC dismissal case that had a cost outside of this range).

293. See *id.* (quoting plaintiffs' witness Ms. Larissa Adam, a principal from Oakland Unified School District, who testified that “[she] viewed [dismissal] as not a realistic option”).

294. See *id.* at 3 (explaining that this means “only 2.2 teachers are dismissed on average, each year, for unsatisfactory performance”).

295. *Id.*

harms of a seniority-based layoff system.<sup>296</sup> Plaintiffs cited a study conducted by Dr. Goldhaber, which analyzed thousands of teacher layoff notices from LIFO districts.<sup>297</sup> At trial, Dr. Goldhaber concluded from his study that only 16% of teachers who were laid off due to seniority would have been laid off had teacher effectiveness been the main criteria.<sup>298</sup>

Causation is often viewed solely as a question of creation—do the tenure provisions create ineffective teachers?<sup>299</sup> Courts reviewing causation in tenure challenges should instead “consider the circumstances in the light of existing conditions.”<sup>300</sup> California’s tenure laws effectuate blind retention—no matter what force prompted a teacher to be ineffective, all grossly ineffective teachers share in the ironclad job protections that tenure provisions afford.<sup>301</sup> California’s tenure provisions cause ineffective teaching because they do not provide administrators with the flexibility to dismiss grossly ineffective teachers.<sup>302</sup> Absent the argument that no grossly ineffective teachers exist in California, the tenure provisions necessarily retain the employment of teachers who impair California students’ educational opportunities.<sup>303</sup>

296. See *id.* at 39–40 (presenting testimony from Dr. Chetty, who claimed that “48 percent of LAUSD teachers who are laid off under a seniority-based layoff system are actually more effective than the average LAUSD teacher”).

297. See *id.* at 39 (referencing Dr. Goldhaber’s study as proof that the harms caused by the LIFO statute are “significant and measurable”).

298. See *id.* at 39 (arguing that this estimate means that “84 percent of teachers laid off under a seniority-based system are *more* effective than *all* the teachers who would be laid off under an effectiveness-based layoff system”).

299. See Black, *supra* note 278, at 119 (listing potential causes of inadequate teaching as “poor leadership at the local level, poor professional development, overcrowded classrooms, or insufficient funds”).

300. *In re Smith*, 143 Cal. 368, 372 (1904).

301. See TEACHER EFFECTIVENESS TASK FORCE, FINAL REPORT 11 (2010), [http://relwest-archive.wested.org/system/event\\_attachments/93/attachments/original/Teacher\\_Effectiveness\\_Task\\_Force\\_Report\\_\\_vfinal\\_\\_0.pdf](http://relwest-archive.wested.org/system/event_attachments/93/attachments/original/Teacher_Effectiveness_Task_Force_Report__vfinal__0.pdf) [hereinafter TASK FORCE REPORT] (observing that many view tenure as an “ironclad guarantee” and that “the framework for teacher tenure decisions should be about growth . . . not about protection from . . . dismissal”).

302. See *id.* (noting that fewer than 1% of tenured teachers get fired).

303. See *supra* note 213 and accompanying text (discussing testimony from a State’s witness that anywhere from 1–3% of California teachers are “grossly ineffective”).

The nature of plaintiffs' evidence at trial should also not be characterized as anecdotal.<sup>304</sup> Much of the public rebuke to California's tenure laws does come in the form of cautionary tales of specific teachers who egregiously personify the harms of rigid tenure.<sup>305</sup> At trial, however, most evidence presented came from school administrators who cope with the constraints of the tenure provisions on a yearly basis.<sup>306</sup> School administrators conduct evaluations and review the test score results of their teacher employees.<sup>307</sup> Because of the qualitative nature of teacher effectiveness, and because administrators are most qualified to present findings on the actual effects of the tenure provisions, courts reviewing tenure challenges similar to *Vergara* should treat this evidence as sufficient to show a "real and appreciable impact" on students' right to education.

*B. Equality or Adequacy: Which Legal Theory?*

Due to the weaknesses inherent in equality challenges to teacher tenure, adequacy theory represents the strongest formulation for a tenure challenge. Exposing some of these weaknesses, the California Court of Appeal overturned the trial court in *Vergara*, finding that for equal protection purposes, students assigned to grossly ineffective teachers were not a sufficiently identifiable class.<sup>308</sup> In their petition to the Supreme Court of California, plaintiffs argued that the appellate court erred by conflating the requirements for equal protection and substantive due process arguments.<sup>309</sup> Regardless of which

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304. See Black, *supra* note 278, at 130 (noting the "reports and anecdotal stories" that simply assert a causal connection between the tenure laws and ineffective teaching).

305. See, e.g., Barrett, *supra* note 157 (using stories of particular teachers to demonstrate the harmful effects of California's tenure provisions).

306. See *supra* notes 288–298 and accompanying text (describing the evidence that various school district administrators presented at trial).

307. See TASK FORCE REPORT, *supra* note 301, at 9 (explaining that in LAUSD, principals conduct "STULL" evaluations which are based on the California Standards for the Teaching Profession).

308. See *Vergara v. State*, 202 Cal. Rptr. 3d 262, 283–84 (Cal. Ct. App. 2016) (noting that plaintiffs' failure to satisfy this threshold requirement precluded the court from reaching fundamental rights analysis).

309. See *Petition for Review*, *supra* note 285, at 5 ("The Court of Appeal's



standard is correct under California law, an adequacy challenge to tenure would avoid such interpretive difficulties.<sup>310</sup>

An adequacy challenge requires no classification of education as a fundamental right. An adequacy challenge also does not require plaintiffs to allege that the tenure provisions impermissibly discriminate against a suspect class. Adequacy arguments are conceptually simpler for courts to interpret—an adequacy challenge only asks courts to interpret the education clause found in the state constitution.<sup>311</sup> Because it is well within the confines of the judiciary’s authority to interpret and give meaning to state constitutions, state courts are more willing to assume an activist role while reviewing adequacy challenges.<sup>312</sup>

The Washington Supreme Court’s recent decision in *McCleary v. State*<sup>313</sup> demonstrates the lengths to which a state court may be willing to go when asked to give meaning to a state education clause. Plaintiffs in *McCleary* brought an adequacy funding challenge, asserting that the quality of Washington schools was insufficient in light of the state’s “affirmative paramount duty” to provide for education.<sup>314</sup> The court in *McCleary* classified education as a positive right; unlike traditional negative rights that restrain government action, positive rights obligate the government to provide some level of services.<sup>315</sup> Because of the state’s affirmative constitutional obligation to provide for education, the court determined that traditional deference to the

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holding conflates fundamental rights claims with suspect-classification claims.”).

310. See McUsic, *supra* note 77, at 312–15 (discussing the difficulties plaintiffs face when bringing equal protection claims).

311. See *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1025 (Colo. 1982) (“Thus, whether a better financing system could be devised is not material to this decision, as our sole function is to rule on the constitutionality of our state’s system.”).

312. See, e.g., *Gannon v. State*, 319 P.3d 1196, 1220 (Kan. 2014) (“Like the Texas Supreme Court’s relationship to its state constitution, the Kansas Supreme Court is the final authority to determine adherence to the Kansas Constitution.”).

313. 269 P.3d 227 (Wash. 2012).

314. *Id.* at 247.

315. See *id.* at 248 (observing that the “distinction between positive and negative constitutional rights is important because it informs the proper orientation for determining whether the State has complied” with its duty to provide education).

legislature was the “wrong lens” through which to review the funding system’s constitutionality.<sup>316</sup>

Instead of reviewing the funding system with a presumption of constitutionality, the court in *McCleary* based constitutionality on “whether the funding system has met, or is reasonably likely to meet, its constitutionally prescribed goals.”<sup>317</sup> The Washington Supreme Court found the current funding scheme was insufficient given the state’s obligation to amply provide for the education of all children.<sup>318</sup> Dissatisfied with over thirty years of perceived legislative stagnation, the court decided to retain jurisdiction over the case to monitor legislative compliance.<sup>319</sup> Finding that the legislature had not remedied the constitutional violation, the court recently issued financial sanctions of \$100,000 per day until the funding system reaches compliance.<sup>320</sup>

The *McCleary* decision is the extreme example of judicial activism in the adequacy context—by rejecting traditional deference to the legislature and by fashioning a more activist standard of review, the Washington Supreme Court likely overstepped its judicial authority under separation of powers principles.<sup>321</sup> Whether the level of activism as seen in *McCleary* is constitutional is beyond the scope of this Note. In the context of challenges to teacher tenure, the greater point is that courts will be more willing to wade into the political thicket when asked to give substantive meaning to education clauses.<sup>322</sup>

Even state courts that defer to the legislature’s decisions in education policy-making and funding will often find that the

316. *Id.*

317. *See id.* (referring to this level of inquiry as a “delicate exercise in constitutional interpretation”).

318. *Id.* at 253.

319. *See id.* at 259 (“What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education.”).

320. *See* Order of Aug. 13, 2015 at 9, *McCleary v. State*, 269 P.3d 227 (Wash. 2012) (No. 84362-7) (“Effective immediately, the State of Washington is assessed a remedial penalty of \$100,000 per day until it adopts a complete plan for complying with article IX, section 1.”).

321. *See* *Island Cty. v. State*, 955 P.2d 377, 380 (Wash. 1998) (noting that Washington state courts deferentially review statutes out of respect for separation of powers principles).

322. *See supra* notes 313–321 (discussing *McCleary v. State*).

education clause provides some minimum quality of educational opportunity.<sup>323</sup> The key to an adequacy challenge to teacher tenure will be connecting tenure provisions with constitutionally inadequate educational opportunities.<sup>324</sup> Demonstrating such a link brings up a common definitional problem in adequacy challenges. For as long as plaintiffs have brought adequacy challenges to education policy, state courts have struggled with defining what exactly constitutes a constitutionally adequate education.<sup>325</sup>

Considerable debate exists as to what inputs best produce superior educational opportunities—the bulk of education reform litigation in the past fifty years has centered on funding, while tenure challenges like *Vergara* base their claims on teacher effectiveness.<sup>326</sup> Funding challenges have struggled with identifying a constitutionally adequate level of funding: How much funding do schools need to give students adequate educational opportunities?<sup>327</sup> Adequacy challenges to tenure could similarly suffer in attempting to answer critics who ask: What percentage of teachers within a district must be “effective” to fend off a constitutional violation?

Yet, here is where tenure suits like *Vergara* would have a distinct advantage in the adequacy context. Whereas plaintiffs and school districts vigorously dispute the correlative relationship

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323. See, e.g., *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 227 (Conn. 2010) (holding that the fundamental right to education under Connecticut’s education clause “encompasses a minimum qualitative standard that guarantees students the right to suitable educational opportunities” (internal quotation marks omitted)).

324. See, e.g., *Davis v. State*, 804 N.W.2d 618, 638–39 (S.D. 2011) (rejecting plaintiff’s funding adequacy claim because, “even assuming the deficiencies, the weakest link in plaintiff’s constitutional challenge is tying the funding to the results”).

325. See, e.g., *Lobato v. State*, 304 P.3d 1132, 1139 (Colo. 2013) (defining a constitutionally adequate education by using Webster’s dictionary to interpret a “thorough and uniform education” as one marked by “completeness, is comprehensive, and is consistent across the state”).

326. See *supra* Part IV (discussing the legal arguments of the *Vergara* lawsuit).

327. See *Morath v. Texas Taxpayer & Student Fairness Coal.*, No. 14–0776, 2016 WL 2853868, at \*17 (Tex. Sup. Ct. May 13, 2016) (finding that to achieve the constitutional threshold of an adequate education, “a court must not only find that a cost-quality relationship exists, but also must assign specific quantitative measures to that relationship”).

between more funding and superior educational outcomes, both sides agree that effective teachers are essential to students' educational growth.<sup>328</sup> There are not many in the education world who would dispute that good teachers are essential to opening educational opportunities for their students. In contrast, the main criticism of funding claims is that more funding does not necessarily lead to better educational opportunities.<sup>329</sup>

Plaintiffs bringing tenure challenges should formulate them as adequacy challenges, and they should further tether teacher effectiveness to the promise of educational opportunity contained in each state's education clause. Good teachers create educational opportunities, while grossly ineffective teachers foreclose them.<sup>330</sup> In California, tenure laws give a teacher permanent employment before adequate time has passed to diagnose that teacher's skill level.<sup>331</sup> When administrators find that a teacher is grossly ineffective, the tenure laws make dismissal of that teacher an unrealistic option.<sup>332</sup> The net result is that many California students receive a quality of education that does not carry with it the educational opportunities envisioned by the California constitution's education clause. If plaintiffs can convince courts that this harm is systematic and substantial across the entire state, then plaintiffs will have set forth a colorable adequacy challenge to teacher tenure laws.

Refashioning the complaint in *Vergara* highlights the advantages that adequacy theory has in the tenure context. Using precedent emphasizing the "indispensable role" of education in California, plaintiffs could have argued that California's education

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328. See *Vergara v. State*, No. BC484642, 2014 WL 6478415, at \*3 (Cal. Super. Ct. Aug. 27, 2014) (citing the State defendants' exhibit 1005 that declared "a growing body of research confirms that the *quality of teaching* is what matters most for students' development and learning in schools").

329. See Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. ECON. LIT. 1141, 1167 (1986) (concluding that the schools are run in an economically inefficient manner, and that "increased expenditures by themselves offer no overall promise for improving education").

330. See *supra* note 17 (describing several studies that have found teacher effectiveness to be the most important factor behind generating better student outcomes).

331. See *supra* Part III.A (detailing the California permanence provisions).

332. See *supra* Part III.B (discussing how the dismissal statutes significantly impair school administrators' ability to dismiss grossly ineffective teachers).

clause imposes a heightened definition of a constitutionally adequate education.<sup>333</sup> Plaintiffs' evidentiary strategy would still be the same—first quantifying the impact of a grossly ineffective teacher and then demonstrating how tenure statutes permanently employ these teachers would illustrate to a reviewing court the inadequacy of the current tenure system.<sup>334</sup> Because this argument singularly targets the language of the education clause, a reviewing court could focus on the existing inadequacies caused by the current tenure system, as opposed to being distracted by the numerous threshold requirements and spillover consequences of finding an equal protection violation.

## VI. Conclusion

The growing consensus regarding the importance of teacher effectiveness to a students' educational growth has made legal challenges to teacher tenure more viable than ever. Plaintiffs in other states who decide to challenge tenure laws will face the strong inclination to adopt *Vergara's* dual equal protection theories.<sup>335</sup> Adequacy theory, however, holds greater promise for plaintiffs seeking tenure reform. Plaintiffs can focus on the gross inadequacy of teachers within their school district to contend that their educational quality does not meet the adequacy standard set forth in the education clause. Despite *Vergara's* ultimate failure within the California court system, the trial court's ruling in *Vergara* has signaled that courts may be willing to give state education clauses greater teeth.<sup>336</sup> Adequacy theory will allow plaintiffs the greatest opportunity to test this hypothesis by

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333. *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1255 (Cal. 1971).

334. *See* *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 198 (recognizing the testimony given by numerous educational experts at trial as to the effects funding disparities have on students' educational opportunities).

335. *See* Black, *supra* note 278, at 123–24 (discussing the factual allegations of the New York plaintiffs).

336. *See* Valerie Strauss, *A Silver Lining in the Vergara Decision?*, WASH. POST (June 11, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/06/11/a-silver-lining-in-the-vergara-decision/> (last visited Sept. 30, 2016) (explaining that the *Vergara* decision could cast California courts as “a guarantor of educational equality”) (on file with the Washington and Lee Law Review).

prompting plaintiffs to argue for a heightened standard of educational quality.

Growing roses in concrete is a difficult feat. The issue that *Vergara* and decades worth of school-funding litigation have sought to address is identifying the force that can create cracks in the concrete wide enough to permit roses to grow. One of the more intractable problems in addressing educational inequality is that there exist so many differing explanations as to why certain students lag behind.<sup>337</sup> *Vergara* is groundbreaking because it seizes on teacher effectiveness as the variable with the greatest potential effect on a child's educational growth. The challenge to teacher tenure in *Vergara* is a valuable start—reducing barriers to eliminating the most harmful subset of ineffective teachers can only help student achievement.

Down the line, however, education reformers must place greater emphasis on teacher evaluation. If teacher effectiveness truly is the most significant factor affecting student achievement, why are most LAUSD teachers observed by their superiors only once a year?<sup>338</sup> Increasing the probationary period before awarding tenure is logical, but only if teachers are more frequently observed and evaluated during that time period. Since No Child Left Behind,<sup>339</sup> school administrators consistently fall into the trap of equating teacher effectiveness with students' standardized test scores.<sup>340</sup> While scores are certainly relevant, employment decisions driven by scores as the sole criterion ignore the fact that effective teaching encompasses many other intangible traits. An effective teacher has high levels of student engagement in class and is able to create a classroom culture that is conducive to every

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337. See *Identifying Factors that Contribute to Achievement Gaps*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/17413.htm> (last visited Sept. 30, 2016) (dividing a list of several causes of the American achievement gap by those factors that are within schools' control and those that are outside schools' control) (on file with the Washington and Lee Law Review).

338. See TASK FORCE REPORT, *supra* note 301, at 9 ("Teachers are evaluated the first year they become permanent, and at least every other year thereafter.").

339. The No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2002).

340. See Eric A. Hanushek & Steven G. Rivkin, *The Quality and Distribution of Teachers Under the No Child Left Behind Act*, 24 J. ECON. PERSP. 133, 134 (2010) (noting that under No Child Left Behind, schools hoping to remain in "good standing" must meet benchmarks based on students' standardized test pass rates).

child's learning abilities. These two intangible qualities of teacher effectiveness can only be measured by in-class observation and evaluation.

*Vergara* challenged legal impediments to removing those teachers already identified as grossly ineffective. These teachers, due to their inability to teach at the most basic level, hamper the educational opportunities of the students in their classrooms. To really have a transformative effect on student achievement, however, it is not enough to simply root out the worst teachers. School districts and administrators must concentrate greater effort and resources on cultivating the teacher talent already within. The status quo, with infrequent observation and one data set of test scores per year, does not achieve this goal.<sup>341</sup> Without more effective teacher evaluation, *Vergara's* goal to address disparities in teacher effectiveness will not be met, regardless of the length of the tenure probationary period or the complexity of the dismissal procedures.

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341. See TASK FORCE REPORT, *supra* note 307, at 11 (observing that 99.3% of teachers in LAUSD receive a "Meets Standard Performance" rating on their evaluation).