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### Caught in the Crossfire: Indiana's Parent Trigger Law's Negative Impact of Teacher Tenure

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# CAUGHT IN THE CROSSFIRE: INDIANA'S PARENT TRIGGER LAW'S NEGATIVE IMPACT ON TEACHER TENURE

## I. INTRODUCTION

Ms. Clancy teaches first grade at Oak Elementary School. A tenured teacher for thirty years, she works tirelessly with students, parents, and the community. She takes time after school with students to master earth science and photosynthesis. Her former students are grateful for her influence during their most formative years, and others are thankful for their success. Keeping Ms. Clancy in mind, consider the following scenario.<sup>1</sup> A corporate group sends representatives to town demanding signatures for a petition pursuant to a parent trigger law ("PTL") to close Oak Elementary.<sup>2</sup> These representatives promise more money for a new school if the petition passes and explain that a corporate charter school promoter would run a new school.<sup>3</sup> A new school would include firing Ms. Clancy.

Over the last quarter century, the privatization of public education began through school choice reform with PTLs making a recent debut.<sup>4</sup> A

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<sup>1</sup> This hypothetical situation is solely the work of the author and meant to be used for demonstrative purposes only.

<sup>2</sup> See Eloise Pasachoff, *Equality, Centralization, Community, and Governance in Contemporary Education Law*, 42 *FORDHAM URB. L.J.* 763, 774-76 (2015) (analyzing how the school choice movement decreased direct community involvement between schools and parents); see also Yasha Levine, *Pulling the Trigger*, NSFWCORP (Apr. 16, 2013), <https://www.nsfwcorp.com/dispatch/parent-trigger/d3864dc5f64aa09ccb6f08fc4c7a302128189b04/> [<https://perma.cc/3A8C-QQZM>] (discussing the impact of privatized interests in the parent-trigger law ("PTL") movement in California as it relates to coercing parents to sign a PTL petition); Jennifer Medina, 'Parent Trigger' Law to Reform Schools Faces Challenges, *N.Y. TIMES* (Sept. 23, 2011), [http://www.nytimes.com/2011/09/24/education/24trigger.html?\\_r=0](http://www.nytimes.com/2011/09/24/education/24trigger.html?_r=0) [<https://perma.cc/3UD7-XYVQ>] (providing analysis on the pitfalls and shortcomings of essentially creating parent unions as a result of PTLs).

<sup>3</sup> See Levine, *supra* note 2 (criticizing the role of corporate influence in California communities impacted by PTLs); see also *Corporate Involvement in School Reforms*, 3 *POL'Y REP.* 1, 1-3 (2002), <http://asu.edu/educ/eps1/EPRU/articles/EPRU-0205-59-OWI.pdf> [<https://perma.cc/K8VL-K9DK>] (describing corporate involvement in schools as self serving, and turning to educational management strategies to remedy the removed nature of corporate school involvement). Corporate entities are defined as for-profit and non-profit groups that engage in the PTL process. Levine, *supra* note 2.

<sup>4</sup> See Noelle Quam, Note, *Big Philanthropy's Unrestrained Influence on Public Education: A Call for Change*, 21 *WASH. & LEE J. CIV. RTS. & SOC. JUST.* 601, 614-15 (2015) (addressing the influence corporate interests have on the privatization movement, including within the PTL movement); see also Natasha Lindstrom, *Parent Trigger Laws Spreading from California to Other States*, *HECHINGER REP.* (Mar. 20, 2015), <http://www.scp.org/news/2015/03/20/50477/parent-trigger-laws-spreading-from-california-to-o/> [<https://perma.cc/49YU-H5BT>] (explaining that school choice options, including voucher programs, charter school

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PTL allows parents to intervene in a statutorily failing school to convert a traditional public school to a charter school through a petition process.<sup>5</sup> Corporate groups help pass PTL legislation, take part in the petition process, and lead operations of a converted charter school.<sup>6</sup> Corporate groups that have supported PTL legislation include, but are not limited to, Parent Revolution, the Bill & Melinda Gates Foundation, and Green Dot Public Schools.<sup>7</sup> PTL supporters commenced a battle against teacher tenure, labeling educators as the issue in a failing education system and claiming that money can fix education problems.<sup>8</sup>

PTLs violate teacher tenure rights and leave tenured teachers unprotected.<sup>9</sup> Teachers who help during a student's formative years may be fired without regard to tenure status.<sup>10</sup> By depriving communities of strong and respected teachers to create a privately funded school that does not have to follow all state standards, corporate interests do not have the best interest of the children in mind.<sup>11</sup> PTLs inject corporate interests into

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programs, and magnet school programs, now includes the PTL option depending on the statute).

<sup>5</sup> See Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. CHI. LEGAL F. 289, 307 (2014) (defining PTLs generally and the options typically afforded in states with PTLs).

<sup>6</sup> See Anne E. Hoover, Note, *Parent Trigger Laws: Powerful Tools or Empty Shells? An Examination of the New Laws That Put Power into Parents' Hands*, 11 RUTGERS J.L. & PUB. POL'Y 788, 790-92 (2014) (contemplating the rise of corporate involvement as it relates to PTLs).

<sup>7</sup> See Levine, *supra* note 2 (describing different corporate entities involved in the parent trigger movement).

<sup>8</sup> See LA School Report, *UTLA Seeking to Take Lead on Changing CA's Parent Trigger*, (Oct. 17, 2013), <http://laschoolreport.com/utla-seeking-to-take-lead-on-changing-californias-parent-trigger/> [<https://perma.cc/FD9X-3758>] (introducing the tension between Parent Trigger advocates and teachers unions); see also Chad d'Entremont, *Trends in School Choice and the Privatization of Education*, NAT. CTR. FOR THE STUDY OF PRIVATIZATION IN EDUC. TCHRS. C., COLUM. U., <https://www.ncsl.org/print/educ/Privatization.pdf> [<https://perma.cc/D2BL-95NH>] (emphasizing the impact of privatization on teachers unions).

<sup>9</sup> See, e.g., CAL. EDUC. CODE § 53300 (2016) (lacking statutory language in regards to teacher tenure laws). The California PTL provides that at least one-half of the parents are required to sign a petition at a statutorily failing school to invoke one of four options including school closure, without any mention of teachers. *Id.*

<sup>10</sup> See generally *infra* Part II (articulating implications of PTLs throughout the states).

<sup>11</sup> See Quam, *supra* note 4, at 613-14 (contemplating the motive of 'big philanthropy' as it relates to the school choice movement); see also Hoover, *supra* note 6, at 790-92 (questioning the rise of corporate involvement as it relates to PTLs and school choice); F. Howard Nelson & Michael Rosen, *Are Teachers' Unions Hurting American Education? A State-by-State Analysis of the Impact of Collective Bargaining among Teachers on Student Performance*, INST. FOR WIS.'S FUTURE MILWAUKEE, Oct. 1996, at 1 (providing an empirical study conducted in all states to see the impact of teachers unions on education, which found a high correlation between state unionization rates and increased SAT scores, along with increased productivity and efficiency in the school); *For Families & Communities: Charter School FAQs*, IND. CHARTER SCH. BD. (2016), <http://www.in.gov/icsb/2447.htm> [<https://perma.cc/DM5B-85PJ>] (stating that

traditional public schools and infringe upon tenured teachers' rights and careers.<sup>12</sup>

This Note proposes an amendment to Indiana's PTL to afford tenured teachers more rights, because absent amendment, the law is vulnerable to challenge.<sup>13</sup> This vulnerability stems from contract law violations and constitutional challenges under the Indiana Constitution.<sup>14</sup> Part II of this Note discusses the PTL movement across the country, the current Indiana PTL, and the history of teacher tenure law in Indiana.<sup>15</sup> Next, Part III examines Indiana's PTL under teacher tenure contract and constitutional analysis and how the PTL directly contravenes pre-existing law.<sup>16</sup> Last, Part IV proposes that Indiana's PTL should be amended to afford job replacement to displaced teachers and to fix the contractual and constitutional vulnerabilities the Indiana PTL possesses.<sup>17</sup>

## II. BACKGROUND

The PTL movement started to increase parent empowerment within community schools.<sup>18</sup> However, the closure of a school pursuant to a PTL

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charter schools are exempt from certain regulations that would apply to traditional public schools).

<sup>12</sup> See Karla Scoon Reid, *Advocates of State's Parent-Trigger Law Seek to Expand Its Influence*, EDSOURCE (Apr. 2, 2015), <http://edsource.org/2015/advocates-of-states-parent-trigger-law-look-to-expand-its-influence/77047> [<https://perma.cc/KT8T-FKQJ>] (pointing out that opponents of PTLs are against the strong corporate influence involved); see also *infra* Part III (presenting ideas supporting the violations Indiana's PTL presents).

<sup>13</sup> See *infra* Part IV (discussing that alternatively, a new statute should include deference to tenured teachers).

<sup>14</sup> See *infra* Part III (exploring the problems presented by the Indiana PTL under contract and constitutional analysis).

<sup>15</sup> See *infra* Part II (establishing background information on PTLs nationally as well as in Indiana, and explaining the history of teacher tenure laws).

<sup>16</sup> See *infra* Part III (analyzing Indiana's PTL under contract and constitutional analysis and how Indiana's law violates pre-existing teacher tenure laws).

<sup>17</sup> See *infra* Part IV (suggesting that due to the contract and constitutional violations an amendment would be the most practical option to provide job replacement services to tenured teachers to comply with the law).

<sup>18</sup> See Joseph L. Bast & Joy Pullman, *The Parent Trigger: Justification and Design Guidelines*, HEARTLAND INST. 1, 3-5 (Nov. 2012), [https://www.heartland.org/sites/default/files/11-01-12\\_parent\\_trigger\\_justification\\_and\\_design\\_guidelines.pdf](https://www.heartland.org/sites/default/files/11-01-12_parent_trigger_justification_and_design_guidelines.pdf) [<https://perma.cc/6W95-EPRS>] (describing studies in which schools with higher rates of parent involvement had higher achievement scores). Proponents of PTLs and parent empowerment maintain that teachers act as an obstacle to parent power in the management of school districts and boards in holding educators accountable. *Id.* at 5-6. See also Paula M. Evans, *When I Grow up, I Don't Think I Want to Be a Teacher*, EDUC. WEEK (June 2, 1999), <http://www.edweek.org/ew/articles/1999/06/02/38evans.h18.html> [<https://perma.cc/75Y3-V7XL>] (exploring the role of legislatures and how that plays into management of failing public schools).

impacts parents, students, and educators.<sup>19</sup> PTL states, including Indiana, provide school closure as an option to convert a public school into a charter school without mention of tenured teachers at schools qualified for closure.<sup>20</sup> Indiana's PTL exists in a balance with pre-existing teacher tenure laws, which calls for reasonable accommodation to recognize all parties involved in the PTL process.<sup>21</sup>

To reach a reasonable accommodation to address the vulnerabilities within Indiana's PTL, discussion of PTLs across the country, Indiana's PTL, and Indiana's teacher tenure laws provide a substantive platform.<sup>22</sup> First, Part II.A introduces PTLs generally and discusses the Indiana PTL.<sup>23</sup> Second, Part II.B presents the history of Indiana's teacher tenure law.<sup>24</sup> Third, Part II.C describes the history of Indiana's PTL in the context of contract doctrine.<sup>25</sup> Finally, Part II.D discusses the history of Indiana's PTL in the context of constitutional law principles.<sup>26</sup>

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<sup>19</sup> See Amelia Hamilton, *Teachers' Union Fights Parent Trigger Laws in California*, FREEDOMWORKS (Oct. 21, 2013), <http://www.freedomworks.org/content/teachers-union-fights-parent-trigger-laws-california> [<https://perma.cc/S7PC-VNPP>] (establishing that PTLs not only impact parents, students, and communities, but that teachers come into play within the PTL equation); see also Kyle Stokes, *New 'Parent Trigger' Bill Would Let Families, Teachers Vote to Close Schools*, STATEIMPACT (Jan 10, 2013), <http://indianapublicmedia.org/stateimpact/2013/01/10/new-parent-trigger-bill-would-let-families-teachers-vote-to-close-schools/> [<https://perma.cc/2M35-H36F>] (exploring a possible amendment to Indiana's PTL that later failed). Indiana's own PTL was up for amendment in 2013 to make the PTL more comprehensive through letting teachers and administrators weigh in on PTL closures, however this amendment was never passed and is not reflected in the current version of the Indiana PTL. IND. CODE § 20-24-11-1 (2016).

<sup>20</sup> See § 20-24-11-1(b) (laying out the options available in the Indiana PTL). The Indiana PTL provides that if fifty-one percent or more of parents sign a petition to convert a public school to a charter school, that the public school would effectively be closed. *Id.* See also LA School Report, *supra* note 8 (illustrating the strife between corporate PTL entities and teachers). The absence of teachers within PTLs, such as Indiana's, relates to one of the main focuses of the law concerning the relationship between failing schools and teacher competency. *Id.*

<sup>21</sup> See *infra* Part IV (proposing an amendment to Indiana's PTL to accommodate teachers in balance with parent empowerment).

<sup>22</sup> See generally *infra* Part II (providing general and specific knowledge as it relates to PTLs across the country, Indiana's PTL, and Indiana's teacher tenure laws).

<sup>23</sup> See generally *infra* Part II.A (introducing PTLs generally, as well as the Indiana PTL).

<sup>24</sup> See generally *infra* Part II.B (presenting the history of Indiana's teacher tenure law as it related to legislative intent, how Indiana courts have interpreted the Teacher Tenure Act, and how Indiana teachers obtain tenured "professional" status).

<sup>25</sup> See generally *infra* Part II.C (discussing teacher tenure law at a foundational level in the context of binding obligation of contracts and third party interference).

<sup>26</sup> See generally *infra* Part II.D (mentioning teacher tenure law at a foundational level in the context of constitutional principles).

## A. PTLs Throughout the Nation &amp; Indiana

California passed the first PTL in 2010.<sup>27</sup> The law aimed to provide parent empowerment within the school choice movement, which started in the United States during the late twentieth century.<sup>28</sup> Support for the law came from failing schools as well as the influence of Race to the Top Funds.<sup>29</sup> The school choice movement began as heavily fueled by strong corporate interests.<sup>30</sup> Since 2010, seven states passed PTLs (California, Indiana, Connecticut, Ohio, Georgia, Mississippi, and Louisiana) and twenty-five states proposed a PTL.<sup>31</sup>

Although PTLs vary, most allow parents to intervene in a statutorily defined “failing school” by requiring fifty percent or more parents of students at the school to sign a petition.<sup>32</sup> The approval of a petition varies

<sup>27</sup> See CAL. EDUC. CODE § 53300 (2016) (creating the first PTL in the country in 2010). The California PTL takes funding into account and explicitly states that any public school receiving funding at a state or national level is subject to the law. *Facts about Parent Trigger Law*, CAL. TCHR.'S ASS'N, <https://www.cta.org/en/Issues-and-Action/Education-Improvement/Parent-Trigger/Facts-about-Parent-Trigger-Law.aspx> [<https://perma.cc/HZC7-Y94J>].

<sup>28</sup> See *Parent Empowerment*, CAL. DEP'T. EDUC., <http://www.cde.ca.gov/ta/ac/pe/> [<https://perma.cc/D8VT-5E3M>] (establishing that the PTL was enacted to create parent empowerment in the school choice process). The language of the California statute allows for an in-depth look at the parent trigger process. § 53300.

<sup>29</sup> See Maurice R. Dyson, *Are We Really Racing to the Top or Leaving behind the Bottom? Challenging Conventional Wisdom and Dismantling Institutional Repression*, 40 WASH. U. J.L. & POL'Y 181, 238–41 (2012) (exploring the possible pressure looming for states to pass school choice legislation that concern Race to the Top Funds). Race to the Top federal funds allow qualified schools pursuant to education standards to receive funding. *Id.* at 238. Schools in low socioeconomic areas often depend on Race to the Top funds. *Id.* at 240.

<sup>30</sup> See Allison R. Levene, Comment, *Parent Trigger Laws: Dispelling the Myths*, 4 WAKE FOREST J.L. & POL'Y: SUA SPONTE 1, 9–10 (2014) (talking in depth about for-profit charter schools state-by-state). It is not merely a PTL that makes this allowable, but that PTLs go back to the infrastructure of the state itself. *Id.* See also Lindstrom, *supra* note 4 (explaining that the quick popularity of PTLs throughout the states focused mostly on parent empowerment in failing schools).

<sup>31</sup> See National Conference of State Legislatures, *Parent Trigger Laws in the States* (Oct. 15, 2013), <http://www.ncsl.org/research/education/state-parent-trigger-laws.aspx> [<https://perma.cc/D6KY-AAN4>] (pointing out which states have passed a PTL and which have proposed a PTL). This information is current through October 2013. *Id.* See, e.g., § 53300 and IND. CODE § 20-24-11-1 (2016) (providing examples of two different PTLs).

<sup>32</sup> See, e.g., § 53300 (introducing a PTL petition process). For example, the California PTL statute provides as follows:

[A]t least one-half of the parents or legal guardians of pupils attending the school, or a combination of at least one-half of the parents or legal guardians of pupils attending the school and the elementary or middle schools that normally matriculate into a middle or high school, as applicable, sign a petition requesting the local educational agency to implement one or more of the four interventions identified pursuant to paragraphs (1) to (4), inclusive of subdivision (a) of Section 53202.

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by state which could mean authorization by the school itself, the state board of education, or some combination thereof.<sup>33</sup> These laws typically provide four options for parents: (1) conversion of the school to a charter school; (2) removal of staff and administration; (3) replacing the school principal; and (4) the option to receive a voucher or to send their child to another school.<sup>34</sup> An example of the successes of PTLs across the country (occurring exclusively in California) include: one charter school conversion, one district-charter partnership, and one principal removal.<sup>35</sup>

*Id.*

<sup>33</sup> See Patte Barth, *Parent Trigger Laws Are Likely to Fire Blanks*, HUFFINGTON POST (July 22, 2013), [http://www.huffingtonpost.com/patte-barth/parent-trigger-laws\\_b\\_3321204.html](http://www.huffingtonpost.com/patte-barth/parent-trigger-laws_b_3321204.html) [<https://perma.cc/R69A-67T5>] (highlighting that PTL options vary by state). Compare OHIO CODE § 3302.042 (2016) (designating the district board with approval authority), with IND. CODE § 20-24-11-1 (appointing a governing board without explanation of which individuals comprise the governing board). Interestingly, the Connecticut Parent Trigger statute provides a hybrid approach, which involves teachers in the decision to close down a school. CONN. GEN. STAT. § 10-66bb (2016). Parents have the option to agree to the conversion plan created by a school district to create a charter school or leave the school unchanged. § 10-66bb(b). Additionally, this statute created a school governance council consisting of parents, teachers, and school administrators. § 10-66bb(d). The sole purpose of this School Governance Council is to improve the school's academics internally before enacting any charter school conversion measures. § 10-66bb(c).

<sup>34</sup> See National Conference of State Legislatures, *supra* note 31 (providing options available in differing PTLs via a comparative table across the current seven states that have such a law).

<sup>35</sup> See *In Your State*, PARENT TRIGGER, <http://theparenttrigger.com/in-your-state/> [<https://perma.cc/B8RH-LZBL>] (providing a map describing parent trigger enactments as well as enforcements throughout the fifty states); see also Cassiopia Restrepo Blausey, *Bold Reform or a Flash in the Pan: Parent Empowerment and the Parent Trigger*, 42 J.L. & EDUC. 363, 368-70 (2013) (elaborating upon the effectiveness of PTLs and whether or not the legislation really serves a purpose at the state level). The long and short term change invoked by PTLs still remains to be seen, as in practice PTLs have only been invoked a handful of times. Blausey, *supra* note 35, at 371. See also Anne Witt, Note, *Who Pulled the Trigger? The Accessibility and Value of Parent Trigger Legislation for Parents in Low-Income Communities*, 21 GEO. J. ON POVERTY L. & POL'Y 163, 170-73 (2013) (analyzing the relationship between poverty and community with PTLs, specifically in California and how competing teacher interests were introduced after the PTL legislation passed in California); Annenberg Institutional School Reform, *Parent Trigger: No Silver Bullet* 1-3 (2012), <http://annenberginstitute.org/sites/default/files/product/836/files/ParentTriggerPolicyBrief.pdf> [<https://perma.cc/KM7X-2F7P>] (proposing that PTLs have proved so far to be impractical and that they do not alone effectuate educational change). Often, proponents argue that PTLs need to focus more on student empowerment and not just parent empowerment. Annenberg Institutional School Reform, *supra* note 35, at 4-5. Students can become lost in the mix, and effective education reform can only come out of effective community involvement and alternatives that are evidence based, rather than convoluted political issues. *Id.* While the parent trigger movement has been pinned as supportive of community involvement, there is the issue of the divisive nature of PTLs. *Id.* The adversarial nature of the PTL process pushes a petition through a community to begin conversion. *Id.* Some opponents would counter that this pits communities against one another and also does not include the entire community within the PTL process. *Id.* However, parent involvement

The PTL debate has strong opponents and proponents.<sup>36</sup> Proponents assert a PTL allows parents to play a central role in their child's education, addresses the achievement gap, and promotes community involvement.<sup>37</sup> Opponents of the law maintain that the PTL movement is not a parent empowerment movement, it encourages privatization, and there is no concrete proof that PTLs or corporate involvement in schools effectuates change.<sup>38</sup>

Indiana passed its PTL in 2011.<sup>39</sup> Under this law, a school categorized as failing for two or more consecutive years can undergo the previously

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continues to be of grave importance to school success. *Parent, Family, Community Involvement in Education*, NAT'L EDUC. ASSOC. 1 (2008), [http://www.nea.org/assets/docs/PB11\\_ParentInvolvement08.pdf](http://www.nea.org/assets/docs/PB11_ParentInvolvement08.pdf) [<https://perma.cc/RE9P-8EQX>].

<sup>36</sup> See generally Levene, *supra* note 30, at 7–11 (examining the notion that individuals disagree over whether or not PTLs positively impact the United States Education system, providing viewpoints from both sides); see also Osamudia R. Jones, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1088–90 (2014) (discussing the interrelation between school choice and racial issues); *Is There a Need for Parent Trigger Laws?*, U.S. NEWS & WORLD REP. (Oct. 26, 2012), <http://www.usnews.com/debate-club/is-there-a-need-for-parent-trigger-laws> [<https://perma.cc/YS6Z-UUQQ>] [hereinafter *Is There a Need?*] (providing pros and cons of PTLs as opponents and proponents view them).

<sup>37</sup> See *Is There a Need?*, *supra* note 36, at 1 (indicating that proponents of PTLs believe that parents and communities should play an integral part in their child's education to fix the achievement gap). Furthermore, proponents explain that parents pay taxes and fees to send their children to public schools and should have a say when a school is considered failing and eligible for conversion. *Id.*; see also Levene, *supra* note 30, at 11 (questioning whether PTLs will have a lasting impact on education policy and school choice reform throughout the United States).

<sup>38</sup> See *Is There a Need?*, *supra* note 36, at 1 (opining that opponents of PTLs believe the entire movement is privatization authorization disguised as a parent empowerment phenomenon); see also Quam, *supra* note 4, at 616–17 (discussing the increasing interest of “big philanthropy” in school choice in terms of how economic influences power over traditional public schools); Christopher Lubienski et al., *Missing the Target? The Parent Trigger as a Strategy for Parental Engagement and School Reform*, NAT'L EDUC. POL'Y CTR. 3 (Sept. 2012), <http://nepc.colorado.edu/files/pm-trigger-2012.pdf> [<https://perma.cc/XJ4B-9JCN>] (highlighting the role of outside private for-profit companies that have fueled the Parent Trigger revolution thus far and how their removed status only creates community issues); Grady et al., *Engaging Cities: How Municipal Leaders Can Mobilize Communities to Improve Public Schools* 2 ANNENBERG INST. SCH. REFORM (2006), [http://annenberginstitute.org/pdf/NLC\\_Engaging\\_Intro.pdf](http://annenberginstitute.org/pdf/NLC_Engaging_Intro.pdf) [<https://perma.cc/JJ7W-5AJV>] (focusing on alternative ways schools can be improved by increasing community relations through city-based leadership and guidance); Diann Woodard, *The Corporate Takeover of Public Education*, HUFFINGTON POST (June 6, 2013), [http://www.huffingtonpost.com/diann-woodard/the-corporate-takeover\\_b\\_3397091.html](http://www.huffingtonpost.com/diann-woodard/the-corporate-takeover_b_3397091.html) [<https://perma.cc/5V2V-5LN8>] (maintaining disconnect between corporate interests and actual knowledge of how the education system works).

<sup>39</sup> See IND. CODE § 20-24-11-1 (2016) (introducing the Indiana PTL as effective since 2011). The full text, which will be referred to throughout this Note, includes the following:

- (a) This section does not apply to an existing public elementary or secondary school that the governing body of the school corporation in which the school is located has scheduled for closure.



explained petition process.<sup>40</sup> If fifty-one percent or more of the parents sign the petition, the school board then engages in a vote to decide whether the petition is valid to conduct the charter school conversion process.<sup>41</sup> While the statute itself focuses heavily on parent actions and school board approval, the statute makes no mention of teachers anywhere within the bill.<sup>42</sup> This oversight would include a lack of coverage and recognition of tenured teachers.<sup>43</sup>

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(b) An existing public elementary or secondary school may be converted into a charter school if all of the following conditions apply:

(1) At least fifty-one percent (51%) of the parents of students who attend the school have signed a petition requesting the conversion, which must be completed not later than ninety (90) days after the date of the first signature.

(2) The school has been placed in either of the two (2) lowest categories or designations under IC 20-31-8-3 for two (2) consecutive years.

(3) The governing body votes to convert an existing school within the school corporation.

(c) Notwithstanding subsection (b), if a governing body operates a school that has been placed in either of the two (2) lowest categories or designations under IC 20-31-8-3 for four (4) consecutive years, the governing body may not serve as that charter school's authorizer.

(d) A conversion charter school shall continue to comply with all legal requirements concerning student diversity and treatment of children with special needs and accept all students who attended the school before its conversion and who wish to attend the conversion charter school. If any space remains, any student in Indiana may attend the conversion charter school.

*Id.*; see also *Parent Trigger: No Silver Bullet*, *supra* note 35, at 2 (providing that the Indiana Parent Trigger Statute was passed originally in 2011).

<sup>40</sup> See § 20-24-11-1(c) (authorizing which schools are parent trigger eligible); see also Sarah Tully, 'Parent Trigger' Campaigns Can Continue Despite Lack of New Test Scores, EDSOURCE (July 27, 2015), <http://edsources.org/2015/parent-trigger-campaigns-can-continue-despite-lack-of-new-test-scores/83632> [<https://perma.cc/C2EF-67GL>] (illustrating that PTL eligible schools depend largely on standardized test scores).

<sup>41</sup> See § 20-24-11-1(b)(1) (requiring fifty-one percent or more of parents sign the petition, and then the school board engages in a vote to decide whether or not the petition is valid to conduct the charter school conversion process); see also Andrew Ujifusa, *State Lawmakers Throttle Back on 'Parent Trigger'*, EDUC. WEEK (May 20, 2014), [http://www.edweek.org/ew/articles/2014/05/21/32choice\\_ep.h33.html](http://www.edweek.org/ew/articles/2014/05/21/32choice_ep.h33.html) [<https://perma.cc/677B-HJ3W>] (describing the intricacies and possible inconsistencies of requiring a petition process).

<sup>42</sup> See § 20-24-11-1 (excluding teachers from the PTL process generally); see also *Engaging Parents in Transforming Schools*, CAL. TEACHERS ASS'N (2016), <https://www.cta.org/en/Issues-and-Action/Education-Improvement/Parent-Trigger/Research-Parent-Involvement.aspx> [<https://perma.cc/GR84-7WHF>] (positing that while parent empowerment is important, all "stakeholders," including teachers, are involved in school choice reform).

<sup>43</sup> See § 20-24-11-1 (missing acknowledgement of what happens to displaced tenured teachers); see also *Huginin v. Madison Sch. Twp. of Daviess Cty.*, 27 N.E.2d 926, 929 (Ind. Ct. App. 1940) (holding that teachers with tenure status remain protected in the consolidation

Indiana's PTL has the potential to transform community owned public schools into privatized public charter schools, which creates a problem.<sup>44</sup> Indiana's PTL focuses on empowering parents to intervene to change failing schools but currently falls silent on teacher tenure protection.<sup>45</sup> While the full implications of the passage of PTLs around the nation is yet to be seen, there are important connections between PTLs and teacher tenure to be made in Indiana specifically.<sup>46</sup>

### B. *The History of Teacher Tenure Laws in Indiana*

Indiana enacted the Teacher Tenure Act in 1927.<sup>47</sup> The Teacher Tenure Act created permanent employment to effectuate efficient and successful learning in Indiana schools.<sup>48</sup> Indiana courts construe the Teacher Tenure

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setting); Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75, 114-16 (2016) (discussing the constitutional rights afforded to tenured teachers). Additionally, tenure status was created to reward effective teachers. Black, *supra* note 43, at 88-89. However, while ineffective tenured teachers may exist, the management of such internal issues can be an issue. *Id.* at 77-78.

<sup>44</sup> See Lubienski et al., *supra* note 38, at 3 (highlighting the role of outside private for-profit companies that have fueled the Parent Trigger revolution thus far, and how their removed status creates community issues); see also Grady et al., *supra* note 38, at 2 (focusing on alternative ways schools can be improved by increasing community relations through city-based leadership and guidance); Alex Molnar, *Corporate Involvement in Schools: Time for a More Critical Look*, CTR. FOR THE ANALYSIS OF COMMERCIALISM IN EDUC. 1 (2001) (questioning the motives of corporate involvement in American schools).

<sup>45</sup> See § 20-24-11-1 (lacking statutory language on what happens to teachers during the PTL process); see also Grace Wyler, *Here's How One Union Blocked Parents from Improving Their Kids' Education*, BUS. INSIDER (Aug. 10, 2011), <http://www.businessinsider.com/teachers-unions-blocks-parent-triggers-2011-8> [<https://perma.cc/7WJR-CKLA>] (explaining that teachers are not afforded protection under PTLs, and that a Connecticut teachers' union spoke out against its own PTL); Bill Bush, *Ohio's 'Parent Trigger' Law Doesn't Work*, GOVERNING (Dec. 1, 2015) <http://www.governing.com/topics/education/takeovers-of-lousy-schools-by-parents-never-began.html> [<https://perma.cc/N25X-GR23>] (emphasizing the need for teacher involvement in the PTL process in Ohio).

<sup>46</sup> See *infra* Part II.B-D (providing background information on teacher tenure, the PTL in Indiana, and the fundamental groundwork for later contractual and constitutional analysis).

<sup>47</sup> See *Conflicting Judicial Criteria of Utility Rates – The Need for a Judicial Restatement*, 38 COLUM. L. REV. 1087, 1088 (1945) [hereinafter *Conflicting Judicial Criteria*] (specifying that Indiana's Teacher Tenure Law was enacted in 1927). Additionally, teacher tenure remains a highly politicized process to protect teachers from powerful officials. Diane Ravitch, *Mitch Daniels: Proof of the Need for Teacher Tenure* (July 29, 2013), <http://dianeravitch.net/2013/07/29/mitch-daniels-proof-of-the-need-for-teacher-tenure/> [<https://perma.cc/PG3U-89K9>]. There is debate regarding the expansiveness of teacher tenure programs. Meghan Mathis, *Teacher Tenure Debate: Pros & Cons*, TEACHERHUB.COM, <http://www.teachhub.com/teacher-tenure-pros-cons> [<https://perma.cc/K4GU>].

<sup>48</sup> See *New Castle-Henry Twp. Sch. Corp. v. Hurst*, 247 N.E.2d 835, 839 (Ind. Ct. App. 1969) (interpreting the primary purpose behind the Teacher Tenure Act was to create permanency in employment).

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Act to favor teachers and the public.<sup>49</sup> Teacher tenure exists within a strong public policy of safeguarding the State's educational interest.<sup>50</sup>

In *Watson v. Burnett*, the court granted a teacher tenure status after teaching for five consecutive years.<sup>51</sup> After receiving tenure, the teacher was suddenly terminated by the school and prevented from teaching anywhere in the school district.<sup>52</sup> The court held that the school was not justified in terminating the teacher.<sup>53</sup> The court reasoned that the teacher's contested qualifications were not valid as the teacher possessed licensure to teach in the school and that the school could not deprive the teacher of her tenured status.<sup>54</sup> The court further reasoned that the deprivation of

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<sup>49</sup> See *Miller v. Barton Sch. Twp. of Gibson Cty.*, 20 N.E.2d 967, 968 (Ind. 1939) (suggesting that the legislative intent behind teacher tenure involved gaining the trust of the public through accountable teachers); see also *State ex rel. Clark v. Stout*, 187 N.E.2d 267, 269 (Ind. 1933) (reinforcing the importance of teacher tenure as enacted by the Indiana legislature); *Gary Teachers Union v. Sch. City of Gary*, 332 N.E.2d 256, 259 (Ind. Ct. App. 1975) (demonstrating the strength of teachers unions to advocate on behalf of teachers across the state of Indiana).

<sup>50</sup> See *State ex rel. Tittle v. Covington Cmty. Consol. Schs.*, 96 N.E.2d 334, 337 (Ind. 1951) (positing that allowing effective teachers to gain tenure status promotes educational excellence); *Engel v. Mathley*, 48 N.E.2d 463, 466 (Ind. 1943) (addressing the public trust aspect of teacher tenure as it relates to the awarding of tenure status); *Lost Creek Sch. Twp. Vigo Cty. v. York*, 21 N.E.2d 58, 62 (Ind. 1939) (holding teacher tenure is a reward for effective teaching); *Brown v. Bd. of Sch. Trs. of Nettle Creek Cmty. Sch. Corp.*, 398 N.E.2d 1359, 1361 (Ind. Ct. App. 1980) (finding the idea behind teacher tenure is to retain effective teachers to adequately educate children). Interestingly, however, Indiana's Charter School Law does not explicitly provide tenure status anywhere in the law. See § 20-24-6-1 (highlighting the lack of teacher tenure language within the charter school law). Importantly and analogously, while Indiana Charter School Law allows employees to facilitate collective bargaining, it explicitly states that a conversion charter school "is not bound by its collective bargaining agreement" and that employees within a converted charter school would need to restart the collective bargaining process. § 20-24-6-3(b). Indiana's PTL seems to follow the same trend of the Charter School Law in not explicitly addressing teacher tenure. *Id.*

<sup>51</sup> See 23 N.E.2d 420, 422 (Ind. 1939) (explaining the aspects taken into consideration when granting teacher tenure); see also Ben Wieder, *Next Class of Teachers Enters Changing Profession*, STATELINE (May 14, 2012), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/05/14/next-class-of-teachers-enters-changing-profession> [<https://perma.cc/WD6C-VGH4>] (highlighting attacks on Indiana teacher tenure law and how that might impact future requirements to attain tenure).

<sup>52</sup> See *Watson*, 23 N.E.2d at 423 (addressing the fact that a tenured teacher cannot be terminated without cause as explained by the teacher tenure statute concerning due process); see also Randy E. Barnett, *The Judicial Duty to Scrutinize Legislation*, 48 VAL. U. L. REV. 903, 913-14 (2014) (discussing an originalist approach to the interrelation between judicial interpretation of legislation to afford due process).

<sup>53</sup> See *Watson*, 23 N.E.2d at 423 (holding that schools may only terminate tenured teachers as provided by statute); see also LEIGH STELZER & JOANNA BANTHIN, *TEACHERS HAVE RIGHTS TOO: WHAT EDUCATORS SHOULD KNOW ABOUT SCHOOL LAW* xvii (1980) (alluding to the notion that teacher tenure systems contain safeguards for teachers not previously available).

<sup>54</sup> See *Watson*, 23 N.E.2d at 423 (introducing the idea that teacher tenure involves a vested right in continued employment); but see Dan Way, *Experts: Property-Right Basis of Teacher*

tenured status contravened the importance of the Teacher Tenure Act, which was to create stability and permanency for teachers.<sup>55</sup> To support the strong policy behind the Teacher Tenure Act, Indiana's teacher tenure system contains specific guidelines to ensure qualified teachers earn tenure status.<sup>56</sup>

Indiana has a grading system in place to categorize teachers into tenure and non-tenure status.<sup>57</sup> Specific teacher tenure statutes require

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*Tenure Shaky Legally*, CAROLINA J. (Feb. 3, 2014), <https://www.carolinajournal.com/news-article/experts-property-right-basis-of-teacher-tenure-shaky-legally/> [<https://perma.cc/QY6J-LHE2>] (contending that a vested right to tenure status is heavily attacked in state court systems).

<sup>55</sup> See *Watson*, 23 N.E.2d at 423 (standing for the proposition that teacher tenure was a tool created to encourage permanency in the education system); see also Brian Jones, *Protections of Teacher Tenure Do Not Hurt Students*, N.Y. TIMES (June 12, 2014), <http://www.nytimes.com/roomfordebate/2014/06/11/does-tenure-protect-bad-teachers-or-good-schools/protections-of-teacher-tenure-do-not-hurt-students> [<https://perma.cc/23LX-2CU8>] (promoting the idea that teacher tenure is designed to help the education system and not hinder American schools).

<sup>56</sup> See *14 Points of Employee Dismissal*, Ind. St. Bd. of Educ. (Aug. 2010), <http://isba-ind.org/14-points-of-employee-dismissal/> [<https://perma.cc/X2A2-LGE3>] (illustrating the ways in which tenured teachers may be terminated in Indiana); see also Julie M. Slavens, *Teacher Evaluation Litigation*, 2-4 (June 11-12, 2015), <https://www.standardforsuccess.com/wp-content/uploads/2015/06/Teacher-Evaluation-Litigation-Handout.pdf> [<https://perma.cc/3LYU-XKC4>] (challenging current teacher evaluation methods that afford teacher tenure status); Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 HOFSTRA LAB. & EMP. L.J. 489, 489-91 (2013) (hypothesizing that corporate influence over education standards diminishes teacher tenure).

<sup>57</sup> See IND. CODE § 20-28-6-7.5 (2016) (setting out teacher performance ratings). The statute in full states as follows:

Sec. 7.5. (a) A teacher who is subject to section 8 of this chapter is not subject to this section.

(b) After June 30, 2011, a teacher who:

(1) serves under contract as a teacher in a public school corporation;

(2) has not received a rating in an evaluation under IC 20-28-11.5 or receives a rating of ineffective in an evaluation under IC 20-28-11.5;

(3) has not at any time before July 1, 2012, entered into a teaching contract for further service with the school corporation; and

(4) has not received three (3) ratings in a five (5) year period of effective or highly effective in an evaluation under IC 20-28-11.5; shall be considered a probationary teacher.

(c) After June 30, 2011, a teacher who receives a rating of:

(1) effective;

(2) highly effective; or

(3) a combination of both subdivisions (1) and (2);

in an evaluation under IC 20-28-11.5 for at least three (3) years in a five (5) year or shorter period becomes a professional teacher by entering into a contract described in section 2 of this chapter.

(d) A professional teacher who receives a rating of ineffective in an evaluation under IC 20-28-11.5 shall be considered a probationary

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achieving “professional” status before tenure is granted.<sup>58</sup> Tenure is achieved by earning ratings of “effective” or “highly effective” for at least three years in a five-year or a lesser period of time.<sup>59</sup> An Indiana teacher under “professional” status that subsequently receives an “ineffective” rating will not automatically cancel a contract.<sup>60</sup> However, the contract could later be terminated if the teacher receives another “ineffective” rating within the next school year, the school experiences a reduction in force, or sustains two “improvement necessary” ratings in a row.<sup>61</sup> The

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teacher but is not subject to the cancellation of the teacher’s contract unless at least one (1) of the following criteria applies:

(1) The teacher receives a rating of ineffective in an evaluation under IC 20-28-11.5 in the year immediately following the teacher’s initial rating of ineffective.

(2) The teacher’s contract cancellation is due to a justifiable decrease in the number of teaching positions under IC 20-28-7.5-1(b)(3).

(3) The teacher’s contract cancellation is due to conduct set forth in IC 20-28-7.5-1(b).

*Id.*

<sup>58</sup> See § 20-28-6-7.5(c) (describing “professional” status); see also *Teacher Tenure 2014 State Profile Indiana*, EDUC. COMM’N OF THE STS. (2014), <http://ecs.force.com/mbdata/mbstprofexcl?Rep=TTP&st=Indiana> [<https://perma.cc/8WCR-CXEB>] (providing a more comprehensive explanation of the “professional” statutory language in § 20-28-6-7.5 of the Indiana Code); see also *Appointment and New York City Licensure*, UNITED FED’N OF TCHRS. (2015), <http://www.uft.org/new-teachers/tenure> [<https://perma.cc/A9MH-LTEL>] (offering a look at tenure grading systems in a different state).

<sup>59</sup> See § 20-28-6-7.5(c) (defining “professional” status as receiving a rating of “effective” or “highly effective” three consecutive times within a five-year period); see also *Teacher Tenure 2014 State Profile Indiana*, *supra* note 58, at 1 (providing a more comprehensive explanation of the “effective” and “highly effective” statutory language in Indiana Code § 20-28-6-7.5(c)).

<sup>60</sup> See § 20-28-6-7.5(d) (stating that multiple ratings of ineffective would take away a professional grade); see also Susan Edelman & Michael Gartland, *It’s Nearly Impossible to Fire Tenured Teachers*, N.Y. POST (June 14, 2014), <http://nypost.com/2014/06/14/tenured-teachers-they-cheat-they-loaf-they-cant-be-fired/> [<https://perma.cc/BCN5-E643>] (positing that even with the tenure procedures in place, that it is still nearly impossible to terminate tenured teachers). While it may be difficult to terminate tenured teachers, it is necessary to point out that termination proceedings concern management efficiency. *Id.* The power of termination must be taken seriously and has become the focus of tenure reform in recent years. *Id.*

<sup>61</sup> See § 20-28-6-7.5(d) (explaining the grounds in which a professional teacher could be terminated). In *Elliott v. Board of School Trustees of Madison Consolidated Schools*, a permanent teacher had achieved tenured status, but was terminated due to a reduction in force at the school. No. 1:13-cv-319-WTL-DML, 2015 WL 2341226, at \*5 (S.D. Ind. 2015). The court held that the reduction in force termination could not stand. *Id.* at \*13. The court reasoned that the teacher established a contractual right to tenure, which was given more weight based on precedent. *Id.* at \*6. Additionally, the court reasoned that the reduction in force termination interfered with this contract right and, therefore, interfered with the Contracts Clause of the Indiana Constitution. *Id.* at \*13. For a clear and concise summary of the case, refer to *Federal District Court Decision on RIF*, IND. ASSOC. OF SCH. BUS. OFFICIALS (2015), <http://www.indiana-asbo.org/federal-district-court-decision-on-rif/> [<https://perma.cc/B7SJ-AECM>]. See also Edelman & Gartland, *supra* note 60 (focusing on

school determines performance ratings before entering into a teacher tenure agreement based upon the conduct and skills of any given teacher.<sup>62</sup> Other categories of employment status include “probationary” teachers, which means the teacher is working under a contract and either without a rating by school officials or received an “ineffective” rating without an “effective” or “highly effective” rating in a five year time period.<sup>63</sup> If a teacher qualifies for teacher tenure, an indefinite contract is written and signed by both the teacher and school official presiding over the agreement.<sup>64</sup> Tenure agreements possess a basis in contract law

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the idea that even with statutory guidance, tenured teachers rarely lose their jobs); Jason Song, *Firing Teachers Can Be a Costly and Tortuous Task*, L.A. TIMES (May 3, 2009), <http://articles.latimes.com/2009/may/03/local/me-teachers3> [https://perma.cc/Q6G6-N8F4] (taking in to consideration a cost benefit analysis of firing teachers and coming to the conclusion that firing teachers, especially tenured teachers, is a costly task).

<sup>62</sup> See § 20-28-6-7.5 (establishing that the school is responsible for administering and collecting evaluation information); see also Matthew M. Chingos, *Ending Teacher Tenure Would Have Little Impact on Its Own*, BROOKINGS INST. (2014), <https://www.brookings.edu/research/ending-teacher-tenure-would-have-little-impact-on-its-own/> [https://perma.cc/QTQ5-6KQH] (indicating that teacher tenure issues are mostly administrative issues in not utilizing teacher evaluation tools effectively and that ultimately most poor performing teachers do not obtain tenure); Dan Goldhaber & Michael Hansen, *Implicit Measurement of Teacher Quality: Using Performance on the Job to Inform Teacher Tenure Decisions*, 100 AM. ECON. REV.: PAPERS & PROC. 250, 253–54 (2010) (proposing that teacher tenure qualifications change across the states to afford for more consideration of job performance). Within the study conducted by Dan Goldhaber and Michael Hansen, it was found that factors such as increasing the amount of time it takes to receive tenure status as well as altering teacher evaluation forms would help increase educational efficiency. Goldhaber & Hansen, *supra* note 62, at 253–54. However, the study cautions that it is necessary to be careful in applying these findings to the entire teaching work force, as different variables may come into play in different teaching environments. *Id.* Furthermore, the study emphasizes that many factors within effective education were not addressed which included socioeconomic status, school finance, as well as race, gender, and family life. *Id.*

<sup>63</sup> See § 20-28-6-7.5(d) (defining how a teacher falls under “probationary” status based on evaluation ratings); see also Lauren Walsh, *PREP Act Would Reform Teacher Tenure, Change Way Teachers Are Evaluated*, ABC NEWS (Mar. 2, 2016), <http://abc3340.com/news/local/prep-act-would-reform-teacher-tenure-change-way-teachers-are-evaluated> [https://perma.cc/3UUJ-QM69] (illustrating the idea that the legislature in each state plays a large part in the status of teacher tenure in any given state, and that evaluation standards are malleable because of this legislative power).

<sup>64</sup> See § 20-28-6-8 (demonstrating that indefinite contracts are written and signed by the teacher and school official presiding over the agreement); see also Regina Umpstead et al., Comment, *The New State of Teacher Evaluation and Employment Laws: An Analysis of Legal Actions and Trends*, 322 ED. L. REP. 577, 578 (2015) (considering teacher tenure evaluation in the aggregate in the wake of No Child Left Behind to assess the impact of tenure status and standardized testing pressures); but see Michael W. Klein, *Declaring an End to “Financial Exigency”? Changes in Higher Education Law, Labor, and Finance*, 38 J.C. & U.L. 221, 222–25 (2015) (positing that teacher tenure evaluations and economic recessions have a relationship to one another in higher education institutions).

relating to contract formation, contract term alterations, and third party interference.<sup>65</sup>

C. *Teacher Tenure as a Binding Contract*

As with all contracts, teacher tenure requires the traditional contract elements of offer, acceptance, and consideration.<sup>66</sup> First, a teacher receives an offer of tenured status after reaching specified qualifications under Indiana law.<sup>67</sup> Second, a teacher accepts the terms set out in a proposed teacher tenure agreement before signing.<sup>68</sup> Third, a teacher tenure agreement includes consideration, in which a teacher exchanges his or her professional services for the permanent employment status agreed upon within the tenure contract.<sup>69</sup> Indiana courts interpret teacher tenure as a binding contract.<sup>70</sup> Essentially, the agreement creates a property interest in the teacher's permanent employment.<sup>71</sup> Within this contract, a teacher

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<sup>65</sup> See *infra* Part II.C (introducing background information regarding Indiana's teacher tenure law and the obligation of contracts); see also Christine Ramelb, Note, *Public Health Care Funding: The Battle over Planned Parenthood*, 47 VAL. U. L. REV. 499, 513 n.80 (2013) (defining the Contracts Clause in the Federal Constitution as it relates to obligation of contracts).

<sup>66</sup> See § 20-28-6-8 (explaining how teacher tenure contracts are entered into); see also Sch. City of Lafayette v. Highley, 12 N.E.2d 927, 930 (Ind. 1938) (holding a tenured teacher has the burden of establishing himself as a tenured teacher with permanent professional status to allege a due process violation). In *Highley*, the Indiana Supreme Court held that while it could not ignore the strong policy in favor of teacher tenure, that even in situations where a tenured teacher was terminated, it is necessary to show professional status. 12 N.E.2d at 930. Furthermore, the court held that when a permanent teacher in an indefinite contract is terminated, the teacher also has the burden of presenting to the school board why termination is inappropriate. *Id.*

<sup>67</sup> See § 20-28-6-7.5 (providing rating mechanisms to determine eligibility for tenure status, which includes the categories of "professional" and "probationary" based off the teacher evaluations conducted); see also generally § 20-28-11.5-1 (creating teacher evaluation forms that base evaluation observations off of teacher performance).

<sup>68</sup> See § 20-28-6-8 (defining an indefinite contract as "between the school corporation and an established teacher"); see also McNeal, *supra* note 56, at 489-91 (considering the impact of teacher tenure contracts on probationary teachers to emphasize the importance of gaining tenure status).

<sup>69</sup> See § 20-28-7.5-1 (stating the instances in which a teacher may be terminated after achieving tenure status).

<sup>70</sup> See Bd. of Sch. Comm'rs of City of Indianapolis v. Walpole, 801 N.E.2d 622, 624 (Ind. 2004) (recognizing teacher tenure agreements as a binding contract). A binding contract means that both parties have legally enforceable obligations under an agreement. Sand Creek Country Club Ltd. v. CSO Architects Inc., 582 N.E.2d 872, 875 (Ind. Ct. App. 1991). See also *id.* (establishing that in order for a binding contract to stand, more than just an "agreement to agree" standard must be met). Binding contracts can be evidenced by either written agreements or by the substantial conduct of the parties to any given agreement. *Id.*

<sup>71</sup> See Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 L. & CONTEMP. PROBS. 325, 339-40 (1990) (suggesting teacher tenure creates a property interest in permanent academic employment in the realm of teacher tenure). Additionally, the formation of a property interest in employment can vary depending on the teaching contract

performs within his or her duties to hold a school corporation accountable for the employment agreement.<sup>72</sup> Indiana courts interpret teacher tenure as first and foremost a binding contract, and require enforcement of these rights to effectuate a longstanding and important contractual agreement.<sup>73</sup>

In the landmark case of *State ex rel. Tittle v. Covington Community Consolidated Schools*, a teacher who previously attained teacher tenure status was terminated after the school district made the executive decision to consolidate schools.<sup>74</sup> The school district did not have enough teaching spaces available, and layoffs were inevitable.<sup>75</sup> The teacher sued under her teacher tenure agreement, claiming that the obligation of binding

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and other supporting documents. *Compare* Bd. of Regents of St. Colleges et al. v. Roth, 406 U.S. 564, 566–67 (1972) (deciding the contract between a professor and a university did not create a reasonable expectation of rehire; thus, no property interest was created), *with* Perry v. Sindermann, 408 U.S. 593, 601–02 (1972) (finding that an employment manual, which created a perception of permanent employment, portrayed a reasonable expectation of rehire; therefore, a property interest was created).

<sup>72</sup> See § 20-24-6-7.5 (providing a teacher tenure contract is formed on the premise that the teacher will continue to receive positive evaluations and recommendations); *see also* Sch. City of Lafayette v. Highley, 12 N.E.2d 927, 930 (Ind. 1938) (asserting that in the event a teacher does not receive positive evaluations and is later terminated, the teacher has the burden of providing the school board with reasons why the termination was unwarranted).

<sup>73</sup> *See generally* Whitlatch v. Sch. Town of Milan, 198 N.E. 85, 87 (Ind. 1935) (dealing with the idea that marriage cannot take away tenured status in a tenure contract); Robinson v. Sch. Town of Milan, 198 N.E. 87, 87–88 (Ind. 1935) (concerning the idea tenure cannot be taken away due to marital status); *see also* State ex. rel. Tittle v. Covington Cmty. Consol. Schs., 96 N.E.2d 334, 336 (Ind. 1951) (interpreting the right created in existing tenure agreements as predominantly contractual at the Indiana State level); State v. Brand, 303 U.S. 443, 447–48 (Ind. 1938) (defining the right created in existing tenure agreements as predominantly contractual and that the repeal of a teacher tenure statute does not rid of any prior granted tenure agreements); *but see* Bruck v. State ex rel. Money, 91 N.E.2d 349, 352–53 (Ind. 1950) (asserting that the proper exercise of police power by a school can warrant termination of a school official as schools are promulgated authority to use policing powers in the best interest of the school); Haas v. Holder, 32 N.E.2d 590, 594 (Ind. 1941) (expressing that neglecting to voice teacher tenure rights in light of potential tenure violation does not automatically waive pre-existing teacher tenure rights).

<sup>74</sup> See 96 N.E.2d at 336 (describing the right created in existing tenure agreements as predominantly contractual at the Indiana state level). *But see* Jeff Wilhelm, N.C. Teacher Tenure is Weak. *That's Why We Should Keep It*, CHARLOTTE OBSERVER (Jun. 8, 2015), <http://www.charlotteobserver.com/opinion/editorials/article23531257.html> [<https://perma.cc/4WX6-CGAJ>] (asserting that weak teacher tenure law allows for legislative intervention). While Indiana teacher tenure law is heavily based in contract doctrine, some teacher tenure laws are not as influential. Wilhelm, *supra* note 74.

<sup>75</sup> *See Covington Cmty. Consol. Schs.*, 96 N.E.2d at 335 (offering an analogous lay-off situation in which tenured teachers were up for termination); *but see* Timothy Knowles, *When Tenure Trumps Talent*, FORBES (Jul. 23, 2010), <http://www.forbes.com/2010/07/23/education-layoffs-tenure-teachers-opinions-contributors-timothy-knowles.html> [<https://perma.cc/Q9AP-MRZW>] (arguing that last-in-first-out mentality as it relates to teacher tenure negatively impacts urban schools).



contracts prevailed in the event of a school consolidation.<sup>76</sup> The court held the school erred in its termination based on a consolidation because teacher tenure agreements are binding contracts.<sup>77</sup> The court reasoned that a strong policy behind teacher tenure, to reward efficient teachers, outweighed the consolidation efforts.<sup>78</sup> The court further reasoned that the main importance of passing the Teacher Tenure Act included the importance of safeguarding the contract rights of teachers in Indiana.<sup>79</sup> Although the Indiana PTL does not propose consolidation, charter school conversion is very close, and there is not as much case law on the latter topic since the inception of the Indiana PTL.<sup>80</sup> Indiana's PTL presents analogous situations that would deny the authorization of a charter school conversion to deprive a teacher of his or her pre-existing binding contract.<sup>81</sup> Further, Indiana's teacher tenure law addresses third-party

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<sup>76</sup> See *Covington Cmty Consol. Schs.*, 96 N.E.2d at 336 (emphasizing the obligation of contract in teacher tenure). Here the court held that contract law is a vital aspect of teacher tenure. *Id.* Teacher tenure is a unique aspect to the American education system specifically, and these contracts would not have as much power if they were deemed unimportant. *Id.*

<sup>77</sup> See *id.* at 336-37 (maintaining that teacher tenure creates a binding contract).

<sup>78</sup> See *id.* at 336 (focusing on the policy behind teacher tenure in rewarding effective teachers); see also Lauren Camera, *Teacher Tenure Back on Trial in California*, U.S. NEWS & WORLD REP. (Feb. 24, 2016), <http://www.usnews.com/news/articles/2016-02-24/teacher-tenure-back-on-trial-in-california> [<https://perma.cc/U5F3-XQJX>] (explaining that the policy of giving children an adequate education trumps teacher tenure law in recent California court cases); Dolores Huerta, *Issues & Action: Vergara v. California*, CAL. TCHRS. ASSOC. (2016), <http://www.cta.org/vergara> [<https://perma.cc/24BG-SZJT>] (presenting the notion that challenge vulnerabilities exist on either side of the PTL equation). As an example, the California PTL contains similar vulnerabilities as the Indiana PTL. Huerta, *supra* note 78. However, the vulnerabilities exist on both sides of the PTL equation, as evidenced here in attacking teacher tenure laws. *Id.* The Indiana PTL could have a similar impact on tenured teachers if no reasonable accommodation is met. *Id.*

<sup>79</sup> See *id.* (utilizing public policy to find in favor of teacher tenure). The Indiana Supreme Court articulated this public policy within its opinion, stating:

In Indiana, teacher tenure is based wholly on contract. This proposition is no longer open to question. It is also based upon the public policy of protecting the educational interests of the state. It should be liberally construed to effect its general purpose since it is legislation in which the public at large is interested.

*Covington Cmty. Consol. Schs.*, 96 N.E.2d at 336.

<sup>80</sup> See IND. CODE § 20-24-11-1 (2016) (dealing with "[c]onversion of existing public schools into charter schools," which essentially results in a termination of teachers similar to teachers in consolidated schools); see also Brown & Kurland, *supra* note 71, at 339-40 (concluding that teacher tenure contracts create permanent interest in employment).

<sup>81</sup> See *supra* note 73 and accompanying text (providing several cases that demonstrate Indiana followed principle that teacher tenure creates a binding agreement between teachers and a school that cannot be infringed or inferred with from external influences).

interference with a binding tenure contract, which also comes into play within the PTL scheme.<sup>82</sup>

Teacher tenure law in Indiana includes the parties to a tenure agreement and who may interject upon a pre-existing binding agreement.<sup>83</sup> A teacher and school are the exclusive parties to a teacher tenure contract.<sup>84</sup> A tenure agreement requires a written and signed agreement between the two contracting parties only.<sup>85</sup> The current Indiana teacher tenure law does not include any information about whether third parties can intervene in the contract because interveners in the PTL could include both parents and charter school authorizers in the conversion process.<sup>86</sup>

In conclusion, while Indiana's PTL falls silent on the obligation of contracts inherent in pre-existing teacher tenure law, the impact the trigger law poses has varied implications.<sup>87</sup> While the implications of Indiana's PTL on teacher tenure is discussed more in Part III, the foundation of binding contract principles helps guide discussion for the duration of this Note.<sup>88</sup>

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<sup>82</sup> See *Ratcliff v. Dick Johnson Sch. Twp.*, 185 N.E. 143, 144 (Ind. 1933) (positing in a teacher tenure action that a violation "interferes with the freedom of contract, which carries with it the right of termination of any given contract"); see also Klein, *supra* note 64, at 222–25 (positing that teacher tenure is negatively impacted in times of economic recessions due to an increase of political interests).

<sup>83</sup> See § 20-24-6-7.5 (defining teacher tenure agreements and grounds for dismissal). The policy behind this idea involves bargaining power. Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279, 281–82 (1977). The bargaining power within a teacher tenure contract is solidified with the procedural safeguards in place once a teacher earns tenure status. *Id.* at 281. Balance of power within contracts is a vital part to contract law. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 192–93 (2005).

<sup>84</sup> See § 20-24-6-8 (requiring that teacher tenure agreements are to be entered between a teacher and a school corporation); see also *Ratcliff*, 185 N.E. at 144 (holding that a teacher tenure violation "interferes with the freedom of contract, which guaranty carries with it the right of termination of any given contract").

<sup>85</sup> See § 20-24-6-8 (supplying the guidance for how a tenure contract can be changed).

<sup>86</sup> See § 20-28-6-8(b) (explaining the duration of indefinite contracts involved in teacher tenure). The statute states: "(b) An indefinite contract remains in force until the indefinite contract is: (1) replaced by a new contract signed by both parties; or (2) canceled as provided in IC 20-28-7.5." *Id.*

<sup>87</sup> See Brown & Kurland, *supra* note 71, at 339–40 (discussing the obligation of contracts as it relates to teacher tenure agreements and how these agreements bind consenting parties).

<sup>88</sup> See generally *infra* Part III.A (addressing the issues inherent within Indiana's PTL as it relates to binding contract principles, due to the absence of teachers or teacher tenure anywhere within the law as it currently stands).

## D. Teacher Tenure on Constitutional Grounds

Historically, state constitutions create a right to education.<sup>89</sup> States that define education as a constitutionally protected right are required to amend its constitution to reflect legislative changes that impact that constitutionally given right.<sup>90</sup> Education options created by legislation provide a different avenue when a state's legislature enacts education legislation.<sup>91</sup> If an act of legislation goes against the right in a state constitution, the legislation may be found unconstitutional.<sup>92</sup> In Indiana specifically, teacher tenure prevails when repealing or reducing tenure rights previously granted to teachers.<sup>93</sup> The passage of the Indiana PTL inherently involves the constitutional doctrines of *ex post facto* laws, vested rights in permanent employment, and also due process rights.<sup>94</sup>

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<sup>89</sup> See, e.g., FLA. CONST. art. IX, § 1(a) (2016) (creating a constitutional right to education). For example, Florida's constitution creates such a right:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

*Id.* Interestingly, Indiana's constitution does not provide this "fundamental right" explicitly and can be demonstrated in the seminal case of *Bonner v. Daniels* where the court held that Indiana's constitution does not create a government duty to strive for any specified level of education quality. 907 N.E.2d 516, 522 (Ind. 2009).

<sup>90</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6-7 (1973) (holding that because education was not described as a fundamental right in the Texas State Constitution that no alteration of the current version of the State Constitution was necessary to effectuate equality in the school finance system). This fundamental case required the Court to engage in critical constitutional construction analysis. *Id.*

<sup>91</sup> See, e.g., § 20-24-11-1 (creating the PTL in Indiana to empower parents to intervene in the education system). An *ex post facto* law is defined as "[d]one or made after the fact; having retroactive force or effect." *Ex post facto*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>92</sup> See *Conflicting Judicial Criteria*, *supra* note 47, at 1088-89 (providing that if a state lists education as a fundamental right that cannot be infringed upon, then the government is required to create an adequate education system).

<sup>93</sup> See *State v. Brand*, 303 U.S. 443, 447-48 (Ind. 1938) (establishing the repeal of a teacher tenure statute does not remove any prior granted tenure agreements because the obligation of contract within Indiana's constitutional safeguards such as infringements); see also Dan Barkin, *Letters of Marque, Teacher Tenure and Other Constitutional Stuff*, NEWS & OBSERVER (May 16, 2014), <http://www.newsobserver.com/news/local/news-columns-blogs/editors-blog/article10328618.html> [<https://perma.cc/345U-GMCV>] (claiming a North Carolina court found that legislation taking away tenure status violated the Contracts Clause of the United States Constitution, which includes the passing of *ex post facto* laws).

<sup>94</sup> See *infra* Part II.C (introducing the ideas of *ex post facto* laws and vested employment rights); see also Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81

The Indiana Constitution provides that “no *ex post facto* law . . . shall ever be passed.”<sup>95</sup> While the *ex post facto* doctrine exists in several contexts, here, the issue of permanent employment as it relates to the PTL has implications.<sup>96</sup> The relationship between *ex post facto* laws and the PTL is important within this analysis because the Indiana Constitution also provides that “no *ex post facto* law shall ever be passed that infringes upon the obligation of contract.”<sup>97</sup> This notion combines both the *ex post facto* doctrine and teacher tenure laws together under the previous discussion of Indiana jurisprudence’s dependence on teacher tenure contracts as a binding agreement, which creates employment rights in both the teacher and the school.<sup>98</sup> As Indiana’s current PTL does not meet this constitutional requirement, it is likely to render judicial review in the future under the Contracts Clause similar to previous occasions in different teacher tenure contexts.<sup>99</sup>

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KY. L.J. 323, 323–26 (1992) (arguing *ex post facto* analysis should be used in a civil and criminal context in interpreting the Founders’ intent).

<sup>95</sup> IND. CONST. art. I, § 24 (2016). See also *Healy v. State*, 969 N.E.2d 607, 611 (Ind. Ct. App. 2012) (defining what constitutes an *ex post facto* law). An *ex post facto* law in the civil context applies an “intent-effects” test to determine whether there was an *ex post facto* law violation. *Healy*, 969 N.E.2d at 612. The two pronged test used by Indiana courts first looks at the effect of the law in its future applicability and then looks at whether the ultimate effect of the new law is so damaging that it cannot stand. *Id.*

<sup>96</sup> See art. I, § 24 (intertwining the doctrines of *ex post facto* and obligation of contracts in an effort to invalidate any such laws that would infringe upon these associated rights).

<sup>97</sup> See *id.* (combining *ex post facto* doctrine with the obligation of contracts in an effort to protect individuals from future infringements); see also *Barkin*, *supra* note 93 (claiming that a North Carolina court found that legislation taking away tenure status violated the Contracts Clause of the United States Constitution, which includes the passing of *ex post facto* laws); *Bruck ex rel. State v. Money*, 91 N.E.2d 349, 352 (Ind. 1950) (analyzing the interrelation between obligation of contract and *ex post facto* laws).

<sup>98</sup> See *State ex. rel. Tittle v. Covington Cmty. Consol. Schs.*, 96 N.E.2d 334, 336 (Ind. 1951) (defining the right created in existing tenure agreements as predominantly contractual at the Indiana state level); *Bruck*, 91 N.E.2d at 352 (confirming that the legislative intent behind the Teacher Tenure Act was to create a law based solely in contracts).

<sup>99</sup> See *infra* Part III (analyzing the implications of Indiana’s PTL and how it violates Teacher Tenure Laws, which can create future issues for Indiana teachers). To foreshadow the possible impact the Indiana PTL could have on teacher tenure law, California remains the most informative with the recent decision of *Vergara v. California*. BC484642, 2014 WL 6478415, at \*5 (Cal. App. Dep’t Super. Ct. Aug. 27, 2014). This case will be discussed in further detail later in this Note, but it is important to consider that several major aspects of California’s Teacher Tenure law were found to be unconstitutional. *Id.* However, this case was reversed in April 2016, with the appellate court noting that overstepping the bounds between the legislature and the judiciary is a dangerous task. *Vergara v. State*, 246 Cal. App. 4th 619, 627 (Cal. Ct. App. 2016). Additionally, in August 2016 the California Supreme Court refused to hear *Vergara* and incorporated the California Appellate Court decision as its own. *Breaking: California Supreme Court Rejects Meritless Vergara Lawsuit Appeal*, CAL. TCHRS. ASSOC. (2016), <http://www.cta.org/vergara> [<https://perma.cc/9RP9-2AYF>]. Another interesting point of note is that one of the avid supporters of the *Vergara* litigation was

While current teacher tenure jurisprudence in Indiana establishes that binding contractual rights create a permanent employment interest, tenure also simultaneously creates a constitutionally vested right in permanent employment.<sup>100</sup> Vested rights create an absolute and certain right in something granted or agreed upon, that according to Indiana law exists through the indefinite teaching contract.<sup>101</sup> Indiana courts interpret the permanent nature of teacher tenure rights as creating a vested property right that is regulated through the enactment of the Indiana Teacher Tenure Act.<sup>102</sup> The vested rights doctrine also relates to due process law as teacher tenure also includes guaranteed requirements and protections in the event of termination.<sup>103</sup>

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originally a proponent of the parent trigger passage in California in 2010 as part of Parent Revolution. Ben Austin, *Students Matter Staff*, STUDENTSMATTER, <http://studentsmatter.org/our-team/students-matter-staff/> [<https://perma.cc/PE28-A9GV>].

<sup>100</sup> See Bd. of Sch. Comm'rs of City of Indianapolis v. Walpole, 801 N.E.2d 622, 624 (Ind. 2004) (recognizing that teacher tenure creates a permanent property interest in employment, which could be interpreted as an inherent constitutional right due to its permanent nature); see also Myers v. Greater Clark Cty. Sch. Corp., 464 N.E.2d 1323, 1328 (Ind. Ct. App. 1984) (“[f]urther, courts have consistently held that the statutory procedures for cancellation of an indefinite contract must be strictly construed and followed since the effect is to take away the vested rights of a teacher”); Blue River Valley Sch. Corp. v. Renfro, 446 N.E.2d 1364, 1366 (Ind. Ct. App. 1983) (holding the Teacher Tenure Act “should be construed in the most beneficial way the language will permit to prevent absurdity, hardship, or injustice”); Stewart v. Fort Wayne Cmty. Sch., 564 N.E.2d 274, 276-77 (Ind. Ct. App. 1975) (acknowledging that while due process is a constitutional right, that analysis hinges on whether there is a protectable property interest); Sch. Cty. of Brazil v. Rupp, 10 N.E.2d 924, 926 (Ind. Ct. App. 1937) (explaining that the Teacher Tenure Act “provides a method whereby the vested rights of the appellee may be taken away, and . . . must be strictly construed to preserve the rights of the teacher”).

<sup>101</sup> See IND. CODE § 20-24-6-8(b) (2016) (defining the terms for entering into an indefinite contract that lasts until either a new contract is agreed upon by both parties, or a teacher qualifies for grounds of dismissal). To see this in another context, author Perry Dane discusses “vestedness” in the realm of choice of law. Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1191, 1205-16 (1987). The author equates vestedness with choice of law to show that there is an absolute right to apply the law of the place where an accident occurs specifically to individuals who are a party to the accident. *Id.* at 1205-07. The idea of vested rights can be evidenced through consolidation cases where courts held that termination of tenured teachers cannot stand on these grounds. See *Covington Cmty. Consol. Schs.*, 96 N.E.2d at 336-37 (establishing the principle that tenured status reins over consolidation issues within a school district).

<sup>102</sup> See *Walpole*, 801 N.E.2d at 624 (recognizing that teacher tenure creates a permanent property interest in employment, which could be interpreted as an inherent constitutional right due to its permanent nature).

<sup>103</sup> See Randi Weingarten, *Teachers Deserve Due Process*, U.S. NEWS & WORLD REP. (July 1, 2014), <http://www.usnews.com/debate-club/should-primary-school-teachers-get-tenure/teachers-deserve-due-process> [<https://perma.cc/76RD-6SEG>] (acknowledging that termination procedures should comport with due process rights of tenured teachers and that the system still contains inherent flaws as it relates to teachers’ rights).

The due process involved in teacher tenure is a unique aspect of the American education system.<sup>104</sup> Due process requires that individuals have an opportunity to bring and challenge claims brought against them, which infringe upon a granted right.<sup>105</sup> The purpose behind procedural due process is to ensure that any individual incurring a loss due to another's actions has the right to his or her day in court to remedy the loss.<sup>106</sup> Teacher tenure involves a similar tiered process, as any tenured teacher in Indiana is entitled to due process rights in termination proceedings.<sup>107</sup>

Indiana teacher tenure law provides different levels of review post termination.<sup>108</sup> The first stage requires a teacher to file a request to have a conference regarding termination.<sup>109</sup> Then, a preliminary meeting occurs to place the teacher on notice of termination grounds and evidence may be submitted to the school before this stage.<sup>110</sup> This initial private

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<sup>104</sup> See Kathy Christie & Jennifer Dounay Zinth, *Teacher Tenure or Continuing Contract Laws*, EDUC. COMM'N OF THE STS. (2011), <http://ecs.org/clearinghouse/94/93/9493.pdf> [<https://perma.cc/9MBK-AZSL>] (providing a national inspection of teacher tenure laws state-by-state, which includes information on the following: the requirements for tenure status, appropriate tenure statutory authority, notification requirements, hearing and appeals procedures, and the currentness of the provisions).

<sup>105</sup> See *Salter v. State*, 906 N.E.2d 212, 221 (Ind. Ct. App. 2009) (contemplating that a vague statute that violates due process rights can only prevent a challenge if precedent would show that the conduct as a result of the statute was within the scope of the legislative intent). Due process in the teacher tenure context has been described as a process, which "provides those teachers who have demonstrated competence after a probationary period with due process rights before being fired." Richard D. Kahlenberg, *How Due Process Protects Teachers and Students*, AM. FED'N TCHRS. 3 (2015), <http://www.aft.org/ae/summer2015/kahlenberg> [<https://perma.cc/7W8V-EHAS>].

<sup>106</sup> See *Riner v. Raines*, 409 N.E.2d 575, 578–79 (Ind. 1980) (addressing procedural due process in the context of teacher tenure); see also *Dunn v. Jenkins*, 377 N.E.2d 868, 876 (Ind. 1978) (exploring procedural due process as it relates to termination of rights).

<sup>107</sup> See IND. CODE § 20-28-7.5-2 (2016) (providing teachers' rights in a preliminary private meeting before a contract is canceled); see also § 20-28-7.5-3 (establishing an intermediate level of meeting after a preliminary private meeting to give notice).

<sup>108</sup> See § 20-28-7.5-2 (creating an incremental process through which tenured teachers can challenge pending termination); see also § 20-28-7.5-3 (defining procedural aspects of termination proceedings to address grievances); *McDowell v. Indianapolis Pub. Sch.*, No. 1:14-CV-00479-SEB-TAB, 2015 WL 7016497, at \*6–7 (S.D. Ind. 2015) (holding that a breach of contract claim arises when a school board does not follow the requisite termination procedures).

<sup>109</sup> See § 20-28-7.5-2(a)(1) (listing the first step to begin termination proceedings at an informal level); see also *Fears v. Pike Cty. Sch. Corp.*, No. 3:13-CV-00189-RLY-WGH, 2014 WL 3740778, at \*3 (S.D. Ind. 2014) (requiring that a school board follow proper evaluation procedures in considering termination proceedings against a tenured teacher).

<sup>110</sup> See § 20-28-7.5-2(b)–(d) (hosting a preliminary meeting in which the school board and teacher can review the terms of termination, as well as for the teacher to establish for the first time why termination is an inappropriate action); see also § 20-28-7.5-2(f)(1) (stating that evidence may be submitted before the preliminary meeting); *Yoshana Jones, Teacher Tenure-*

conference operates under a preponderance of the evidence standard to determine the validity of the termination.<sup>111</sup>

After this preliminary meeting, if the school board initially finds grounds for contract termination, a public meeting may take place.<sup>112</sup> A governing body of school officials facilitates the public meeting.<sup>113</sup> After review, the governing body renders a final decision.<sup>114</sup> If the school board still finds a valid teacher termination, the teacher can challenge the action in court.<sup>115</sup> All the steps included within the termination procedure are to be followed in the event of a tenured teacher's termination.<sup>116</sup>

In *Joyce v. Hanover Community School District*, a tenured teacher was terminated.<sup>117</sup> The teacher challenged the termination based on the school's non-compliance with its notice and due process requirements in its school policy as mandated by state law.<sup>118</sup> The court held that the school board violated the teacher's due process rights.<sup>119</sup> The court

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*An Ancient Policy or Is It Still Needed?*, EDUCATOR'S ROOM (Jan. 8, 2013), <http://theeducatorsroom.com/2013/01/teacher-tenure/> [<https://perma.cc/72DZ-TV93>] (creating reasons for and against due process protection of tenured teachers).

<sup>111</sup> See § 20-28-7.5-2(f)(1) (positing that the preponderance of the evidence standard be construed to ensure that facts within the record establish that termination is appropriate); see also *Smith v. Bd. of Sch. Trs. of Monroe Cty. Cmty. Sch. Corp.*, 991 N.E.2d 581, 587 (Ind. Ct. App. 2013) (addressing the intricacies of testimony within termination proceedings as held to the preponderance of the evidence standard).

<sup>112</sup> See § 20-28-7.5-3 (offering a public meeting option to obtain more opinions over the termination proceedings).

<sup>113</sup> See § 20-28-7.5-2(d) (authorizing school officials to review the termination record to come to a fair conclusion).

<sup>114</sup> See § 20-28-7.5-2 (requiring that decision making be kept as efficient as possible in authorizing school officials to come to an educated disposition).

<sup>115</sup> See § 20-28-7.5-2 (giving a tenured teacher under termination proceedings the option to appeal the decision of the school board); see also *Joyce v. Hanover Cmty. Sch. Corp.*, 276 N.E.2d 549, 559-60 (Ind. 1971) (discussing the role of school boards in the dismissal process). The appeals process very closely mirrors court proceedings, as school boards act as quasi-courts under administrative proceedings. *Joyce*, 276 N.E.2d at 559-60. Once a tenured teacher exhausts his or her internal remedies with the school board, the teacher can then bring an action in a court of law. *Id.* The Indiana legislature had the intent to allow schools to reconcile termination proceedings first, as school boards typically have a more hands on knowledge of school proceedings. *Id.*

<sup>116</sup> See *McDowell v. Indianapolis Pub. Schs.*, No. 1:14-CV-00479-SEB-TAB, 2015 WL 7016497, at \*6-7 (S.D. Ind. Nov. 12, 2015) (holding that a breach of contract claim arises when a school board does not follow the requisite termination procedures).

<sup>117</sup> See 276 N.E.2d at 559-60 (requiring the school board to conform with six mandatory steps before a tenured teacher's contract could be dismissed).

<sup>118</sup> See *id.* (listing the six termination procedures to take place). The Indiana Supreme Court in *Joyce* further reasoned that due process requirements, such as the steps in place at the school in this case, were set in place by the legislature to safeguard teacher tenure. *Id.* at 559.

<sup>119</sup> See *id.* (asserting that due process rights are a unique aspect of the education profession and should be respected).

reasoned that the school board was required to follow the six-step process before terminating an employee.<sup>120</sup>

In a recent 2014 teacher tenure decision, *Vergara v. California* challenged California's tenure law.<sup>121</sup> The action was brought under constitutional law.<sup>122</sup> The court held that five parts within California's tenure law were unconstitutional.<sup>123</sup> The court reasoned that the teacher tenure law promoted inadequate teachers in schools and deprived students of an adequate education.<sup>124</sup> Interestingly, the California Court of Appeals reversed the *Vergara* case in April 2016, and the appellate ruling was later affirmed by the California Supreme Court in August 2016.<sup>125</sup> These cases could influence Indiana education law, as the Indiana PTL directly clashes with long established Indiana teacher tenure law, and constitutional challenges could arise.<sup>126</sup>

Indiana's PTL poses obstacles for tenured teachers under constitutional doctrines of due process and *ex post facto* laws.<sup>127</sup> Part III

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<sup>120</sup> See *id.* at 559–60 (prescribing requirements which included: (1) a contract between the superintendent and the teacher in which the teacher agrees to a meeting with school officials; (2) the exact time, place, and date of the meeting needed to be given through written notice to contest termination; (3) that a school cannot cancel a current contract until thirty to forty days after notice is given to the teacher; (4) that the date of the signing of the contract to indicate employment status; (5) that if all of the previous requirements were met, then the school could proceed to rightfully terminate the employee in the sixth step; and (6) the school corporation carries the burden of showing that a contract cancellation is not based on political or personal reasons).

<sup>121</sup> No. BC484642, 2014 WL 6478415, at \*5 (Cal. App. Dep't Super. Ct. Aug. 27, 2014) (declaring prominent sections of California's teacher tenure law unconstitutional in part because keeping inadequate teachers in schools deprived students of the right to an adequate education).

<sup>122</sup> See *id.* at \*1 ("Under the strict 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.").

<sup>123</sup> See *id.* at \*5–7 (highlighting the five sections of California teacher tenure law that were deemed by the lower court to be unconstitutional).

<sup>124</sup> See *id.* at \*7 (stressing the idea that teacher tenure retains inadequate teachers); see also *Parent Revolution, Vergara Arguments Conclude*, PARENT REVOLUTION (Apr. 14, 2014), <http://parentrevolution.org/our-blog/2014/4/14/vergara-arguments-conclude> [<https://perma.cc/9B4Q-A9B9>] (disclosing the holding of the California superior court).

<sup>125</sup> See *Vergara v. State*, 246 Cal. App. 4th 619, 627 (Cal. Ct. App. 2016) (overruling a 2014 decision and noting that overstepping the bounds between the legislature and the judiciary is a dangerous task); CAL. TCHRS. ASSOC., *supra* note 99 (explaining the California Supreme Court's decision to deny rehearing of the unanimous appeals decision).

<sup>126</sup> See *infra* Part III (pointing out the vulnerabilities of Indiana's PTL in an attempt to salvage pre-existing teacher tenure laws).

<sup>127</sup> See Kahlenberg, *supra* note 105 (presenting the foundation of constitutional analysis of teacher tenure rights, as well as constitutional doctrines in an effort to show how teacher tenure law has been interpreted and enforced in Indiana courts).



provides both a contract and constitutional analysis of the Indiana PTL's silence on teacher tenure rights.<sup>128</sup>

### III. ANALYSIS

Indiana's PTL should be amended to address the inherent vulnerability the law currently possesses concerning contract and constitutional law.<sup>129</sup> The Indiana PTL's silence on teachers and teacher tenure in general has implications on pre-existing teacher tenure laws.<sup>130</sup> The current PTL does not mention teachers, or what happens to teachers, in the charter conversion process.<sup>131</sup> This gap leaves tenured teachers unprotected from the impact that the PTL would have on their teacher tenure contract agreement, their permanent employment status, and their ability to challenge an inevitable termination on due process grounds once a school is closed and converted to a charter school.<sup>132</sup> Additionally, Indiana's teacher tenure law does not include a cause for dismissal such as the one presented by the PTL.<sup>133</sup> Indiana courts have interpreted teacher tenure as a vested right to provide constitutional protection that

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<sup>128</sup> See *infra* Part III (delving into the contractual and constitutional implications Indiana's PTL sheds on teacher tenure laws).

<sup>129</sup> See *infra* Part IV (proposing an amendment to § 20-24-11-1 of the Indiana Code to afford tenured teachers more rights).

<sup>130</sup> See IND. CODE § 20-24-11-1(b) (2016) (lacking language regarding teacher tenure law). The Indiana PTL was enacted in 2011, and to date has not been successfully invoked via case law; however, some analogous consolidation case law among other select teacher tenure cases show the strength of granting teacher tenure over school closures or other extraneous situations. *State v. Covington Cmty. Sch.*, 96 N.E.2d 334, 336-37 (Ind. 1951).

<sup>131</sup> See § 20-24-11-1 (providing instances where a school can be converted to a charter school under the PTL).

<sup>132</sup> See *id.* (missing language providing for procedures to follow once a school is closed); see also § 20-28-6-8(b) (explaining that an indefinite contract lasts until the parties to the agreement are able to terminate the agreement); § 20-28-7.5-1(a)-(b) (establishing Indiana's charter school law). Indiana's current charter school law does not recognize any pre-existing teacher tenure status. § 20-24-6-1. Charter school law carries over into the problematic equation this Note presents because after a conversion a public school becomes a charter school, which is governed by a different set of laws as far as tenure is concerned and has further implications on the employment of teachers at those schools. Bill Raden, *Former Teacher Calls Parent Trigger School 'Law-Breakingly Unprofessional'*, HUFFINGTON POST (2014), [http://www.huffingtonpost.com/2014/10/20/parent-trigger-charter\\_n\\_6016450.html](http://www.huffingtonpost.com/2014/10/20/parent-trigger-charter_n_6016450.html) [<https://perma.cc/L9HJ-LP9T>].

<sup>133</sup> See § 20-28-6-8(b) (establishing the duration of indefinite contracts involved in teacher tenure). The statute states: "An indefinite contract remains in force until the indefinite contract is: (1) replaced by a new contract signed by both parties; or (2) canceled as provided in IC 20-28-6-7.5." *Id.* See also § 20-28-7.5-1 (providing conduct based dismissal procedures for tenured teachers); *Covington Cmty. Consol. Sch.*, 96 N.E.2d at 336 (explaining that teacher tenure revolves around contract rights).

has subsequently become overridden within the context of the PTL.<sup>134</sup> There are underlying reasons for this lack of teacher tenure protection in Indiana's PTL as evidenced by the relationship among corporate interests, teachers, and increased privatized charter school legislation.<sup>135</sup> Indiana's PTL violates key parts of Indiana teacher tenure law, leaving the law vulnerable to challenge on contractual and constitutional grounds.<sup>136</sup> To reach a reasonable accommodation, amending Indiana Code § 20-24-11-1 to provide deference to tenured teachers' rights is the most practical solution.<sup>137</sup>

First, Part III.A analyzes the impact Indiana's PTL has on pre-existing teacher tenure laws through contract analysis.<sup>138</sup> Second, Part III.B examines the effect of Indiana's PTL on teacher tenure under constitutional analysis.<sup>139</sup> Finally, Part III.C evaluates the relationship between corporate interests, teachers' rights, and the PTLs in the school choice movement as it impacts Indiana.<sup>140</sup>

#### A. *Problem 1: Validity of Indiana's PTL under Contract Analysis*

The first problem faced by Indiana's PTL concerning teacher tenure involves issues arising under teacher tenure as a contract.<sup>141</sup> This presents an implication that Indiana's PTL violates permanent contract rights created under pre-existing teacher tenure laws, leaving tenured teachers without protection.<sup>142</sup> Current parent-trigger legislation shows no deference to pre-existing tenure contracts, as the law is focused on parent

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<sup>134</sup> See *Kostanzer v. State*, 187 N.E. 337, 340-42 (Ind. 1933) (establishing the principle that teacher tenure laws that create permanent teaching positions cannot violate Indiana's Constitution).

<sup>135</sup> See Patricia H. Hinchey & Karen Cadiero-Kaplan, *The Future of Teacher Education and Teaching: Another Piece of the Privatization Puzzle*, 3 J. FOR CRITICAL EDUC. POL'Y STUD. 34, 35-36 (discussing the tension between corporate interests, teachers, and politics).

<sup>136</sup> See *infra* Part IV (suggesting an amendment to Indiana's PTL).

<sup>137</sup> See *infra* Part IV (emphasizing the balance necessary to account for all impacted by Indiana's PTL).

<sup>138</sup> See *infra* Part III.A (examining how lack of teacher protection in the PTL violates the obligation of contract involving teacher tenure law).

<sup>139</sup> See *infra* Part III.B (analyzing how the lack of teacher protection in the PTL violates the Indiana Constitution under *ex post facto* and due process analysis).

<sup>140</sup> See *infra* Part III.C (delving into the relationship between corporate interests as it relates to teachers' rights in the school choice movement).

<sup>141</sup> See *infra* Part III.A (exploring the impact of Indiana's PTL on the obligation of contracts).

<sup>142</sup> See IND. CONST. art. I, § 24 ("[n]o *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed"). Additionally, the implications presented from the intersection of the PTL and teacher tenure is contrary to fundamental contract doctrine which provides that contracts include a bargained for exchange with terms created by the contracting parties themselves. Edward C. Tomlinson & Roy J. Lewicki, *The Negotiation of Contractual Agreements*, 1 J. STRATEGIC CONTRACTING & NEGOT. 85, 85-98 (2015).

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signatures on a petition to convert a qualified school into a public charter.<sup>143</sup> While the law was passed under the premise of promoting parent and student rights, the rights of tenured teachers also exist in this balance.<sup>144</sup> Teacher tenure creates a binding contract that creates an exchange of services for permanent employment and does not account for the implications the PTL presents.<sup>145</sup> Furthermore, a teacher tenure contract in Indiana can only be terminated in the ways specified by law and not in the way that the PTL proposes.<sup>146</sup> In an effort to protect teachers, Indiana jurisprudence created a strong policy recognizing permanent teacher contracts to promote educational excellence.<sup>147</sup> This policy is halted by the parent trigger legislation because currently tenured teachers are under binding contracts that can be broken in a way not specified in teacher tenure law.<sup>148</sup>

Future problems could occur when the law is invoked, as this hole in legislation could furnish lawsuits surrounding the uncertainty of teacher tenure under this new legislative scheme.<sup>149</sup> Breach of contract claims would be substantiated as the Indiana PTL unravels binding contract agreements.<sup>150</sup> In conclusion, the current Indiana PTL does not provide deference to binding contracts that create a specific agreement between two parties.<sup>151</sup>

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<sup>143</sup> See IND. CODE § 20-24-11-1 (2016) (presenting that the plain language of the current PTL does not mention teachers).

<sup>144</sup> See Raden, *supra* note 132 (examining the effects of a parent trigger converted school in California and its impact on teachers).

<sup>145</sup> Norfolk S. Ry. Co. v. Harris, 59 S.E.2d 110, 115 (Va. 1950). In an analogous case, an employment agreement that provided an employee can only be dismissed for cause in exchange for permanent services by an employee created consideration for a binding contract. *Id.* See also Kostanzer v. Ramsey, 187 N.E. 337, 340-42 (Ind. 1933) (recognizing that Indiana teacher tenure provides a permanent contract in exchange for teacher services).

<sup>146</sup> See § 20-28-7.5-1 (providing grounds for dismissal include immortality, incompetence, neglect of duty, a specified conviction, or other good cause).

<sup>147</sup> See State v. Covington Cmty. Consol. Sch., 96 N.E.2d 334, 336 (Ind. 1951) (stressing the importance of safeguarding the contract rights of teachers in Indiana); see also Watson v. Burnett, 23 N.E.2d 420, 423 (Ind. 1939) (discussing that the importance of the Indiana Teacher Tenure Act was to create stability and permanency for teachers).

<sup>148</sup> See § 20-28-6-8(b) (explaining the duration of indefinite contracts involved in teacher tenure). The statute states: "An indefinite contract remains in force until the indefinite contract is: (1) replaced by a new contract signed by both parties; or (2) canceled as provided in IC 20-28-7.5." *Id.*

<sup>149</sup> See Vergara v. California, STUDENTS MATTER, <http://studentsmatter.org/our-case/vergara-v-california-case-summary/> [<https://perma.cc/NVF6-G82Y>] (addressing key components to the teacher tenure decision).

<sup>150</sup> See Bd. of Sch. Comm'rs of City of Indianapolis v. Walpole, 801 N.E.2d 622, 624 (Ind. 2004) (recognizing teacher tenure agreements as a binding contracts between two parties).

<sup>151</sup> See Brown & Kurland, *supra* note 71, at 339-40 (presenting implications faced by tenured teachers under contract doctrines including binding contract and third party interference).

Furthermore, the current PTL grants authoritative power to a third non-party to a separate binding agreement, which violates the obligation of contract.<sup>152</sup> The only parties to a teacher tenure contract in Indiana are the teacher and public school corporation, whereas the PTL allows an unauthorized third party to infringe upon a pre-established contract.<sup>153</sup> A binding contract agreement does not allow an outside entity to interfere if that outside party was never given that authority by the parties.<sup>154</sup> Allowing an unauthorized entity to become a party to a contract is the kind of situation the Indiana PTL presents because of the intervention within a school throughout the conversion process.<sup>155</sup>

The right to contract provides a bargaining process between willing parties at the time of contract that is to be followed.<sup>156</sup> Within this contract, the authority to dismiss a tenured teacher is left specifically with the public school board corporation.<sup>157</sup> The problem presented by the PTL is that the law allows a third party charter school corporation to take over the management and operation of a new public charter school.<sup>158</sup> The implications this poses include trumping the pre-existing agreement between a teacher and a public school if the PTL is invoked.<sup>159</sup> The current law provides no safeguards or acknowledgements to a contract that has already established the essential binding parties.<sup>160</sup> The lack of protection afforded in the PTL is contradictory to the current state of teacher tenure

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<sup>152</sup> See § 20-24-11-1(b)(1) (allowing a parent petition to invoke the PTL process).

<sup>153</sup> See § 20-28-6-8(b) (stating that an indefinite contract is entered into by a teacher and a school).

<sup>154</sup> See, e.g., *Winkler v. V.G. Reed & Sons Inc.*, 638 N.E.2d 1228, 1234 (Ind. 1994) (recognizing unjustified intentional interference by third parties in an employment contract is an actionable tort).

<sup>155</sup> See § 20-24-11-1(b) (authorizing a third party corporation to carry out a conversion plan once fifty-one percent or more parents sign a petition).

<sup>156</sup> See *State v. Brand*, 303 U.S. 443, 447-48 (Ind. 1938) (finding that a permanent contract is carried out by the school board, which needs to comport with the statute that creates the contracts); see also *Fresh Cut Inc. v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995) (“Indiana courts recognize the freedom of parties to enter into contracts and, indeed, presume that contracts represent the freely bargained agreement of the parties.”).

<sup>157</sup> See § 20-28-6-2 (explaining contract requirements between teachers and school corporations); see also § 20-28-7.5-1 (explaining the ways in which a contract may be terminated).

<sup>158</sup> See § 20-24-11-1(c)-(d) (providing guidelines for charter school converters after the PTL has been invoked).

<sup>159</sup> See The Times Editorial Board, *It's Time to Reconsider the Parent Trigger*, L.A. TIMES (Aug. 3, 2015), <http://www.latimes.com/opinion/editorials/la-ed-parent-trigger-20150803-story.html> [<https://perma.cc/7L8C-HLZM>] (providing the inherent issues with PTL passage specifically in California, which may be applied generally to all PTL states).

<sup>160</sup> See § 20-24-11-1 (lacking recognition of a pre-existing agreement between a tenured teacher and school).

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that grants tenured teachers the highest protection.<sup>161</sup> Indiana's PTL creates an unforeseen third party in the form of a potential charter school operator.<sup>162</sup> Current teacher tenure law that addresses how a teacher may be dismissed is conduct based, and not based on extrinsic third parties.<sup>163</sup> The Indiana PTL creates an avenue for outside power to interfere with a preexisting binding contract supported by a law in existence for nearly ninety years, which inherently bears constitutional issues.<sup>164</sup>

The current Indiana PTL violates contract principles inherent in the permanent employment status granted to tenured teachers as agreed to within a teacher tenure agreement with a school district.<sup>165</sup> Third party interference through parent trigger legislation infringes upon rights agreed to by consenting parties to a teacher tenure contract.<sup>166</sup> Indiana's teacher tenure law contract obligations taken together with the constitutional protections discussed in Part III.B are reconciled through the suggested amendment to Indiana Code section 20-24-11-1 in Part IV of this Note.<sup>167</sup>

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<sup>161</sup> See *Kostanzer v. State*, 187 N.E. 337, 340-42 (Ind. 1933) (establishing the principle that teacher tenure laws that establish permanent teaching positions cannot violate Indiana's constitution); see also *Smith v. Bd. of Sch. Trs. of Monroe Cty. Cmty. Sch. Corp.*, 991 N.E.2d 581, 587-88 (Ind. Ct. App. 2013) (proclaiming that termination of a tenured teacher's employment must comport with due process requirements).

<sup>162</sup> See *Evan v. Poe & Assoc.*, 873 N.E.2d 92, 98 (Ind. Ct. App. 2007) ("Generally, only parties to a contract or those in privity with the parties have rights under the contract."); see also Diane Ravitch, *The Story of the "Parent Trigger," an Education Fad That Failed*, DIANE RAVITCH'S BLOG (Jan. 8, 2015), <http://dianeravitch.net/2015/01/08/the-story-of-the-parent-trigger-an-education-fad-that-failed/> [<https://perma.cc/LF8W-MAA4>] (advocating for the idea that the parent trigger phenomenon sweeping the nation is losing muster after some of its initial impact has been seen).

<sup>163</sup> See § 20-28-7.5-1 (stating that grounds for dismissal include: immortality, incompetence, neglect of duty, a specified conviction, or other good cause).

<sup>164</sup> See *Sand Creek Country Club Ltd v. CSO Architects Inc.*, 582 N.E.2d 872, 875 (Ind. Ct. App. 1991) (holding that the binding contract standard requires more than an "agreement to agree" proposition, and that written evidence ameliorates intent); see also *Conflicting Judicial Criteria*, *supra* note 47, at 1088 (providing that Indiana passed its first tenure law in 1927).

<sup>165</sup> See *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) (finding that an employment manual, which created a perception of permanent employment, portrayed a reasonable expectation of rehire and thus a property interest was created); see also *Kostanzer v. State*, 187 N.E. 337, 340-42 (Ind. 1933) (establishing precedent that teacher tenure laws establish permanent employment and should not violate Indiana's constitution).

<sup>166</sup> See *Elliot v. Bd. of Trs. of Madison Consol. Schs.*, No. 1:13-cv-319-WTL-DML, 2015 WL 1125022, at \*12-13 (S.D. Ind. Mar. 12, 2013) (upholding the policy that unwarranted interference with teacher tenure contracts cannot stand); see generally *Joyce v. Hanover Cmty. Sch. Corp.*, 276 N.E. 2d 549, 559-60 (Ind. 1971) (finding that the school board was required to conform with six required steps before a tenured teacher's contract could be dismissed).

<sup>167</sup> See *infra* Part IV (proposing an amendment that would ensure the obligation of contracts entered into between tenured teachers and schools).

## B. Problem 2: Validity of Indiana's PTL Applying Constitutional Analysis

The Indiana PTL poses another problem that involves constitutional analysis.<sup>168</sup> The PTL's silence on the fate of tenured teachers at schools forcibly closed under its authority violates tenured teachers' vested rights, infringes upon due process requirements, and violates pre-existing teacher tenure law pursuant to the *ex post facto* doctrine.<sup>169</sup> The contracts clause of the Indiana Constitution states that "no *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed."<sup>170</sup> The Indiana Constitution provides a constitutional framework to assess the obligation of contract, which is considered a vested right in tenured teachers.<sup>171</sup> A school must comport with due process before a tenured teacher is terminated.<sup>172</sup> The discussion below covers vested right, due process, and *ex post facto* analyses as impacted by the Indiana PTL.<sup>173</sup>

First, the structure of Indiana's PTL does not acknowledge the vested right that arises under a teacher tenure agreement.<sup>174</sup> Under vested right analysis, a contract is to remain as it was agreed upon by contracting parties.<sup>175</sup> At the time of the original contract, an agreement is formed between a teacher and school, creating certain rights in either party.<sup>176</sup> For

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<sup>168</sup> See *infra* Part IV.B (examining the constitutional deprivations inherent in Indiana's PTL and silence on teacher tenure rights).

<sup>169</sup> See Brown & Kurland, *supra* note 71, at 339–40 (explaining constitutional rights that arise under preexisting teacher tenure agreements).

<sup>170</sup> See IND. CONST. art. I, § 24 (providing that no law can infringe upon the obligation of contracts).

<sup>171</sup> See art. I, § 24 (insinuating that no law can be passed that would render contracts void).

<sup>172</sup> See IND. CODE § 20-28-7.5-2(a)(1)–(2) (2016) (administering teachers rights in a preliminary private meeting before a contract is canceled); see also § 20-28-7.5-3 (establishing an intermediate level of meeting after a preliminary private meeting to give notice).

<sup>173</sup> See *infra* Part IV.B (analyzing vested rights, due process, and *ex post facto* implications as a result of Indiana's PTL).

<sup>174</sup> See § 20-24-11-1 (providing no mention of tenured teachers employed by schools up for closure).

<sup>175</sup> See art. I, § 24 (stating that laws cannot infringe upon contract rights); see also § 20-24-11-1 (failing to include tenured teachers employed by schools up for closure). Indiana's teacher tenure laws form permanent employment that creates a vested right. § 20-28-6-8(b). To illustrate this, consider the text of the Indiana Constitution: "No *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed." art. I, § 24. The clear entwinement of vested contract rights into constitutional rights shows a compelling interest that the Indiana legislature has to show deference towards contracting parties as analogously shown in *State v. City of Anderson*. See 142 N.E.2d 914, 917 (Ind. 1957) (construing an indefinite teacher tenure contract in favor of the teacher's vested rights). In *City of Anderson*, the Indiana Supreme Court found for a wrongfully terminated teacher. *Id.* In the court's reasoning, it stated that Indiana courts are to construe permanent teaching contracts and dismissals in favor of the educator. *Id.*

<sup>176</sup> See § 20-28-6-8(b) ("An indefinite contract remains in force until the indefinite contract is: (1) replaced by a new contract signed by both parties; or (2) canceled as provided in IC

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teachers, this right creates permanent employment, and for schools it creates instances where tenured teachers can be dismissed based on conduct.<sup>177</sup> Consequently, the PTL's enactment ignores the pre-existing rights of either party and does not address the rights of these entities in an employment contract context.<sup>178</sup>

The PTL cannot stand under vested right analysis because Indiana law carries a strong policy in favor of educators' rights and the obligation of contract.<sup>179</sup> Problems arise under the pre-existing statutory scheme, which provides how teachers earn tenure status and the guidelines for following tenure after it is granted.<sup>180</sup> The PTL attempts to bypass this process in its creation of a parent empowerment movement that focuses on the ability of parents to sign a petition to convert a public school into a charter school.<sup>181</sup> However, the current PTL does not account for any pre-existing tenure law that could be impacted by this current enactment.<sup>182</sup> The trigger law usurps rights afforded in the tenure agreement that ultimately leads to a due process termination issue, as discussed below.<sup>183</sup>

Second, the Indiana PTL's silence on tenured teachers' rights also violates due process.<sup>184</sup> Practically, the closure of a school under Indiana's PTL creates a large gap in the traditional due process procedures followed in the typical termination proceedings of tenured teachers.<sup>185</sup> The Indiana

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20-28-7.5."); see also 20-28-7.5-1 (providing conduct based ways to be terminated after entering an indefinite contract).

<sup>177</sup> See § 20-28-6-8(b) (creating an indefinite contract for a qualifying teacher); see also § 20-28-7.5-1 (promulgating authority to schools to warrant dismissal of teachers based on conduct).

<sup>178</sup> See § 20-24-11-1(b) (establishing a right in parents to convert a school to a charter).

<sup>179</sup> See *Watson v. Burnett*, 23 N.E.2d 420, 423 (Ind. 1939) (noting that the legislative purpose behind the Teacher Tenure Act was to create stability and permanency for all teachers); see also *Kostanzer v. State*, 187 N.E. 337, 340-42 (Ind. 1933) (stating that teacher tenure laws establish permanent employment rights and should not violate Indiana's constitution).

<sup>180</sup> See J.K. Wall, *How Hard Is It to Fire a Teacher, Really?*, INDIANAPOLIS BUS. J. (Nov. 6, 2010), <http://www.ibj.com/articles/23257-how-hard-is-it-to-fire-a-teacher-really> [<https://perma.cc/NLM6-LA3U>] (laying out the guidelines for obtaining teacher tenure and the conditions under which a teacher may be terminated after achieving permanent status).

<sup>181</sup> See Nicholas Dagostino, *Giving the School Bully a Timeout: Protecting Urban Students from Teachers' Unions*, 63 ALA. L. REV. 177, 208-09 (2011) (describing the general petition process under PTLs).

<sup>182</sup> See generally § 20-24-11-1 (lacking language about teachers within the PTL).

<sup>183</sup> See *infra* Part IV.B (discussing potential due process implications as a result of Indiana's PTL).

<sup>184</sup> See *Stewart v. Fort Wayne Cmty. Sch.*, 564 N.E.2d 274, 276-77 (Ind. 1990) (holding that because teacher tenure creates a vested property interest in employment, teacher terminations must comply with due process).

<sup>185</sup> Dan Walters, *State's 'Parent Trigger' Law Effectively Guttled*, SAN DIEGO UNION-TR. (Dec. 24, 2015), <http://www.sandiegouniontribune.com/news/2015/dec/24/dan-walters-torlakson-guts-parent-trigger/> [<https://perma.cc/WD7Q-BU25>] (contemplating the after effects of California's PTL on current teacher tenure litigation in terms of unlawful

teacher tenure law provides a multi-step process where tenured teachers are notified of a possible dismissal that cannot occur under the current parent trigger statutory scheme.<sup>186</sup> Indiana's PTL purports to convert a currently existing school to a charter school, which as a result would terminate any employee at an existing school.<sup>187</sup>

The PTL in effect provides teachers no notice or any sort of process that would recognize previously afforded due process rights and should look to current teacher tenure laws to provide that deference.<sup>188</sup> While a teacher may have notice of a PTL-induced school closing through common knowledge, the way in which a teacher is automatically terminated under this scheme is not explicitly accounted for in teacher tenure laws.<sup>189</sup> Teacher tenure legislation provides "for cause" situations where a tenured teacher may be terminated, but the Indiana PTL does not account for previously passed legislation, such as the termination process.<sup>190</sup> The problems that arise here could be resolved through amendments to teacher tenure laws or to the PTL; however, the strength and longstanding merit of Indiana's teacher tenure laws seem to indicate that the 2011 PTL could conform easier to the current status of teacher tenure.<sup>191</sup>

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termination). The PTL inherently leaves tenured teachers displaced in the event of a closure, and they are not granted an opportunity to refute termination when it comports with the termination statute based on conduct where the parent trigger involves school performance and not a teacher-by-teacher assessment. *Id.*

<sup>186</sup> See § 20-28-7.5-2 (providing teachers' rights in a preliminary private meeting before a contract is canceled); see also § 20-28-7.5-3 (offering an intermediate level of meeting after a preliminary private meeting to give notice); *Thomas v. South Bend Cmty. Sch. Corp. Bd. of Trs.*, No. 2:05-CV-253 RM, 2008 WL 1774958, at \* 18 (N.D. Ind. April 15, 2008) (finding that a school comported with due process when terminating an employee); *Vukadinovich v. Hanover Cmty. Sch. Corp.*, No. 2:13-cv-00144-PPS, 2015 WL 5432483, at \*7-9 (N.D. Ind. Sept. 14, 2015) (holding under section 20-28-7.5-2 of the Indiana Code, a school complied with due process requirements).

<sup>187</sup> See § 20-24-11-1(b) (describing "an existing public elementary or secondary school may be converted into a charter school" under certain conditions).

<sup>188</sup> See § 20-28-7.5-2 (affording teachers due process rights); see also § 20-28-7.5-3 (supplying administrators with information regarding teacher evaluations to assess job performance).

<sup>189</sup> See § 20-28-7.5-2 (aiding in the termination process); see also § 20-28-7.5-3 (providing schools with information regarding teacher performance); Larry Sand, CA's "Parent Trigger" Laws under Union Attack, CAL. POL. REV. (Aug. 12, 2013), <http://www.capoliticalreview.com/top-stories/cas-parent-trigger-laws-under-union-attack/> [<https://perma.cc/UM4M-NV7Y>] (providing PTL impact implications).

<sup>190</sup> See § 20-28-7.5-1 (explaining for cause termination scenarios); see also § 20-28-7.5-3 (codifying due process protection rights for tenured teachers).

<sup>191</sup> See Scoon Reid, *supra* note 12, at 1 (suggesting unrest in the field by noting legislative discrepancies when passing PTLs).



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Third, *ex post facto* analysis provides that the Indiana PTL violates teacher tenure law.<sup>192</sup> *Ex post facto* laws retroactively alter a legal status afforded as a result of a new law.<sup>193</sup> Indiana's teacher tenure law was enacted in 1927.<sup>194</sup> Subsequently, Indiana passed a PTL in 2011.<sup>195</sup> The Indiana PTL makes no mention of teacher tenure laws in place, and as a result, provides no deference to preexisting rights created under teacher tenure.<sup>196</sup> This PTL displaces a long-standing body of law that operates under an obligation of contract.<sup>197</sup> The retroactive effect that the PTL has on teacher tenure law has major implications in the realm of education law and the permanent impact has yet to fully unfold.<sup>198</sup> The ability to identify the contradictions the Indiana PTL imposes, both temporally and substantively, relates to many of the subareas already analyzed to convey the idea that the Indiana PTL should be amended.<sup>199</sup> Consequently, the PTL cannot pass muster under *ex post facto* analysis due to its conflict with preexisting teacher tenure laws.<sup>200</sup> In conclusion, the Indiana PTL proposes constitutional challenges under vested right, due process, and *ex post facto* analysis, and creates vulnerability without the amendment offered in Part IV to afford tenured teachers more rights.<sup>201</sup>

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<sup>192</sup> See IND. CONST. art. I, § 24 ("No *ex post facto* law, or law impairing the obligation of contracts, shall be passed.").

<sup>193</sup> See *Clem v. Cristole Inc.*, 582 N.E.2d 780, 782-84 (Ind. 1991) (discussing the effect an *ex post facto* law has under the contract clause of the Indiana Constitution).

<sup>194</sup> See *Conflicting Judicial Criteria*, *supra* note 47, at 1088 (explaining that Indiana's Teacher Tenure Law was enacted in 1927).

<sup>195</sup> See § 20-24-11-1 (establishing Indiana's PTL); see also *In Your State*, *supra* note 35, at 1 (reconciling Indiana's PTL with school choice on a national scale).

<sup>196</sup> See § 20-24-11-1(b) (creating a way in which parents may sign a petition at a qualified school, which is later reviewed by a school corporation to convert a public school to a charter school).

<sup>197</sup> See § 20-24-11-1 (demonstrating that Indiana's PTL makes no mention of teachers); see generally §§ 20-28-6-1 to 20-28-6-9 (highlighting the area of Indiana's Teacher Tenure Law that covers obligation of contracts).

<sup>198</sup> See *infra* Part III (positing that while the lasting impact of Indiana's PTL has yet to unfold, taking the law as it currently stands and putting it through contractual and constitutional scrutiny conveys the ineffectiveness of the law).

<sup>199</sup> See *infra* Part III.C (utilizing binding contract, third party interference, vested right, and due process analyses to support the thesis of this Note).

<sup>200</sup> See § 20-24-11-1 (establishing a new precedent that changes the legal status of tenured teachers).

<sup>201</sup> See *infra* Part IV (purporting an amendment to § 20-24-11-1 of the Indiana Code would fix current vulnerabilities).

C. *Problem 3: The Tension between Corporate Interests and Teachers*

Corporate interests have an increasing stake in school choice that evolved into the most recent effort to privatize education through PTLs.<sup>202</sup> Corporate involvement in education reform can be traced back farther than the beginning of the school choice movement.<sup>203</sup> Corporate entities, including Parent Revolution and Green Dot Public Schools, within the PTL movement alone show the power a corporate interest is able to place over teachers due to fear, coercion, and surplus of financial resources.<sup>204</sup> A large part of the tension between corporate interests and teachers deals with the entity that is best equipped to carry out effective education for students.<sup>205</sup>

The PTL relationship with tenured teachers includes supporters and adversaries of the PTL impact on tenured teachers' rights.<sup>206</sup> One idea typically concerns inadequate teachers kept over time at a school.<sup>207</sup> The other usually involves a concern of a child being deprived of a constitutional right to adequate education when exposed to incompetent permanent teachers.<sup>208</sup> Adversaries note that school failure, which the PTL attempts to ameliorate through the conversion process, is equated to

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<sup>202</sup> See MICHAEL TIMPANE & LAURIE MILLER MCNEILL, BUSINESS IMPACT ON EDUCATION AND CHILD DEVELOPMENT REFORM: A STUDY PREPARED FOR THE COMMITTEE FOR ECONOMIC DEVELOPMENT 2-7 (1991) (illustrating an historical aspect of corporate involvement in education); see also Hoover, *supra* note 6, at 790-92 (contemplating the rise of corporate involvement as it relates to PTLs).

<sup>203</sup> See Quam, *supra* note 4, at 614-17 (discussing the increasing interest of big philanthropy in school choice).

<sup>204</sup> See Levine, *supra* note 2 (describing several different corporate entities involved in the parent trigger movement).

<sup>205</sup> See Hinchey & Cadiero-Kaplan, *supra* note 135, at 35-36 (discussing the tension between corporate interests, teachers, and politics). For the purpose of this Note, this issue will not be discussed in depth and hopefully will become part of a future article. However, some sources can speak to this issue. See also INST. FOR WISCONSIN'S FUTURE MILWAUKEE, *supra* note 11, at 5-6 (finding higher test scores in states with higher rates of teacher unions).

<sup>206</sup> See *Rebalancing Teacher Tenure: A Post-Vergara Guide for Policymakers*, NEW TCHR. PROJECT, 1-4 (2014), [http://tntp.org/assets/documents/TNTP\\_RebalancingTenure\\_2014.pdf](http://tntp.org/assets/documents/TNTP_RebalancingTenure_2014.pdf) [<https://perma.cc/8965-NZ6L>] (suggesting that current teacher tenure laws are too lenient in granting tenure, which allows ineffective teaching).

<sup>207</sup> See *id.* (asserting that teacher tenure should only be granted when there is a strong showing of educational performance); but see Michael R. Lanzarone, *Teacher Tenure-Some Proposals for Change*, 42 FORDHAM L. REV. 526, 561 (1973) (offering that tenured teachers who receive low measurement scores can be punished by decreasing pay).

<sup>208</sup> See *Vergara v. California*, No. BC484642, 2014 WL 6478415 at \*5 (Cal. App. Dep't Super. Ct. Aug. 27, 2014) (declaring prominent sections of California's teacher tenure law unconstitutional); but see *Vergara v. State*, 246 Cal. App. 4th 619, 627 (Cal. Ct. App. 2016) (reversing the 2014 decision on constitutional grounds).

inadequate educators.<sup>209</sup> Also, advocates claim that corporate-run schools give struggling education systems structure and funding.<sup>210</sup> Additionally, opponents posit that tenure laws push new, energized teachers away from the field of education and instead, keep ineffective teachers at schools in need of the most help.<sup>211</sup>

However, the Indiana teacher tenure law was specifically designed to prevent these issues.<sup>212</sup> Furthermore, certain requirements need to be met before a teacher in Indiana is given permanent status.<sup>213</sup> Grounds for dismissal are all conduct based.<sup>214</sup> Issues arising from teacher tenure laws are misplaced, as responsibility here lies with management.<sup>215</sup> Indiana's teacher tenure law provides avenues a school can pursue to dismiss ineffective tenured teachers.<sup>216</sup> These laws are at management's disposal to use, and the possible lack of usage is not within the teacher's authority.<sup>217</sup> Additionally, the focus of the PTL remains upon a school's performance as a whole, which does not take into consideration individual performance of teachers on a case-by-case basis.<sup>218</sup> Closing

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<sup>209</sup> See *Is There a Need?*, *supra* note 36, at 1 (introducing that proponents of PTLs believe the legislation curbsides poor performing teachers); but see *A Better 'Parent Trigger': Regulations Aren't Enough to Fix the Sloppy Law That Created the Parent Trigger*, L.A. TIMES (Jan. 2011), <http://articles.latimes.com/2011/jan/29/opinion/la-ed-trigger-20110129> [<https://perma.cc/JU52-8HMK>] (expanding upon the notion that PTLs cannot create watershed change as originally hoped).

<sup>210</sup> See Hinchey & Cadiero-Kaplan, *supra* note 135, at 35-36 (discussing the tension between corporate interests, teachers, and politics).

<sup>211</sup> See *Last-In, First-Out Statute*, STUDENTS MATTER, <http://studentsmatter.org/our-case/vergara-v-california-case-summary/last-in-first-out-statute/> [<https://perma.cc/C7FE-PL7E>] (explaining that increased efforts to keep tenured teachers disallows new teachers from entering the field of education as evidenced during the *Vergara v. California* trial concerning Last-In First-Out Statutes).

<sup>212</sup> See *State v. Covington Cmty. Consol. Sch.*, 96 N.E.2d 334, 336 (Ind. 1951) (offering that the purpose behind teacher tenure is to reward competent teachers so as to improve the educational goals of the State of Indiana).

<sup>213</sup> See IND. CODE § 20-28-6-7.5 (2016) (creating teacher rating categories to obtain as well as maintain teacher tenure).

<sup>214</sup> See § 20-28-7.5-1 (describing the ways a tenured teacher may be terminated for cause).

<sup>215</sup> See David B. Cohen, *The Problem with the 'Problem with Tenure' for Teachers*, N.Y. TIMES (Aug. 26, 2014), <https://www.washingtonpost.com/blogs/answer-sheet/wp/2014/08/26/the-problem-with-the-problem-with-tenure-for-teachers/> [<https://perma.cc/P4JV-YH94>] (suggesting that the issue in the ineffective carrying out of teacher tenure lies with school management issues).

<sup>216</sup> See § 20-28-7.5-2 (providing the due process system that creates a preliminary meeting with a teacher in jeopardy of dismissal); see also § 20-28-7.5-3 (offering a tiered process in which schools are allowed to evaluate a potential decision to dismiss a tenured teacher).

<sup>217</sup> See Cohen, *supra* note 215 (emphasizing management issues in effectuating teacher tenure).

<sup>218</sup> See Umpstead et al., *supra* note 64, at 578 (considering the pressure of schools in enforcing teacher tenure laws in the wake of expansive legislative actions including No Child Left Behind ("NCLB") and PTLs).

down an entire school is not necessarily the result of each and every teacher in a school's underperformance, as many other aspects of school operation may have an impact on its successes and failures.<sup>219</sup>

Providing analysis of the implications of Indiana's PTL on teacher tenure laws shows that silence results in fatal vulnerabilities.<sup>220</sup> Under contract analysis, Indiana's PTL affords no deference to the obligation of binding contract, and essentially allow a third party to intentionally interfere with a separate agreement between two parties.<sup>221</sup> Additionally, under constitutional analysis, Indiana's PTL violates a vested right in a teacher tenure contract, implicates due process issues, and also infringes upon *ex post facto* contract law.<sup>222</sup> These contractual and constitutional issues coexist with broader issues between corporate interests and teachers unions.<sup>223</sup>

Indiana's PTL is vulnerable to challenge under contract and constitutional doctrines.<sup>224</sup> As previously established, a teacher tenure agreement creates a binding agreement between two parties that cannot be violated except for specified instances by law.<sup>225</sup> Additionally, current teacher tenure laws do not allow for third party interference with the validity of a pre-formed teacher tenure agreement.<sup>226</sup> Indiana's current PTL allows both of those to occur, by simultaneously permitting both parents as well as charter school authorizers to infringe upon contractual rights.<sup>227</sup> The Indiana PTL inherently goes against these established contract principles and would not be able to stand without challenge.<sup>228</sup> Accordingly, Part IV recommends that Indiana's PTL be amended to afford more rights to tenured teachers in an effort to fix contractual and constitutional vulnerabilities.<sup>229</sup>

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<sup>219</sup> See Hinchey & Cadiero-Kaplan, *supra* note 135, at 35–36 (discussing the tension between corporate interests, teachers, and politics).

<sup>220</sup> See generally *supra* Part III (highlighting areas of contract and constitutional law that Indiana's PTL violates as it relates to teacher tenure).

<sup>221</sup> See *supra* Part III.A (discussing how Indiana's PTL violates contract rights).

<sup>222</sup> See *supra* Part III.B (examining how Indiana's PTL infringes upon constitutional rights).

<sup>223</sup> See *supra* Part III.C (analyzing the relationship between corporate interests and teachers as it relates to Indiana's PTL).

<sup>224</sup> See *supra* Part III (exploring Indiana's PTL under contract law and constitutional law).

<sup>225</sup> See *Bd. of Sch. Comm'rs of City of Indianapolis v. Walpole*, 801 N.E.2d 622, 624 (Ind. 2004) (recognizing teacher tenure agreements as a binding contracts).

<sup>226</sup> See *State v. Covington Cmty. Consol. Sch.*, 96 N.E.2d 334, 336 (Ind. 1951) (explaining that teacher tenure revolves around binding contract rights).

<sup>227</sup> See *supra* Part III.A (addressing the holes in Indiana's PTL and its vulnerability under contract law).

<sup>228</sup> See *infra* Part IV (addressing the vulnerabilities of Indiana's PTL with an amendment).

<sup>229</sup> See *infra* Part IV (creating an amendment to invoke job replacement and due process rights for tenured teachers in Indiana's PTL).

IV. CONTRIBUTION

The current Indiana PTL infringes upon the constitutional rights associated with teacher tenure laws.<sup>230</sup> The Indiana PTL violates the obligation of binding contract and unwarranted third party interference.<sup>231</sup> The current Indiana PTL contains constitutional violations under *ex post facto* law doctrine because it creates a law that restrains tenured teachers' due process rights.<sup>232</sup> Furthermore, the conditions of termination already established in Indiana teacher tenure laws are conduct based and do not provide for a situation such as one the PTL proposes, which could be interpreted as termination without cause.<sup>233</sup> This could result in increased court actions by tenured teachers on constitutional grounds.<sup>234</sup>

Part IV of this Note argues that Indiana's current PTL should be amended to ameliorate its contract and constitutional violations with preexisting teacher tenure laws.<sup>235</sup> This is because the current PTL facially presents contract and constitutional challenges that make the PTL vulnerable.<sup>236</sup> This Note proposes an amended statute that accounts for tenured teachers in an attempt to create job replacement and termination proceeding options to tenured teachers displaced by the PTL.<sup>237</sup> By providing both avenues of contribution, this Note hopes to achieve the notion that although Indiana's PTL violates teacher tenure laws, ultimately, the amendment of the PTL is the most practical option to ensure that tenured teachers' rights are protected.<sup>238</sup>

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<sup>230</sup> See *supra* Part III (analyzing the contract and constitutional deficits of Indiana's PTL under teacher tenure).

<sup>231</sup> See *supra* Part III.A (arguing that Indiana's PTL violates teacher tenure contracts).

<sup>232</sup> See *supra* Part III.B (laying out the constitutional holes within Indiana's PTL).

<sup>233</sup> See *supra* Part III.B (presenting that Indiana's PTL allows for termination of tenured teachers in a way not defined by statute).

<sup>234</sup> See *supra* Part III (positing that PTL vulnerabilities could result in increased lawsuits).

<sup>235</sup> See *infra* Part IV.A (asserting that Indiana's PTL should be repealed utilizing a summary of the violations found throughout contract and constitutional analysis).

<sup>236</sup> See generally *supra* Part III (discussing contract and constitutional vulnerabilities of Indiana's PTL).

<sup>237</sup> See *infra* Part IV.B (proposing an addition of subpart "e" of § 20-24-11-1 of the Indiana Code, which would allow tenured teachers to exercise previously granted job security under two options).

<sup>238</sup> See *infra* Part IV.A (designing an amendment to § 20-24-11-1 of the Indiana Code that would satisfy contract and constitutional rights of tenured teachers).

A. *Proposal*

The following proposed amendment would add a new subpart to section 20-24-11-1 of the Indiana Code to account for teacher tenure rights.<sup>239</sup> The amended statute would read as follows:

**Ind. Code § 20-24-11-1 Conditions Required For Conversion**

(a) This section does not apply to an existing public elementary or secondary school that the governing body of the school corporation in which the school is located has scheduled for closure.

(b) An existing public elementary or secondary school may be converted into a charter school if all of the following conditions apply:

(1) At least fifty-one percent (51%) of the parents of students who attend the school have signed a petition requesting the conversion, which must be completed not later than ninety (90) days after the date of the first signature.

(2) The school has been placed in either of the two (2) lowest categories or designations under Ind. Code 20-31-8-3 for two (2) consecutive years.

(3) The governing body votes to convert an existing school within the school corporation.

(c) Notwithstanding subsection (b), if a governing body operates a school that has been placed in either of the two (2) lowest categories or designations under IC 20-31-8-3 for four (4) consecutive years, the governing body may not serve as that charter school's authorizer.

(d) A conversion charter school shall continue to comply with all legal requirements concerning student diversity and treatment of children with special needs and accept all students who attended the school before its conversion and who wish to attend the conversion charter school. If any space remains, any student in Indiana may attend the conversion charter school.

(e) *Additionally, in the scenario when a school is closed after the invocation of this law, teachers with established tenured status evidenced by a valid tenure agreement pursuant to Ind. Code*

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<sup>239</sup> See *infra* Part IV.B (promoting an amended statute to add a new subpart to § 20-24-11-1 of the Indiana Code to make Indiana's PTL comply with pre-existing teacher tenure laws).

§ 20-28-6-7.5 with a score of 'effective' or 'highly effective' obtain the right to either:

- (1) stay at the school through and after the charter conversion process;
- (2) elect to enter into a State run job replacement program to protect granted tenured status in accordance with Indiana State law; or
- (3) challenge the termination inherent in a charter school conversion under appropriate statutory law.<sup>240</sup>

B. Commentary

The amended version as evidenced above recognizes the contract right and teacher tenure system established under section 20-28-6-7.5 of the Indiana Code.<sup>241</sup> The proposed statute accounts for Indiana's constitutional provision, which would enforce the obligation of contract established in teacher tenure agreements and the due process and vested rights included in teacher tenure status.<sup>242</sup> Additionally, the amended statute would afford further protection through job replacement programs adapted from other states.<sup>243</sup>

First, the proposed amendment recognizes the binding contract rights and teacher tenure system established under Indiana Code section 20-28-6-7.5.<sup>244</sup> Utilizing the terminology "teachers with established tenured status evidenced by a valid tenure agreement" is key in accomplishing this goal because it recognizes tenure and provides the importance of pre-existing tenure laws.<sup>245</sup> The proposed law would require not only that a teacher obtains tenure status, but also that the tenure agreement entered into by the teacher and school administration is valid.<sup>246</sup> This modifier would mean that the teacher would be required to meet acceptable rating

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<sup>240</sup> See IND. CODE § 20-24-11-1 (2016) (providing the framework in which the proposed statute was created). The italicized portion in subpart (e) is the work of the author.

<sup>241</sup> See *supra* Part IV.A (adding subpart (e)(3), which creates a due process option for tenured teachers terminated as a result of a charter school conversion).

<sup>242</sup> See *supra* Part IV.A (creating subpart (e)(1) and subpart (e)(2), which create alternate employment options for tenured teachers terminated as a result of a charter school conversion).

<sup>243</sup> See *infra* Part IV.B (explaining a job replacement program option to afford tenured teachers more rights).

<sup>244</sup> See § 20-28-7.5-1 (setting out due process procedures a school may undergo in the event a teacher requests a review of his or her termination).

<sup>245</sup> See *supra* Part IV.A (establishing an amended subpart (e) to verify that qualifying teachers are in fact tenured pursuant to Indiana teacher tenure laws).

<sup>246</sup> See § 20-28-6-8 (complying with the obligation of contract created between contracting parties in a teacher tenure agreement).

standards to have obtained a tenure agreement by law.<sup>247</sup> To have a valid tenure agreement there would also need to be evidence of a contract to which both the teacher and school administration agreed upon.<sup>248</sup> This amendment ensures that the bargaining power utilized by both contracting parties would be honored despite a PTL takeover.<sup>249</sup>

Second, the proposed amendment accounts for Indiana's constitutional provision, which would enforce the obligation of contract established in teacher tenure agreements, leaving the teacher with two different employment options to protect the vested right created in permanent employment.<sup>250</sup> The job replacement options offered in the proposed statute would help secure permanent employment for tenured teachers because the way the PTL is currently structured does not account for the right to tenured status obtained by teachers under Indiana law.<sup>251</sup> In offering the option of staying with the school through the conversion process, teachers would be able to continue to work with their current students that choose to stay at the new school, and would essentially allow a "grandfathering" process to secure employment.<sup>252</sup>

In addition, the law would suggest that teachers could also be placed in a new employment position through a job replacement program, because tenured teachers might not want to stay with a converted school.<sup>253</sup> A job replacement program run by the state would help facilitate the employment process that would not be intertwined with the conflicting supporters behind PTLs and would ensure that a tenured teacher's vested right in permanent employment would be secure.<sup>254</sup>

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<sup>247</sup> See § 20-28-6-7.5 (defining teacher rating categories to obtain as well as maintain teacher tenure).

<sup>248</sup> See § 20-28-6-8 (referring to a binding contract that exists exclusively between the teacher eligible for tenure and the school).

<sup>249</sup> See *supra* Part III (presenting the idea that teacher tenure law creates a binding agreement between two parties, which is not honored via Indiana's PTL); see also *supra* Part IV.A (proposing an amendment to § 20-24-11-1 of the Indiana Code by adding subpart (e), which would allow the obligation of contract to be carried out through job replacement as well as due process rights).

<sup>250</sup> See *supra* Part IV.A (establishing subpart (e)(1) and subpart (e)(2), which create alternate employment options for tenured teachers).

<sup>251</sup> See *supra* Part IV.A (adding subpart (e)(1) and subpart (e)(2) to increase teacher tenure rights).

<sup>252</sup> See generally *supra* Part IV.B (proposing subpart (e)(1), which would secure employment for a tenured teacher through the conversion process and would allow that teacher to stay at the school where he or she currently teaches).

<sup>253</sup> See generally *supra* Part IV.B (suggesting subpart (e)(2) to create a job replacement program for displaced teachers due to Indiana's PTL to secure the permanent employment of tenured teachers).

<sup>254</sup> See generally *supra* Part IV.B (explaining within the proposed amendment subpart (e)(2) that the program would be state run and free from interference).



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States including New Mexico and Alaska all offer established teacher placement programs that could be mirrored in a program established in Indiana for tenured teachers essentially seeking the same services.<sup>255</sup>

Third, due process requirements would be met pursuant to Indiana Code section 20-28-7.5-2 and Indiana Code section 20-28-7.5-3.<sup>256</sup> Specifically, the amended version of Indiana Code section 20-24-11-1 allows a tenured teacher to contest his or her firing under the proper due process procedures set out in the Indiana Code.<sup>257</sup> There could be a due process requirement to require schools to put teachers on formal notice of a potential closure and provide teachers with options.<sup>258</sup> Job assistance could include offering and educating tenured teachers on job replacement options.<sup>259</sup> Making these due process requirements available would allow a vital characteristic of teacher tenure in Indiana to survive.<sup>260</sup>

Opponents might assert that the job replacement program is too expansive.<sup>261</sup> Additionally, opponents would posit that the legislative intent of the Indiana PTL is to empower parents, and not to protect tenured teachers.<sup>262</sup> However, the job replacement program is not too expansive, as other states have successfully enacted a similar program for

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<sup>255</sup> See *Cooperative Educational Services*, N.M. REGIONAL EDUC. APPLICANT PLACEMENT, <http://www.nmreap.net> [<https://perma.cc/876S-7S2A>] (providing job placement services to both teachers and schools in an effort to increase and facilitate educational employment); see also *About ATP*, ALASKA TCHR. PLACEMENT, [http://www.alaskateacher.org/about\\_atp.php](http://www.alaskateacher.org/about_atp.php) [<https://perma.cc/PV33-X489>] (instituting a statewide teacher placement program to facilitate a partnership between teachers and school districts). These programs could be mirrored in Indiana to ensure protection of tenured teachers in light of the PTL movement that has begun throughout the state. *Id.*

<sup>256</sup> See IND. CODE § 20-28-7.5-2 (2016) (granting teachers' rights in a preliminary private meeting before a contract is canceled); see also § 20-28-7.5-3 (defining an intermediate level of meeting after a preliminary private meeting to give notice).

<sup>257</sup> See *infra* Part IV.B (explaining within the proposed amendment, subpart (e)(3), that a tenured teacher terminated as the result of a charter conversion is able to challenge the law on due process grounds).

<sup>258</sup> This would comply with § 20-28-7.5-2 of the Indiana Code, which states that a teacher is entitled to notice of possible termination and the tiered process that is available if that teacher wishes to challenge a possible termination. § 20-28-7.5-1.

<sup>259</sup> See *supra* Part IV.B (examining the proposed subpart (e) amendment altogether, which provides under part (1) and part (2) alternative modes of job replacement security to tenured teachers).

<sup>260</sup> See § 20-28-7.5-2 (offering incremental termination proceedings).

<sup>261</sup> See Mathis, *supra* note 47 (suggesting that teacher tenure has become too expansive in certain respects).

<sup>262</sup> See Bast & Pullman, *supra* note 18, at 1 (emphasizing parent empowerment as the main PTL goal).

teachers.<sup>263</sup> Even though the legislative intent of the Indiana PTL was to empower parents, this law inherently involves tenured teachers.<sup>264</sup>

The current state of Indiana's PTL requires that an amendment be made in adding subpart e to Indiana Code section 20-24-11-1 to ensure compliance with preexisting teacher tenure law.<sup>265</sup> Without the amendment, the Indiana PTL contains vulnerabilities subject to challenge.<sup>266</sup> The lack of protection for current tenured teachers cannot stand because Indiana's PTL infringes upon contract and constitutional obligations, which leaves an amendment as the most practical solution to reach a reasonable accommodation.<sup>267</sup>

#### V. CONCLUSION

The Indiana State legislature should consider the ways in which the current PTL infringes the rights inherent in a teacher tenure agreement. Education is a concern among many Americans and the inception of the school choice movement, particularly the most recent PTL passage, exemplifies just that. While the PTL movement empowers parents to "take back" failing schools, it is also influenced by corporate interests, which do not necessarily know what is best for our nation's students. In addition, while the Indiana PTL empowers parents to take a stand in Indiana schools, it leaves out a very important group of individuals. Amendments should be made to the Indiana PTL to create job security through different employment options, as well as due process rights inherent in teacher tenure status. These amendments will afford tenured teachers the rights given to them through teacher tenure agreements and will keep the legislature and schools, as well as communities, in line with Indiana law so as not to create future challenges.

Returning back to the situation posed in the beginning of this Note, think again about Ms. Clancy.<sup>268</sup> Ms. Clancy would have her rights safeguarded under the new proposed amendment. She would be able to continue practicing her passion that is seen year after year as students gain a love of biology or math through job replacement options. An

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<sup>263</sup> See *supra* note 254 and accompanying text (providing teacher job replacement options in other states).

<sup>264</sup> See *supra* Part III (pointing out areas of Indiana's PTL that involve tenured teachers).

<sup>265</sup> See *supra* Part IV.B (suggesting a proposed amendment to § 20-24-11-1 of the Indiana Code).

<sup>266</sup> See *supra* Part IV (addressing the inherent PTL vulnerabilities in suggesting an amendment).

<sup>267</sup> See *supra* Part III (analyzing Indiana's PTL under contract and constitutional doctrines with the conclusion that it violated pre-existing teacher tenure laws).

<sup>268</sup> This hypothetical was created by the author and is meant for demonstrative purposes only.

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amendment would also ensure that future teachers are not negatively impacted in the wake of Indiana's PTL. Thus, the Indiana legislature should enact the proposed amendment to section 20-24-11-1 of the Indiana Code to ensure that tenured teachers can continue to enjoy their profession.

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\* J.D. Candidate, Valparaiso University Law School (2017); B.S., Child Psychology, Minor, Political Science, University of Minnesota Twin Cities (2014). First, I would like to thank my family. Mom, thank you for being my rock and always believing in my potential ever since I was a little girl and insisted on becoming an attorney. Dad, thank you for your constant pride in all of my endeavors. To my sister Aimee, thank you for your radiating positivity and for cheering me on, always. Second, I would like to thank all of my friends who helped me get through my law school journey and for being so encouraging and supportive of my dreams. Third, I would like to thank my faculty advisor Professor Emerita Joellen Lind for the time, effort, and enthusiasm she put into helping me throughout the writing process. I dedicate this Note to hardworking teachers; the world is a better place because of your influence.