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Abigail Hogle-Shen

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## FIXER UPPER: REFORMING VERGARA'S TEACHER TENURE STATUTES

Abigail Hoglund-Shen\*

### INTRODUCTION

From its origins in colonial Massachusetts's 1642 and 1647 school laws<sup>1</sup> to No Child Left Behind's<sup>2</sup> contemporary successor, the Every Student Succeeds Act,<sup>3</sup> education has remained a storied and lasting component of our nation's heritage. Today, all state constitutions guarantee education in "some form."<sup>4</sup> Though education has long existed in our nation's history, perspectives vary widely as to the best way to educate our children.<sup>5</sup> Accordingly, lawmakers and activists, fed up with stagnant and declining student performance, have enacted a variety of reforms in recent years.<sup>6</sup> Across America, leaders in education have striven to improve educational outcomes, which have lagged behind those of many developed nations.<sup>7</sup> High-poverty schools often have poor educational results: Only a small portion of students attend college, many students drop out, and many schools function as what some activists have dubbed the "school-to-prison pipeline."<sup>8</sup> To combat these schools' dismal educational results, many reformers have challenged the status quo: uprooting

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\* JD Candidate, William & Mary Law School, 2017; BA, Johns Hopkins University, 2012. I thank my family and friends for their continued support, Professor Vivian Hamilton for her guidance during the drafting process, and the *William & Mary Bill of Rights Journal* staff for their meticulous editing work. Any errors are my own.

<sup>1</sup> See Eric R. Ebeling, *Massachusetts Education Laws of 1642, 1647, and 1648*, in *HISTORICAL DICTIONARY OF AMERICAN EDUCATION* 225, 225–26 (Richard J. Altenbaugh ed., 1999).

<sup>2</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

<sup>3</sup> Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

<sup>4</sup> Note, *Education Policy Litigation as Devolution*, 128 *HARV. L. REV.* 929, 929 (2015).

<sup>5</sup> See *id.* at 950 (discussing contrasting opinions in the wake of *Vergara v. State (Vergara I)*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016)).

<sup>6</sup> See Nicholas Kristof, *Beyond Education Wars*, *N.Y. TIMES*, Apr. 23, 2015, at A27 (describing reform efforts such as Teach for America, the Common Core curriculum, and charter schools).

<sup>7</sup> See Allie Bidwell, *American Students Fall in International Academic Tests, Chinese Lead the Pack*, *U.S. NEWS & WORLD REP.* (Dec. 3, 2013, 5:00 AM), <http://www.usnews.com/news/articles/2013/12/03/american-students-fall-in-international-academic-tests-chinese-lead-the-pack> [<https://perma.cc/E6UG-EW8Z>] (detailing that students from Hong Kong, Shanghai, and Singapore outperformed Americans on the 2012 Programme for International Student Assessment, an international test).

<sup>8</sup> See *School-To-Prison Pipeline*, *AM. CIV. LIBERTIES UNION*, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> [<https://perma.cc/LX3C-HH94>].

traditional school systems and replacing them with alternatives, such as charter schools.<sup>9</sup> Charter schools are privately managed and are typically non-union.<sup>10</sup> However, they are still public schools, and therefore, they receive public funding from the states.<sup>11</sup> As charter schools have grown in popularity in recent years, established structures of American K–12 public education, such as teacher tenure, have come under fire.<sup>12</sup> The recent California case *Vergara v. State (Vergara I)*<sup>13</sup>—in which the trial court held that teacher tenure was unconstitutional—follows this trend.<sup>14</sup>

In *Vergara*, nine California public school students challenged five state teacher tenure laws.<sup>15</sup> Petitioners argued that teacher tenure statutes enabled dysfunction at high-poverty schools by making it easy for ineffective teachers to gain tenure, and making it difficult to fire them.<sup>16</sup> Ineffective teachers, therefore, were kept in disproportionately low-income schools indefinitely and consequently denied students their fundamental right to education.<sup>17</sup> The trial court held that teacher tenure statutes were indeed unconstitutional.<sup>18</sup> Though the decision was ultimately reversed at the appellate level,<sup>19</sup> *Vergara I* has inspired copycat lawsuits in New York and elsewhere; commentators have noted the potential ramifications of *Vergara I* nationwide.<sup>20</sup>

This Note will argue that charter schools, deemed an alternative to traditional public school systems with teacher tenure, raise the same equal protection concerns as teacher tenure statutes. Charter schools, many of which are located in urban, low-income areas, have similar rates of inadequate student performance as public schools.<sup>21</sup> These schools serve student populations comparable to those of the schools challenged in *Vergara I & II*, and yet, charter schools (in general) do *not* have teacher

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<sup>9</sup> See Kevin S. Huffman, Note, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1290–91 (1988).

<sup>10</sup> See *infra* Section IV.A; see also CTR. FOR EDUC. REFORM, SURVEY OF AMERICA'S CHARTER SCHOOLS 2014, at 13 (Ted Rebarber & Allison Consoletti Zaginer eds., 2014), <https://www.edreform.com/wp-content/uploads/2014/02/2014CharterSchoolSurveyFINAL.pdf> [<https://perma.cc/8KJG-TE3S>].

<sup>11</sup> See *infra* Section IV.A; see also *The Charter School Alternative*, WEEK (May 21, 2009), <http://theweek.com/articles/505341/charter-school-alternative> [<http://perma.cc/4AG7-ZGU9>].

<sup>12</sup> See Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 79 (2016) (describing how reformers, unable to make progress through the political system, began the “War on Teacher Tenure” by using litigation to disrupt the status quo).

<sup>13</sup> *Vergara v. State (Vergara I)*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016).

<sup>14</sup> *Id.* at \*5.

<sup>15</sup> *Id.* at \*2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at \*9.

<sup>18</sup> *Id.*

<sup>19</sup> *Vergara v. State (Vergara II)*, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016).

<sup>20</sup> See *infra* Section III.E.

<sup>21</sup> See *infra* Part IV.

tenure programs.<sup>22</sup> Yet, charter schools produce student outcomes similar to those of traditional public schools with low-quality tenured teachers.<sup>23</sup>

In Part I, this Note will explain the history of teacher tenure and the rationale behind its initial development at the K–12 level.<sup>24</sup> This Note will detail state courts' equal protection and fundamental right analyses within the context of education in Part II.<sup>25</sup> Part III will outline the *Vergara I & II* courts' rationales, exploring why the trial court held California's teacher tenure statutes as unconstitutional in the first place, and why the appellate court's reversal does not necessarily mean the California teacher tenure statutes are constitutional as applied.<sup>26</sup> Additionally, this Note will address how commentators have characterized *Vergara I*.<sup>27</sup> In Part IV, this Note will describe how charter schools create the same equal protection concerns as the California teacher tenure laws, and therefore, charters are not a viable alternative to tenure systems in traditional public schools.<sup>28</sup> Finally, in Part V, this Note will propose a solution that will help lawmakers address the equal protection concerns present in California's teacher tenure statutes and in systems like it in other states: developing a longer probationary period before granting public school teachers tenure while simultaneously incorporating a vetting process similar to those found in university tenure systems.<sup>29</sup>

## I. BACKGROUND ON TEACHER TENURE

Tenure laws give teachers job protections and securities.<sup>30</sup> As of 2008, 2.3 million teachers at public schools had tenure rights.<sup>31</sup> The laws in place grant due process rights to teachers who have shown they are qualified during a probationary period.<sup>32</sup> Teacher tenure exists at both the K–12 education level and the university level, though the systems in place in universities have significant differences from the K–12 teacher tenure systems.<sup>33</sup> At the university level, the laws serve a similar

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<sup>22</sup> See CTR. FOR EDUC. REFORM, *supra* note 10, at 3.

<sup>23</sup> See *id.*

<sup>24</sup> See *infra* Part I.

<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *infra* Part III.

<sup>27</sup> See *infra* Section III.E.

<sup>28</sup> See *infra* Part IV.

<sup>29</sup> See *infra* Part V.

<sup>30</sup> Richard D. Kahlenberg, *Tenure: How Due Process Protects Teachers and Students*, AM. EDUCATOR, Summer 2015, at 4, 5, 7, <http://www.etanews.org/DueProcess.pdf> [<https://perma.cc/3738-DKZG>] (noting, inter alia, that teacher tenure developed to shield teachers from “nepotism” and to ensure that “arbitrary” administrative perspectives did not influence hiring and firing decisions).

<sup>31</sup> M.J. Stephey, *A Brief History of Tenure*, TIME (Nov. 17, 2008), <http://content.time.com/time/nation/article/0,8599,1859505,00.html> [<https://perma.cc/2BLM-LCTJ>].

<sup>32</sup> Kahlenberg, *supra* note 30, at 5.

<sup>33</sup> See *id.* On average, most teachers at the K–12 level receive tenure after an average of three years, whereas in universities, professors' probationary period for permanent employment averages from seven to eight years. *Id.* at 5–6; see also *infra* Section V.C.

function: Tenure ensures that professors have academic freedom and job security, which in turn attracts talent to the profession.<sup>34</sup> Essentially, once a teacher obtains tenure, she gains the right to request an impartial hearing before being fired: due process rights.<sup>35</sup>

Teacher tenure rights at the K–12 level originated in the late nineteenth century and eventually developed into an established component of the K–12 educational system.<sup>36</sup> Before teacher tenure protections developed in Massachusetts, school administrators in the state could fire female teachers if they married, got pregnant, stayed out too late at night, or wore pants.<sup>37</sup> New York established the first laws detailing tenure protections for teachers in 1897.<sup>38</sup> New Jersey developed similar statutes in 1909.<sup>39</sup> In part, states created teacher tenure statutes for K–12 public educators to protect them from administrative firing decisions based on in-school politics or arbitrary whims.<sup>40</sup> In a world where many educators were female, the early teacher tenure statutes ensured that teachers enjoyed job security in the face of rampant sex discrimination.<sup>41</sup> Sigrid Bathen notes that teacher tenure protections developed in tandem with feminist movements to protect female teachers.<sup>42</sup> Additionally, as educating young children can be a thankless and grueling profession, teacher tenure developed as an incentive to attract new talent and keep good teachers in schools.<sup>43</sup>

Modern teacher unions are, predictably, in support of current teacher tenure laws.<sup>44</sup> For example, New York’s statewide teacher union, New York State United Teachers (NYSUT), details arguments in support of tenure on its website, calling tenure “a safeguard that ensures teachers can speak up for what students need” and explaining that tenure shields teachers from being fired unfairly.<sup>45</sup> Additionally, the California Teachers Association, which refers to teacher tenure laws as “due process

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<sup>34</sup> Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279, 279 (1977).

<sup>35</sup> Kahlenberg, *supra* note 30, at 5.

<sup>36</sup> *Why Tenure Matters*, NYSUT, <http://www.nysut.org/resources/special-resources-sites/tenure/why-tenure-matters> [<https://perma.cc/YYQ5-Q3X3>].

<sup>37</sup> *Should Teachers Get Tenure?*, PROCON.ORG, <http://teachertenure.procon.org/> [<https://perma.cc/JKS6-EPX2>].

<sup>38</sup> *Why Tenure Matters*, *supra* note 36.

<sup>39</sup> Kahlenberg, *supra* note 30, at 6.

<sup>40</sup> *Why Tenure Matters*, *supra* note 36.

<sup>41</sup> See Sigrid Bathen, *Tackling the Teacher Tenure Issue*, L.A. TIMES (May 20, 2009), <http://articles.latimes.com/2009/may/20/opinion/oe-bathen20> [<https://perma.cc/5UA8-GYKB>] (discussing the history of teacher tenure and its current surrounding controversy).

<sup>42</sup> *Id.*

<sup>43</sup> See Molly Robertson, *Blaming Teacher Tenure Is Not the Answer*, 44 J.L. & EDUC. 463, 467 (2015) (noting that there may be a shortage of qualified professionals to fill every school district and that the job security of tenure will motivate talented individuals to take jobs in schools).

<sup>44</sup> See *Why Tenure Matters*, *supra* note 36 (noting that the lawsuits challenging teacher tenure statutes are funded by anti-union forces).

<sup>45</sup> *Id.*

rights,” asserts that teacher tenure is necessary to ensure that good teachers remain in schools and are not subject to politicized hiring and firing decisions.<sup>46</sup>

However, in recent times, reformers have begun to question and challenge teacher tenure.<sup>47</sup> Critics of the laws assert that teacher tenure causes inefficiency and makes it difficult for administrators to fire bad teachers.<sup>48</sup> They claim that at a time when schools are combatting budget decreases, inequalities between school districts, and high student dropout rates, teacher tenure presents an obstacle to improving public schools.<sup>49</sup> Additionally, the wave of litigation attacking teacher tenure has received prominent media attention.<sup>50</sup> For example, media sources have reported that one Silicon Valley mogul has created a nonprofit with the sole purpose of bringing lawsuits challenging teacher tenure statutes in various states.<sup>51</sup>

## II. STATE CONSTITUTIONAL PROTECTION FOR EDUCATION

Although the U.S. Constitution does not protect citizens' right to an education,<sup>52</sup> all states guarantee the right to education in their respective constitutions.<sup>53</sup> Therefore, education enjoys constitutional protection at the state level.<sup>54</sup>

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<sup>46</sup> See CAL. TCHRS. ASS'N, EVALUATION: KEY TO EXCELLENCE 5 (2005), <http://www.cta.org/~media/Documents/Issues%20%20Action/Teacher%20Quality/KeytoExcellence2005.pdf?dmc=1&ts=20150411T1000032164> [<http://perma.cc/NDE7-9542>] (noting that due process is necessary for teachers “who perform satisfactorily” because teachers employ a wide variety of instructional methods, and these teachers facilitate good educational outcomes for students).

<sup>47</sup> See, e.g., *Vergara I*, No. BC484642, 2014 WL 6478415, at \*5 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016) (California trial court decision in which the court held teacher tenure laws to be unconstitutional, discussed at length in Part III); Leslie Brody, *Hearing Set on Challenge to New York Teacher Tenure Law*, WALL ST. J. (Jan. 13, 2015, 1:19 PM), <http://www.wsj.com/articles/hearing-set-on-challenge-to-new-york-teacher-tenure-law-1421113358> [<https://perma.cc/MH5C-CNLC>] (describing a hearing in which teacher tenure laws were attacked).

<sup>48</sup> Bathen, *supra* note 41.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., Jennifer Medina, *Judge Rejects Teacher Tenure*, N.Y. TIMES, June 11, 2014, at A1 (detailing the outcome of *Vergara I*); Haley Sweetland Edwards, *The War on Teacher Tenure*, TIME (Oct. 23, 2014), <http://time.com/3533556/the-war-on-teacher-tenure/> [<https://perma.cc/EBQ4-T2KZ>] (describing Silicon Valley businessman David Welch's litigation activism against teacher tenure statutes).

<sup>51</sup> See Edwards, *supra* note 50 (detailing David Welch's nonprofit Students Matter); STUDENTS MATTER, <http://studentsmatter.org/> [<https://perma.cc/J2H8-ZP5H>].

<sup>52</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.”).

<sup>53</sup> See *Education Policy Litigation as Devolution*, *supra* note 4, at 929.

<sup>54</sup> *Id.*; see also, e.g., *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 948 (Cal. 1976) (noting that education was a fundamental interest under California's state constitution), *cert. denied*, 432 U.S. 907 (1977).

Several states afford strong protections for education, holding out education as a “fundamental right” to which all of its citizens are entitled.<sup>55</sup> State-level conceptions of fundamental rights are based on the Due Process Clause of the Fourteenth Amendment, which guarantees that all citizens enjoy rights that are considered “fundamental.”<sup>56</sup> In *Serrano v. Priest* (*Serrano I*),<sup>57</sup> California—the state from which *Vergara I & II* originate—first acknowledged that education was a “fundamental interest” within the state.<sup>58</sup> In states that recognize education as a fundamental interest, courts must analyze laws that interfere with citizens’ right to education with “strict scrutiny”: The state must prove that any law interfering with a fundamental right serves a “compelling interest which justifies” its existence and that “the distinctions drawn by the law are [n]ecessary to further its purpose.”<sup>59</sup>

Education can also receive protection through a state-level equal protection analysis. These protections—and their resulting court analyses—also originate from the U.S. Constitution. Under the Fourteenth Amendment, all groups—regardless of national origin, race, or religious background—are entitled to “equal protection of the laws,” including the enumerated rights laid out in the Constitution.<sup>60</sup> This guarantee is known as the Equal Protection Clause.<sup>61</sup> Equal protection guarantees also exist at the state constitutional level: Fifteen state constitutions have their own equal protection clauses,<sup>62</sup> and many state constitutions contain equality provisions roughly analogous to equal protection clauses.<sup>63</sup> Therefore, each state constitution’s version or analogue of the Equal Protection Clause guarantees rights to all citizens of those respective states.<sup>64</sup>

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<sup>55</sup> See, e.g., Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1333 (1992) (noting that California, West Virginia, and Connecticut have held education to be a fundamental right). *But see* Huffman, *supra* note 9, at 1313 (noting many other states have held education to be a “basic” but “less than fundamental” right).

<sup>56</sup> See U.S. CONST. amend. XIV (containing the Due Process Clause, out of which fundamental rights have been interpreted by the Court); see also *Roe v. Wade*, 410 U.S. 113, 155 (1973) (detailing that under the Constitution, courts must review state actions that violate fundamental rights under strict scrutiny, and they must further a “compelling state interest”). Note that education is not a fundamental interest under the Fourteenth Amendment.

<sup>57</sup> 487 P.2d 1241 (Cal. 1971).

<sup>58</sup> *Id.* at 1244 (referring to education as a “fundamental interest”).

<sup>59</sup> *Id.* at 1249.

<sup>60</sup> U.S. CONST. amend. XIV.

<sup>61</sup> *Id.*

<sup>62</sup> ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 209 n.109 (2009) (citations omitted); see also, e.g., CAL. CONST. art. I, § 3(b)(4); TEX. CONST. art. I, § 3(a).

<sup>63</sup> WILLIAMS, *supra* note 62, at 209–10. Williams later goes on to explain that most state constitutions guarantee civil rights and prohibit sex discrimination. *Id.* at 210; see also, e.g., *Civil Remedies and Procedure: Certain Incidents of Trial, Constitution of Virginia: Bill of Rights—Legislature*, 2000 WL 33187319, \*1 n.1 (Va. A.G. Apr. 13, 2000) (Attorney General Mark L. Earley explains to the Honorable J. R. Zepkin that the Virginia Constitution contains an antidiscrimination clause in Article I, § 11 and a bar on “special legislation in Article IV, § 14” that effectively functions as a state-level analogue to the federal Equal Protection Clause).

<sup>64</sup> Furthermore, when dealing with equality violations, state courts typically utilize an equal protection analysis based on the federal courts’ interpretation of the Equal Protection Clause.

If a certain class is denied their right to education, courts follow a specific analysis under their respective state constitutions.<sup>65</sup> The California Supreme Court explained this framework in the *Serrano v. Priest* (*Serrano II*) case.<sup>66</sup> In *Serrano II*, the court utilized the U.S. Supreme Court's approach<sup>67</sup> to scrutinize laws disproportionately affecting a "suspect classification."<sup>68</sup> Similar to a fundamental interest analysis, laws interfering with a suspect class's rights are also subject to strict scrutiny.<sup>69</sup>

Courts can analyze any law that interferes with the right to education through an equal protection analysis or a fundamental right analysis.<sup>70</sup> In an equal protection analysis, the courts must first establish that the challenged education law specifically harms a suspect class.<sup>71</sup> Courts may identify the impact to suspect classes by looking at statistics or data.<sup>72</sup> Second, if the courts find that the law interferes with a suspect class's rights, the law must survive "strict scrutiny" in order to maintain viability.<sup>73</sup> In other words, the law must be "narrowly tailored" to serve a "compelling interest" in order to survive the analysis.<sup>74</sup> If no such compelling interest can be found, then the

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WILLIAMS, *supra* note 62, at 209–10; *see also* Darces v. Woods, 679 P.2d 458, 472 (Cal. 1984) (noting that state equal protection clauses could function independently of the federal Fourteenth Amendment).

<sup>65</sup> *See Vergara I*, No. BC484642, 2014 WL 6478415, at \*1, \*2 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016) (citing *Serrano II*, 557 P.2d 929, 948 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977)) ("Under the strict scrutiny standard applied in such (suspect classifications or fundamental interests) cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (citation omitted)).

<sup>66</sup> 557 P.2d 929, 948 (Cal. 1976).

<sup>67</sup> *See* 13 CAL. JUR. 3d CONSTITUTIONAL LAW § 339, Westlaw (database updated Nov. 2016) (noting that because the Constitution's Equal Protection Clause and the California Constitution's equal protection clause both establish similar rights, the courts generally apply the federal framework in the state constitutional equal protection analysis).

<sup>68</sup> *Serrano II*, 557 P.2d at 948 (citing *Serrano I*, 487 P.2d 1241, 1249 (Cal. 1971)). Note that in California, suspect classes can include groups of a particular socioeconomic level. *See Butt v. State*, 842 P.2d 1240, 1249 (Cal. 1992); *see also Serrano II*, 557 P.2d at 948 (minorities as a suspect class).

<sup>69</sup> *See Butt*, 842 P.2d at 1249 ("[W]here fundamental rights or suspect classifications are at stake, a state's general freedom to discriminate on a geographical basis will be significantly curtailed by the equal protection clause." (citations omitted)).

<sup>70</sup> *See WILLIAMS*, *supra* note 62, at 208.

<sup>71</sup> *See Vergara I*, No. BC484642, 2014 WL 6478415, at \*6 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016) (citing statistics to establish that the challenged laws disproportionately denied minority groups and people in poverty their fundamental rights to an education).

<sup>72</sup> *Id.*

<sup>73</sup> *See* U.S. CONST. amend. XIV; WILLIAMS, *supra* note 62, at 214; *see also* Roe v. Wade, 410 U.S. 113, 155 (1973).

<sup>74</sup> *See Serrano II*, 557 P.2d 929, 948 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977) (stating that the state has the burden of proof in this analysis).

law violates the state's constitutional equivalent of the Equal Protection Clause.<sup>75</sup> Additionally, in states that consider education to be a fundamental right—including California, West Virginia, and Connecticut—the courts can also use a strict scrutiny analysis when dealing with laws that limit educational opportunity.<sup>76</sup> Therefore, if a state's laws interfere with a suspect class's right to education, or in cases where education is a fundamental right, the courts would apply a strict scrutiny analysis to see if the challenged laws hold water.<sup>77</sup>

Because education is a fundamental right in California, and the challenged teacher tenure statutes also raised equal protection issues, the trial court in *Vergara I* applied a strict scrutiny analysis to California's teacher tenure laws.<sup>78</sup>

### III. *VERGARA V. STATE*: OVERVIEW AND CHARACTERIZATIONS OF COMMENTATORS

#### A. *Fact Summary*

In *Vergara I & II*, the plaintiffs were nine California public school students represented by guardians ad litem.<sup>79</sup> They attended low-income schools.<sup>80</sup> These petitioners brought challenges against five California statutes: the “Permanent Employment Statute,”<sup>81</sup> the “Dismissal Statutes,”<sup>82</sup> and the three laws comprising the “Last-In-First-Out (LIFO)” statutes.<sup>83</sup> Petitioners argued that these challenged statutes created the unconstitutional teacher tenure infrastructure at their low-income public schools. Essentially, the “Permanent Employment Statute” enabled potentially unqualified teachers to gain tenure after an insufficient probationary period, and the “Dismissal Statutes” and the “Last-In-First-Out” statutes fostered a system that kept these “grossly ineffective” teachers in the schools.<sup>84</sup> First, petitioners argued that these “grossly ineffective” teachers harmed California students “in general.”<sup>85</sup> Additionally, petitioners

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<sup>75</sup> Once it is found that a law affects a “suspect class” and is subject to strict scrutiny, few laws have survived the analysis. *See, e.g.*, *Woods v. Horton*, 84 Cal. Rptr. 3d 332, 350 (Cal. Ct. App. 2008) (in which state statute that did not survive strict scrutiny was reformed to conform with equal protection standards). *But see, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (in which Japanese internment during World War II survived strict scrutiny, despite modern criticism of the decision).

<sup>76</sup> Hubsch, *supra* note 55, at 125.

<sup>77</sup> *Id.*

<sup>78</sup> *Vergara I*, No. BC484642, 2014 WL 6478415, at \*5 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016).

<sup>79</sup> *Id.* at \*2.

<sup>80</sup> *Id.*

<sup>81</sup> CAL. EDUC. CODE § 44929.21(b) (West 1987).

<sup>82</sup> CAL. EDUC. CODE § 44934 (West 2015); CAL. EDUC. CODE § 44938(b)(1)–(2) (West 1995); CAL. EDUC. CODE § 44944 (West 2016).

<sup>83</sup> CAL. EDUC. CODE § 44955 (West 1983).

<sup>84</sup> *Vergara I*, 2014 WL 6478415, at \*2.

<sup>85</sup> *Id.* at \*9.

claimed that the inadequate teachers were disproportionately present in low-income school systems and interfered with these students' fundamental interest in education.<sup>86</sup> Therefore, they claimed that low-income students were getting unequal educations (because they had more "grossly ineffective teachers" within their schools) than middle- and high-income students, who attended schools that had fewer "grossly ineffective teachers."<sup>87</sup> Thus, plaintiffs claimed that the teacher tenure statutes violated the equal protection clause of California's constitution.<sup>88</sup>

### *B. Trial Court's Holding and Analysis*

According to the California Constitution's equal protection clause, "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."<sup>89</sup> First, the trial court laid out the provisions of the California Constitution that established California's duty to maintain educational systems for its citizens.<sup>90</sup> Then, the trial court noted state cases had already established education as a fundamental interest. In *Serrano I & II*, California courts held that education was a fundamental interest.<sup>91</sup> Additionally, *Butt v. State*<sup>92</sup> further reiterated children's rights to education in California, ruling that closing schools early because of budgeting concerns denied students their fundamental right to education.<sup>93</sup> The court in *Vergara I* consequently interpreted these cases as establishing the right to education as a fundamental interest.<sup>94</sup>

After establishing the precedent of education as a fundamental interest in California, the trial court then addressed how grossly ineffective teachers denied students their fundamental right to education and disproportionately hurt low-income students by citing statistical evidence.<sup>95</sup> First, the trial court referenced the detrimental effects of grossly ineffective teachers, citing a study in Los Angeles Public Schools, finding

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<sup>86</sup> *Id.* at \*3.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*; see also CAL. CONST. art. I, § 7 (containing the California Constitution's due process and equal protection clauses).

<sup>89</sup> CAL. CONST. art. I, § 7.

<sup>90</sup> 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 [and] scientific . . . improvement."); CAL. CONST. art. IX, § 5 ("The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district . . .").

<sup>91</sup> *Serrano II*, 557 P.2d 929, 951 (Cal. 1976), cert. denied, 432 U.S. 907 (1977); *Serrano I*, 487 P.2d 1241, 1243 (Cal. 1971).

<sup>92</sup> 842 P.2d 1240 (Cal. 1992).

<sup>93</sup> *Id.* at 1252–53.

<sup>94</sup> *Vergara I*, No. BC484642, 2014 WL 6478415, at \*1, \*3 (Cal. Super. Ct. Aug. 27, 2014), rev'd, 209 Cal. Rptr. 3d 532 (Cal. Ct. App.), modified (May 3), review denied (Aug. 22, 2016).

<sup>95</sup> *Id.* at \*4–7.

that students taught by teachers in the fifth percentile of competence “los[t] 9.54 months of learning in a single year” as compared to students taught by “average teachers.”<sup>96</sup> The court then cited additional statistics to demonstrate that grossly ineffective teachers were actively present in numerous classrooms across California.<sup>97</sup> Therefore, the trial court established that grossly ineffective teachers could have a catastrophic and detrimental effect on students’ education.<sup>98</sup>

After determining the danger of grossly ineffective teachers, the trial court then explained that the challenged statutes allowed these grossly ineffective teachers into the system.<sup>99</sup> The trial court explained that the statutes challenged in the lawsuit (1) interfered with students’ fundamental right to education and (2) disproportionately affected poor and minority students.<sup>100</sup> In determining that grossly ineffective teachers hurt poor and minority students disproportionately, the court cited a report from the California Department of Education.<sup>101</sup>

Finally, the trial court applied the strict scrutiny standard to each of the challenged statutes.<sup>102</sup> The Permanent Employment Statute, the court concluded, did not provide enough time for teachers to be evaluated properly.<sup>103</sup> The trial court compared California’s tenure probationary period with those of other states to illustrate its insufficient assessment time.<sup>104</sup> It noted that California’s probationary period for evaluating whether teachers should be awarded tenure—under two years<sup>105</sup>—was, in fact, shorter than the vast majority of most states (three or more years).<sup>106</sup> Comparing California’s Permanent Employment Statute to the relevant laws of other states, the trial court found no justification for their provisions to satisfy strict scrutiny.<sup>107</sup> Accordingly, the court held that the Permanent Employment Statute failed strict scrutiny.<sup>108</sup>

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<sup>96</sup> *Id.* at \*4.

<sup>97</sup> *Id.* (“[A]n expert . . . testified that 1–3% of teachers . . . are grossly ineffective. . . . [T]he extrapolated number of grossly ineffective teachers ranges from 2,750 to 8,250 [in California].”).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at \*5–7.

<sup>100</sup> *Id.* at \*4.

<sup>101</sup> *Id.* at \*7.

<sup>102</sup> *Id.* at \*4–7.

<sup>103</sup> *Id.* at \*5.

<sup>104</sup> *See id.* at \*4–5. The court noted that while “32 states have three[-]year period[s]” for evaluating teachers before awarding them tenure, and nine states have four- to five-year probationary periods for new teachers, California is among only five states that have probationary periods for new teachers of two or fewer years. *Id.* at \*5.

<sup>105</sup> *Id.* at \*4–5. Because teachers would find out if they had received tenure by March 15 of their second year, the two-year probationary period, in effect, was shortened by two to three months. *Id.* at \*4.

<sup>106</sup> *Id.* at \*5.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

The trial court then applied a strict scrutiny standard to the Dismissal Statutes.<sup>109</sup> The Dismissal Statutes described the termination process for tenured personnel.<sup>110</sup> The plaintiffs argued that the dismissal process, as outlined by the statutes, was too inefficient, allowing grossly ineffective teachers to remain in the system because it was expensive and time-consuming for schools to fire them.<sup>111</sup> In scrutinizing the statutes, the trial court noted that teachers had due process rights in tenure, but that these rights did not outweigh the children's fundamental interest in education.<sup>112</sup> According to the trial court, the state did not meet its burden to prove that inefficient Dismissal Statutes were necessary to serve the state's interest in maintaining due process rights for tenured teachers.<sup>113</sup> Therefore, the Dismissal Statutes did not survive strict scrutiny.<sup>114</sup>

Finally, the trial court analyzed the "Last-In-First-Out" Statutes under strict scrutiny.<sup>115</sup> The trial court noted that these statutes kept grossly ineffective teachers in the public school system, as they required that the most recently hired teacher be the first one to be fired during layoffs, regardless of ability.<sup>116</sup> The trial court noted that the Last-In-First-Out Statutes "separat[ed] . . . students from competent teachers" and, furthermore, that there was no compelling justification to support the statutes' existence.<sup>117</sup> Therefore, the "Last-In-First-Out" Statutes did not survive strict scrutiny.<sup>118</sup> In *Vergara I*, the trial court held that all five of the challenged teacher tenure statutes were unconstitutional under the California Constitution's Equal Protection Clause.<sup>119</sup>

The Governor of California appealed the case on August 29, 2014, and oral arguments for this appeal took place on February 25, 2016.<sup>120</sup> The respondents' brief noted that the trial court had used the correct standard of review—strict scrutiny—for assessing the challenged tenure statutes because they made a "real and appreciable

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<sup>109</sup> *Id.* at \*5–6.

<sup>110</sup> See CAL. EDUC. CODE § 44934 (West 2015); CAL. EDUC. CODE § 44938(b)(1)–(2) (West 1995); CAL. EDUC. CODE § 44944 (West 2016).

<sup>111</sup> *Vergara I*, 2014 WL 6478415, at \*5 (explaining that the process to fire a grossly ineffective teacher with tenure could last between two and ten years and could cost "\$50,000 to \$450,000 or more").

<sup>112</sup> See *id.* at \*6; see also *Skelly v. State Pers. Bd.*, 539 P.2d 774, 788–89 (Cal. 1975) (establishing due process hearing rights for tenured employees).

<sup>113</sup> *Vergara I*, 2014 WL 6478415, at \*6.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at \*6–7; see also CAL. EDUC. CODE § 44955 (West 1983).

<sup>116</sup> *Vergara I*, 2014 WL 6478415, at \*6.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*7.

<sup>119</sup> *Id.*

<sup>120</sup> See Perry A. Zirkel, *Vergara v. State of California: Judicial Abolition of Teacher Tenure?*, 20 PUB. INT. L. REP. 57, 61 (2014) (noting that the appeal could take "years"); *Vergara v. State of California*, CAL. TCHRS. ASS'N, <http://www.cta.org/vergara> [<https://perma.cc/2AQN-D3BX>] [hereinafter CAL. TCHRS. ASS'N] (providing up-to-date coverage of the *Vergara* decision from the perspective of the California Teachers Association).

impact on” students’ fundamental rights.<sup>121</sup> The brief also argued that the statutes disproportionately affected poor and minority students,<sup>122</sup> and later went on to support the validity of the respondents’ standing.<sup>123</sup>

*C. Though the California Court of Appeal Reversed Vergara I, It Limited Its Judgment to Facial Grounds*

The California Court of Appeal ultimately overturned *Vergara I* on “facial” grounds, and the California Supreme Court declined to review the appellate decision.<sup>124</sup> First, the court characterized the narrow nature of its holding, noting that it was limited to determining whether the teacher tenure statutes were unconstitutional on their face, “not [in their] application to the particular circumstances of an individual.”<sup>125</sup> According to the court, the tenure statutes would be “facially unconstitutional” if the “constitutional violation flow[ed] ‘inevitably’ from” them.<sup>126</sup> The appellate court held that the challenged statutes did not violate equal protection because (1) the petitioners did not demonstrate that the teacher tenure statutes had *inevitably* led to disproportionate amounts of poor and minority students receiving a worse education than other students, and (2) the “unlucky” students in general (those who had grossly ineffective teachers) did not constitute a specific class under which equal protection could be claimed.<sup>127</sup> The decision additionally explained that because education administrators made hiring and firing decisions, *they* allowed ineffective teachers to receive tenure, not the statutes themselves.<sup>128</sup>

However, the Court of Appeal’s judgment was limited to establishing that the challenged statutes did not *facially* violate equal protection.<sup>129</sup> The court never determined that the teacher tenure statutes were constitutional “as applied.”<sup>130</sup> In the decision, the court distinguished an “as applied” constitutional challenge as follows: “[A]n ‘as applied’ constitutional challenge seeks ‘relief from a *specific application*

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<sup>121</sup> Respondents’ Brief at 67, *Vergara v. State*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016) (No. B258589).

<sup>122</sup> *Id.* at 95, 99.

<sup>123</sup> *Id.* at 113–16.

<sup>124</sup> *Vergara II*, 209 Cal. Rptr. 3d 532, 536, 550, 558 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016) (“Both plaintiffs and defendants characterize this case—which seeks to enjoin any enforcement of the tenure, dismissal, and reduction-in-force statutes—as a facial challenge to the constitutionality of the subject statutes.”).

<sup>125</sup> *Id.* at 550 (citations omitted).

<sup>126</sup> *Id.* at 555 (citations omitted).

<sup>127</sup> *Id.* at 551–53.

<sup>128</sup> *Id.* at 556 (“[S]ince the challenged statutes, on their face and in effect, do not dictate where teachers are assigned, declaring the statutes facially unconstitutional would not prevent administrators from assigning the worst teachers to schools serving poor and minority students.”).

<sup>129</sup> *Id.* at 538.

<sup>130</sup> *See id.* at 550 (contrasting a facial constitutional attack with an “as applied” constitutional attack).

of a facially valid statute or ordinance,' or an injunction against future application of the statute or ordinance in the manner in which it has previously been applied."<sup>131</sup> The decision also noted that the plaintiffs had not addressed how the statutes applied to specific, individual schools in their complaint.<sup>132</sup> Therefore, California's *facially valid* teacher tenure statutes nonetheless may still violate equal protection or interfere with students' fundamental right to education under an "as applied" constitutional analysis.<sup>133</sup>

Additionally, the dissenting judges in the *Vergara II* appellate decision emphasized that the court should have applied a strict scrutiny analysis because the statutes denied certain students their fundamental right to education.<sup>134</sup> Justice Liu noted that when a law denies any group of students their right to education, the challenged law deserves a strict scrutiny analysis.<sup>135</sup> He later noted that the plaintiffs' proffered statistical evidence established that the laws imposed an "appreciable" burden on students' right to education.<sup>136</sup> In addition, Justice Cuéllar argued that education's status as a fundamental right warranted strict scrutiny review of the challenged statutes.<sup>137</sup>

#### *D. Continued Relevance of the Vergara I Trial Court's Holding in Other States*

In addition to the potential "as applied" unconstitutionality of the teacher tenure statutes, the trial court's analysis is still relevant because of the numerous copycat lawsuits filed around the country.<sup>138</sup> State courts nationwide may employ a similar equal protection analysis under their respective state constitutions. Connecticut and West Virginia courts have affirmatively determined that education is a fundamental right in their states,<sup>139</sup> so these courts may apply the *Vergara* trial court's fundamental interest analysis if similar challenges are made in those states against tenure

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<sup>131</sup> See *id.* (emphasis added) (quoting *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1152 (Cal. 1995)).

<sup>132</sup> See *id.* at 551 ("Plaintiffs did not attempt to establish that the statutes were applied unconstitutionally to a particular person, the type of challenge made in an as-applied case. . . . Instead, plaintiffs' challenge 'sought to enjoin *any* application of the [statutes] to *any* person in *any* circumstance.'" (quoting *Tobe*, 892 P.2d at 1154)).

<sup>133</sup> See, e.g., *Tobe*, 892 P.2d at 1152 (describing an "as applied" constitutional challenge and its corresponding remedies).

<sup>134</sup> See generally *Vergara II*, 209 Cal. Rptr. 3d at 559–64 (Liu, J., dissenting); *id.* at 564–70 (Cuéllar, J., dissenting).

<sup>135</sup> *Id.* at 560 (Liu, J., dissenting).

<sup>136</sup> *Id.* at 562 ("There is considerable evidence in the record to support the trial court's conclusion that the hiring and retention of a substantial number of grossly ineffective teachers in California public schools have an appreciable impact on students' fundamental right to education.").

<sup>137</sup> See *id.* at 564 (Cuéllar, J., dissenting) ("Nothing in California's Constitution or any other law supports the Court of Appeal's reasoning. When a fundamental right [such as education] has been appreciably burdened, we apply strict scrutiny." (citations omitted)).

<sup>138</sup> See *infra* Section III.E.

<sup>139</sup> Hubsch, *supra* note 55, at 125.

statutes.<sup>140</sup> Additionally, challenged teacher statutes in other states could be subject to equal protection analyses if plaintiffs argue that K–12 teacher tenure statutes disproportionately affect a suspect class.<sup>141</sup>

### *E. Commentator Reactions to Vergara I*

Commentators have expressed varying reactions to the *Vergara I* trial decision. Some have noted that the case will affect teacher tenure statutes in other states; for example, as mentioned in the introduction, *Vergara I* has spawned a variety of copycat cases.<sup>142</sup> A *New York Times* article noted that the Silicon Valley–funded nonprofit, Students Matter, had the goal of bringing similar tenure-challenging litigation elsewhere.<sup>143</sup> Students Matter has considered filing lawsuits attacking teacher tenure similar to *Vergara I* in New York, Connecticut, New Mexico, Oregon, Kansas, and other states.<sup>144</sup> Other individuals have praised the trial-level *Vergara I* decision.<sup>145</sup> For example, former Secretary of Education Arne Duncan lauded the *Vergara I* trial court holding as a way to provide better educational outcomes.<sup>146</sup>

Other groups have condemned the trial decision.<sup>147</sup> For example, teacher unions have been predictably critical of *Vergara I*'s trial holding, warning that the decision will hurt teachers and, consequently, negatively impact children.<sup>148</sup> The American

<sup>140</sup> See *Vergara I*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016). See generally *Vergara II*, 209 Cal. Rptr. 3d at 560 (Liu, J., dissenting) (explaining that laws that interfere with the fundamental right to education warrant strict scrutiny analysis).

<sup>141</sup> See *Vergara I*, 2014 WL 6478415, at \*1.

<sup>142</sup> See, e.g., Verified Class Action Complaint at 1–2, 8, *Dauids v. State*, 2014 WL 3374692 (N.Y. Sup. Ct. June 30, 2014) (No. 101105) (an anti-tenure lawsuit filed by the New York City Parents Union); see also Javier C. Hernández, *Educators Fight Back on Attacks to Tenure*, N.Y. TIMES, July 30, 2014, at A24 (explaining that *Dauids* is one of two tenure-challenging lawsuits “modeled” on *Vergara I* in New York).

<sup>143</sup> See Medina, *supra* note 50, at A1, A15 (noting that David Welch’s nonprofit Students Matter is considering filing lawsuits in “states with powerful unions where legislatures have defeated attempts to change teacher tenure laws”); see also Edwards, *supra* note 50 (detailing Students Matter).

<sup>144</sup> See Medina, *supra* note 50, at A15.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See, e.g., CAL. TCHRS. ASS’N, *supra* note 120 (explaining that abolishing tenure will make it more difficult to retain qualified teaching personnel); NYSUT Media Relations, *California Decision “Meritless” Assault on Workers’ Rights*, NYSUT (June 11, 2014), <http://www.nysut.org/news/2014/june/nysut-california-decision-meritless-assault-on-workers-rights> [<https://perma.cc/LR8V-QBDX>] (“[T]enure laws like those in California, New York and other states benefit students and help ensure good teaching. . . . The disturbing trend in America today, supported by billionaires like the Walton family and the Koch brothers, is to take away union protections and the employment rights of all working people. They want a low-paid compliant workforce that can be fired at will. Teachers are their current target.”).

Federation of Teachers remarked that the *Vergara I* decision was a “sad day for public education[.]”<sup>149</sup> Additionally, in a proposed amicus brief for the California Teachers Association, various education-related unions in California argued that eliminating these teacher tenure laws will make recruiting teachers more difficult.<sup>150</sup> The brief also asserted that teacher tenure decisions are political questions that should be kept out of the courtroom and remain subject to legislature decision-making, and that “it is not clear what due-process protections and judicial standards of review will apply in the vacuum left by [this] decision.”<sup>151</sup> Other scholarly critics have also echoed these concerns, noting that *Vergara I* could have a potential ripple effect across the country.<sup>152</sup>

Finally, some commentators have argued that the effects of *Vergara I* will be limited. In light of the California Court of Appeal’s reversal and the California Supreme Court’s decision declining to review the appellate decision,<sup>153</sup> such an assessment certainly seems possible. One scholar noted that “the *Vergara* decision is more significant symbolically than legally. . . . [T]he trial court’s decision serves as not only a stimulus for ‘rebalancing’ tenure to its original meaning of reasonable and fair procedural due process but also a reminder of the overriding need for more . . . reform.”<sup>154</sup> Another commentator criticized the decision for relying on statistics about teachers instead of analyzing the numerous other factors relevant to producing quality educational outcomes for students.<sup>155</sup>

Regardless of *Vergara I*’s legal impact on teacher tenure laws and regulations, it has heightened the possibility that teacher tenure statutes may raise equal protection and due process concerns. Therefore, lawmakers must ensure that their school systems provide all students with an appropriate education. Some reformers have suggested charter schools—which are more autonomous and do not generally have tenure programs—as an alternative to traditional public schools.<sup>156</sup> However, as this

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<sup>149</sup> See M. Rebecca Cooper, *Alaska and Vergara v. California: Evaluating the Constitutionality of Teacher Tenure in Alaska*, 32 ALASKA L. REV. 395, 396 (2015).

<sup>150</sup> See Proposed Brief for Am. Fed’n of State, Cty. and Mun. Emps., et al. as Amici Curiae Supporting Appellants at 23–24, *Vergara v. State*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016) (No. B258589), [http://www.cta.org/~media/Documents/Issues%20%20Action/Ongoing%20Issues/B258589\\_ACB\\_AFSCME\\_CFA\\_CSEA\\_SEIU.pdf?dmc=1&ts=20151007T1005465611](http://www.cta.org/~media/Documents/Issues%20%20Action/Ongoing%20Issues/B258589_ACB_AFSCME_CFA_CSEA_SEIU.pdf?dmc=1&ts=20151007T1005465611) [https://perma.cc/52XP-T7VM].

<sup>151</sup> See *id.* at 5, 7–8.

<sup>152</sup> See Cooper, *supra* note 149, at 396–97 (describing how *Vergara* may influence teacher tenure statutes in Alaska); Robertson, *supra* note 43, at 469–71 (explaining that if legislatures invalidate teacher tenure statutes, quality teachers with talent will no longer be interested in working in the field, and therefore, children will suffer from the resulting brain drain).

<sup>153</sup> See *Vergara II*, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016).

<sup>154</sup> Zirkel, *supra* note 120, at 70.

<sup>155</sup> See Robertson, *supra* note 43, at 471; see also Michele Aronson, *The Deceptive Promise of Vergara: Why Teacher Tenure Lawsuits Will Not Improve Student Achievement*, 37 CARDOZO L. REV. 393, 396 (2015).

<sup>156</sup> See, e.g., Lewis Solomon & Mary Gifford, *Teacher Accountability in Charter Schools*,

Note will discuss at length in Part IV, the potential charter school “solution” inevitably raises many of the same concerns as teacher tenure.<sup>157</sup>

IV. CHARTER SCHOOLS RAISE THE SAME EQUAL PROTECTION CONCERNS  
AS TEACHER TENURE STATUTES. THEREFORE, THEY ARE NOT A  
VIABLE ALTERNATIVE TO TEACHER TENURE

In *Vergara I*, the trial court relied on an equal protection analysis in holding that teacher tenure statutes deny low-income and minority students their fundamental right to an education.<sup>158</sup> Locally managed charter schools are sometimes touted as superior alternatives to traditional public school systems with teacher tenure.<sup>159</sup> Charter schools do *not generally have* teacher tenure systems in place.<sup>160</sup> With many charters located in low-income, inner-city areas, these schools serve similar populations of students as the schools discussed in *Vergara I & II*.<sup>161</sup> However, because the educational outcomes of numerous charter schools are lacking, charters raise the same equal protection issues as the challenged teacher tenure statutes; therefore, they are not actually viable alternate options.<sup>162</sup>

NAT'L CTR. FOR POL'Y ANALYSIS (Mar. 1, 1999), <http://www.nepa.org/pub/ba285> [<https://perma.cc/LWH3-FQ3X>].

<sup>157</sup> See *infra* Part IV.

<sup>158</sup> See *Vergara I*, No. BC484642, 2014 WL 6478415, at \*2 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016).

<sup>159</sup> See *The Charter School Alternative*, *supra* note 11 (noting that charters are not subject to the same regulations as traditional systems and that some charter school networks have excelled despite receiving twenty-two percent less funding than traditional public schools); Solomon & Gifford, *supra* note 156.

<sup>160</sup> For the most part, charter schools are union-free institutions; ninety-three percent of charter schools were non-union in 2012. See CTR. FOR EDUC. REFORM, *supra* note 10, at 13. *But see, e.g., Charter School Chapters*, UNITED FED'N TCHRS., <http://www.uft.org/chapters/charter-schools> [<https://perma.cc/L56Y-FHMG>] (highlighting that twenty-two New York City charter schools are part of the United Federation of Teachers, New York City's teachers' union); N.Y.C. CHARTER SCH. CTR., <http://www.nyccharterschools.org/> [<https://perma.cc/CF5K-R47U>] (noting there are 216 charter schools in New York City, meaning about ten percent of charter schools in New York City are unionized).

<sup>161</sup> See *infra* Section IV.C.

<sup>162</sup> Other scholars have touched upon this idea, but none have yet explored it both in depth and post-*Vergara I & II*. See, e.g., Kevin G. Welner, *Silver Linings Casebook: How Vergara's Backers May Lose by Winning*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 121, 140 (2015) (“Similar research-based scrutiny could be repeated for a wide array of other policies and practices, including in suits grounded in very different claims about teacher quality. Using [the *Vergara I* court's] reasoning, imagine a lawsuit by students in a place like Los Angeles or New Orleans challenging laws that allow charter schools to hire inexperienced, un-credentialed teachers. Such plaintiffs would have little difficulty mustering at least the same degree of evidence as the *Vergara* plaintiffs to support such a challenge.”). See generally Huffman, *supra* note 9 (describing charter school equal protection claims, but in a pre-*Vergara I & II* context).

### A. Background on Charter Schools

Charter schools are publically funded, K–12 institutions that function mostly independently of state and local regulation.<sup>163</sup> For charter schools to exist, states must pass enabling statutes.<sup>164</sup> Most states have charter systems, as forty-two states have enabling statutes that authorize charters.<sup>165</sup> Assuming these laws are in place, groups of individuals or people acting on their own can apply to plan, develop, and operate a charter school.<sup>166</sup> Going forward, the charter school can run and operate; then, administrators receive funding in support of their school's operation.<sup>167</sup> Generally, charter administrators can make their own choices regarding the design, faculty, and budget allocation of their schools.<sup>168</sup>

Numerous charter schools have spread in low-income, urban areas. In Washington, D.C., charter schools make up roughly forty-four percent of the public schools in that district.<sup>169</sup> Another example is New Orleans.<sup>170</sup> After Hurricane Katrina literally destroyed the city's public school system in 2005, a network of charter schools emerged as a way to cultivate innovation.<sup>171</sup> Now, charter schools compose nearly all of the publicly funded schools in New Orleans.<sup>172</sup>

Because charters are individually managed, the schools vary widely in terms of their performance—each charter school may only be as good as the specific management at each individual school. It should be noted that many charter schools have enjoyed widespread success.<sup>173</sup> Programs such as the Knowledge Is Power Program (KIPP)<sup>174</sup> and the IDEA Academy network of charter schools<sup>175</sup> have had positive

<sup>163</sup> Huffman, *supra* note 9, at 1294.

<sup>164</sup> See *Education Policy Litigation as Devolution*, *supra* note 4, at 948.

<sup>165</sup> See *id.*

<sup>166</sup> See Huffman, *supra* note 9, at 1294.

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> FRIENDS CHOICE URBAN SCH., <http://www.focusdc.org/charter-facts> [<https://perma.cc/T6YA-CV92>].

<sup>170</sup> See, e.g., Andrea Gabor, *The Myth of the New Orleans School Makeover*, N.Y. TIMES, Aug. 23, 2015, at SR3.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* (“After Katrina, the district eventually took over about 60 local schools; about 20 well-performing schools remained in the Orleans Parish School Board, creating, in essence, a two-tier system. Nearly all the schools in both parts of the system have since been converted to charters.”).

<sup>173</sup> See *The Charter School Alternative*, *supra* note 11 (noting that “some charter schools truly do excel. Students at KIPP schools . . . for instance, generally achieve far superior test scores”).

<sup>174</sup> See Editorial, *Charters in the Crosshairs*, CHI. TRIBUNE (Oct. 26, 2015, 6:40 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-chicago-charter-schools-edit-1027-2015-1026-story.html> [<https://perma.cc/QWY3-4K5P>] (noting that KIPP, the Knowledge Is Power Program charter school network, has enjoyed strong academic performance).

<sup>175</sup> See *Search Best High Schools*, U.S. NEWS & WORLD REP., <http://www.usnews.com>

educational outcomes for students in low-income areas. However, numerous charter schools across the country suffer from lackluster performance.<sup>176</sup> Therefore, these low-achieving institutions deny their students equal access to education. Furthermore, when charters disproportionately impact minority or low-income students, or when they infringe upon educational outcomes in states where education is a fundamental interest, charter-enabling statutes can raise state constitutional equal protection concerns similar to the issues that teacher tenure statutes raise in *Vergara*.<sup>177</sup>

### *B. The Performance of Numerous Charter Schools Is Lacking*

Though reformers have touted charter schools as a grand improvement over traditional school systems, these institutions do not exhibit better outcomes universally. First of all, researchers find charter schools difficult to study due to “the constant flux of schools and students.”<sup>178</sup> Additionally, charter schools are only as good as their individual administrators, so they can be challenging to study in the aggregate. When looking at aggregate charter school performance, however, studies have found that traditional public school systems outperform many charter schools.<sup>179</sup> In addition, while Stanford University’s Center for Research on Education Outcomes (CREDO) 2015 Urban Charter School Study noted that in high-poverty, urban areas, many charters outperformed traditional public schools, the schools did *not* have a universally beneficial impact.<sup>180</sup> In numerous low-income areas, children performed worse in the charters than in the traditional public school systems.<sup>181</sup>

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/education/best-high-schools/search?charter=true&state-urlname=texas [https://perma.cc/QMV9-Y7TE]. Four IDEA high schools rank within the top thirty-one of Texas high schools.

<sup>176</sup> See, e.g., Valerie Strauss, *A Dozen Problems with Charter Schools*, WASH. POST (May 20, 2014), [https://www.washingtonpost.com/news/answer-sheet/wp/2014/05/20/a-dozen-problems-with-charter-schools/?utm\\_team=.eca3826e4255](https://www.washingtonpost.com/news/answer-sheet/wp/2014/05/20/a-dozen-problems-with-charter-schools/?utm_team=.eca3826e4255) [https://perma.cc/2KNN-XQC6] (noting that Pennsylvania charters fared worse than the state’s traditional schools in terms of performance).

<sup>177</sup> See Welner, *supra* note 162, at 140.

<sup>178</sup> Huffman, *supra* note 9, at 1298.

<sup>179</sup> See *Charter Schools: Finding Out the Facts: At a Glance*, CTR. FOR PUB. EDUC., <http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Charter-schools-Finding-out-the-facts-At-a-glance> [https://perma.cc/R5WD-U8JB] [hereinafter *Charter Schools*] (“Some charters do better; the majority do the same or worse. . . . [A study by the Center for Research on Education Outcomes] found that while some charter schools do better than the traditional public schools that fed them, the majority do the same or worse. Almost one-fifth of charters (17 percent) performed significantly better . . . than the traditional public school. However, an even larger group of charters (37 percent) performed significantly worse in terms of reading and math. The remainder (46 percent) did not do significantly better or worse.”).

<sup>180</sup> See CTR. FOR RESEARCH ON EDUC. OUTCOMES, URBAN CHARTER SCHOOL STUDY: REPORT ON 41 REGIONS 16 (2015), <http://www.nyccharterschools.org/sites/default/files/resources/Urban%20Charter%20School%20Study%20Report%20on%2041%20Regions.pdf> [https://perma.cc/ZG6H-3CWD].

<sup>181</sup> See *id.*

Poverty rates of urban charter schools in the CREDO study ranged from 11% (Las Vegas) to 93% (Chicago).<sup>182</sup> In Fort Worth, with 44% of its charter school student population in poverty, academic growth in reading and math was lower than that of traditional public schools.<sup>183</sup> Additionally, in Fort Myers (with 35% of students in poverty), Mesa (with 41% of students in poverty), and West Palm Beach (with 72% of students in poverty), charter school students had lower levels of annual growth in math and reading as compared to the general student population in these cities' respective states.<sup>184</sup> The CREDO study went on to analyze the results of these schools, noting that these charter sectors had to increase the academic growth levels of their students; otherwise these children would fall behind their non-charter peers.<sup>185</sup>

Furthermore, according to a University of Minnesota Law School study,<sup>186</sup> many charter schools are performing no better than traditional public schools, the unionized systems challenged by some education reformers.<sup>187</sup> In an article for the *Washington Post*, one commentator also referenced the University of Minnesota Law School charter school study and expressed that the study vindicated the theory that charter school students do no better than traditional public school students.<sup>188</sup>

New Orleans's charter school experiment has also produced dismal academic outcomes.<sup>189</sup> The system provides a good case study due to the lack of traditional public schools there—92% of New Orleans students attended charters in fall 2014.<sup>190</sup> The public school system, which includes charters, serves a predominately minority, low-income population: In 2014–2015, 87% of students were African American, and 84% were considered to be “economically disadvantaged.”<sup>191</sup> Even though the performance of students has seemingly increased,<sup>192</sup> Louisiana state testing standards

<sup>182</sup> *Id.* at 6.

<sup>183</sup> *See id.* at 6, 16.

<sup>184</sup> *See id.* at 6–7, 16.

<sup>185</sup> *See id.* at 16.

<sup>186</sup> INST. ON METRO. OPPORTUNITY, U. MINN. L. SCH., CHARTER SCHOOLS IN CHICAGO: NO MODEL FOR EDUCATION REFORM (2014), <https://www.law.umn.edu/sites/law.umn.edu/files/newsfiles/8a690b58/Chicago-Charter-FINAL.pdf> [<https://perma.cc/7E3V-P7RQ>].

<sup>187</sup> *IMO Study Shows Chicago Charter Schools Underperform Their Traditional Counterparts*, U. MINN. L. SCH. (Oct. 13, 2014), <https://www.law.umn.edu/news/2014-10-13-imo-study-shows-chicago-charter-schools-underperform-their-traditional-counterparts> [<https://perma.cc/5TVX-7EPD>] [hereinafter *IMO Study*].

<sup>188</sup> Strauss, *supra* note 176.

<sup>189</sup> Gabor, *supra* note 170.

<sup>190</sup> LA. DEP'T OF EDUC., STUDENT ENROLLMENT & DEMOGRAPHICS (2015), <https://www.louisianabelieves.com/docs/default-source/katrina/final-louisiana-believes-v5--enrollment-demographics22f9e85b8c9b66d6b292ff0000215f92.pdf?sfvrsn=2> [<https://perma.cc/A5X5-NAXE>].

<sup>191</sup> *Id.*

<sup>192</sup> Gabor, *supra* note 170 (“Last year, 63 percent of children in local elementary and middle schools were proficient on state tests, up from 37 percent in 2005.”).

are very low compared to other states.<sup>193</sup> Additionally, research that claimed that the New Orleans charters had improved student performance did not include high school performance data, which is often directly correlated with successful outcomes in college and beyond.<sup>194</sup> The school district most affected by Hurricane Katrina—with the most charters—had an ACT score dramatically below what was required for entry to a four-year public college.<sup>195</sup> Finally, some commentators have noted that very disadvantaged children may fall outside the scope of research; therefore, studies may fail to factor these children into performance data that supposedly demonstrate improvement.<sup>196</sup>

*C. Many Charter Schools Disproportionately Affect the Educational Outcomes of Minority Students*

Many local charter schools disproportionately enroll—and negatively impact—minorities.<sup>197</sup> Specific data pulled from various research support this conclusion.<sup>198</sup> For example, according to a study at the University of Minnesota Law School, Chicago charter schools are more racially segregated than the city’s traditional public schools and also have worse academic outcomes.<sup>199</sup> Additionally, New Orleans charter schools predominately enroll African-American students and, as noted in Section IV.B, are underperforming.<sup>200</sup>

The University of Minnesota Law School also noted that numerous charters are more likely to enroll students of one particular race.<sup>201</sup> The study highlighted that 7% of charters demonstrated ethnic diversity (“in the form of schools with mixed black and Latino student populations”) as opposed to 20% of traditional public schools.<sup>202</sup>

*D. Charter Schools May Fail Under an Equal Protection Analysis*

First, because of charter schools’ overall range of performance, it is more likely that individual charter schools or districts suffer from equal protection concerns over charter schools in the aggregate.<sup>203</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *See id.* (noting Recovery School District’s average ACT score in 2014 was 16.4).

<sup>196</sup> *Id.*

<sup>197</sup> *See, e.g., IMO Study, supra* note 187.

<sup>198</sup> *See id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See* LA. DEP’T OF EDUC., *supra* note 190; *see also* Gabor, *supra* note 170.

<sup>201</sup> *IMO Study, supra* note 187.

<sup>202</sup> *Id.*

<sup>203</sup> *See generally* Huffman, *supra* note 9.

As noted, states may consider the right to education a fundamental interest,<sup>204</sup> whereas the U.S. Supreme Court has explicitly held that education is not a fundamental interest at the federal level.<sup>205</sup> Accordingly, if plaintiffs bring an equal protection claim that charter school statutes deny students the right to education, they are more likely to succeed at the state constitutional level. According to one commentator, state courts have been more inclined to use state constitutions to reform education than on Fourteenth Amendment grounds.<sup>206</sup> Aspiring plaintiffs could argue that the lackluster performance of certain charter schools “impose[s] a real and appreciable impact”<sup>207</sup> on their students’ access to education, denying them their fundamental rights.

In addition, based on the data that these ineffective charter school networks serve predominately poor and minority populations,<sup>208</sup> the charter schools may also “burden poor and minority students disproportionately.”<sup>209</sup> As explained previously, many charters overwhelmingly enroll minority students<sup>210</sup> and serve low-income populations.<sup>211</sup> Additionally, these schools do not necessarily perform at a high level.<sup>212</sup> Under the *Vergara I* trial court’s suspect class equal protection analysis, charter schools may run into the exact same issues that plagued the teacher tenure statutes in California.<sup>213</sup>

Because these charter schools impact the educational outcomes of minority and low-income students and may affect their fundamental interest in education, the charter-enabling statutes must survive strict scrutiny in order to be viable (applying the *Vergara I* trial court framework).<sup>214</sup> Many legal commentators have noted that once courts apply strict scrutiny, the result is “fatal in fact.”<sup>215</sup> Therefore, it is unlikely that courts would uphold charter school systems or their enabling statutes as constitutional. Just as grossly ineffective teachers deny minority students equal access to education and infringe upon students’ fundamental interest in education, charter schools suffer from the same issues. Although scholars have highlighted the equal protection concerns of charter schools in the past,<sup>216</sup> these theories have greater resonance, applicability, and clarity after the *Vergara I* trial decision.

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<sup>204</sup> See *supra* Part II.

<sup>205</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that education is not a fundamental interest under the U.S. Constitution).

<sup>206</sup> Huffiman, *supra* note 9, at 1315.

<sup>207</sup> See *Vergara I*, No. BC484642, 2014 WL 6478415, at \*4 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016).

<sup>208</sup> See, e.g., *IMO Study*, *supra* note 187 (in Chicago); LA. DEP’T OF EDUC., *supra* note 190, at 2 (in New Orleans).

<sup>209</sup> *Vergara I*, 2014 WL 6478415, at \*4.

<sup>210</sup> See *Charter Schools*, *supra* note 179.

<sup>211</sup> LA. DEP’T OF EDUC., *supra* note 190.

<sup>212</sup> See *supra* Section IV.B.

<sup>213</sup> *Vergara I*, 2014 WL 6478415, at \*4.

<sup>214</sup> *Id.*

<sup>215</sup> Huffiman, *supra* note 9, at 1306.

<sup>216</sup> See, e.g., *id.*; Welner, *supra* note 162.

V. REFORMING TEACHER TENURE STATUTES ELIMINATES  
THEIR EQUAL PROTECTION CONCERNS

The trial court in *Vergara I* noted that California's teacher tenure statutes led to a host of equal protection concerns.<sup>217</sup> However, when we apply the same legal framework to charter schools, in many cases they similarly fail to provide minorities and low-income students with equal access to educational opportunities and may deny students their right to education more generally. Our education systems need another solution to resolve these equal protection issues. By reforming teacher tenure statutes, rather than eliminating them, lawmakers can fix their potential constitutional violations.

Reforming teacher tenure statutes will ensure that teachers keep their due process rights<sup>218</sup> and eliminate the teacher tenure statutes' equal protection concerns. First of all, other state courts in which teacher tenure has been challenged have held, in fact, that tenure is a contractual, constitutionally protected right.<sup>219</sup> Removing tenure from our education systems altogether may raise additional constitutional violations. If lawmakers *lengthen* the probationary period present in teacher tenure statutes, administrators will be able to monitor teachers for an adequate length of time before awarding them tenure privileges. A longer probation period will help ensure that only qualified teachers enter the school system.<sup>220</sup> Furthermore, to overhaul potentially unconstitutional teacher tenure systems, reformers should streamline the process for firing "grossly ineffective" instructors so that administrative staff can rid schools of teachers with insufficient performance.<sup>221</sup> Finally, making K–12 teacher tenure more like university tenure systems—which employ strict screening processes and longer probation periods<sup>222</sup>—would also eliminate the equal protection issues raised by the current state of tenure.

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<sup>217</sup> *Vergara I*, 2014 WL 6478415, at \*5–7 (holding that multiple teacher tenure statutes were unconstitutional under the Equal Protection Clause). While the Court of Appeal ultimately overturned this decision on "facial" grounds, it never determined that the teacher tenure statutes were constitutional "*as applied*." Therefore, the equal protection concerns raised by the *Vergara* trial court decision may still apply in individualized, "as applied" constitutional claims.

<sup>218</sup> Arah N. Shumway, *Teacher Tenure Reform in Wyoming: Bad Teachers Left Behind*, 15 WYO. L. REV. 45, 52 (2015) (citing *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Perry v. Sindermann*, 408 U.S. 593, 599 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)) (noting that teacher tenure statutes afford teachers due process rights).

<sup>219</sup> *See* N.C. Ass'n of Educators, Inc. v. State, 776 S.E.2d 1 (N.C. Ct. App. 2015), *aff'd as modified*, 786 S.E.2d 255 (N.C. 2016).

<sup>220</sup> *Vergara I*, 2014 WL 6478415, at \*1, \*5 (describing a sufficiently long probation period as "critical for both students and teachers").

<sup>221</sup> *See id.*

<sup>222</sup> *See* Shumway, *supra* note 218, at 54.

*A. Teacher Tenure Is Constitutionally Protected and Therefore Should Remain in Place*

Policymakers should *not eliminate* teacher tenure altogether because, as some courts and scholars have argued, it is a constitutionally protected property right.<sup>223</sup> Though teacher tenure has been under attack in several states, other state courts have reached dramatically different conclusions regarding its constitutionality.<sup>224</sup> In *North Carolina Ass'n of Educators, Inc. v. State*,<sup>225</sup> the court held that tenure is a part of teachers' constitutional right to contract.<sup>226</sup> Prior to the case, the state legislature had repealed North Carolina's Career Status Law, threatening the existence of teacher tenure.<sup>227</sup> However, the court ultimately held that the federal<sup>228</sup> and state<sup>229</sup> constitutions protected teachers' tenure rights. Furthermore, other commentators have noted that "[i]n states where courts have recognized that contractual rights inhere in the legislative grant of employment benefits, the [Federal] Contract Clause may thus provide a shield against lawmakers' efforts to strip tenured teachers of their tenure rights."<sup>230</sup>

*B. The Trial Court in Vergara I Identifies the Solution to Equal Protection Problems—Making Probation Periods Longer and Removing Obstacles to Firing Ineffective Teachers*

The trial-level decision in *Vergara I* actually states potential solutions to solving the teacher tenure problem.<sup>231</sup> In *Vergara I*, the evidence suggests that a probationary period of less than two years—California's probationary period length—does not provide administrators with "enough time" to assess teacher quality.<sup>232</sup> In California, teachers who would have been weeded out in a longer observation period end up receiving tenure. The trial court also described California as an "outlier" in the length of its teacher tenure probationary period, and expert testimony from the case

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<sup>223</sup> *Id.* at 52.

<sup>224</sup> *See N.C. Ass'n of Educators*, 776 S.E.2d at 11 (upholding teacher tenure statutes).

<sup>225</sup> 776 S.E.2d 1 (N.C. App. 2015).

<sup>226</sup> *Id.* at 16.

<sup>227</sup> *Id.* at 4.

<sup>228</sup> *Id.* at 16.

<sup>229</sup> *Id.* at 8, 18.

<sup>230</sup> Recent Case, *Constitutional Law—Contract Clause—North Carolina Superior Court Holds That Law Eliminating Teacher Tenure Violates Tenured Teachers' Constitutionally Protected Contractual Rights*.—North Carolina Ass'n of Educators, Inc. v. State, 128 HARV. L. REV. 995, 1002 (2015) [hereinafter *North Carolina Teacher Tenure*].

<sup>231</sup> *Vergara I*, No. BC484642, 2014 WL 6478415, at \*6 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016).

<sup>232</sup> *Id.* at \*5 (stating that a probation period long enough for administrators to evaluate teachers is "critical for both students and teachers").

states that a probationary period of three to five years would give administrators more time to evaluate instruction, “mutual[ly] benefit[ing]” both students and teachers.<sup>233</sup>

Therefore, by making the tenure probationary period longer, reformers can improve instructor screening and ensure that only qualified teachers receive tenure in our nation’s schools. Lengthening tenure periods is the better strategy.<sup>234</sup> Additionally, states making their teacher probation periods longer is not an unprecedented practice; Michigan increased its teacher tenure probation period from four to five years.<sup>235</sup> Similarly, New Hampshire increased the length of its probation period from three to five years.<sup>236</sup> Scholar Kevin Welner notes that “[t]he first three to five years of a teacher’s career generally see *substantial improvement*, so a pattern of hiring inexperienced teachers can be detrimental to student learning.”<sup>237</sup> Forty-one states have a waiting period of three or more years before teachers are eligible to receive tenure.<sup>238</sup> Some opponents of shorter tenure periods have argued that three-year probation periods do not reflect teacher performance.<sup>239</sup> In contrast, the probation periods of nine states last four or five years.<sup>240</sup> If California and other states with shorter probation periods lengthen their probation periods to *four or five* years—after which, as Welner notes, many teachers experience high levels of improvement<sup>241</sup>—significantly fewer grossly ineffective instructors would receive tenure rights in the first place. Then, lawmakers would no longer have to worry about equal protection issues of teacher tenure systems.

In addition, some may argue that previous efforts to lengthen the probation period in California have not been successful,<sup>242</sup> but these past failures may not apply in a post-*Vergara I & II* world. In 2005, lawmakers introduced Proposition 74, a measure to lengthen the probationary period from two to five years.<sup>243</sup> The California Teachers Association aggressively fought the initiative, increasing dues to raise \$50 million to campaign against Proposition 74.<sup>244</sup> Ultimately, Proposition 74 did not

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 HOFSTRA LAB. & EMP. L.J. 489, 498 (2013); see also MICH. COMP. LAWS § 38.83(b)(1) (2015).

<sup>236</sup> McNeal, *supra* note 235, at 499; see also N.H. REV. STAT. ANN. § 189:14-a (2008 & Supp. 2012).

<sup>237</sup> Welner, *supra* note 162, at 140 n.66 (emphasis added) (citations omitted).

<sup>238</sup> *Vergara I*, 2014 WL 6478415, at \*5.

<sup>239</sup> Shumway, *supra* note 218, at 54–55.

<sup>240</sup> *Vergara I*, 2014 WL 6478415, at \*5.

<sup>241</sup> Welner, *supra* note 162, at 140 n.66.

<sup>242</sup> PATRICK MCGUINN, CTR. FOR AM. PROGRESS, RINGING THE BELL FOR K–12 TEACHER TENURE REFORM, 1, 12–13 (2010), [https://www.americanprogress.org/wp-content/uploads/issues/2010/02/pdf/teacher\\_tenure.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2010/02/pdf/teacher_tenure.pdf) [<https://perma.cc/4RPE-9T2U>] (citing a 2005 proposal—to lengthen the probation period; ultimately, voters rejected the initiative).

<sup>243</sup> *Id.* at 12.

<sup>244</sup> *Id.*

pass; only forty-five percent of voters supported the initiative.<sup>245</sup> After the *Vergara I* trial decision that highlighted the potential equal protection concerns of the Permanent Employment Statute, an initiative like Proposition 74 might be more viable today.

Additionally, making it easier for school districts to remove ineffective teachers with tenure may similarly alleviate equal protection concerns. *Vergara I* noted that the Dismissal Statutes made it difficult for administrators to terminate problematic teachers.<sup>246</sup> When the Dismissal Statutes were in place, it was expensive and time-consuming to fire teachers—costing \$50,000 to \$450,000 or more to undergo proceedings, which could take up to ten years.<sup>247</sup> Ultimately, school districts were reluctant to fire ineffective teachers simply because the process was too costly and time-intensive.<sup>248</sup> However, several states have reformed their tenure laws to make it easier to fire bad teachers.<sup>249</sup> For example, Alabama passed The Students First Act of 2011,<sup>250</sup> which limits the compensation that a teacher may receive during firing proceedings and mandates that teachers must go to an administrative law judge to appeal firing decisions.<sup>251</sup> It also allows a school district greater deference in making firing decisions, which makes the process faster.<sup>252</sup> Another example comes from Michigan.<sup>253</sup> According to its teacher tenure laws, if a tenured teacher receives a rating of “ineffective” or “highly ineffective” for three consecutive years, then the school district must fire the teacher.<sup>254</sup> If lawmakers in California introduce similar measures to streamline their teacher tenure dismissal statutes, reformers will lessen the equal protection concerns from their teacher tenure systems, making them more likely to survive future constitutional attacks.

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<sup>245</sup> *Id.*

<sup>246</sup> See *Vergara I*, No. BC484642, 2014 WL 6478415, at \*5 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016); see also CAL. EDUC. CODE § 44934 (West 2015); CAL. EDUC. CODE § 44938(b)(1)–(2) (West 1995); CAL. EDUC. CODE § 44944 (West 2016).

<sup>247</sup> See *Vergara I*, 2014 WL 6478415, at \*5.

<sup>248</sup> *Id.* In New York, the process for firing teachers was so difficult that officials would keep ineffective tenured teachers in “rubber rooms”—offices in which these individuals would do nothing all day but continue to be paid. See WAITING FOR SUPERMAN (Walden Media, Participant Media 2010). After negative media coverage of the “rubber rooms,” officials have since abolished rubber room reassignment centers in New York. Ed Pilkington, *New York to Erase ‘Rubber Rooms’ for Suspended Teachers*, GUARDIAN (Apr. 16, 2010, 1:50 PM), <http://www.theguardian.com/world/2010/apr/16/new-york-teacher-rubber-rooms> [<https://perma.cc/R9BV-PNXZ>]. Before rubber rooms were abolished in June 2010, 600 tenured teachers had occupied them. *Should Teachers Get Tenure?*, *supra* note 37.

<sup>249</sup> See, e.g., McNeal, *supra* note 235, at 497–504.

<sup>250</sup> ALA. CODE § 16-24C-4 (2011).

<sup>251</sup> McNeal, *supra* note 235, at 497.

<sup>252</sup> *Id.*

<sup>253</sup> MICH. COMP. LAWS § 38.83(b)(1) (2011).

<sup>254</sup> McNeal, *supra* note 235, at 498.

*C. Modeling K–12 Tenure Infrastructure on University Professor Tenure Systems May Further Eliminate Equal Protection Concerns*

In state university systems, as well as many private university systems, teacher tenure involves a significantly more comprehensive evaluation process.<sup>255</sup> For example, many instructors at the college level are required to wait seven years in order to get a shot at tenure.<sup>256</sup>

Additionally, some have advocated that making K–12 teacher tenure more like the university system will ensure that only the most highly qualified instructors make it to our elementary, middle, and high schools across the United States.<sup>257</sup> For example, Dean Cordeiro of the University of San Diego’s School of Leadership and Education has suggested that her institution—which uses fourteen different metrics in order to determine whether a teacher is worthy of tenure—may provide a model for K–12 school administrators.<sup>258</sup> The current state of K–12 teacher tenure lacks this comprehensive evaluation process.<sup>259</sup> If elementary, middle, and high schools use a more thorough vetting process—such as the University of San Diego’s evaluation strategy<sup>260</sup>—only the most qualified teachers would receive tenure, therefore boosting the quality of education at schools.

Additionally, other advocates of teacher tenure reform have noted that K–12 systems should adopt preliminary reviews during the probation period.<sup>261</sup> David Willingham, a professor of psychology at the University of Virginia, remarked that administrator feedback prior to a tenure decision could help teachers with self-assessment.<sup>262</sup> The review at the end of the third year could “provide[] useful

<sup>255</sup> See, e.g., Mario Koran, *Wanna Fix Teacher Tenure? Look to Universities*, VOICE SAN DIEGO (Aug. 11, 2014), <http://www.voiceofsandiego.org/teacher-tenure/wanna-fix-teacher-tenure-look-to-universities/> [<https://perma.cc/LV48-Q7A2>].

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Dean Cordeiro Discusses Teacher Tenure at Voice of San Diego’s Politifest*, U. SAN DIEGO SCH. LEADERSHIP & EDUC. SCI., [http://www.sandiego.edu/soles/news/news\\_detail.php?\\_focus=48687](http://www.sandiego.edu/soles/news/news_detail.php?_focus=48687) [<https://perma.cc/L98Q-9RJ7>] [hereinafter *Dean Cordeiro Discusses Teacher Tenure*] (“In . . . the School of Leadership and Education . . . we’re looking at teaching in many ways, not only the evaluations that students do, but also we’re looking at the syllabus itself. People go in and visit your classrooms . . . Teachers do enormous service within their schools and in their communities. [K–12 school districts] don’t even factor that in, and that service plays a major role in what they bring into the classroom when they try to form partnerships. . . . We have a lot to learn from good promotion tenure system in higher ed[ucation].”(quoting Dean Polla Cordeiro)).

<sup>259</sup> MCGUINN, *supra* note 242, at 2.

<sup>260</sup> *Dean Cordeiro Discusses Teacher Tenure*, *supra* note 258.

<sup>261</sup> See, e.g., Daniel Willingham, *2 Years Isn’t Enough: What K–12 Can Learn from Higher Ed on Tenure*, REAL CLEAR EDUC. (July 15, 2014), [http://www.realcleareducation.com/articles/2014/07/15/teacher\\_tenure\\_education\\_higher\\_ed\\_1054.html](http://www.realcleareducation.com/articles/2014/07/15/teacher_tenure_education_higher_ed_1054.html) [<https://perma.cc/7L8U-Z29J>].

<sup>262</sup> See, e.g., *id.*

information to the candidate to know where he or she stands and what needs to be improved in the next few years. It also gives the university a chance to fire someone if things are going *really* poorly.”<sup>263</sup>

By taking a page from the university playbook and applying it in the K–12 tenure context, public schools could ensure that only highly qualified instructors make it through the screening process. This way, California and the other states with short teacher tenure probationary periods<sup>264</sup> could ensure that they minimize the number of ineffective teachers receiving tenure. Ultimately, by making K–12 teacher tenure schemes more like those of universities, reformers will ensure better educational outcomes for our nation’s children.

#### CONCLUSION

There are many reasons for maintaining teacher tenure laws. Tenure is a valuable asset to our educational landscape. It motivates the best teachers to work at troubled schools, attracts talent that may be swayed by better employment prospects elsewhere, and ensures that teachers in the system encounter less discrimination and bias.<sup>265</sup> Additionally, some courts have acknowledged that it is an integral part of teachers’ constitutional rights under the Contract Clause.<sup>266</sup>

Although teacher tenure laws serve a beneficial purpose, the laws may violate equal protection if they enable ineffective teachers to gain tenure and make it difficult to terminate these teachers.<sup>267</sup> Unfortunately, proposed alternatives, such as charter schools, create near-identical legal concerns and problems.<sup>268</sup> Like the unqualified teachers in poor and minority-dominated school districts in *Vergara I & II*, charter school systems may similarly hurt poor and minority students disproportionately.<sup>269</sup> Because many low-performing charters may also deny students their fundamental right to education, they may be similarly unconstitutional under a strict scrutiny analysis.<sup>270</sup> Therefore, charter schools are an unsuitable alternative to problematic teacher tenure laws.

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<sup>263</sup> *Id.*

<sup>264</sup> *See, e.g.*, AMBER M. WINKLER, JANIE SCULL & DARA ZEEHANDELAAR, THOMAS B. FORDHAM INST., HOW STRONG ARE U.S. TEACHER UNIONS? A STATE-BY-STATE COMPARISON 176, 266 (2012), [http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/2012-1029-Union-Strength-Full-Report\\_7\\_0.pdf](http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/2012-1029-Union-Strength-Full-Report_7_0.pdf) [<https://perma.cc/4WTB-WMQU>] (noting that North Dakota has a probationary period of two years and that Maine had recently decreased its probationary period from three years to two years).

<sup>265</sup> *Should Teachers Get Tenure?*, *supra* note 37.

<sup>266</sup> *North Carolina Teacher Tenure*, *supra* note 230, at 1002.

<sup>267</sup> *See Vergara I*, No. BC484642, 2014 WL 6478415, at \*1, \*2 (Cal. Super. Ct. Aug. 27, 2014), *rev'd*, 209 Cal. Rptr. 3d 532, 558 (Cal. Ct. App.), *modified* (May 3), *review denied* (Aug. 22, 2016).

<sup>268</sup> *See supra* Part IV.

<sup>269</sup> LA. DEP’T OF EDUC., *supra* note 190.

<sup>270</sup> Welner, *supra* note 162, at 140.

Reforming teacher tenure laws will ensure that teachers maintain their constitutional rights and that qualified teachers remain in the field, leading to better educational outcomes for our nation's children.<sup>271</sup> First of all, these laws should include longer probationary periods to provide school administrators with more time to assess teachers' abilities. Longer probation periods will prevent ineffective teachers from receiving tenure. Although past attempts to lengthen the probation periods have not been universally successful, they may be more viable within the context of today's reform-oriented litigation. Additionally, reformers should change states' dismissal statutes to ensure that administrators can fire ineffective teachers easily and efficiently. Finally, because universities have experimented with tenure systems and proven that more stringent tenure vetting standards can help colleges retain and attract talented professionals, it is clear that longer probation systems and stricter evaluation processes can work at the K-12 level. By fixing tenure statutes, our leaders will help our children attain the best possible educational outcomes. The future of our nation depends on it.

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<sup>271</sup> See, e.g., WINKLER, SCULL & ZEEHANDELAAR, *supra* note 264.