

Public Interest Law Reporter

Volume 20
Issue 1 Fall 2014

Article 11

2014

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Recommended Citation

Perry A. Zirkel, *Vergara v.State of California:Judicial Aboliton of Teacher Tenure?*, 20 Pub. Interest L. Rptr. 57 (2014).
Available at: <http://lawcommons.luc.edu/pilr/vol20/iss1/11>

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***Vergara v. State of California: Judicial Abolition of
 Teacher Tenure?***

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On August 27, 2014, a trial court in California issued a decision that invalidated three statutory employment protections for public school teachers as violations of the state constitution.¹ National media reported that this decision abolished tenure.² The school reform organization that sponsored the suit characterized the decision in *Vergara v. State of California* as “a historic victory.”³ In an editorial, the *New York Times* inveighed: “The ruling opens a new chapter in the equal education struggle. It also underscores a shameful problem that has cast a long shadow over the lives of children, not just in California but in the rest of the country as well.”⁴

This impartial examination summarizes and analyzes the decision in terms of its effect in California and elsewhere.⁵ More specifically, the succeeding sec-

¹ *Vergara v. State of California*, No. BC484642 (Cal. Super. Ct. Aug. 27, 2014). The court first issued its decision as a tentative ruling on June 10, 2014; the content did not change in any significant way in the interim. For the tentative decision, see, e.g., <http://www.documentcloud.org/documents/1193670-tentative-vergara-decision.html>. The suit was filed on May 14, 2012. The state’s two largest teacher unions, the California Teachers Association and the California both of Teachers, intervened on May 2, 2013. The trial began on January 27, 2014. For the full case timeline, see <http://studentsmatter.org/our-case/vergara-v-california-case-status/time-line/>

² See, e.g., Michelle Chen, *California Just Abolished Due Process for Public School Students*, THE NATION (June 13, 2014), <http://www.thenation.com/blog/180223/california-just-abolished-due-process-public-school-teachers>; cf. Leslie C. Francis, *The Teachers Unions Must Embrace the Future*, EDUC. WK. at 32 (Aug. 6, 2014) (characterizing *Vergara* as “overturning the state’s laws on teacher tenure”).

³ The founder the sponsoring organization, Students Matter, is Silicon Valley entrepreneur, David Welch. *Id.* Critics also take issue with “the group’s connections to other deep-pocketed donors, such as philanthropist Eli Broad, who has a history of butting heads with the teachers’ unions.” Stephen Sawchuk, *Teacher Protections Violated Student Rights, Calif. Judge Finds*, EDUC. WK. (June 11, 2014), <http://www.edweek.org/ew/articles/2014/06/11/36vergara.h33.html?tkn=STMFxNg6fFszkHdriccexYRSXkB7cyp241cm&intc=ES>. See also <http://studentsmatter.org/victory/>.

⁴ *A New Battle for Equal Education*, NEW YORK TIMES, June 12, 2014, p. A30.

⁵ For the need for an objective analysis, see, e.g., Stephen Sawchuk, *Teacher Case Raises Stakes in Equity Fight*, EDUC. WK., July 9, 2014, at 1, 22:

To a degree, the cacophony of responses greeting the decision has obfuscated the fact that many of the implications of the lawsuit remain unclear, both in the Golden State and nationwide. Among the lingering questions: Will the ruling, at a slim 16 pages,

tions of this brief overview provide 1) a summary of the decision, 2) analysis of its legal status and effect in California, 3) projection of its legal effect in other states, and 4) its overall impact in terms of school reform on behalf of students in high-poverty and high-minority schools.

THE TRIAL COURT DECISION

After hearing the arguments and evidence, including the testimony of various experts, the trial court judge ruled that each of these three statutory requirements violated the California constitution: 1) the two-year probationary period of the teacher tenure statute, 2) the super due process of three related teacher dismissal statutes, and 3) the last-in-first-out (LIFO) provision of the teacher reduction-in-force statute.⁶ The suit was filed on behalf of high-poverty and high-minority schools in California.⁷

First, the court set forth the following legal framework for analyzing the factual findings:

- precedents in California, including but not limited to the school finance decision in *Serrano v. Priest II*,⁸ clearly establish that education is a fundamental right under the state constitution

hold up on appeal? Will California's notoriously polarized legislature, fearful of additional litigation and bad press, consider changing the statutes at issue on its own? And finally, will similar lawsuits elsewhere—one is already primed for introduction in New York—be as initially successful?

⁶ Thus, there were six challenged statutes in total, but—due to the cluster of three dismissal statutes for the middle category, the treatment here is organized in terms of three challenged requirements.

⁷ According a critic of the decision, the nine named student plaintiffs were not entirely minority or poor students. Alan Singer, *The Case Against Teacher Tenure* (Sept. 11, 2014), http://www.huffingtonpost.com/alan-singer/the-case-against-teacher-_b_5527306.html.

⁸ 135 Cal. Rptr. 345 (Cal. 1976) (holding that revised school finance system that continued to result in substantial disparities in per pupil expenditures among districts violates the state constitution by not passing the strict scrutiny/compelling justification test based on the interaction of its education and equal protection clauses). This decision is part of a line of cases ranging from *Serrano I*, 96 Cal. Rptr. 601 (Cal. 1971) (holding, prior to the superseding Supreme Court ruling in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) with respect to the U.S. Constitution, that the former system violated both the federal and state constitutions) to *Serrano III*, 226 Cal. Rptr. 584 (Ct. App. 1986), *remanded on limited other issue*, 253 Cal. Rptr. 1 (1989). The other cited precedent was *Butt v. State of California*, 15 Cal. Rptr. 480 (1992) (extending *Serrano*'s principal of basic educational equality to proposed closure of a district's schools six weeks early).

- the equally well-settled precedent in California establish the concept of “equal educational opportunity,” requiring strict scrutiny, i.e., compelling justification, for substantial, appreciable disparities⁹

Second, as the factual fabric within this legal framework, the court arrived at the following overall set of findings:

- competent teachers are a critical, if not the most important, factor to student success
- conversely, grossly ineffective teachers substantially undermine the ability of the child to succeed in school
- an estimated 1–3% of the teachers in California are grossly ineffective (amounting to 2,750–8,250 teachers)
- high-poverty, low-performing schools have a disproportionate number of both minority students and grossly ineffective teachers¹⁰

The court’s next set of factual findings was specific to the three statutory requirements that the court found to be contributing factors to this disproportionate effect:

- the statutorily mandated two-year probationary period, which effectively is more like 1.6 years due to the notice requirement, is not long enough for an informed decision for the critical question of tenure
- the dismissal statutes’ procedures are so unwieldy¹¹ in terms of time and cost that districts rarely resort to termination of incompetent teachers
- the LIFO statute, which treats seniority as the sole criterion, for reductions-in-force (RIF) is distinctly different than the vast majority of state laws, which either treat seniority as one consideration or leave the matter to district discretion

Finally, applying the foregoing legal framework to the factual findings for the three challenged statutory requirements, the court not only concluded that they did not pass muster under the state constitution¹² but also indirectly indicated a template for revising them to survive the requisite strict scrutiny analy-

⁹ This strict scrutiny analysis is parallel to Fourteenth Amendment equal protection adjudication for fundamental rights or suspect classifications.

¹⁰ The court posited the issue in terms of both “all California students in general and . . . minority and/or low income students in particular.”

¹¹ The court characterized the dismissal statutes are providing “uber due process.”

¹² Acknowledging the separation of powers among the branches of government, the court intoned:

All this Court may do is apply constitutional principles of law to the Challenged Statutes as it has done here, and trust the legislature to fulfill its mandated duty to enact legislation on the issues herein discussed that passes constitutional muster, thus providing each child in this state with a basically equal opportunity to achieve a quality education.

sis.¹³ More specifically, here is the implicit prescription for each of the three fatal flaws:

- the acceptable minimum, per the court's comparison to other jurisdictions with 3–5 year probationary periods, appears to be three or, allowing for due notice, perhaps 3.5 years
- the constitutionally satisfactory level, per the court's comparison to the statutory due process accorded to California's permanent classified employees, is a more streamlined system in terms of time and cost, though its specific contours are not entirely clear¹⁴

¹³ See *supra* note 9 and accompanying text.

¹⁴ The trial court ascribed the specific procedural rights to *Skelly v. State Personnel Board*, 124 Cal. Rptr. 14 (1975):

As a minimum, these *preremoval* safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

Id. at 215 (emphasis supplied). However, this federal constitutional minimum concerns pre-termination safeguards, which the Supreme Court subsequently addressed in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Such a so-called *Loudermill* hearing is only “an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Id.* at 545–46. The *Loudermill* Court also made clear that the rather minimal due process requirements of such a pre-termination hearing are premised on the availability of a more formal termination, or “post-termination,” hearing. *Id.* at 546. In California, school district permanent classified employees are statutorily entitled to:

written notice of the specific charges against him or her, a statement of the employee's right to a hearing on those charges, and the time within which the hearing may be requested which shall be not less than five days after service of the notice to the employee The burden of proof shall remain with the governing board

CAL. EDUC. CODE § 45113. The constitutional requirement for an impartial adjudicator in this context is relatively relaxed, with the board having the authority to be the final decision maker. See, e.g., *Thornbrough v. W. Placer Unified Sch. Dist.*, 167 Cal. Rptr. 3d 24 (Ct. App. 2013). The present complicated system includes, for example, a tripartite panel. CAL. EDUC. CODE § 44944. Such a panel is typical elsewhere only for interest arbitration, where the stakes are the livelihood of the entire collective bargaining unit rather than the individual employee, far exceeds not only the constitutional minimum but also the prevailing statutory standard in other states. In most states, the school board or a single hearing officer implements this process. See, e.g., Education Commission of the States, *Teacher Tenure: Notification of Nonrenewal and Hearing* <http://ecs.force.com/mbdata/mbquestRTL?rep=TT02>. A legislative compromise that would likely fit within the boundaries that the trial court outlined would be a single California administrative law judge with a firm, fixed time limit and/or cost limit. For example, California amended its dismissal legislation in June 2014 solely for teachers engaged in “egregious misconduct,” such as criminal sex offenses, to add limitations to the extensive hearing process, including an administrative law judge rather than a tripartite panel and a seven-month period without exceptions. CAL. EDUC. CODE §§ 44934.1 and 44944. Similarly, Connecticut recently eliminated the three-member adjudicator, while reducing the length of the proceedings,

- the minimum, again based on the court's discussion of contrasting treatments of seniority in RIF statutes, appears to be a waiver procedure or, more safely, reducing its level to being a factor, rather than the factor¹⁵

NEXT STAGE IN CALIFORNIA

Beating the two California teacher unions, which were intervenors in the trial court deliberations, to the door of the appeals court, the Governor filed an appeal on August 29, 2014.¹⁶ In the meanwhile, the trial court's decision is in abeyance.¹⁷

The appeal in California's congested courts is more likely to take years than months, especially if the state's highest court agrees to hear this significant issue. For example, the appeals process for another recent school case, which concerned whether the state's nurse practices act prohibited school personnel from administering injections to students with diabetes, took 4.7 years from the filing of appeal at the intermediate level to the state supreme court's decision.¹⁸ Although the final judicial outcome is unpredictable, an affirmance is more likely than a reversal. Although skeletal, the trial court judge's factual findings, which typically receive deference on appeal, were largely undisputed. More vulnerable is the activist bent of his legal conclusions. Seeing the slippery slope of establishing a precedent for various other substantial and appreciable disparities in educational opportunity¹⁹ between the low income and

including a six-hour limit for each side's presentation at the hearing, with extensions for good cause. CONN. GEN. STAT. § 10-151(d) [<http://www.cga.ct.gov/2012/ACT/PA/2012PA-00116-R00SB-00458-PA.htm>]. Providing perhaps the strongest example, New Jersey's 2012 amendments that, *inter alia*, changed the adjudicator from an administrative law judge to an arbitrator from a panel administered by the commissioner of education; required the hearing to start within 45 days of assignment the decision issued within the next 45 days with no extensions except those that the commissioner approves; and capped the arbitrator's compensation at \$7500. N.J. STAT. ANN. § 18A:6-17.1

¹⁵ More specifically, in light of its central position in this case, competence—sometimes referred to in this context as “merit”—would have to be another and major factor.

¹⁶ State of California Notice of Appeal, <http://studentsmatter.org/legal-filings/>; Madeline Will, *Calif. Governor Appeals Teacher-Tenure Ruling*, EDUC. WK., Sept. 10, 2014.

¹⁷ Howard Blume, *Bill to Speed Firing of Some Public School Teachers Advances*, L.A. TIMES, June 16, 2014, <http://www.latimes.com/local/education/la-me-teacher-dismissal-bill-20140617-story.html>

¹⁸ See, e.g., Perry A. Zirkel, *Unlicensed Administration of Medication: The California Supreme Court Decision*, 29 NASN SCH. NURSE 248 (2014).

¹⁹ For example, the ACLU reportedly filed suit in May 2014 challenging the alleged disparity in instructional time between schools serving low-income and minority and other schools. Sawchuk, *supra* note 5.

minority students and other students,²⁰ the appellate judiciary might follow the more conservative, post-*Serrano* interpretation of equal protection analysis, which requires direct or indirect evidence of discriminatory intent.²¹ Yet, as recently as 1992, California's highest court concluded that "both federal and California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect *or* the disparate treatment has a real and appreciable impact on a fundamental right or interest."²² The trial court's equal protection analysis may also be sustained on appeal based on alternate grounds.²³ Thus, although uncertain, it would not be surprising if the ultimate appellate outcome were an affirmation of the trial court's ruling.

In the meanwhile, California's legislature has a clear opportunity to resolve the matter by revising the challenged statutes within the trial court's implicitly countenanced boundaries. Yet, the state's complicated politics, including the strong influence of the unions, would suggest that such a seemingly rational resolution is unlikely.²⁴ Successive examples of the teacher unions' power in favor of resisting such changes include 1) their success in helping to defeat then Governor Schwarzenegger's 2005 referendum to extend the teachers' proba-

²⁰ One of the conceptual problems that the trial court glossed over with broad strokes is whether the disparity is in terms of students or schools and, either way, whether it limited to the overlapping low income and minority categories. See *supra* note 10 and accompanying text.

²¹ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982).

²² *Butt v. State of California*, 15 Cal. Rptr. 2d 480, 490–91 (1992). For the trial court's reliance on this extension of *Serrano*, see *supra* note 8.

²³ For example, Welner has identified another possible basis for a less activist approach on appeal based on language in the post-*Serrano* precedent—requiring an effect clearly below a threshold minimum level of basic educational equality. Valerie Strauss, *A Silver Lining in the Vergara Decision*, <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/06/11/a-silver-lining-in-the-vergara-decision/>. For the specific language, see *Butt v. State of California*, 15 Cal. Rptr. 2d at 492 ("Unless the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs"). The factual findings in *Vergara* would seem to show a real and appreciable effect on this prerequisite basic level; by its norm-like definition a grossly ineffective teacher is well below the state standard and having such a teacher for a year would seem to be at least equivalent to *Butts'* qualifying loss of six weeks at the end of the school year.

²⁴ Just as the reformers' theories of productivity and competition are in significant part attributable to a commercial model, the unions are rooted in a collective employee interest tied to the industrial model. The plea from a former staff member of the California Teachers Association to change the position of both unions from an industrial to an innovative model is likely to go unheeded. Leslie C. Francis, *The Teachers' Unions Must Embrace the Future*, *EDUC. WK.*, Aug. 6, 2014, p. 32.

tionary period from two to five years²⁵; 2) the California Teachers' Association refusal to support the attempt of its local affiliate in San Jose to extend some teacher' probationary period for another year²⁶; 3) the April 2014 settlement of an earlier suit challenging the LIFO system in the Los Angeles school district made other relatively limited changes but did not alter the fundamental seniority standard that the suit targeted²⁷; and 4) both teachers unions' multi-million-dollar support for the election of the incumbent chief state school officer, narrowly defeating the former leader of a charter school network who tried to use *Vergara* as a wedge issue.²⁸

OTHER STATES

Vergara is likely to have a ripple effect in terms of litigation in other states, but its leverage is markedly limited. First, it is only a trial court decision, thus carrying negligible legal weight. Second, even if upheld on appeal, its importability to other states is restricted to the relatively few states with a similarly solid state constitutional foundation, as primarily reflected in the school finance litigation that corresponded to *Serrano*.²⁹

²⁵ Howard Blume, *Schools' Next Test is Getting Tenure Ruling to Pay Off in Class*, L.A. TIMES, June 11, 2014, <http://www.latimes.com/local/education/la-me-teacher-decision-lawsuit-20140612-story.html>; Sawchuk, *supra* note 5, at 22.

²⁶ Sawchuk, *supra* note 5, at 22.

²⁷ Stephen Sawchuk, *Los Angeles Settlement on Teacher Layoffs Ducks the Seniority Issue*, EDUC. WK. blog, Apr.9, 2014, http://blogs.edweek.org/edweek/teacherbeat/2014/04/la_settlement_ducks_the_senior.html?qs=sawchuk. For the intervening decision that negated the prior consent decree based on the teacher union's due process right, see *Reed v. United Teachers Los Angeles*, 145 Cal. Rptr. 3d 454 (Ct. App. 2012).

²⁸ Andrew Ujifusa, *California Chiefs Win a Bright Spot for Teachers' Unions*, EDUC. WK., Nov. 12, 2014, at 16.

²⁹ For an overview of the outcomes of the school finance litigation, which very considerably but in recent years have largely moved in a defendants-favorable direction. See, e.g., Perry A. Zirkel, *An Updated Tabular Overview of the School Finance Litigation*, 45 ELA NOTES 8 (Jan. 2013) (newsletter of the Education Law Association, <https://educationlaw.org>). For more detailed analysis of the waves of this litigation, see, e.g., Jared S. Buszin, *Beyond School Finance: Refocusing Educational Reform Litigation to Realize the Deferred Dream of Educational Equality and Adequacy*, 62 EMORY L.J. 1613 (2013); Kristine Kiracofe, *Serial and Second Generation School Finance Litigation: 2003–2013*, 299 EDUC. L. REP. 1 (2014)

In the primary tangible example to date,³⁰ an educational reform organization in New York³¹ filed suit on July 28, 2014 challenged a similar set of statutes based on the education article of the New York state constitution.³² The resulting problem is also similar.³³ However, the differences in this case may amount to a distinction. For example, although the named plaintiffs are students in New York City and another urban school system³⁴ and the complaint uses New York City as its primary example, the theory of the case does not seem to focus on the disparity in educational opportunity for low-income and minority students. Perhaps more significantly, the precedents in New York are less robust than in California with respect to the state constitution; in comparison to California's *Serrano* and subsequent case law foundation of "equal educational opportunity,"³⁵ New York's precedents lack the leverage of requiring a compelling justification for the challenged statutes.³⁶ Finally, al-

³⁰ A different reform organization in New York, which has an overlapping but not identical agenda, filed a less well-publicized separate suit in New York on June 30, 2014. *Dauids v. State of New York*, <http://s3.documentcloud.org/documents/1212617/nyc-parents-union-class-action-lawsuit.pdf>. This complaint expressly mentions "the watershed case in *Vergara v. State of California*." *Id.* However, on September 11, 2014, a New York court combined the two lawsuits and allowed New York's United Federation of Teachers to enter the case as an intervenor defendant. Jessica Glazer, *Chalkbeat NY: Two Tenure Lawsuits Are Combined, But Not in Harmony*, <http://www.nycparentsunion.org/archives/1451>.

³¹ The organization is the Partnership for Educational Justice. For its website, see <http://www.edjustice.org/projects/new-york-lawsuit/>. For the addition of famed trial attorney David Boies as the chair of the organization's suit, see, e.g., Mokoto Rich, *Celebrated Trial Lawyer to Head Group Challenging Teacher Tenure*, N.Y. TIMES, Aug. 3, 2014, http://www.nytimes.com/2014/08/04/us/celebrated-trial-lawyer-david-boies-to-head-group-challenging-teacher-tenure.html?_r=0

³² *Wright v. State of New York*, <http://nylawyer.nylj.com/adgifs/decisions14/072914summons.pdf>. Interestingly, despite the obvious impetus, the complaint does not specifically cited the *Vergara* decision. *Id.*

³³ See, e.g., KATHARINE B. STEVENS, *TENURED TEACHER DISMISSAL IN NEW YORK* (2014), <http://www.aei.org/papers/education/k-12/tenured-teacher-dismissal-in-new-york/> (reporting that .0008% of New York City's teachers were dismissed for poor performance during the decade 1997–2007).

³⁴ Two of the seven named plaintiffs are in the Rochester City School District. *Id.*

³⁵ See *supra* note 8 and accompanying text.

³⁶ Compare *New York Civil Liberties Union v. State*, 791 N.Y.S.2d 507 (2005) (rejecting alleged academic failures on the school level without element of district-wide sabotage), and *Paynter v. State of New York*, 765 N.Y.S.2d 819 (2003) (rejecting allegations of academic failure without element of state failure to provide minimally acceptable educational services), and *Bd. of Educ., Levittown Free Sch. Dist. v. Nyquist*, 453 N.Y.S.2d 643 (1982) (ruling that the education article provides for a minimum but not equal educational opportunity), *with Campaign for Fiscal Equity, Inc. v. State of New York*, 769 N.Y.S.2d 106 (2003) ("*CFE II*") (ruling that plaintiffs established causation element of prima facie case that state funding system failed to

though New York’s dismissal and LIFO statutes are approximately parallel to their counterparts in California, the probationary period is three, not two years.³⁷

OVERALL IMPACT

Even if the appeal in *Vergara* ultimately affirms the trial court decision and the California legislature revises the challenged statutes an ample accordance with its constitutional template,³⁸ it is not likely to come close to resolving the appreciable and substantial disparity faced by low-income and minority students³⁹ for several overlapping reasons. First, the state constitutional minimum is far from the educational optimum. For example, if California revised its probationary period to three or four years, adopted the dismissal procedures of its permanent classified employees or for its teachers accused of “egregious misconduct,”⁴⁰ and in one way or another reduced seniority and introduced merit into the RIF criteria,⁴¹ there may well not be a resulting significant reduction in the number of grossly ineffective teachers, because the time and cost are likely to remain considerable. In the various other states that have a com-

provide a sound basic education to New York City’s school children in violation of the education article in the state constitution). In a case that rejected extending *CFE II* to educational quality issues more generally, see *K.M. v. Hyde Park Central School District*, 381 F. Supp. 2d 343, 363 n.16 (S.D.N.Y. 2005). At best, *CFE II* recognized that teaching is “the first and most important input” for the requisite minimally sound education and that, in measuring this input, “principals’ reviews tend to conceal teacher inadequacy because principals find it difficult to fire bad teachers and to hire better ones.” 769 N.Y.S.2d at 113. However, the court also found various other inputs, such as facilities and instructional equipment, as essential elements of this equation and that for the teaching factors, the key determinant was the New York City system’s “inability to attract and retain qualified teachers.” *Id.* at 114. In a subsequent decision, New York’s highest court rejected the plaintiffs’ claim that the legislature’s appropriations and capital improvement plan for New York City did not satisfy the remedial order in *CFE II*. *Campaign for Fiscal Equity, Inc. v. State of New York*, 828 N.Y.S.2d 235 (2006) (“*CFE III*”).

³⁷ N.Y. EDUC. LAW § 3012(1)(a). In other developments reflecting controversy concerning New York’s teacher tenure policies, governor Cuomo (1) vetoed legislation that would have temporarily shielded teachers from the effects of student testing on teacher evaluation, and (2) urged the state board of regents to make it easier to remove “poor performing” teachers. *N.Y. Governor Aims to Flex Muscles on Education Policy*, EDUC. WK., Jan. 14, 2015, at 15.

³⁸ See *supra* text accompanying notes 13–15.

³⁹ Thus, this sobering prognosis calls into question the *Vergara* judge’s assumption about or meaning of “a basically equal opportunity to achieve a quality education.” See *supra* note 12. However, it is consistent with the boundaries that the primary part of his statement establishes.

⁴⁰ See *supra* note 14 and accompanying text.

⁴¹ See *supra* note 15 and accompanying text.

parable combination of less stringent procedural requirements, the length and expense of the proceedings tends to be high.⁴²

The second and interrelated reason is the school culture, specifically the perceptions of school officials.⁴³ The trial court's *Vergara* decision depended on not only the actual but also the perceived difficulties of this triad of California statutes.⁴⁴ The evidence is considerable that in the rest of the country, which largely has a range of less onerous procedures extending to the other extreme of "right-to-work" states, administrators do not resort to teacher termination based on incompetence.⁴⁵ For example, the U.S. Department of Education's National Center on Educational Statistics found that in 2010–11 the average number of tenured teachers per school districts terminated for poor performance was less than .1%.⁴⁶ Yet, contrary to the lore among the administrators,⁴⁷ the law from the courts is strongly skewed in favor of school districts,

⁴² See, e.g., SABA BIREDA, *DEVIL IN THE DETAILS: AN ANALYSIS OF STATE TEACHER DISMISSAL LAWS* (2010), <http://cdn.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/sabateacherdismissal.pdf>; New York State School Boards Association, *Accountability for All* (Mar. 2007), http://www.nyssba.org/clientuploads/gr_3020a_reform.pdf

⁴³ In this school culture, where student grade inflation is another manifestation, less than 1% of the teachers typically receive unsatisfactory summative evaluation ratings. See, e.g., DANIEL WEISBERG, SUSAN SEXTON, JENNIFER MULHERN, & DAVID KEELING, *THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS* (2009), <http://tntp.org/publications/view/the-widget-effect-failure-to-act-on-differences-in-teacher-effectiveness>; see also Donald Langlois & Mary Rita Colarusso, *Don't Let Teacher Evaluation Become an Empty Ritual*, 10 EXEC. EDUC. 32 (May 1988); Pamela Tucker, *Lake Wobegon: Where All Teachers Are Competent*, 11 J. PERSONNEL EVALUATION EDUC. 103 (1997).

⁴⁴ Based on the testimony of a defense expert and substantial supporting evidence, the *Vergara* opinion found that "dismissals are 'extremely rare' in California because administrators believe it to be 'impossible' to dismiss a tenured teacher under the current system" (emphasis added).

⁴⁵ See, e.g., Brian A. Jacob, *Do Principals Fire the Worst Teachers?*, 33 EDUC. EVALUATION & POL'Y ANALYSIS 403 (2011) (finding that a notable proportion of Chicago principals, including those in the lowest performing schools, failed to resort to the more flexible dismissal procedures under the collective bargaining agreement).

⁴⁶ U.S. Department of Education, National Center on Educational Statistics, *Schools and Staffing Survey* (n.d.), http://nces.ed.gov/surveys/sass/tables/sas1112__2013311_d1s_009.asp. The corresponding figure for nonrenewal of nontenured teachers based on poor performance is .5%. *Id.* For much earlier and similar data in various states, see EDWIN M. BRIDGES & BARRY GROVES, *MANAGING THE INCOMPETENT TEACHER* 16 (1990), available from the Education Resources Information Center, Access No. ED320195.

⁴⁷ See, e.g., Edwin M. Bridges, *It's Time to Get Tough with the Turkeys*, 64 PRINCIPAL 20 (Jan. 1985) (identifying various common "excuses," or "rationalizations," among principals, including the following: "It's too costly," "It's too time-consuming," and "You can never win."). Other contributing factors appear to include avoidance of conflict and lack of support. Don L.

thus posing a steep uphill slope against the teachers in the final judicial outcomes of termination proceeding based on performance.⁴⁸

Third, various other strategies are the relatively hidden or at least unofficial responses to grossly incompetent teachers, such as the gamesmanship of “pass the turkey” (i.e., inflated ratings),⁴⁹ “dance of the lemons” (i.e., transfers),⁵⁰ and “passing the trash” (i.e., resignation/recommendation deals).⁵¹ For example, in a survey at a large urban school district the teacher-respondents identified the use of several strategies with incompetent teachers more frequently

Fuhr, *Managing Mediocrity in the Classroom*, 50 SCH. ADM’R 26 (Apr. 1993); see also Brendan P. Menuey, *Teachers’ Perceptions of Professional Incompetence*, 18 J. PERSONNEL EVALUATION EDUC. 309, 311 (2005) (adding fear of staff repercussions and lack of technical skill).

⁴⁸ See, e.g., Perry A. Zirkel, *Teacher Evaluation: A Case of “Loreful” Leadership?* 13 PRINCIPAL LEADERSHIP 46 (Mar. 2013); Perry A. Zirkel, *Legal Boundaries for Performance Evaluation of Public School Professional Personnel*, 172 EDUC. L. REP. 1 (2003). The outcomes of the teacher termination challenges based on alleged discrimination reflects this marked judicial deference to school authorities. See, e.g., Mark Paige & Perry A. Zirkel, *Teacher Termination Based on Performance Evaluations: Age and Disability Discrimination?* 300 EDUC. L. REP. 1 (2014). Similarly, the outcomes of principals’ challenges to dismissals and other adverse employment actions were largely in favor of the defendant districts. Linda Mayger & Perry A. Zirkel, *Principals’ Challenges to Adverse Employment Actions: An Empirical Analysis of the Case Law*, 98 NASSP BULL. 219 (2014).

⁴⁹ See, e.g., Langlois & Colarusso, *supra* note 43, at 32.

⁵⁰ See, e.g., C. EDWARD LAWRENCE, *THE MARGINAL TEACHER* 2-3 (2003); JESSICA LEVIN, JENNIFER MULHERN, & JOAN SCHUNK, *UNINTENDED CONSEQUENCES: THE CASE FOR REFORMING THE STAFFING RULES IN URBAN TEACHER CONTRACTS* (2005), <http://tntp.org/publications/view/unintended-consequences-the-case-for-reforming-staffing-rules>

⁵¹ See, e.g., Perry A. Zirkel, *“Passing the Trash,”* 92 PRINCIPAL 50 (Mar./Apr. 2013). For another more extreme example, which was limited to a couple of the largest cities and which helped direct public attention to the issue of teacher terminations, see Susan Abram, *Rubber Rooms: LA Teachers Protest Against “Teacher Jails,”* LOS ANGELES DAILY NEWS (Dec. 10, 2013), <http://www.huffingtonpost.com/tag/rubber-rooms/>; Stephen Brill, *The Rubber Room: The Battle over New York City’s Worst Teachers,* THE NEW YORKER (Aug. 31, 2009), http://www.newyorker.com/reporting/2009/08/31/090831fa_fact_brill.

than dismissal proceedings, including—whether truly voluntary⁵² or not⁵³—transfer, retirement, and resignation.⁵⁴

Fourth, even if the administrators fully utilized the streamlined statutory procedures to eliminate grossly ineffective teachers, the substantial overall disparities between low-income and high-minority schools or students and their mainstream counterparts will remain largely the same due to several other systemic factors, including 1) the remaining segment of teachers who are moderately or marginally ineffective,⁵⁵ 2) other significant issues of teacher quality,⁵⁶

⁵² There is reason to suspect that at least some of the grossly ineffective teachers would leave based on frustration in being so unsuccessful. See, e.g., Richard M. Ingersoll, *Why Do High-Poverty Schools Have Difficulty Staffing Their Classrooms with High Quality Teachers?*, <http://www.shankerinstitute.org/images/ASI-Talk-Oct-2014-Ingersoll.pdf> (reporting that high-poverty schools have particularly high rates of attrition and that job dissatisfaction is the leading reason).

⁵³ The data tend to be anecdotal and informal based on the covertness of this strategy, but I have on more than one occasion heard principals boasting about their success in effectuating resignations of teachers they perceived to be ineffective by making their working conditions intolerable.

⁵⁴ Menuey, *supra* note 47, at 315. These strategies also included those that did not involve exiting, such as successful remediation or voluntary switching to a different teaching assignment in the school. *Id.*; see also Tucker, *supra* note 43 (finding that the typical principal in Virginia with a staff of 100 teacher annually identifies 1.53 incompetent teachers and for them remediates .68, encourages retirement or resignation for .37, reassigns .29, and recommends dismissal for .10).

⁵⁵ See, e.g., Bridges & Groves, *supra* note 46, at 11 (estimating that 11% of teachers were unsatisfactory based on statewide survey of principals in 1985); Richard Ehr Gott, Joan C. Henderson-Sparks, & Richard K. Sparks, *Marginal Teachers in California*, available from the Education Resources Information Center, Access No. ED356556 (Jan. 1993) (estimating that 10.8% of teachers in California were marginal based on survey of school administrators in the early 1990s); Carolyn Lavelly, Neal Berger, & John Follman, *Actual Incidence of Incompetent Teachers*, 15 EDUC. RES. Q. 11 (1992) (estimated that 10% of public school teachers in the U.S. are incompetent based on a mix of early, state-based sources); Menuey, *supra* note 47, at 310 (estimated that 5% of teachers are incompetent or marginal based on various earlier studies and “gross disparity” from the dismissal rate). Part of the problem in arriving at accurate estimates is the imprecise definitions of such relative terms. An overlapping part is their unclear or lack of uniform reference frame—is it criterion-based or norm-referenced?

⁵⁶ The identification of contributing factors depends in part on the specific definition of teacher quality and similar terms, such as effectiveness or competency. For example, in advocating for output-oriented policies, Hanushek provide this definition of teacher quality: “good teachers are ones that get large gains in student achievement for their classes; bad teachers are just the opposite.” Eric A. Hanushek, *Teacher Quality*, in *TEACHER QUALITY 1* (Lance T. Izumi & M. Evers eds., 2002). The recent development of value-added evaluation grapples with the measurement issues in implementing such a seemingly simple definition. See, e.g., Michael Croft & Richard Buddin, *Applying Value-Added Methods to Teachers in Untested Grades and Subjects*, 44 J.L. & EDUC. 1 (2015); Preston C. Green Bruce D. Baker & Joseph Oluwole, *The Legal*

including recruitment and retention,⁵⁷ 3) various other, non-teacher factors,

and Policy Implications of Value-Added Teacher Assessment Policies, 2012 BYU EDUC. & L.J. 1; Mark A. Paige, *A Legal Argument Against the Use of VAMs in Teacher Evaluation*, TEACHERS C. REC. (Dec. 21, 2014), <http://www.tcrecord.org/Content.asp?ContentId=17796>; Cassandra M. Guarino et al., *Policy and Research Challenges of Moving Toward Best Practices in Using Student Test Scores to Evaluate Teacher Performance*, 8 J. RES. EDUC. EFFECTIVENESS 1 (2015); June C. Rivers & William L. Sanders, *Teacher Quality and Equity in Educational Opportunities: Findings and Policy Implications*, in TEACHER QUALITY 13 (Lance T. Izumi & M. Evers eds., 2002); Marcus I. Winters & Joshua M. Cowen, *Who Would Stay, Would Be Dismissed?: An Empirical Analysis of Value Added Teacher Retention Policies*, 42 EDUC. RESEARCHER 330 (2013).

⁵⁷ TARAH BETEILLE, DEMETRA KALOGRIDES, & SUSANNA LOEB, EFFECTIVE SCHOOLS: MANAGING THE RECRUITMENT, DEVELOPMENT, AND RETENTION OF HIGH QUALITY TEACHERS (2009), <http://www.urban.org/UploadedPDF/1001428-effective-schools.pdf>; THE IRREPLACEABLES: UNDERSTANDING THE REAL RETENTION CRISIS IN AMERICA'S URBAN SCHOOLS (2012), http://tntp.org/assets/documents/TNTP_Irreplaceables_2012.pdf; cf. SARAH ALMY & MELISSA TOOLEY, BUILDING AND SUSTAINING TALENT: CREATING CONDITIONS IN HIGH-POVERTY SCHOOLS THAT SUPPORT EFFECTIVE TEACHING AND LEARNING (June 2012), <http://www.edtrust.org/dc/publication/building-and-sustaining-talent-creating-conditions-in-high-poverty-schools-that-suppo> (concluding that “[d]espite widespread assumptions that students are the primary cause of teacher dissatisfaction and attrition, research shows that the work environment in schools — particularly the quality of school leadership and staff cohesion — actually matters more, especially among teachers working in high-poverty schools”); NATIONAL COUNCIL ON TEACHER QUALITY, 2013 STATE TEACHER POLICY YEARBOOK: NATIONAL SUMMARY (Jan. 2014), http://www.nctq.org/dmsStage/2013_State_Teacher_Policy_Yearbook_National_Summary_NCTQ_Report (identifying exiting ineffective teachers as only one of five critical factors in state teacher policies, with the others being delivering well-prepared teachers, expanding the pool of teachers, identifying effective teachers, and retaining effective teachers); NICOLE S. SIMON & SUSAN MOORE JOHNSON, TEACHER TURNOVER IN HIGH-POVERTY SCHOOLS: WHAT WE KNOW AND CAN DO (2013), <http://isites.harvard.edu/fs/docs/icb.topic1231814.files/Teacher%20Turnover%20in%20High-Poverty%20Schools.pdf> (concluding that teachers leave high-poverty schools for positions in the suburbs due to poor working conditions in terms of school leadership and collegial culture); cf. Steven Sawchuk, *Steep Drop Seen in Teacher-Prep Enrollment Numbers*, EDUC. WK., Oct. 22, 2014, at 1 (attributing 10% national decline in teacher education enrollments not only to the economic/employment situation but also the policy changes perceived as diminishing the status of teachers). For other significant teacher quality factors, see, e.g., David N. Figlio & Lawrence W. Kenney, *Individual Teacher Incentives and Student Performance*, 91 J. PUB. ECON. 901 (2007) (finding that student test scores are higher in schools that offer merit pay, particularly those with low parental oversight); Linda Darling Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1 (Jan. 2000) (concluding that teacher preparation and certification are by far the strongest correlates with student achievement before and after controlling for student poverty); Eric A. Hanushek, *Teacher Quality*, in TEACHER QUALITY 1 (Lance T. Izumi & M. Evers eds., 2002) (advocating experimentation focused on incentive measures for student-gain rather than input policies); Charles Taylor Kerchner, *Even in Winning, Vergara Is Still a Loser*, EDUC. WK. blog, http://blogs.edweek.org/edweek/on_california/2014/06/even_in_winning_vergara_is_still_a_loser.html?qs=vergara (pointing out proposed California legislation focus on professional development of teachers).

such as effective leadership,⁵⁸ equitable resources,⁵⁹ and social injustice,⁶⁰ and 4) the overlay of procedural and other security protection in teacher contracts in collective bargaining jurisdictions.⁶¹

In conclusion, the *Vergara* decision is more significant symbolically than legally. Analyzed carefully and objectively, the real meaning of this decision is not to abolish tenure. Rather, the trial court's decision serves as not only a stimulus for "rebalancing"⁶² tenure to its original meaning of reasonable and fair procedural due process but also a reminder of the overriding need for more comprehensive and systematic reform.⁶³ The fulcrum for such policymaking ultimately is in the legislative, not the judicial branch, requiring powerful and collaborative educational leadership and broad-based political will.⁶⁴

⁵⁸ See, e.g., ROBERT J. MARZANO, TIMOTHY WATERS, & BRIAN MCNULTY, *SCHOOL LEADERSHIP THAT WORKS: FROM RESEARCH TO RESULTS* (2005), available from the Education Resources Information Center, Access No. ED509055.

⁵⁹ See, e.g., Allan Alson & Elizabeth Nelson, *Educational Impact of Resource Allocation Differences Between Suburban and Urban High Schools*, 14 PUB. INT. L. REP. 242 (2009); Jay G. Chambers, Jesse D. Levin, & Larisa Shambaugh, *Exploring Weighted Student Formulas as a Policy for Improving Equity for Distributing Resources to Schools: A Case Study of Two California School Districts*, 29 ECON. EDUC. REV. 283 (2010); Jaekyung Lee & Kenneth K. Wong, *The Impact of Accountability of Racial and Socioeconomic Equity: Considering Both School Resources and Student Achievement*, 41 AM. EDUC. RES. J. 797 (2004); see also Dear Colleague Letter (Oct. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>; cf. Douglas B. Larson & Joseph O. Oluwole, *The Opportunity Costs of Teacher Evaluation: A Labor and Equity Analysis of the Teach-NJ Legislation*, 308 EDUC. L. REP. 1 (2014) (examining the impact of such legislative reform on administrators' time demands and inter-district inequities).

⁶⁰ See, e.g., DANIEL DORLING, *INJUSTICE: WHY SOCIAL INEQUALITY PERSISTS* (2011); Gail C. Furman & Carolyn M. Shields, *How Can Educational Leaders Promote Social Justice and Democratic Community in Schools*, in *A NEW AGENDA FOR RESEARCH IN EDUCATIONAL LEADERSHIP* 119 (William A. Firestone & Carolyn Riehl eds., 2005).

⁶¹ See, e.g., LEVIN, MULHERN, & SCHUNK, *supra* note 50.

⁶² See, e.g., REBALANCING TEACHER TENURE: A POST-*Vergara* Guide for Policy Makers (2013), <http://tntp.org/publications/view/school-staffing-employment-policy/rebalancing-teacher-tenure-a-post-vergara-guide-for-policymakers>. For the Education Commission of the States' ongoing systematic snapshots of state laws for teacher dismissal and RIF, see http://www.ecs.org/html/educationIssues/teachingQuality/teacherdb_intro.asp. For another synthesis of the ongoing reform movement in state laws for teacher tenure and tenure evaluation, see Ann Blankenship, *Teacher Tenure: The Times, They Are a Changin'*, 1 EDUC. L. & POL'Y REV. 193 (2014).

⁶³ For the need for more comprehensive and systematic policymaking in related areas, see, e.g., Erik A. Hanushek & Alfred A. Lindseth, *Performance-Based Funding*, EDUC. WK., June 10, 2008, at 20.

⁶⁴ In her report on New York's teacher dismissal legislation, Stevens, *supra* note 33, at 52, argued that "while removing chronically ineffective teachers alone will not fix the problem, that's no reason not to do it. . . . The aim is to protect children." However, the interest of protecting children and providing them with competent teachers dictates corresponding revision of the interrelated causes of this problem; there's every reason to do it.