

The Constitutional Challenge to Teacher Tenure

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Reformers argue that ineffective teaching is the linchpin of educational inequality and failure. Starting in 2010, they successfully sought important changes in teacher evaluation systems at the state and federal levels. But tenure, a fundamental source of teachers' strength to resist more aggressive reform, remained in place. Thus, in 2012, reformers theorized a novel constitutional strategy to eliminate tenure. They argued that tenure leads to the retention of ineffective teachers, and that ineffective teaching deprives students of the constitutional right to education embedded in state constitutions. This theory immediately caught hold, with a California trial court striking down tenure in 2014 and litigation commencing in other states weeks thereafter.

The outcome of this litigation movement will determine both the future of the teaching profession and the scope of the constitutional right to education. To date, however, no high court or scholar has thoroughly analyzed the theory. This Article offers that first analysis, concluding that the constitutional challenge to tenure raises a theoretically valid claim but lacks a sufficient empirical basis. At the theoretical level, the tenure challenge easily falls within broadly worded precedent that establishes students' constitutional right to an equal and adequate education. If ineffective teaching deprives students of equal or adequate education, state constitutions should protect against it. But in the context of school funding cases—where the relevant precedent first developed—courts have demanded that litigants precisely demonstrate multiple aspects of causation and harm. Evidence on causation and harm is lacking in regard to tenure.

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This split between theory and fact requires courts to proceed cautiously. Rejecting current tenure challenges on their face would unfairly prejudice future legal challenges to teacher quality, particularly those predicated on potential empirical advances in social science. A facial rejection would also require courts to narrow the existing scope of the constitutional right to education. This narrowing would negatively affect education rights in other important and developing contexts. The solution is to insist on more detailed evidence to support plaintiffs' causal theories and presumed remedies. By doing so, courts can validate students' constitutional right to education without venturing into unsettled policy debates.

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INTRODUCTION

Two persistently high achievement gaps have motivated national education policy for the past three decades: the international one between the United States and its peers and the domestic one between racial and

socioeconomic groups.¹ In recent years, scholars and policy makers have reached a consensus that improving teacher quality is the key to resolving these achievement gaps.² But no consensus among researchers or policy makers has emerged as to a strategy to actually improve teacher quality. Debates abound as to whether years of experience, academic credentials, student outcomes, or some other factor reflects quality teaching.³ Other more difficult questions arise as to whether we can improve the teachers we currently have or whether we must devise strategies to recruit stronger ones to replace them.

Nonetheless, many education reformers are convinced that eliminating teacher tenure is the necessary first step to any meaningful reform because tenure locks in the status quo. Their argument is simple. If teachers could not hide behind tenure, schools could easily remove the worst teachers and the rest would be motivated to improve. Given what we know about the effects of quality teaching, this, they say, would dramatically improve student outcomes and shrink achievement gaps.⁴

Education reformers initially sought this change through the political process,⁵ but were, in important respects, blocked by the political strength of teachers and their unions. Reformers are now pressing a novel constitutional theory in the courts,⁶ a theory that would sidestep the political process. They argue that tenure and the retention of ineffective teachers violates students' constitutional right to education embedded in each of the fifty state constitutions.⁷ For decades, state supreme courts have used state constitutional

1. See generally Valerie Strauss, *Key PISA Test Results for U.S. Students*, WASH. POST (Dec. 3, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/12/03/key-pisa-test-results-for-u-s-students> [<https://perma.cc/DR25-D6XA>] (reporting that U.S. math and reading scores are at or below international average); Michael Winerip, *Closing the Achievement Gap Without Widening a Racial One*, N.Y. TIMES (Feb. 13, 2011), <http://www.nytimes.com/2011/02/14/education/14winerip.html> [<http://perma.cc/YBL7-MEBB>] (indicating the racial achievement gap is the most pressing issue in education).

2. See generally THE EDUC. TRUST, *THEIR FAIR SHARE: HOW TEXAS-SIZED GAPS IN TEACHER QUALITY SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS* (2008); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1 (2000); James H. Stronge et al., *What is the Relationship Between Teacher Quality and Student Achievement? An Exploratory Study*, 20 J. PERS. EVALUATION EDUC. 165, 167 (2007).

3. See discussion *infra* Parts I.B., II.B.

4. See discussion *infra* Part I.A.

5. See generally Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607 (2015) (discussing new policies on teacher evaluation and the Common Core Curriculum).

6. Haley Sweetland Edwards, *The War on Teacher Tenure*, TIME, Oct. 30, 2014 (explaining that reform-oriented individuals saw the litigation as the only way to break the national gridlock).

7. *Id.*; see also William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989) (detailing the constitutional right to education in all fifty states).

rights to equalize school funding.⁸ If unequal funding violates the constitutional right to education, so too might ineffective teaching caused by tenure.

With that basic theory, a constitutional “War on Teacher Tenure” has caught hold.⁹ The first case, *Vergara v. State*,¹⁰ was filed in California in 2012. The plaintiffs alleged that California statutes grant teachers tenure far too easily and “force school administrators to keep teachers in the classroom long after they have demonstrated themselves to be grossly ineffective.”¹¹ Even when schools must let teachers go in response to budget shortfalls during a recession, statutes require schools to retain senior teachers over newer ones, regardless of who might be the most effective.¹² These problems are particularly acute in predominantly poor and minority schools because they “have a disproportionate share of grossly ineffective teachers.”¹³ This, plaintiffs reasoned, violates the California Constitution’s equal protection clause, under which education is a fundamental right.¹⁴

In 2014, the trial court in *Vergara* became the first to strike down a tenure statute as unconstitutional, agreeing with plaintiffs’ theory.¹⁵ New York courts are now considering the same theory under their own state constitution, with a wave of similar cases readying for litigation in other states.¹⁶ Simply put, tenure is on national trial. The stakes could not be higher, nor the terrain more uncertain. Current research offers little hard evidence as to whether eliminating tenure will finally free schools to take the necessary steps to improve teaching or just make matters worse by creating additional workplace pressures that render the profession even less attractive to existing and potential teachers. In

8. See Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500–05 (2006) (discussing plaintiff victories in school funding litigation).

9. Edwards, *supra* note 6.

10. *Vergara v. State*, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014).

11. First Amended Complaint for Declaratory & Injunctive Relief at 1, *Vergara v. State*, No. BC484642 (Cal. Super. Ct. Aug. 15, 2012) [hereinafter *Vergara* Complaint], 2012 WL 10129922.

12. This challenge is to the “Last-In-First-Out” statute, which mandates that schools retain senior teachers when making reductions in force and thereby prevents administrators from relying on teaching effectiveness to let teachers go. *Id.* at 2, 6–7. Although this Article primarily evaluates the challenge to tenure rather than seniority or last-in-first-out statutes, it will address seniority statutes to explain how they arguably raise a more compelling legal theory. In particular, seniority statutes necessarily have systematic effects during reductions-in-force and thereby have the potential to systematically affect teacher quality. This Article, however, does not elevate seniority statutes to a primary level of analysis because reductions-in-force should occur only in isolated circumstances and, thus, under normal circumstances, may bear little relevance to long-term teaching quality.

13. *Id.* at 1.

14. *Id.* at 4–5.

15. *Vergara*, 2014 WL 6478415.

16. Al Baker, *Lawsuit Challenges New York’s Teacher Tenure Laws*, N.Y. TIMES, July 4, 2014, at A14; see also *Plaintiff Attorney in the Landmark Vergara Case in Twin Cities to Talk About Teacher Tenure*, CLASS ACT BLOG, MINN. STAR TRIB. (Nov. 14, 2014, 5:21 PM), <http://www.startribune.com/plaintiff-attorney-in-the-landmark-vergara-case-in-twin-cities-to-talk-about-teacher-tenure/282763021> [<http://perma.cc/ZX23-3G9Y>] (discussing possible *Vergara*-like suits in Minnesota).

addition, filtering these questions through the constitutional right to education will require courts to define the scope of that right,¹⁷ which could affect any number of education policies beyond teaching.

To date, no high court or scholar has thoroughly vetted the constitutional argument against tenure. The claim is so unique that few guideposts—other than the broadly stated right to an equal or adequate education—exist.¹⁸ This Article provides that first analysis.¹⁹ It concludes that although the tenure theory is valid on its face, the theory lacks sufficient evidentiary support. This conclusion leaves open the possibility of future meritorious challenges to tenure while preventing speculative and uncertain evidence from dictating education policy.²⁰ It also distinguishes policy preferences from constitutionally enforceable mandates.

The specific issue of whether the tenure theory is valid is relatively straightforward. No one questions that ineffective teaching negatively affects student outcomes. If tenure is the cause of ineffective teaching, students' constitutional right to education should require the state to respond to the problem. When a state does not, it deprives students of the constitutional right to education. Existing school funding precedent would strongly support this theory. Thus, courts should not dismiss the challenge to tenure on its face.

Beyond theory, however, the constitutional challenge to tenure falls well short of the evidentiary requirements prior courts have set for other violations of the constitutional right to education. The weakness of the evidentiary claim is apparent on four grounds. First, plaintiffs lack evidence that tenure is causally connected to ineffective teaching. Ineffective teaching might persist with or without tenure. For instance, labor market forces, segregation, school funding, and school leadership significantly contribute to ineffective teaching.²¹ No evidence suggests that tenure supersedes these factors. Moreover, even if eliminating tenure allowed administrators to more easily remove ineffective teachers, eliminating tenure could also produce indirect effects that might

17. See Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 390–403 (2012) (discussing the potential breadth of constitutional rights to education); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 307–10 (1999).

18. Michael Rebell, a longtime scholar and litigator of constitutional education claims, calls the theory “unprecedented.” Baker, *supra* note 16.

19. Like the earliest school equity and adequacy decisions, the first full and thoughtful analysis will play an outsized role across jurisdictions. See generally Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 129 (1995) (identifying New Jersey's and West Virginia's school finance decisions as beacons).

20. Some early school finance opinions, skeptical of the causal connection between money and educational outcomes, preemptively hobbled litigation in their states. See, e.g., *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *McDaniel v. Thomas*, 285 S.E.2d 156, 160–61 (Ga. 1981). This Article's rationale avoids that problem.

21. See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 333–34 (N.Y. 2003) (examining how low-quality teaching was caused by market forces); Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 3 (2008).

undermine the teaching profession overall.²² If so, the net result of eliminating tenure could be negative, and tenure would not play the causal role that plaintiffs assume.

Second, even if tenure causes ineffective teaching, plaintiffs have not demonstrated that the number of ineffective teachers that tenure protects rises to the level of a substantial and systematic educational deprivation.²³ For instance, one out of a student's ten teachers may be ineffective, but that teacher does not necessarily undermine the student's overall educational opportunity to the extent necessary for a court to deem the student's education inadequate. Even if inadequate, plaintiffs may need to show systematic repetition of the problem.²⁴ Otherwise, random local variation, rather than state policy, would cause the inadequacy. Seniority statutes, which *Vergara* and the New York litigation also challenged, could potentially have systematic effects on teacher quality during a large reduction-in-force, but to the extent these reductions are abnormal, their bearing on the long-term teacher quality in a district may be negligible.²⁵

Third, ignoring these and other serious causal questions, plaintiffs rely on generalized social science about the effects of quality teachers on student outcomes.²⁶ This generalized research does not address the effects of tenure on student outcomes. Even if it did, generalized evidence of this sort is insufficient to establish the state's specific causation that courts have required in school funding cases.²⁷

Fourth, plaintiffs seek a remedy that would potentially violate separation of powers constraints. Plaintiffs identify tenure as a singular flaw in state law and its elimination as a singular solution. No prior litigation to enforce the right to education has ever narrowed its focus so far, and for good reason. The details of educational policy, including solutions to constitutional violations,

22. Sam Dillon, *Teachers' Union Shuns Obama Aides at Convention*, N.Y. TIMES, July 5, 2010, at A8 (quoting head of nation's largest teacher union stating that today's teachers "face the most anti-educator, anti-union, anti-student environment" ever).

23. See *Serrano v. Priest*, 557 P.2d 929, 939 (Cal. 1976) (requiring substantial disparities); *Serrano v. Priest*, 226 Cal. Rptr. 584, 605 (Ct. App. 1986), *cause dismissed* (Oct. 27, 1989), *review granted, and opinion superseded sub nom.* *Placentia Unified Sch. Dist. v. Riles*, 723 P.2d 1248 (Cal. 1986) (explaining that simply touching on a fundamental right is insufficient to trigger heightened scrutiny); *Sheff v. O'Neill*, 678 A.2d 1267, 1285 (Conn. 1996) (requiring substantial disparities).

24. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Pauley v. Bailey*, 324 S.E.2d 128 (W. Va. 1984) (evaluating the overall education system for a violation).

25. A court addressing the immediate effects of teacher layoffs, however, might have a stronger basis upon which to intervene in contrast to the general challenge to tenure.

26. They rely heavily on the general research and testimony of Dr. Raj Chetty. See Raj Chetty et al., *The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood* (Nat'l Bureau of Econ. Research, Working Paper No. 17,699, 2011).

27. See, e.g., *Serrano*, 226 Cal. Rptr. at 615 (rejecting state responsibility because disparities were not caused by state policy); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 340, 343 (N.Y. 2003) (requiring input and output causation, and addressing supervening causes).

rest within the discretion of legislatures.²⁸ Where more than one solution to a constitutional violation is possible or reasonable, constitutions vest legislatures with the discretion to choose among them.²⁹ The potential solutions to ineffective teaching and teacher removal are multifaceted, placing them within the domain of the legislature and making them ill-suited to judicial prerogative. Moreover, plaintiffs assume that some other better alternative to a tenure system exists, but current research and litigation indicate serious practical and constitutional due process flaws in the alternatives.³⁰ None of the foregoing is meant to minimize the problem of ineffective teaching. Ineffective teaching demands a solution, but presuming that eliminating tenure through constitutional litigation is a solution, much less the best among many competing possibilities, is dangerous.³¹

This Article evaluates the constitutional challenge to tenure in four Parts. Part I explains the social science evidence regarding the importance of quality teachers to students' educational outcomes. It also explores traditional theories of why our schools suffer from low quality teaching and how to resolve the problem. In this respect, it offers a primer on the potential causes of ineffective teaching, which are central to the legal questions raised by the constitutional challenge to tenure.

Part II details the most recent legislative efforts to use statistical models that pair students' standardized test scores to individual teachers as a major factor in the tenure and termination of teachers. Part II also examines the scientific and legal validity of these models, pointing out the technical limitations in the data systems and the attendant due process concerns that the limitations raise. This background analysis is key to fully evaluating the constitutional challenge to tenure because these models would serve as the basis for identifying teachers for termination or tenure denial. Plaintiffs' lead expert in *Vergara* specifically premises his conclusions about the benefits of eliminating grossly ineffective teachers on one of these models.³² If these evaluation systems are fundamentally flawed, however, plaintiffs may be

28. See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50 (N.Y. 2006); see also *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996).

29. See, e.g., *Rose*, 790 S.W.2d at 213–14; *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 392–95 (N.C. 2004).

30. See Bruce D. Baker et al., *The Legal Consequences of Mandating High Stakes Decisions Based on Low Quality Information: Teacher Evaluation in the Race-to-the-Top Era*, 21 EDUC. POL'Y ANALYSIS ARCHIVES (2013).

31. See generally Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 961–65, 977 (2014) (explaining the nature of polycentric problems and identifying remedies in constitutional education litigation as raising polycentric challenges); Kevin G. Welner, *Silver Linings Casebook: How Vergara's Backers May Lose by Winning*, 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 121, 122 (2015) (emphasizing how the theory of *Vergara* might “invit[e] litigation with very different goals for school policy and reform” beyond just the tenure claim).

32. See Chetty et al., *supra* note 26 (relying on value-added statistical modeling).

asking courts to trade one constitutional violation—unequal educational opportunities stemming from ineffective teaching—for another—unreliable evaluation systems that deny teachers due process.

Part III evaluates the theory that tenure might violate students’ constitutional right to education. Part III first constructs the theoretical and practical frameworks to explain how courts evaluate constitutional challenges to educational deprivations. Next, Part III situates tenure challenges within this framework, identifying the advantages and disadvantages of the claim. It includes an analysis of the related challenges to seniority systems that mandate the retention of senior teachers over junior teachers during reductions-in-force, regardless of teaching effectiveness.

Based on this analysis, Part IV articulates the legal, factual, and policy-based conclusions that courts should reach in adjudicating these cases, reasoning that plaintiffs have stated a claim, but need far more evidence than is currently available to substantiate their claim in regard to tenure. In short, Part IV concludes that courts should reject the current constitutional challenges to tenure on the facts.

I.

THE IMPORTANCE OF AND INSUFFICIENT ACCESS TO QUALITY TEACHERS

A. *Quality Teachers and Improved Student Outcomes*

The centrality of quality teachers to educational outcomes is intuitive. Voluminous social science findings confirm that teacher quality is among the most significant variables in student outcomes.³³ But equally well established is that an individual student’s socioeconomic status, along with that of his peers, exerts enormous influence on educational outcomes. Students attending predominantly low-income schools achieve at lower levels, regardless of their own individual socioeconomic status.³⁴ These socioeconomic variables also

33. See, e.g., JAMES H. STRONGE & PAMELA D. TUCKER, NAT’L EDUC. ASS’N, *TEACHER EVALUATION AND STUDENT ACHIEVEMENT* (2000); LINDA DARLING-HAMMOND, NAT’L COMM’N ON TEACHING & AM.’S FUTURE, *DOING WHAT MATTERS MOST: INVESTING IN QUALITY TEACHING* (1997); BRIAN ROWAN ET AL., CONSORTIUM FOR POL’Y RESEARCH IN EDUC., RESEARCH REPORT NO. RR-051, *WHAT LARGE-SCALE, SURVEY RESEARCH TELLS US ABOUT TEACHER EFFECTS ON STUDENT ACHIEVEMENT: INSIGHTS FROM THE PROSPECTS STUDY OF ELEMENTARY SCHOOLS* (2002); Joseph O. Oluwole, *Tenure and the “Highly Qualified Teacher” Requirement*, 8 WHITTIER J. CHILD. & FAM. ADVOC. 157, 158 (2009) (discussing the “various studies [that] have shown that teachers are important to student achievement”); Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417 (2005); S. Paul Wright et al., *Teachers and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation*, 11 J. PERSONNEL EVALUATION EDUC. 57 (1997).

34. JAMES S. COLEMAN ET AL., NAT’L CTR. FOR EDUC. STATISTICS, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 302–10 (1966); RICHARD D. KAHLBERG, *ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 47–76 (2001); Geoffrey D. Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman’s Equality of Educational Opportunity Data*, 112 TCHRS. C. REC. 1201 (2010); Molly S. McUsic, *The Future of*

intersect with teaching quality. Predominantly poor and minority schools find it hard to recruit, hire, and retain high quality teachers because those teachers would rather teach elsewhere.³⁵ Even if this were not the case, quality teachers cannot singlehandedly eliminate the disadvantages that low-income students in predominantly poor schools face. In short, while teacher quality is extremely important to student outcomes, poverty and race would appear to play a precedent role in student outcomes.

Some social scientists, however, have begun to challenge the notion of student determinism with more concrete findings regarding the longitudinal effects of teacher quality on student outcomes and achievement gaps.³⁶ One prominent study found that “having a top-quartile teacher rather than a bottom-quartile teacher four years in a row would be enough to close the black-white test score gap.”³⁷ Another found that elementary students assigned to high-performing teachers for three straight years achieve fifty percentile points higher on standardized tests than students assigned to low-performing teachers.³⁸ Scholars have also dramatized these findings by quantifying the

Brown v. Board of Education: *Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1355–56 (2004); Laura B. Perry & Andrew McConney, *Does the SES of the School Matter? An Examination of Socioeconomic Status and Student Achievement Using PISA 2003*, 112 TCHRS. C. REC. 1137 (2010); Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter? The Impact of Social Composition on Academic Achievement in Southern High Schools*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 127 (John Charles Boger & Gary Orfield eds., 2005); see also Roslyn Arlin Mickelson, *Segregation and the SAT*, 67 OHIO ST. L.J. 157 (2006); Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215 (2001) (finding that even after controlling for factors such as a student’s family background, prior achievement, peer effects, and self-reported academic effort, the more time students spent in predominantly minority elementary schools in Charlotte Mecklenburg’s school district, the worse their academic achievement would be in middle and high school in terms of standardized tests and grade point averages).

35. Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345, 1372–73 (2007); Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 ECON. EDUC. REV. 377 (2005); Parker, *supra* note 21, at 35–36.

36. See, e.g., PATRICIA CAHAPE HAMMER ET AL., EDVANTIA, RURAL TEACHER RECRUITMENT AND RETENTION PRACTICES: A REVIEW OF THE RESEARCH LITERATURE, NATIONAL SURVEY OF RURAL SUPERINTENDENTS, AND CASE STUDIES OF PROGRAMS IN VIRGINIA 1, 10 (2005) (“A growing body of research indicates that the most important thing schools can do to improve student achievement is to ensure there is a high-quality teacher in every classroom.”); Ethan Hutt & Aaron Tang, *The New Education Malpractice Litigation*, 99 VA. L. REV. 419, 420 (2013); THE EDUC. TRUST, *supra* note 2, at 2 (“[R]esearchers warn that assigning low-performing students to a series of ineffective teachers is ‘educationally deadly.’”).

37. ROBERT GORDON ET AL., THE BROOKINGS INST., IDENTIFYING EFFECTIVE TEACHERS USING PERFORMANCE ON THE JOB 8 (2006), www.brookings.edu/views/papers/200604_hamilton_1.pdf [http://perma.cc/L6V9-TZP3]. See generally Elizabeth Powell, *The Quest for Teacher Quality: Early Lessons from Race to the Top and State Legislative Efforts Regarding Teacher Evaluation*, 62 DEPAUL L. REV. 1061, 1070 (2013) (“This significant finding has heavily shaped education policy over the last several years.”).

38. WILLIAM L. SANDERS & JUNE C. RIVERS, UNIV. OF TENN. VALUE-ADDED RESEARCH & ASSESSMENT CTR., CUMULATIVE AND RESIDENTIAL EFFECTS OF TEACHERS ON FUTURE STUDENT ACADEMIC ACHIEVEMENT 3, 6–7 (1996). By “high-performing,” the authors mean teachers who have

effect of teacher quality on the nation as a whole.³⁹ Eric Hanushek concludes that minimal improvements to the lowest performing group of teachers would move the United States toward the top of international rankings of educational attainment and add trillions of dollars to our gross domestic product each year.⁴⁰

B. *The Challenge of Identifying and Supplying Quality Teachers*

The difficult question is not whether quality teaching matters, but how to identify, measure, and actually improve teaching quality. For decades, states have relied on competency testing as one check on teacher quality.⁴¹ Those tests were, in some instances, insufficiently rigorous and, in other instances, under-enforced.⁴² More experienced teachers, for instance, might be exempted.⁴³ The No Child Left Behind Act (NCLB or the Act) attempted to address the problem with a national mandate: all teachers of core subjects must be highly qualified.⁴⁴ Unfortunately, this attempt failed.

The Act left states to define and measure teacher quality themselves, creating a race to the bottom in some.⁴⁵ That problem aside, certification requirements did nothing to actually increase the number of available qualified teachers. Rather, the mandate's real achievement was to reveal the high number of uncertified and low-credentialed teachers in our nation's schools, and that

high "value-added" scores based on a statistical analysis of their students' standardized test results. *Id.* at 6. For further explanation of value-added scores, see Part IIA.

39. See ROBIN CHAIT, CTR. FOR AM. PROGRESS, REMOVING CHRONICALLY INEFFECTIVE TEACHERS: BARRIERS AND OPPORTUNITIES 2 (2010) ("[D]ismissing the bottom quartile of novice teachers in the district after their first year based on value-added estimates would result in a net increase in student test score gains of 1.2 percentage points annually across the district."); Eric A. Hanushek, *Valuing Teachers*, EDUC. NEXT, Summer 2011, at 41, 43.

40. Hanushek, *supra* note 39, at 41, 43.

41. See generally Jerry R. Parkinson, *The Use of Competency Testing in the Evaluation of Public School Teachers*, 39 U. KAN. L. REV. 845, 845 (1991) (noting that "[a] majority of states now employ competency tests as a prerequisite to the initial certification of prospective teachers"). The high-quality teacher requirement in the No Child Left Behind Act was similarly premised on qualifications, deeming a teacher highly qualified if he or she passed the state's exam or experience-based certification process. 20 U.S.C. § 6319 (2012).

42. See, e.g., Complaint for Declaratory & Injunctive Relief at 39, *Martinez v. State*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. April 1, 2014) [hereinafter *Martinez Complaint*] ("[The] prior [teacher rating] system was not applied in a manner to ensure a sufficient education and most schools rated most teachers as 'meeting competency.'"); Parkinson, *supra* note 41, at 845–46.

43. See Jane G. Noble, Note, *Teacher Termination and Competency Testing*, 63 TEX. L. REV. 933, 938 & n.25 (1985) (noting that only few larger districts, despite having the necessary resources, test currently certified teachers); Parkinson, *supra* note 41, at 845–46 (discussing states' reluctance to require previously certified teachers to pass a competency examination).

44. 20 U.S.C. § 6319(a)(2).

45. *Id.* § 7801(23) (defining "highly qualified"); see also James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 976–78 (2004) (describing the perverse incentives for states to lower their academic standards and teacher quality requirements so as to make them easier to meet).

they are concentrated in particular schools.⁴⁶ In fact, systemic violations of the teacher quality requirements mounted quicker than violations of any other NCLB requirement, including improving student test scores.⁴⁷

Even if states had complied with the Act, the Act's basic premise regarding how to measure teacher quality may have been fundamentally flawed. The Act assumed that teaching credentials are a reliable proxy for teacher quality. Some minimal qualifications are necessary to be an effective teacher,⁴⁸ but possessing a master's degree, for instance, does not necessarily make one teacher more effective than another who only has a bachelor's degree. To the contrary, many studies conclude that both teacher credentials and experience are unreliable proxies for teaching effectiveness or quality.⁴⁹ Given the Act's flawed premise and implementation, federal officials abandoned enforcement of the teacher mandate very early into the Act's life.⁵⁰

46. See, e.g., EDUC. COMM'N OF THE STATES, ECS REPORT TO THE NATION: STATE IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT 69 (2004) (showing that not a single state was on track to meet teacher requirements); see also *Renee v. Duncan*, 623 F.3d 787 (9th Cir. 2010) (finding California had failed to meet teacher requirements in high minority schools).

47. EDUC. COMM'N, *supra* note 46, app. B at 81–86 (indicating not a single state was on track to meet NCLB's highly qualified teacher and high-quality professional development requirements whereas more than half of states were on track to meet every other requirement).

48. See Darling-Hammond, *supra* note 2 (finding negative impact of having teacher without even a minor in the subject taught); Dan D. Goldhaber & Dominic J. Brewer, *Does Teacher Certification Matter? High School Teacher Certification Status and Student Achievement*, 22 EDUC. EVALUATION & POL'Y ANALYSIS 129 (2000) (finding positive impact of teachers with a major in the subject taught); see also Rivkin et al., *supra* note 33 (finding positive effect of teachers with more than three years of experience).

49. Marco A. Muñoz & Florence C. Chang, *The Elusive Relationship Between Teacher Characteristics and Student Academic Growth: A Longitudinal Multilevel Model for Change*, 20 J. PERS. EVALUATION EDUC. 147, 148 (2007) (finding mixed results as to whether teacher qualifications are related to student achievement); Powell, *supra* note 37, at 1068 (claiming that after NCLB “it became apparent that . . . ‘Highly qualified’ teachers were not necessarily highly effective”). In reviewing the literature on this point, the Ninth Circuit wrote, “It is unclear whether fully certified teachers provide a better education than teachers participating in alternative route programs.” *Renee v. Duncan*, 573 F.3d 903, 912 n.9 (9th Cir. 2009) (comparing KATI HAYCOCK, THE EDUC. TRUST, GOOD TEACHING MATTERS: HOW WELL-QUALIFIED TEACHERS CAN CLOSE THE GAP 13 (1998) (“Education courses completed, advanced education degrees, scores on professional knowledge sections of licensing exams, even, interestingly, years of experience—none seem to have a clear relationship to student achievement.”), and Thomas J. Kane et al., *Photo Finish: Certification Doesn't Guarantee a Winner*, EDUC. NEXT, Winter 2007, at 64 (“[A] teacher's certification status matters little for student learning.”), with Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequality in California's Public Schools*, 43 SANTA CLARA L. REV. 1045, 1051 (2003) (“National studies have . . . found that differences in teachers' qualifications—including teachers' general ability, knowledge of subject matter, preparation for teaching, and certification status, which reflects aspects of all of these other indicators—show significant effects on student achievement measured at the state, district, school, and individual student levels.”)), *opinion withdrawn and superseded on denial of reh'g*, 623 F.3d 787 (9th Cir. 2010), *opinion supplemented on reh'g*, 686 F.3d 1002 (9th Cir. 2012).

50. Letter from Margaret Spellings, Sec'y, U.S. Dep't of Educ., to Chief State School Officers (July 23, 2007), <http://www.ed.gov/policy/elsec/guid/secletter/070723.html> [<http://perma.cc/FLT9-MR9Z>] (indicating that Secretary Spellings would continue to excuse states for failing to meet teacher requirements).

C. Potential Causes of Ineffective Teaching

1. School Segregation

The cause of ineffective teaching and the means by which to remedy it present another set of difficult questions. A number of scholars focus on supply-side causes. For instance, predominantly poor and minority schools find it particularly difficult to recruit and retain teachers in general, much less highly effective ones.⁵¹ These challenges cannot be easily remedied because the racial and socioeconomic characteristics of schools significantly influence where teachers decide to teach.⁵² In other words, the root of inequitable access to quality teachers is school segregation,⁵³ not teacher policy itself. School

51. See, e.g., STEPHEN CARROLL ET AL., RAND EDUC., THE DISTRIBUTION OF TEACHERS AMONG CALIFORNIA'S SCHOOL DISTRICTS AND SCHOOLS (2000); SUSANNA LOEB & MICHELLE REININGER, THE EDUC. POLICY CTR. AT MICH. STATE UNIV., PUBLIC POLICY AND TEACHER LABOR MARKETS: WHAT WE KNOW AND WHY IT MATTERS (2004); DANIEL P. MAYER ET AL., U.S. DEP'T OF EDUC., MONITORING SCHOOL QUALITY: AN INDICATORS REPORT (2000), <http://nces.ed.gov/pubs2001/2001030.pdf> [<http://perma.cc/2CZK-9866>]; Charles T. Clotfelter et al., *Who Teaches Whom?*, *supra* note 35; Darling-Hammond, *supra* note 2; Catherine E. Freeman et al., *Racial Segregation in Georgia Public Schools, 1994–2001*, in *SCHOOL RESEGREGATION*, *supra* note 34, at 148, 157–59; Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326, 337 (2004); Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS INST. (Mar. 13, 2008), <http://www.brookings.edu/research/articles/1998/03/spring-education-jencks> [<http://perma.cc/4X9P-LSJ4>] (“Predominantly white schools seem to attract more skilled teachers than black schools.”); Rivkin et al., *supra* note 33; see also BARNETT BERRY & ERIC HIRSCH, CTR. FOR TEACHING QUALITY, RECRUITING AND RETAINING TEACHERS FOR HARD-TO-STAFF SCHOOLS (2005) (identifying recruitment and retention problems in high poverty, low performing schools); ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., THE SEGREGATION OF AMERICAN TEACHERS 25–26 (2006) (revealing that teacher dissatisfaction tends to rise as the percentage of minority students in a school rises, making it more likely that teachers will leave); SUSAN MOORE JOHNSON ET AL., HARVARD GRADUATE SCH. OF EDUC., WHO STAYS IN TEACHING AND WHY: A REVIEW OF THE LITERATURE ON TEACHER RETENTION (2005); THE EDUC. TRUST, *supra* note 2, at 6 (illustrating how most of Texas’s districts, the poorest and mostly minority, also have the highest rate of teacher turnover).

52. Jane L. David, *Teacher Recruitment Incentives*, EDUC. LEADERSHIP, Apr. 2008, at 84; Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 PEABODY J. EDUC., no. 3, 2005, at 44 (noting that moderate salary increases, for instance, may be insufficient to break this cycle); Parker, *supra* note 21; Benjamin Scafidi et al., *Race, Poverty, and Teacher Mobility*, 26 ECON. EDUC. REV. 145 (2007). For instance, past incentive pay policies have been generally insufficient to alter unequal distribution patterns. See, e.g., Hanushek et al., *supra* note 51, at 350–51 (finding that a ten percent salary increase would be necessary for each increase of ten percent in minority student enrollment to induce white women to teach in the school); ALL FOR EXCELLENT EDUC, IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS 7 (2008), <http://all4ed.org/reports-factsheets/improving-the-distribution-of-teachers-in-low-performing-high-schools> [<http://perma.cc/K9RQ-HAW8>] (indicating that several states already have incentive pay for low-performing schools, but pay increase alone is insufficient to attract teachers). But see Charles Clotfelter et al., *Would Higher Salaries Keep Teachers in High-Poverty Schools? Evidence from a Policy Intervention in North Carolina*, 92 J. PUB. ECON. 1352 (2008).

53. See Benjamin Michael Superfine, *The Promises and Pitfalls of Teacher Evaluation and Accountability Reform*, 17 RICH. J.L. & PUB. INT. 591, 592 (2014) (“This movement to increase teacher effectiveness has strong roots extending to efforts focused on equalizing students’ educational

finance litigation has also demonstrated that poor rural communities face analogous challenges in hiring teachers due to geography and money,⁵⁴ both of which are beyond their control. In short, structural problems of race, poverty, geography, and money exert enormous influences on students' access to quality instruction.

2. *Underdeveloped Market for Teachers*

Another group of scholars locate the cause of unequal access to quality teachers at a higher macro level, arguing that the fundamental problem is a labor market and higher education pipeline that does not drive sufficiently qualified individuals into the profession or keep them there.⁵⁵ Compared to other countries, the United States' teacher education, preparation, and compensation systems under-incentivize the teaching profession.⁵⁶ Thus, our teaching quality problems can only be resolved by taking steps to expand the teaching pool and recruit more ambitious individuals into it, not by micromanaging and certifying the ones in our current pool.

3. *Ineffective Personnel Management*

Finally, in the last decade, another group of scholars and policy makers have turned toward a business and econometrics approach to teaching quality. They locate the causes of ineffective teaching in the way schools manage and motivate teachers. The education system makes almost no effort to distinguish between teachers, treating them instead as interchangeable "widgets."⁵⁷ This, they say, creates a disincentive to teaching excellence and, over time, leads to "instructional lethargy where the lowest performer sets the standard for the

opportunities that began with the struggle to desegregate schools and continued with school finance reform litigation.").

54. See, e.g., *Leandro v. State*, 488 S.E.2d 249, 252 (N.C. 1997); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

55. See, e.g., Frank Adamson & Linda Darling-Hammond, *Funding Disparities and the Inequitable Distribution of Teachers: Evaluating Sources and Solutions*, EDUC. POL'Y ANALYSIS ARCHIVES, Nov. 19, 2012, at 1, 9 ("Those most responsive to salary differences in their decisions to remain in teaching include beginning teachers, those in high-demand fields such as mathematics and science, and those who have higher measured ability." (citations omitted)); Marigee P. Bacolod, *Do Alternative Opportunities Matter? The Role of Female Labor Markets in the Decline of Teacher Quality*, 89 REV. ECON. & STAT. 737 (2007).

56. Other countries do a far better job of raising the prestige of schools of education and the profession in general. Our schools of education admit most students who apply. This then breeds a desire to counteract permissive admissions policies through odious certification processes. See generally Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1949 (2012) (discussing the prestige of the teaching profession in Finland, South Korea, and Singapore).

57. See DANIEL WEISBERG ET AL., *THE NEW TEACHER PROJECT, THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS* 10 (2009).

entire staff.”⁵⁸ Those who might want to promote more effective teaching would be blocked at every turn. Seniority systems, tenure, and due process bar or stiffly resist otherwise effective personnel actions.⁵⁹ The procedural process of removing even the most grossly ineffective teachers from the classroom is extremely difficult and costly.⁶⁰

Once a teacher receives tenure, the teacher can only be removed based on statutory grounds.⁶¹ The grounds fall into two major categories: misconduct and performance.⁶² To remove an ineffective teacher, states typically require a demonstrated record of incompetent teaching over a period of time.⁶³ The extended time period affords the teacher notice of the deficiency and an opportunity to remediate the deficiency.⁶⁴ Once those requirements have been met, a tenured teacher still must receive formal notice of the school’s intent to terminate and an opportunity to contest the determination of incompetence through administrative hearings and appeals.⁶⁵

For decades, state statutes refrained from precisely defining incompetence or ineffectiveness, which further complicated the removal process.⁶⁶ As one state supreme court explained, “the term ‘incompetent’ is generic in its meaning and of itself conveys no information of the particular act of

58. Ralph D. Mawdsley et al., “A ‘Law’ Too Far”? *The Wisconsin Budget Repair Act: Counterpoint*, 275 EDUC. L. REP. 16, 19 (2012).

59. See, e.g., Nicholas Dagostino, *Giving the School Bully a Timeout: Protecting Urban Students from Teachers’ Unions*, 63 ALA. L. REV. 177, 196 (2011) (critiquing the role of seniority rather than teaching effectiveness in layoffs); PATRICK MCGUINN, CTR. FOR AM. PROGRESS, RINGING THE BELL FOR K-12 TEACHER TENURE REFORM 2 (2010) (stating that “political opposition and technical challenges around tenure reform have historically prevented [teacher effectiveness policies] from advancing very far in state legislatures”); Stephen Sawchuk, *Due Process Laws Vary for Teachers by State*, EDUC. WEEK, Sept. 24, 2014, at 1 (discussing the debate over whether due process protections unnecessarily impede the removal of ineffective teachers or ensure fairness).

60. See generally CHAIT, *supra* note 39, at 10–12, 14–15 (discussing the time and cost of teacher dismissal); Hutt & Tang, *supra* note 36, at 423 (discussing removal cost of \$250,000 per teacher in New York); Katharine B. Stevens, *Tenured Teacher Dismissal in New York: Education Law § 3020-a “Disciplinary Procedures and Penalties”* (Am. Enterprise Inst., Working Paper No. 2014-1, 2014) (arguing that procedures are dominated by teacher rehabilitation rather than dismissal).

61. See, e.g., CAL. EDUC. CODE § 44932 (West 2015); LA. STAT. ANN. § 17:442 (2014); MINN. STAT. ANN. § 122A.41(2)(a) (West 2015).

62. See Oluwole, *supra* note 33, at 175–83; Stephen Sawchuk, *D.C. Teachers Improved After Overhaul of Evaluations, Pay*, EDUC. WEEK, Oct. 23, 2013, at 8 (analyzing several state discharge statutes such as New York, South Carolina, and Pennsylvania).

63. See, e.g., N.Y. EDUC. LAW § 3020-b (McKinney 2015) (requiring “two or more consecutive annual ineffective ratings”); S.C. CODE ANN. § 59-25-440 (2015) (requiring principal to assist teacher with improving teacher in advance of taking any formal steps to dismiss the teacher). Those who rely on horror stories of the length and difficulty of removing alcoholic or sexually abusive teachers offer misplaced critiques of tenure. See, e.g., J. Tyler Walthall, *Us Got the Bestest Teachers in the Everywhere: North Carolina Public School Teacher Employment Problems, Interests, and Potential Solutions*, 36 CAMPBELL L. REV. 303, 311–13 (2014) (premising a critique on ineffective tenured teachers based on cases that do not involve ineffective teaching).

64. See Sawchuk, *supra* note 62.

65. *Id.*

66. See generally Oluwole, *supra* note 33, at 175–78.

commission or omission, or want of qualification which will authorize” a teacher’s removal.⁶⁷ Therein lies the problem for school districts. If they do not have a reliable standard for what constitutes incompetence or ineffective teaching, they cannot identify a teacher as such and, thus, cannot pursue dismissal on those grounds.⁶⁸ Cognizant of this reality, most administrators make no attempt to critically evaluate teachers. Instead, they give all teachers good to very good evaluations,⁶⁹ knowing that less than good evaluations would create dissension and conflict to no end.⁷⁰ The practical result is a profession left with no incentives, no quantitative or qualitative checks, and no ability to improve teaching performance.

Some argue that anti-tenure advocates seriously misrepresent and overstate the barriers to removal. When poor performance is properly documented, courts generally defer to administrators’ assessments of teachers.⁷¹ Teachers escape termination not because of the law, but because principals believe “firing an ineffective teacher may yield little benefit because of the difficulties associated . . . with finding qualified replacement teachers.”⁷² Until the market changes, the solution is to focus on developing and remediating the teachers we have.⁷³

Reformers interpret this as just a call for more of the same. They argue that the only way to break the cycle of ineffective teaching is to suffer the short-term losses to affect long-term changes in the market. A move to differentiated retention and pay, they say, would motivate existing teachers, improve retention of good teachers, and change the perception of the profession, thereby encouraging higher performing individuals to enter it.⁷⁴

67. *Cty. Bd. of Educ. v. Oliver*, 116 So. 2d 566, 567 (Ala. 1959). Other state courts have reasoned that the term creates a floor of sufficiency in teaching, below which a teacher cannot fall, but those courts still do not identify that floor. *See, e.g., Benke v. Neenan*, 658 P.2d 860, 861 (Colo. 1983); *Sekor v. Bd. of Educ.*, 689 A.2d 1112, 1119 (Conn. 1997).

68. WEISBERG ET AL., *supra* note 57, at 2.

69. *Id.* at 11 (revealing that only 0.3 percent and 0.4 percent of teachers in Toledo and Chicago, respectively, received unsatisfactory ratings); Perry A. Zirkel, *Legal Boundaries for Performance Evaluation of Public School Professional Personnel*, 172 EDUC. L. REP. 1, 3 (2003) (discussing that “over 99 percent of the administrators gave teachers perfect ratings” in Pennsylvania).

70. Hutt & Tang, *supra* note 36, at 423–24 (“Some researchers also suggest that even if dismissing a teacher were not so difficult, administrators might still avoid it for reasons related to school culture, such as a desire to avoid unpleasant encounters or a fear of harming school morale.”).

71. *See* Stella C. Batagiannis, Commentary, *The School District Is Not Married to Mediocrity*, 26 EDUC. L. REP. 939, 939 (1985) (discussing cases deferring to administrators’ tenure decisions).

72. Hutt & Tang, *supra* note 36, at 424; *see also* Batagiannis, *supra* note 71.

73. *See* Linda Darling-Hammond & Barnett Berry, *Highly Qualified Teachers for All*, EDUC. LEADERSHIP, Nov. 2006, at 14.

74. *See* WEISBERG ET AL., *supra* note 57.

II.
PROMOTING TEACHING EFFECTIVENESS THROUGH DATA-DRIVEN
EVALUATIONS

The econometrics and business approach to teacher evaluation and management has recently gained a foothold in state law due, in large part, to the coalescing of various interests. During the recent recession, teachers became the prime target for politicians seeking to offset falling revenues.⁷⁵ Anti-labor groups had long argued that teachers' unions manipulate the political process to secure unreasonable benefits and protections for themselves.⁷⁶ Those anti-labor interests intersected with those seeking to substantively reform education.⁷⁷ Education reformers, at both the state and federal level, were already pushing for more teacher accountability.⁷⁸ A set of federal competitive grant programs and new conditions on receiving waivers under NCLB pushed teacher policies over the edge, prompting an entirely new set of state statutory frameworks.

The following Sections briefly describe these new statutory frameworks and data systems, and then analyze the important practical and legal questions that they raise. First, do states' performance data systems accurately measure teaching effectiveness? Second, does the implementation of these systems violate teachers' statutory or constitutional rights? The answers to these questions, while not directly raised in the constitutional challenge to teacher tenure, are of huge significance. The challenge to tenure presupposes that schools can (1) reliably identify ineffective or grossly ineffective teachers and (2) remove them with no serious legal obstacle other than tenure.⁷⁹ But if neither is true, the constitutional challenge to tenure may not produce the operational results that advocates seek.

75. See, e.g., *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014) (litigating over legislative changes to collective bargaining rights in the state); Mawdsley et al., *supra* note 58, at 19.

76. See generally Dagostino, *supra* note 59, at 181–85.

77. Some would charge even more sinister motivations. They see teacher evaluation, federal accountability, charter schools, and the narrative of failing schools as an attack on public education itself. See generally DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* (2010). These efforts to improve public education are really an effort to delegitimize it and drive resources instead to private approaches to education. This Article takes no position on whether such a motivation underlies the policies described above the line, although my intuition is that most reformers are well meaning. They, however, are aided in their efforts by privatization sentiments and interests.

78. See, e.g., U.S. DEP'T OF EDUC., *ESEA FLEXIBILITY POLICY DOCUMENT 2* (2012), <http://www2.ed.gov/policy/eseaflex/approved-requests/flexrequest.doc> (requiring states to adopt teacher evaluation systems to receive a waiver from No Child Left Behind); Steven Brill, *The Teachers' Union's Last Stand*, N.Y. TIMES (May 17, 2010), <http://www.nytimes.com/2010/05/23/magazine/23Race-t.html> [<http://perma.cc/W7Y2-UF79>] (discussing the political movement to change tenure and teacher evaluations, along with states' and districts' move toward those ends).

79. In fact, plaintiffs' lead expert, Raj Chetty, rests his conclusions about the benefits of terminating ineffective teachers (those whom tenure purportedly protects) on value-added statistical modeling of students' standardized tests and teachers' effect on them. See Chetty et al., *supra* note 26.

The elimination of tenure protections could simply lead to random teacher dismissals and tenure denials under these evaluation systems, which would do little to improve teaching quality. It could even make matters worse by further eroding the existing and potential teaching workforce. At the very least, unreliable teacher dismissals would likely produce a new wave of litigation by teachers alleging that they had been denied due process. Rather than solving the challenge of ensuring access to quality teachers, eliminating teacher tenure might simply set off another host of problems. Yet from the perspective of reformers, tenure is what prevents rigorous and meaningful teacher evaluation, and the absence of rigorous and meaningful evaluation is what makes tenure so problematic. In short, the challenge to tenure and the push to increase teacher evaluation are intertwined. Thus, evaluating the distinct flaws in the current value-added models and student growth percentile models is an important first step in evaluating the constitutional challenge to tenure.

A. The Move to New Statutory Frameworks: Evaluating Teachers Through Their Students' Standardized Test Scores

Starting in 2009, the U.S. Department of Education used competitive grant programs to prompt states to implement data systems to track student achievement from year to year by classroom.⁸⁰ States were to use that data to evaluate individual teachers' effects on student outcomes.⁸¹ Many states adopted those systems in hopes of securing a grant from the Department, and those states that did not were later forced to do so. By the fall of 2011, nearly every state and school district in the nation was in violation of NCLB's student achievement and teacher quality requirements.⁸² To avoid sanctions under NCLB, states were forced to seek waivers from the Department, which agreed to grant those waivers only on certain conditions.⁸³ In particular, states and districts had to develop assessments that would "measure student growth" and implement "teacher and principal evaluation and support systems" that "meaningfully differentiate[d] [teacher] performance" into at least three levels

80. See U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009) (requiring states to build "data systems that measure student growth and success"); see also U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 6 (2010), <http://www.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf> [<http://perma.cc/75CP-PUDY>].

81. RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY, *supra* note 80, at 8–9.

82. Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES, Aug. 8, 2011, at A12 (predicting that the number of failing schools would reach 80,000 out of 100,000 in fall 2011).

83. ESEA FLEXIBILITY POLICY DOCUMENT, *supra* note 78, at 1–2; see also U.S. DEP'T EDUC., ESEA FLEXIBILITY: REQUEST FOR WINDOW 3, at 10–11 (June 7, 2012), www2.ed.gov/policy/eseaflex/approved-requests/eseaflexreqw3.doc (requiring, as a condition for receiving a waiver from NCLB, that states adopt "college- and career-ready standards [for all students] in at least reading/language arts and mathematics" and develop assessments of that curriculum that "measure student growth").

based on “student growth” data.⁸⁴ School districts had to use that data in making “personnel decisions,”⁸⁵ which could include tenure, compensation, and retention.⁸⁶ These intersecting forces resulted in entirely new teacher evaluation systems in most states.

Between 2009 and 2012, thirty-six states and the District of Columbia passed laws mandating the consideration of students’ standardized test scores in teacher evaluations.⁸⁷ Classroom observations, certifications, and other measures may also play a role, but student test scores are non-negotiable.⁸⁸ Some states require test scores to count for 50 percent or more of teachers’ evaluations, while other states offer localities more flexibility, only mandating that test scores play a “significant” role.⁸⁹

Several states go further to mandate specific consequences for teachers who receive unfavorable or below average teaching effectiveness ratings.⁹⁰ Tennessee, for instance, requires that school administrators rank teachers into one of four tiers of effectiveness.⁹¹ Only teachers ranking in the top two tiers of effectiveness in two of their first five years of teaching receive tenure.⁹² A teacher can subsequently lose tenure by falling “below expectations” on evaluations for two consecutive years.⁹³

These new statutory frameworks generally rely on one of two statistical models to evaluate teachers’ effectiveness: “value-added models” (VAMs) and “student growth percentile models” (SGPs). Value-added models attempt to estimate how a group of students would perform if all things but the teacher were equal.⁹⁴ Based on that estimate, value-added models measure whether individual teachers help students achieve more or less than expected.⁹⁵ This serves as the basis to compare teachers to each other and determine which

84. ESEA FLEXIBILITY POLICY DOCUMENT, *supra* note 78, at 1, 3.

85. *Id.*

86. U.S. DEP’T EDUC., ESEA FLEXIBILITY FREQUENTLY ASKED QUESTIONS 53–55 (Aug. 3, 2012), www2.ed.gov/policy/eseaflex/esea-flexibility-faqs.doc.

87. Superfine, *supra* note 53, at 592.

88. Baker et al., *The Legal Consequences*, *supra* note 30.

89. Student performance data must be 35 to 50 percent of teachers’ evaluations in Arizona; 50 or more percent in Colorado, Florida, and Idaho; and a “significant factor” in Maine, Maryland, Indiana, Oregon, and Illinois. *Id.* at 3.

90. See NAT’L COUNCIL ON TEACHER QUALITY, STATE OF THE STATES: TRENDS AND EARLY LESSONS ON TEACHER EVALUATION AND EFFECTIVENESS POLICIES 20 (2011); see, e.g., COLO. REV. STAT. ANN. § 22-63-203 (West 2010); LA. STAT. ANN. § 17:442(C)(1) (2012); MICH. COMP. LAWS § 380.1249(2)(h) (West 2014); TENN. CODE ANN. §§ 49-5-503 to -504 (2012).

91. See NAT’L COUNCIL ON TEACHER QUALITY, *supra* note 90, at 20.

92. TENN. CODE ANN. § 49-5-503.

93. TENN. CODE ANN. § 49-5-504. Colorado goes much further, requiring that student performance count as 50 percent of a teacher’s evaluation and three consecutive years of improving students’ performance to receive non-probationary status. COLO. REV. STAT. ANN. § 22-63-203.

94. Baker et al., *supra* note 30; Dan Goldhaber et al., *Does the Model Matter? Exploring the Relationship Between Different Student Achievement-Based Teacher Assessments*, 1 STAT. & PUB. POL’Y 1 (2014).

95. Hutt & Tang, *supra* note 36, at 449–53.

teachers “add value” to learning outcomes. Student growth percentile models are similar in theory, but distinct in their calculations. Rather than rely on estimates, student growth percentile models measure the actual growth that students demonstrate on standardized tests from one school year to the next.⁹⁶ That growth is then compared to the growth of students in other classrooms to rank the growth of a teacher’s students in terms of percentiles.⁹⁷ Student growth percentile models, however, do not control for student demographics and other relevant school level factors.⁹⁸ In this respect, they are no more than raw data and not designed for assessing a teacher’s effectiveness.⁹⁹

B. The Practical Limits and Flaws of Using Students’ Test Scores to Evaluate Teachers

The notion that student achievement on standardized tests could be disaggregated and correlated with teachers makes perfect sense. It comes with the heavy allure of objectivity. If those scores and their attribution to teachers are not objective, however, treating them as such is dangerous.¹⁰⁰ To be clear, collecting and studying this data certainly has the potential to drastically enhance our understanding of teaching in the future, but scholars have demonstrated that the current gap between theory and practical implementation is large.

This gap is important not only to teacher evaluation in general, but also to the current challenges to tenure. First, the current tenure challenges are premised on the notion that schools can reliably identify teachers for retention,

96. Goldhaber et al., *supra* note 94.

97. Baker et al., *The Legal Consequences*, *supra* note 30.

98. See, e.g., *Student Growth Percentiles FAQ*, STATE OF WASH., OFF. SUPERINTENDENT PUB. INSTRUCTION, <http://www.k12.wa.us/assessment/SGP/FAQ.aspx> [<http://perma.cc/RH42-Z5BW>] (last visited Oct. 29, 2015) (indicating that the basis on which students’ scores are compared to one another is their prior year test scores, with no reference to demographic controls); *Student Growth Percentiles - Georgia’s Student Growth Model*, GA. DEP’T EDUC., <https://www.gadoe.org/School-Improvement/Teacher-and-Leader-Effectiveness/Pages/Student-Growth-Percentiles.aspx> [<https://perma.cc/U55S-KXLV>] (last visited Oct. 29, 2015) (indicating Georgia’s similar student score basis); STATE OF N.J., DEP’T OF EDUC., STUDENT GROWTH PERCENTILES (2015), <http://www.nj.gov/education/AchieveNJ/teacher/SGPOverview.pdf> [<http://perma.cc/XF5M-KZCK>] (indicating New Jersey’s similar student score basis).

99. See generally Bruce D. Baker & Joseph Oluwole, *Deconstructing Disinformation on Student Growth Percentiles & Teacher Evaluation in New Jersey*, N.J. EDUC. POL’Y F. (May 2, 2013), <https://njedpolicy.wordpress.com/2013/05/02/deconstructing-disinformation-on-student-growth-percentiles-teacher-evaluation-in-new-jersey> [<https://perma.cc/V85H-2DB4>] (claiming that Student Growth Percentiles are “not designed for inferring teacher influence on student outcomes,” “do not control for various factors outside of the teacher’s control,” and “are not backed by research on estimating teacher effectiveness”).

100. See generally John Ewing, *Mathematical Intimidation: Driven by the Data*, 58 NOTICES AMS 667, 667 (2011) (leading mathematician cautioning against “mathematics employed as a rhetorical weapon—an intellectual credential to convince the public that an idea or a process is ‘objective’ and hence better than other competing ideas or processes” and concluding that “[t]he latest instance of the phenomenon is valued-added modeling (VAM), used to interpret test data”).

dismissal, tenure denial, and hire based on their students' test scores. In *Vergara*, for instance, the claimed benefits of teacher removal and replacement are based on a value-added assessment of teachers.¹⁰¹ But if this premise is false, eliminating tenure protections and dismissing teachers based on their students' test scores would be unlikely to improve teaching effectiveness. Second, if these evaluation systems are not reliable, tenure may be necessary to protect teachers from arbitrary personnel decisions and, thus, is not an unnecessary administrative burden as plaintiffs argue. In the absence of these protections, the possibility of violating teachers' federal constitutional due process rights becomes more likely. In short, it is far from clear that the teacher evaluation and retention policies that would replace tenure comply with due process or would improve teaching. The following Sections address each of the practical and legal flaws in value-added models and student growth percentile models.

1. *When Tests Do Not Match the Curriculum*

The tests on which the data models rely are often misaligned with the teachers whom they evaluate and the curriculum the teachers are expected to teach. In some states, value-added models and student growth percentile models apply to all teachers every year, even though many teachers' subjects are not tested at all and other teachers' subjects are tested only every few years.¹⁰² In other words, the data required to produce a value-added model or student growth percentile model score for many teachers does not exist. Thus, it is impossible to fairly or reliably rate those teachers.¹⁰³

Alignment problems, however, can exist even for those teachers whose subjects are tested yearly. Accurately measuring a teacher's effectiveness requires more than just a standardized test in that teacher's subject. First, the test must be directly aligned to the curriculum the state requires the teacher to deliver.¹⁰⁴ Second, the test should be designed to measure teaching

101. Plaintiffs principally rely on Raj Chetty's value-added study of teaching effectiveness. See Chetty et al., *supra* note 26.

102. See, e.g., Brief of Education Law and Educational Measurement Professors as Amici Curiae in Support of Plaintiffs-Appellants at 21–25, *Cook v. Bennett*, 792 F.3d 1294 (11th Cir. 2015) (No. 14-12506-BB); Martinez Complaint, *supra* note 42, at 38; Michael Winerip, *In Tennessee, Following the Rules for Evaluations Off a Cliff*, N.Y. TIMES, Nov. 7, 2011, at A18; see also STATE OF N.J., DEP'T OF EDUC., OVERVIEW OF STUDENT GROWTH PERCENTILE (SGP) 10 (2014), <http://www.state.nj.us/education/AchieveNJ/teacher/SGPOverviewPresentation.pdf> [<http://perma.cc/55XE-RXTM>] (requiring that a teacher have taught only 60 percent of the content prior to the exam and students have attended 70 percent of the classes prior to the exam).

103. See Brief of Education Law and Educational Measurement Professors, *supra* note 102, at 21–25 (“[T]he model isolates the teaching performance of one teacher and attributes the responsibility for it to another teacher—a use that could not be more at odds with the model's design.”).

104. See Eva L. Baker et al., *Problems with the Use of Student Test Scores to Evaluate Teachers* 2, 14 (The Econ. Pol'y Inst., Briefing Paper No. 278, 2010) (indicating the misalignment of tests and curriculum is a flaw); Michelle Croft & Richard Buddin, *Applying Value-Added Methods to Teachers in Untested Grades and Subjects*, 44 J.L. & EDUC. 1, 12, 15 (2015) (discussing the problem

effectiveness rather than student competencies.¹⁰⁵ To ensure reliability, psychometricians construct different tests to measure different factors and outcomes.¹⁰⁶

The tests states are currently using to evaluate teachers do not meet either of these criteria. Several states have relied on exams that are not tied to the actual state curriculum,¹⁰⁷ and none of these tests were designed to assess teachers.¹⁰⁸ They were designed to assess students. Tests designed to assess students surely overlap with those designed to assess teachers, but they are not the same. The effect of using a test designed for alternate purposes can be enormous. An examination of two different sets of test scores in Texas, for instance, showed that teachers can regularly rank as highly effective on one test but rank ineffective on another.¹⁰⁹ In short, student scores on standardized tests are not inherently reliable measures of teaching effectiveness. They are the opposite if they are not properly designed and aligned.

of assessing teachers in untested subjects and writing that “assessments should be aligned with the district’s curriculum to accurately measure whether students are learning the material taught in the classroom”); *see also* Anderson v. Banks, 540 F. Supp. 761, 761–63 (S.D. Ga. 1982) (bringing a due process challenge to high stakes testing, focusing on the factual question of whether students had been taught the material on which they were tested).

105. *See* Baker et al., *supra* note 30, at 14–17 (discussing the need for evaluations to assess teaching effectiveness and the difficulty in attributing student achievement gains or losses to the teacher rather than student factors); Superfine, *supra* note 53, at 608–09 (discussing the unreliability of new evaluation systems in assessing teaching effectiveness due to the fact that they do “not account for the characteristics of students that can influence the progress students make”); *see also* ESEA FLEXIBILITY FREQUENTLY ASKED QUESTIONS, *supra* note 86, at 32–37 (discussing the required alignment between standards, curriculum, and student assessment to receive an NCLB waiver); RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY, *supra* note 80, at 13 (requiring high quality assessments and defining them as “an assessment designed to measure a student’s knowledge, understanding of, and ability,” “enable measurement of student achievement . . . and student growth (as defined in this notice),” and are “of high technical quality (e.g., be valid, reliable, fair, and aligned to standards)”).

106. *See* Superfine, *supra* note 53, at 607–08.

107. *See, e.g.,* Cook, 792 F.3d at 1297–98 (describing three different categories of teachers who were subject to Florida’s value-added model and indicating that one category of teachers taught subjects that were not tested at all and another category taught subjects that were not tested every year); Croft & Buddin, *supra* note 104, at 11–17, 20 (discussing the challenge of evaluating teachers based on test scores in untested subjects and the lawsuits this might trigger); *see also* Audrey R. Lynn, *Teacher Evaluations Based on Student Testing: Missing an Opportunity for True Education Reform*, 18 TEX. J. CIV. LIBERTIES & CIV. RGTS. 203, 230 (2013) (discussing the problem of the differential sequencing in curriculum across schools when the exam assumes uniformity).

108. *See* Superfine, *supra* note 53, at 607–08.

109. *See, e.g.,* MOSHE ADLER, NAT’L EDUC. POLICY CTR., REVIEW OF *MEASURING THE IMPACTS OF TEACHERS* 7 (2014), http://nepc.colorado.edu/files/ttr-chetty-teachimpacts_0.pdf [<http://perma.cc/V5JH-XJR4>] (discussing research demonstrating that different tests can produce different results); SEAN P. CORCORAN, ANNEBERG INST. FOR SCH. REFORM, CAN TEACHERS BE EVALUATED BY THEIR STUDENTS’ TEST SCORES? SHOULD THEY BE? THE USE OF VALUE-ADDED MEASURES OF TEACHER EFFECTIVENESS IN POLICY AND PRACTICE 13 (2010).

2. *Failing to Account for Demographic and Other Variables*

Curriculum alignment and test design are susceptible to correction, but accounting for the variables necessary to draw fine distinctions between teachers is more difficult. Student test scores alone reveal almost nothing meaningful about a teacher's role in students' growth. Test scores must first be disaggregated by demographic and other variables.¹¹⁰ On average, low-income students, students with disabilities, English Language Learners, and racial minorities score lower on exams and make less academic progress from year to year than other students.¹¹¹ Thus, regardless of teaching quality, teachers with disproportionate numbers of these students will, on average, see less raw growth than other teachers. To measure actual teaching effectiveness, statistical models must account for and disaggregate these and other factors.¹¹² Those states that do not fully account for student demographics in their models are measuring students' preexisting knowledge, aptitude, and familial advantages, not teaching effectiveness.¹¹³

Student growth percentile models do not explicitly account for these demographic variables. Instead, they either compare all students to one another or compare students with similar scores on a prior exam to one another.¹¹⁴ Thus, at best, these models are a basis for comparing students to one another. Scholars reason that, without demographic controls, student growth percentile models are facially invalid when attributed to teachers.¹¹⁵

110. See generally Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 HOFSTRA LAB. & EMP. L.J. 489, 506 (2013).

111. See NAT'L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2009*, at 31 fig.12.1 (2009), <http://nces.ed.gov/pubs2009/2009081.pdf> [<http://perma.cc/4HTJ-HL3S>].

112. See AM. INST. FOR RESEARCH, 2011–2012 GROWTH MODEL FOR EDUCATOR EVALUATION TECHNICAL REPORT: FINAL (2012); Baker et al., *supra* note 30, at 8, 9, 16 (exploring biases in value-added models that result from demographic differences in student body populations and noting the serious problems that result from student growth percentile models' failure to account for any demographic variances); Jesse Rothstein, *Student Sorting and Bias in Value-Added Estimation: Selection on Observables and Unobservables*, 4 EDUC. FIN. & POL'Y 537, 538 (2009) (discussing how the student variable makes it difficult to fairly compare teachers).

113. Even in New York, where the model attempted to control for student demographics, teachers with more low-income students still, on average, had lower growth percentiles. AM. INST. FOR RESEARCH, *supra* note 112, at 1.

114. See, e.g., GA. DEP'T OF EDUC., *supra* note 98; ST. OF WASH., *supra* note 98.

115. Baker & Oluwole, *supra* note 99; Mark Ehlert et al., *Selecting Growth Measures for School and Teacher Evaluations* 23 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 80, 2012) ("Although [Student Growth Percentiles] are currently employed for this purpose by several states, we argue that they [] cannot be used for causal inference (nor were they designed to be used as such)."); Bruce D. Baker, *Rebutting (Again) the Persistent Flow of Disinformation on VAM, SGP and Teacher Evaluation*, SCH. FIN. 101 BLOG (June 8, 2013), <https://schoolfinance101.wordpress.com/2013/06/08/rebutting-again-the-persistent-flow-of-disinformation-on-vam-sgp-and-teacher-evaluation> [<https://perma.cc/MQ69-EZ3C>].

States' value-added models account for some student demographic factors, but still miss other variables.¹¹⁶ Studies indicate that unusual progress, or lack thereof, in an individual student's scores from one year to the next is more likely attributable to a student's personal circumstances outside of school or some other random variable, such as the particular test taken, subject matter, or statistical method employed, than the teacher.¹¹⁷ Most notable, homelessness, unemployment, divorce, tutors, after-school programs, and summer programs can drastically change an individual student's achievement.¹¹⁸ Neither value-added models nor student growth percentile models account for variables of this sort.¹¹⁹ In short, value-added models and student growth percentile models, as currently implemented, are more a measure of student demographics and out-of-school factors than teaching effectiveness.

3. *The Instability of Effectiveness Ratings Across Years and Metrics*

Variations in teachers' value-added model and student growth percentile model scores across years reinforce the point advanced in the prior Section—that the models capture insufficient data to assess teaching effectiveness—and that they are highly unreliable. Teachers' effectiveness ratings are determined in the first year data becomes available, but the databases are longitudinal and expand in following years as additional data becomes available.¹²⁰ Subsequent data in year three, for instance, can be used to change the calculation of a teacher's effectiveness for year one.¹²¹ These changes are, in part, explained by

116. See generally DANIEL F. MCCAFFREY ET AL., RAND EDUC., EVALUATING VALUE-ADDED MODELS FOR TEACHER ACCOUNTABILITY, at xvi–xvii (2004), <http://www.rand.org/pubs/monographs/MG158.html> [<http://perma.cc/S62V-LBX4>].

117. See BILL & MELINDA GATES FOUND., LEARNING ABOUT TEACHING: INITIAL FINDINGS FROM THE MEASURES OF EFFECTIVE TEACHING PROJECT 8 (2010), http://www.metproject.org/downloads/Preliminary_Findings-Research_Paper.pdf [<http://perma.cc/V7B6-DRHE>]; Sarah Theule Lubienski & Corinna Crawford Crane, *Beyond Free Lunch: Which Family Background Measures Matter?*, EDUC. POL'Y ANALYSIS ARCHIVES, May 25, 2010, at 1, 21 (finding that “the degree parents expected the child to obtain, lunch-program eligibility, [] music lessons[,] the number of books the child had, the number of children in the household, [] whether the child had speech problems[,] . . . [the m]other's age at first birth and [the] child's hearing problems” were statistically significant in predicting student math and reading achievement in elementary school); Rothstein, *supra* note 112 at 537, 565–66 (finding that variances in student achievement between teachers are influenced by classroom assignments that principals make based on factors that are unobservable in data).

118. See *supra* note 117.

119. Controlling for these factors may be impossible for obvious reasons. Of course, other education studies rely on this same data, but they do not attempt to isolate the results of individual students and teachers in the ways value-added models and student growth percentile models do.

120. See generally RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY, *supra* note 80, at 3–5, 8–9 (promoting longitudinal data systems to track student growth and assess teaching effectiveness).

121. See, e.g., LINDA WESSON ET AL., TENN. COMP. OF THE TREAS., USE OF VALUE-ADDED IN TEACHER EVALUATIONS: KEY CONCEPTS AND STATE PROFILES 34 (2015) (“[E]ach year of additional test scores is accumulated to provide more precise estimates of each student's NCE (percentile-like)

missing and variable data from year to year and, in part, by the fact that the available data is simply misinterpreted by the statistical model.¹²² The result is that a value-added model can identify a teacher as high performing in 2014, only to change that identification to average performing when additional data is incorporated in 2016.¹²³ Studies have already shown that it is common for a teacher's rating for a previous year to change significantly after the fact, which begs the question of how a value-added model or student growth percentile model could be a reliable basis upon which to tenure or terminate a teacher.¹²⁴ A teacher could have been terminated based on an ineffectiveness rating in 2014, only to have that rating change to average the next year. In short, while teachers' actual effectiveness in the classroom is set by the end of the school year, the various conclusions one might draw based on statistical analysis of their students' test scores are not.

4. *Setting Arbitrary Cut-Off Scores for Teaching Effectiveness*

The problem of year-to-year variations is further exacerbated by arbitrary cut-off points in the statistical models. The models will identify student growth or value-added teaching, but policy makers and administrators must still label a particular amount of growth or value added sufficient or insufficient, and teachers as effective or ineffective.¹²⁵ Assume, for instance, that a school's entire teaching staff was normatively effective. The models would still identify a group of bottom percentile teachers. But being in the bottom 25 percent is not any more inherently indicative of being ineffective than is being in the top 75

ranking . . . [resulting in a] re-estimation of teachers' value-added scores.”), <http://www.comptroller.tn.gov/Repository/RE/ValueAdded2015.pdf>.

122. McCaffrey et al., *supra* note 116, at xvi–xvii (noting that value-added model results are distorted and “confound[ed] by influences other than teachers on student learning that are incorrectly modeled or are not modeled at all—for example, a model that does not properly distinguish the effects of teachers from other effects of the school in which the teacher works”).

123. See Wesson et al., *supra* note 121; see also Baker et al., *supra* note 104, at 2 (“[Value-added model] estimates have proven to be unstable across statistical models, years, and classes that teachers teach. One study found that across five large urban districts, among teachers who were ranked in the top 20% of effectiveness in the first year, fewer than a third were in that top group the next year, and another third moved all the way down to the bottom 40%. Another found that teachers' effectiveness ratings in one year could only predict from 4% to 16% of the variation in such ratings in the following year.”).

124. Daniel F. McCaffrey et al., *The Intertemporal Variability of Teacher Effect Estimates*, 4 EDUC. FIN. & POL'Y 572, 585–98 (2009). It is also worth noting that the data that the models intend to include is not always complete, which also reduces its reliability for individual teachers. See Adler, *supra* note 109, at 6–7 (discussing research finding instability of value-added model scores across years); Baker et al., *supra* note 30.

125. See Baker et al., *supra* note 30; Ewing, *supra* note 100, at 671 (“Are those teachers identified as superior (or inferior) by value-added models actually superior (or inferior)? This is perhaps the shakiest part of [the value-added model]. There has been surprisingly little effort to compare valued-added rankings to other measures of teacher quality, and to the extent that informal comparisons are made (as in the *LA Times* article), they sometimes don't agree with common sense.”).

percent necessarily indicative of effectiveness.¹²⁶ Rather, the cut-off points currently used to label teachers as effective or ineffective are arbitrary and lacking any social science or research basis.

The practical result is that in locales with high cut-off points, the state may be labeling a significant number of teachers as ineffective, even though they are performing satisfactorily by other normative measures. For instance, according to a new lawsuit in Texas, several of the teachers whom Houston's new student growth percentile model had identified as ineffective were previously identified by the district as high performing under pre-student growth percentile model methods.¹²⁷ By requiring multiple years of poor value-added model or student growth percentile model scores prior to any negative action against a teacher, several states also effectively concede that being in the bottom quartile of a student growth percentile model or below average on a value-added model does not necessarily equate with ineffective teaching. Likewise, in an attempt to minimize unreliability, most states also require actual observations of classroom teachers prior to termination or demotion.¹²⁸ But placing less weight on test scores does not cure the fundamental arbitrariness of the cut-off itself.¹²⁹ Nor does it change the fact that value-added model and student growth percentile model scores still tend to play a decisive role in overall teacher evaluations.¹³⁰ In short, unreliable student growth percentile model and value-added model scores can infect the entire teacher evaluation system in a way that is not easily undone.

126. See *id.* For instance, in Miami-Dade County in 2011–12, the school district literally negotiated the value-added model designations with teachers, drastically increasing the percentage it would label as highly effective to 30.60 percent, while also reducing the percentage it would label as ineffective from 7 percent down to less than 1 percent. See UNITED TEACHERS OF DADE, VAM BARGAINING (Apr. 5, 2013), http://www.utd.org/file_download/1243/VAM+Progression.pptx.

127. Plaintiffs' Original Complaint, *Hous. Fed'n of Teachers v. Hous. Indep. Sch. Dist.*, No. 4:2014cv01189 (S.D. Tex. Apr. 30, 2014) [hereinafter *Hous. Fed'n of Teachers Complaint*]. In fact, the district had recognized one of its teachers as award-winning just one year prior to ranking him as low-performing based on his student growth percentile model. *Id.*

128. See Superfine, *supra* note 53, at 609.

129. Baker et al., *supra* note 30, at 5–6.

130. *Id.*; see also ESEA FLEXIBILITY POLICY DOCUMENT, *supra* note 78, at 3 (requiring states to treat student growth as a "significant factor" in teacher evaluations to receive an NCLB waiver). Moreover, initial research suggests that when an administrator is aware that a teacher has already received a low student growth percentile model or value-added model score, the administrator's in-class observations of the teacher may be negatively biased. See, e.g., GROVER J. (RUSS) WHITEHURST ET AL., THE BROOKINGS INST., EVALUATING TEACHERS WITH CLASSROOM OBSERVATIONS: LESSONS LEARNED IN FOUR DISTRICTS 11–19 (2014) (finding "inclusion in individual teacher evaluation scores of a school value-added component negatively impacts good teachers in bad schools and positively impacts bad teachers in good schools" and that observations often remain steady over time regardless of subsequent student scores); see also LAUREN SARTAIN ET AL., UNIV. OF CHI. URBAN EDUC. INST., RETHINKING TEACHER EVALUATION: FINDINGS FROM THE FIRST YEAR OF THE EXCELLENCE IN TEACHING PROJECT IN CHICAGO PUBLIC SCHOOLS 9 (2010) (noting inconsistency in the principals' evaluations of teachers versus those of external reviewers, as principals consistently rated teachers higher on some measures and lower on others).

5. *Conflating Statistical Correlation with Actual Causation*

Overall, the way in which states use value-added model and student growth percentile model scores indicates a failure to distinguish between statistical correlation and causation. First, the strength of the statistical correlation is of concern. Given the numerous flaws noted above, the strength of the correlations and statistical significance of those correlations are sure to be low in many instances. Second, even if being in a particular teacher's class might correlate with learning growth, the correlation does not necessarily mean that the teacher, or his or her teaching effectiveness, is the cause of student growth or its absence.¹³¹ Correlation is just that—a correlation. Causation is the inference that decision makers choose to make.¹³²

That causal inference is fraught with “many pitfalls [given] the kinds of data available from typical school districts.”¹³³ Even if data problems could be cured, “no statistical model, however complex, and no method of analysis, however sophisticated, can fully compensate for the lack of randomization.”¹³⁴ Thus, “treating the output of a value-added analysis as an accurate indicator of a teacher's relative contribution to student learning is equivalent to making a causal interpretation of a statistical estimate.”¹³⁵

The current evaluation models, nonetheless, suggest a firm belief that correlation means causation, rather than simply offering a piece of circumstantial evidence to weigh.¹³⁶ They suggest little, if any, recognition of the possibility that a correlation between a teacher or set of teachers and the standardized test scores of their students is caused by some other observed or unobserved phenomenon.

In sum, policy makers and states shifted teacher evaluation to new statistical models based on the assumption that the models would add a level of objectivity and reliability previously missing, and make it possible to identify and remove ineffective teachers. In the abstract, these assumptions are entirely

131. See C. Kirabo Jackson & Elias Bruegmann, *Teaching Students and Teaching Each Other: The Importance of Peer Learning for Teachers*, AM. ECON. J.: APPLIED ECON., Oct. 2009, at 85; Cory Koedel, *An Empirical Analysis of Teacher Spillover Effects in Secondary School*, 28 ECON. EDUC. REV. 682 (2009). A major report by RAND Education explained early on some of the issues with value-added models. See MCCAFFREY ET AL., *supra* note 116, at xvi–xvii (“Because true teacher effects might be correlated with the characteristics of the students they teach, current VAM approaches cannot separate any existing contextual effects from these true teacher effects.”).

132. See generally HENRY I. BRAUN, EDUC. TESTING SERV., USING STUDENT PROGRESS TO EVALUATE TEACHERS: A PRIMER ON VALUE-ADDED MODELS 7–8 (2005), <http://www.ets.org/Media/Research/pdf/PICVAM.pdf> [<http://perma.cc/ZU5E-B2UR>] (“A problem arises because the word ‘effectiveness’ denotes a causal interpretation . . . [and the] assumptions required to justify endowing the estimated teacher effects with a causal interpretation . . . are usually not made explicit.”).

133. Ewing, *supra* note 100, at 671.

134. BRAUN, *supra* note 132, at 8.

135. *Id.* at 3.

136. See *id.* at 8 (claiming that “[d]evelopers of VAM software and those who employ the results rarely acknowledge the implications of the fundamental problem” and instead make implicit assumptions without any real credible or plausible basis).

reasonable. But statistical approaches, even if generally appropriate, require careful implementation and testing to ensure their valid use in a particular context. States have neither tested the models prior to implementation, nor carefully implemented them. Scholars and empirical evidence have now demonstrated that these new teacher evaluation methods are seriously flawed. As discussed later, these flaws also strike at one of the fact predicates of the constitutional challenge to tenure: that states can systematically and reliably identify ineffective teachers for removal.

C. The Conflict Between Constitutional Due Process and Data-Driven Evaluation

Over the past two years, teachers have filed several legal challenges to changes in teacher evaluation, terms of employment, and tenure.¹³⁷ These challenges potentially implicate three distinct legal rights: (1) prohibitions against impairment of contract, (2) collective bargaining, and (3) due process protections. Teacher tenure and evaluation changes have been heavily litigated in the past. Most courts routinely reject challenges based on the Contracts Clause¹³⁸ and collective bargaining.¹³⁹ Thus, those claims warrant little discussion here. But due process requirements of fair notice, an opportunity to respond to purported ineffective teaching, and evaluations free from arbitrariness present more fundamental limitations to the use of value-added models and student growth percentile models.

The following Sections discuss each of these due process limitations, separating them into the categories of procedural and substantive requirements. Procedurally, due process ensures that a tenured teacher cannot be terminated without the state making a case against the teacher and allowing the teacher a chance to respond. Substantively, due process limits the reasons why a school might remove a teacher and the reliability of the evidence on which a district might do so.

137. See, e.g., Hous. Fed'n of Teachers Complaint, *supra* note 127; *Masters v. Sch. Dist. No. 1*, No. 2014CV30371 (Colo. Super. Ct. June 6, 2014); *N.C. Ass'n of Educators v. State*, No. 13 CVS 16240, 2014 WL 4952101 (N.C. Super. Ct. June 6, 2014).

138. Courts presume that legislatures do not intend to create contractual rights in statutes. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka, & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985). Even when legislatures intend to create contracts, courts afford legislatures significant leeway in altering those rights when necessary to achieve important state goals, such as improving education. See, e.g., *Balt. Teachers Union v. Mayor of Balt.*, 6 F.3d 1012, 1015 (4th Cir. 1993); *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014); see also *Parkinson*, *supra* note 41, at 860; Chris E. Vance, *Teacher Competency Testing: "Decertification" and the Federal Constitution and Title VII*, 37 EMORY L.J. 1077, 1102–12 (1988).

139. Collective bargaining presents political problems for the state, not legal ones. Teachers' constitutional and statutory rights to bargaining do not guarantee teachers preferential employment terms, only the right to bargain for those terms. *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979). Teachers' unions have been successful because of their political rather than legal strength. See generally *Dagostino*, *supra* note 59.

1. *The Right to Notice and a Chance to Respond*

Teachers' due process rights stem from a property right in their jobs.¹⁴⁰ Tenure, however, is not a right to "a lifetime job, [but it] affords certain legal protections to a teacher in order to prevent summary and groundless dismissals."¹⁴¹ Due process requires that teachers receive notice of any grounds for dismissal that a district might bring, the evidence supporting those grounds, and a chance to respond.¹⁴² States and localities generally retain the power to change certain terms of employment, such as certification requirements. However, to the extent those terms require teachers to meet new conditions to retain their jobs, due process also requires advance notice of those changes so that teachers have time to comply with new requirements before becoming subject to any negative action.

In a typical state, notice of termination and a chance to respond are afforded through formal procedures. The superintendent or principal provides a teacher with written notice of the intent to terminate or demote, including the specific statutory grounds on which he believes the action is justified.¹⁴³ The teacher then has the right to contest the action in a number of forums: a meeting with the superintendent or principal, a formal hearing before a hearing officer and/or the school board, and an appeal to a court.¹⁴⁴

No matter how good a school's case for terminating an ineffective tenured teacher, it must go through processes of this sort. Moreover, some states, or local interpretations of state law, afford teachers an opportunity to remedy their teaching deficiencies.¹⁴⁵ Only after failed remediation can a teacher be terminated.¹⁴⁶ None of the procedures create a bar to changes in teacher evaluation, but they mandate specific procedures for enforcing those changes if they are going to be a basis for removing teachers.

2. *The Need for Fair, Accurate, and Reliable Termination Processes*

Substantive due process ensures some minimal level of fairness and logic in the decision to terminate a teacher. It protects teachers from arbitrary, capricious, and insufficiently substantiated deprivations of property, even if all

140. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

141. Powell, *supra* note 37, at 1075 ("[T]he creation of a property interest and the corresponding right to procedural due process does not guarantee [lifetime employment]."); Monica Teixeira de Sousa, *The State of Our Unions: How President Obama's Education Reforms Threaten the Working Class*, 50 U. LOUISVILLE L. REV. 201 (2011).

142. Parkinson, *supra* note 41, at 863–70.

143. See N.C. GEN. STAT. ANN. § 115C-325 (2012).

144. See *id.*

145. See, e.g., S.C. CODE ANN. § 59-25-440 (2014) (requiring principal to "to assist the teacher to correct whatever appears to be the cause of potential dismissal [and] allow reasonable time for improvement"); see also Powell, *supra* note 37.

146. See S.C. CODE ANN. § 59-25-440 (2014).

the correct procedures are followed.¹⁴⁷ In the context of teacher evaluations, this means that evaluation methods, such as value-added models and student growth percentile models, should produce reliable results.¹⁴⁸ While courts defer to districts' professional determination that a teacher is incompetent or ineffective and to the decision to select particular measures of competence and effectiveness, the measures should have some reasonable and reliable connection to actual teaching effectiveness.¹⁴⁹

Due process litigation of value-added models and student growth percentile models is in its earliest stages, but several scholars reason that student testing cases will structure the adjudication.¹⁵⁰ Those cases require the test to be a "valid" assessment of the skills or knowledge the state is seeking to measure. In a leading case, *Debra P. v. Turlington*,¹⁵¹ the Fifth Circuit emphasized that "content validity [is] most important for a competency examination. . . . In the field of competency testing, an important component of content validity is curricular validity, defined . . . as 'things that are currently taught.'"¹⁵² The court held that fundamental fairness under due process required that the state demonstrate "that the test administered measures what was actually taught in the schools."¹⁵³

A number of lower courts and scholars have further inferred that due process requires specific forms of validity beyond simply testing what is taught.¹⁵⁴ To be valid, a test should accurately measure the skills and content that it seeks to test.¹⁵⁵ In other words, a low score on a standardized reading

147. See *Debra P. v. Turlington*, 644 F.2d 397, 404 (5th Cir. Unit B May 1981) (stating that government action violates substantive due process if it is "arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair"); Parkinson, *supra* note 41, at 871.

148. Baker et al., *supra* note 30, at 10–11; see also *Armstead v. Starkville Mun. Separate Sch. Dist.*, 461 F.2d 276 (5th Cir. 1972); *York v. Ala. State Bd. of Educ.*, 581 F. Supp. 779 (M.D. Ala. 1983); *Ga. Ass'n of Educators v. Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976).

149. Parkinson, *supra* note 41, at 853 (finding that courts vary in the level of rigor they apply in validation analysis).

150. See Baker et al., *supra* note 30, at 17–18 (relying on *Debra P.* and one case that followed it to structure the legal analysis); Preston C. Green III et al., *The Legal and Policy Implications of Value-Added Teacher Assessment Policies*, 2012 B.Y.U. EDUC. & L.J. 1; see also Vance, *supra* note 138, at 1092.

151. 644 F.2d 397.

152. *Id.* at 405.

153. *Id.* at 404–06.

154. See, e.g., *United States v. LULAC*, 793 F.2d 636, 639 (5th Cir. 1986) (discussing test validation analysis); *United States v. Texas*, 628 F. Supp. 304, 320–21 (E.D. Tex. 1985), *rev'd sub nom.* *United States v. LULAC*, 793 F.2d 636 (5th Cir. 1986) (discussing test validation analysis); see also *Larry P. v. Riles*, 793 F.2d 969, 972 (9th Cir. 1984); *G.I. Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (requiring testing regime to comport with professional standards). Scholars also point to employment discrimination cases that require test validity. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). While those cases do not control due process analysis, they bear directly on what a reliable and fair test is.

155. See *LULAC*, 793 F.2d at 639 (discussing test validity); *Brookhart v. Ill. State Bd. of Educ.*, 697 F.2d 179, 184–87 (7th Cir. 1983). See generally Superfine, *supra* note 53; U.S. DEP'T EDUC., THE

exam should actually reflect a current lack of reading skill and knowledge, rather than inadvertently testing other skills and knowledge that deflate or inflate a student's score.

Some courts, however, have resisted detailed analysis of student exams, asking only the general question of whether administering the exam is rationally related to some legitimate educational goal of the state.¹⁵⁶ Under this generalized approach, some courts have been willing to find that although an exam might lack full technical validity, the exam was rationally related to the state's goal of improving teacher quality or effectiveness.¹⁵⁷ This approach and conclusion may be more reflective of judicial reluctance to upset public policy and enter a political thicket than sound legal reasoning. If so, the politics and policy surrounding student growth percentile models and value-added models are just as prevalent.¹⁵⁸

Save complete judicial abdication, however, even the most basic analysis should place some limits on how value-added models and student growth percentile models are used. Some of the current flaws in the value-added models and student growth percentile models are so fundamental that even the most rudimentary due process analysis would raise concerns. For instance, applying student growth percentile models and value-added models to teachers whose subjects do not appear on state standardized exams would clearly violate the basic concept of curricular validity. Even if it did not violate curricular validity, applying models to teachers under those circumstances would likely

USE OF TESTS AS PART OF HIGH-STAKES DECISION-MAKING FOR STUDENTS: A RESOURCE GUIDE FOR EDUCATORS AND POLICY-MAKERS 20, 66 (2000).

156. Parkinson, *supra* note 41, at 871–72 (discussing cases).

157. Nat'l Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978); United States v. South Carolina, 445 F. Supp. 1094, 1107–09 (D.S.C. 1977). *But see* Ga. Ass'n of Educators v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976) (holding that the failure to validate the test based on its purpose violated equal protection).

158. As this Article was moving to press, for instance, the Eleventh Circuit decided a challenge to Florida's value-added approach to teacher evaluations in *Cook v. Bennett*, 792 F.3d 1294 (11th Cir. 2015). The court's opinion appears heavily influenced by the larger policy questions surrounding value-added models. The court was willing to find the evaluation system constitutional notwithstanding the fact that not all teachers' subjects are tested each year. *See id.* As a result, some teachers are evaluated not on how students scored in the subjects they taught, but how students scored in subjects taught by other teachers. The court held this was a rational policy because its purpose was to "increas[e] student academic performance by improving the quality of instructional, administrative, and supervisory services in the public schools of the state." *Id.* at 1301 (citing FLA. STAT. § 1012.34(1)(a) (2015)). The court reasoned that the value-added model "may not be the best method—or may even be a poor one—for achieving [the state's] goal, [but] it is still rational to think that the challenged evaluation procedures would advance the government's stated purpose." *Id.* This approach entirely ignores questions of test validity and due process fairness to teachers and instead simply focuses on whether the policy might have some marginal relationship to the state's goals. *See also* New Mexico *ex rel.* Stewart v. N.M. Pub. Educ. Dep't, No. D-101-CV-2015-00409 (N.M. Dec. 2, 2015) (enjoining New Mexico's evaluation system).

violate any concept of due process fairness a court could articulate.¹⁵⁹ The states' goals of improving learning and teaching are certainly legitimate, but holding a teacher accountable for what a student learns in someone else's classroom is irrational because the teacher has almost zero control over what happens in other classrooms. Control aside, however, a social studies teacher, for instance, might have no competency to support or critique what is taught in geometry or biology class. Thus, the teacher lacks the ability to directly or indirectly influence learning. Similar conclusions should also follow if a teacher's subject matter appears on the relevant standardized test, but the test covers material that is different from the curriculum the state requires a teacher to deliver.

Those courts applying more detailed validity analysis to student growth percentile models and value-added models would find several additional technical flaws in the models. First, the tests have not been validated as accurate measurements of teaching effectiveness. To the contrary, that teachers' scores change so much from year to year, require revision after the fact, and lack sufficient demographic and variable controls strongly suggest that either the evaluation models or the exams upon which they rely are invalid.

Second, even if the models might accurately measure teaching effectiveness, states have not validated the cut-off scores embedded in the models. In other words, demonstrating that one teacher is more effective than another or is in some particular percentile does not demonstrate that the teacher is effective or ineffective. To be valid, a state would need to demonstrate that the model's cut-off points accurately distinguish between effective and ineffective teachers.

Third, these validity problems bleed into procedural due process problems. Value-added and student growth percentile models do not identify actual aspects of a teacher's classroom performance, preparation, or pedagogy that are ineffective. They merely offer statistical data outputs of how one teacher's entire class scored on a standardized exam compared to other teachers' classes. Statutes, case law, and labor contracts generally require notice of the teaching deficiency that is the basis for negative action and an opportunity to remediate. However, informing a teacher that a statistical model has labeled the teacher ineffective because students' scores are low is not notice of a particular instructional deficiency that a teacher needs to address. Thus, the models may leave a teacher uncertain as to how to respond or remediate the problem. Of course, the state might insist that the models identify the deficiency—insufficiently effective teaching to produce the expected student outcomes—and offer a chance to respond by allowing another year for the teacher to improve student outcomes. While a deferential court might

159. The Eleventh Circuit in *Cook* was only able to uphold an evaluation system that rated teachers on subjects they did not teach by effectively avoiding the question of validity altogether. See *supra* note 158.

accept this defense, past notice requirements have required more specificity. It has never been enough to say, for instance, that a teacher is “incompetent” without giving some indication of what makes the teacher incompetent and/or how the teacher failed to remediate himself.

3. *Connecting Due Process to the Constitutional Challenge to Tenure*

Of the three legal challenges that teachers might lodge against value-added models and student growth percentile models, due process is the most likely to succeed. Due process does not present any per se bar to the new systems, but if value-added models and student growth percentile models are to be a basis upon which to terminate teachers or alter their legal status, due process requires a level of calibration between student tests, the statistical models, and what is taught in the classroom. While the exact level of calibration may vary by court, the current systems suffer from flaws so fundamentally unfair and illogical that they would likely fail under any reasoned analysis.

The limitations that due process imposes on teacher evaluations intersect with the primary question this Article addresses—whether tenure and other teacher rights violate students’ constitutional right to education. Reformers have sought to achieve through litigation what they have been unable to achieve through the political process: the elimination or restriction of tenure. They have argued that tenure and retention policies violate students’ right to an adequate and equitable education. If tenure were removed or restricted, states’ and schools’ ability to evaluate teachers based on student test scores and to hire, retain, and fire them on that basis potentially increase. In these respects, eliminating tenure and evaluating teachers are part of a singular effort to reform teaching.

This tenure agenda, however, places far too much faith in the accuracy and legality of value-added models and student growth percentile models. As the foregoing Sections demonstrate, drawing inferences about a teacher’s effectiveness based on students’ test scores is not an exact science and is prone to error. For this reason, they may also violate teachers’ due process rights. Yet, the constitutional challenge to tenure amplifies the importance of errors because it assumes that the systems can identify those teachers to be dismissed and those to be hired to replace them. As the following Sections will further demonstrate, the challenge to tenure also replicates many of the oversimplifications regarding the causes of ineffective teaching and poor student performance found in value-added and student growth percentile models. In other words, the legal theory challenging tenure cannot operate in a vacuum. It operates within a larger education policy context. Any changes to tenure and evaluation that equity or adequacy rights might demand must still make sense, as well as comply with due process principles. This context

suggests the options for teacher evaluation and termination are not nearly as broad as reform litigators might assume.

III.

TEACHER TENURE IN THE CONTEXT OF THE CONSTITUTIONAL RIGHT TO EDUCATION

The right to education embedded in the fifty state constitutions and the states' duty to deliver it has consistently grown more robust over the past four decades. Prior to the 1970s, no court recognized state constitutions as guaranteeing any substantive education obligations on the part of the state. Afterward, many courts held that state education clauses were enforceable. Those rights and duties morphed from an emphasis on roughly equal funding across districts, to adequate funding based on student need, to an overall quality education that prepares students for the future.¹⁶⁰ As this morphing suggests, the push of litigants has been to expand students' rights and states' duties, so as to further improve educational opportunities. The constitutional challenge to teacher tenure seeks to build on those rights and duties but use them in an entirely new way.¹⁶¹

Prior litigation to enforce the constitutional right to and duty of education focused on the broadest aspects of education and the structural means through which to equalize and improve it. As a practical matter, that meant two things: (1) ensuring equal or adequate access to the financial resources necessary to purchase the core components of education and (2) relying on state leadership to set and enforce standards for the delivery and implementation of those resources. While successful litigation on these points thrust enormous duties on the state, the details of educational policy, implementation, and funding were almost always left to the state's discretion.

In contrast, the constitutional challenge to tenure seeks to dictate narrow educational policy. In fact, the current claims ignore larger policy. They do not challenge funding or education standards. They seek one thing—the ability to remove teachers. On multiple levels, this is the opposite of what prior litigation demanded. Prior litigation generally sought to reform the overall education

160. Nipun Kant, *Teachers, School Spending, and Educational Achievement: Toward a New Wave of School Quality Litigation* (Spring 2014) (unpublished J.D. article, Yale Law School), http://digitalcommons.law.yale.edu/student_papers/130 [<http://perma.cc/774C-R8KK>] (analyzing *Vergara* before the decision was issued).

161. This paragraph uses both “rights” and “duties” to discuss school finance precedent for the sake of avoiding the doctrinal issues that flow from using just one term. Scott Bauries aptly points out the distinction between rights and duties in the context of school finance precedent, and argues that courts have recognized state duties but not necessarily individual rights. Bauries, *supra* note 31. This distinction could have particular importance in the context of the constitutional challenge to tenure and is discussed further in later Sections of this Article, although this Article does not necessarily concede that the constitutional duty to deliver education does not include ancillary rights on the part of students. See Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. (forthcoming 2016) (arguing that the duty does include rights).

system rather than just one aspect of it. The doctrinal question is whether these theoretical distinctions—or any others—matter. If not, a factual question still remains: do tenure laws cause substantial and systematic education inequalities and inadequacies? A similar subsidiary question also remains with seniority laws, which plaintiffs also challenge.

The answers to these questions will, of course, depend on the exact precedent and facts of each particular state, but the constitutional rights and duties at stake, the framework for adjudicating them, and the claims that plaintiffs intend to make are sufficiently synonymous that the same legal questions and factual hurdles will likely arise in any state. These similarities, moreover, are borne out by past scholarship that has organized school funding litigation into historical waves and categories.

Part III.A identifies those waves and their legal premises. Part III.B explores the goals prior litigation has sought to achieve. Part III.C extracts a common legal framework from past cases that extends across any particular jurisdiction, including the evidence courts require to sustain a constitutional claim and the circumstances under which a court will and will not intervene in education policy. Part III.D examines the constitutional theory of teacher tenure challenges and how it fits within existing precedent. Part III.E identifies the flaws in the constitutional challenge to teacher tenure. Finally, Part III.F identifies the potential merit in the related challenge to seniority systems, which require that senior teachers be retained and newer ones dismissed during reductions in force, regardless of teaching efficacy.

A. *Historical Development of Constitutional Rights to Education*

The first wave of school finance litigation reached the United States Supreme Court, but proved the least important. In *San Antonio Independent School District v. Rodriguez*,¹⁶² plaintiffs argued that funding inequalities based on local property taxes violated students' rights on two bases: (1) education is a fundamental right under the Federal Constitution, and (2) poor students are a suspect class, against whom the funding structure discriminates.¹⁶³ Plaintiffs' underlying theory was that all students are roughly equal, should be treated as equal, and are entitled to resource equity. The Supreme Court rejected this theory, holding that education is not a fundamental right and that poverty is not a suspect class.¹⁶⁴ This holding led advocates to abandon school funding litigation in the federal courts and move to a second phase in state courts.

In state courts, advocates brought claims that were theoretically and factually the same as those in *Rodriguez*, but the claims proceeded under the education and equal protection clauses in state constitutions.¹⁶⁵ They were

162. 411 U.S. 1 (1973).

163. *Id.* at 17.

164. *Id.* at 18.

165. *See Thro, supra* note 7.

immediately successful. The California Supreme Court held that education was a fundamental right under the California Constitution and that funding inequalities violated that right.¹⁶⁶ New Jersey's Supreme Court likewise held that funding inequities violated students' state constitutional right to a "thorough and efficient" education.¹⁶⁷ With California and New Jersey leading the analytical way, courts in Arkansas, Connecticut, Washington, and Wyoming shortly thereafter recognized a fundamental right to education under their respective state constitutions.¹⁶⁸

This second wave of litigation eventually raised issues beyond absolute equity in funding. Evolving concepts of equity recognized that some students, particularly poor students, have greater learning needs and require more educational resources to achieve at the same level as others.¹⁶⁹ In addition, because most poor children live in property-poor school districts located in rural areas and inner cities, their districts need more resources than others.¹⁷⁰ The difficulty of incorporating these realities into absolute equity, along with stiff political opposition to radical redistribution of resources along strictly equitable lines, helped prompt a third wave of litigation.

The third wave of school finance litigation intersected with the "standards-based reform" movement of the 1980s. A series of reports, national summits, and popular media charged that students in the United States were not mastering basic core educational concepts and were falling behind their international counterparts.¹⁷¹ In response, states developed core academic standards that all students should meet.¹⁷² Plaintiffs began weaving those academic standards and students' test scores into their legal claims. They argued that state constitutional phrases such as "efficient," "thorough," and "sound basic" education obligated states to provide children with a level of education that could be measured through the academic standards and tests that

166. *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976).

167. *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973).

168. See *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 71 (Wash. 1978); *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980).

169. Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 516-17 (1995).

170. Erin E. Kelly, Note, *All Students Are Not Created Equal: The Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, 45 DUKE L.J. 397, 397-99 (1995); *Rebell*, *supra* note 56, at 1866, 1888.

171. See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 555-61 (1992) (discussing the nature and scope of the national crisis in education); NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983) (warning of a "rising tide of mediocrity" in American education).

172. Joetta L. Sack, *The End of an Education Presidency*, EDUC. WEEK, Jan. 17, 2001, at 1 (discussing President Bush's national summit, which brought together the nation's governors and resulted in a set of national and state education goals).

states had developed.¹⁷³ While a few courts ruled in plaintiffs' favor prior to 1989, that year, in *Rose v. Council for Better Education, Inc.*,¹⁷⁴ the Kentucky Supreme Court became the first to fully articulate a qualitative right to education.¹⁷⁵ The court held that a constitutionally adequate or "efficient" education included several specific skills and outcomes in each of the major subjects of school curriculum.¹⁷⁶ Following *Rose*, numerous other courts borrowed from *Rose*'s standards or followed *Rose*'s approach in defining their own.¹⁷⁷

The third wave of litigation overcame some of the limitations of equity litigation. By setting a standards-based qualitative floor, these cases prevented the state from leveling down everyone's education to create basic equality. On the other hand, adequacy standards left inequalities between rich and poor districts untouched, so long as the state assured an adequate education everywhere. But, for the same reason, standards-based litigation posed fewer judicial and political objections,¹⁷⁸ resulting in a much higher win rate for plaintiffs. In twenty-seven cases between 1989 and 2006, plaintiffs prevailed nearly 75 percent of the time, whereas plaintiffs were previously successful less than half the time.¹⁷⁹

173. Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 34, 53–56 (Helen F. Ladd et al. eds., 1999).

174. 790 S.W.2d 186 (Ky. 1989).

175. *Id.* at 212.

176. The court wrote that an efficient education requires:

(i) [S]ufficient oral and written communication skills to enable students to function in . . . civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her . . . nation; (iv) sufficient self-knowledge of . . . mental and physical wellness; (v) sufficient . . . arts [education] to enable each student to appreciate [their] cultural and historic heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields . . . ; and (vii) sufficient levels of academic or vocational skills to enable . . . students to compete . . . in the job market.

Id.

177. See, e.g., Opinion of the Justices, 624 So. 2d 107, 165–66 (Ala. 1993); Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 485 (Ark. 2002), supplemented by 189 S.W.3d 1 (Ark. 2004); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 527–28 (Tex. 1992).

178. See generally Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 83, 95–96 (2010).

179. Rebell, *supra* note 8, at 1527.

B. The Goals of Constitutional Education Litigation

As a practical matter, constitutional education litigation has coalesced around three major challenges and remedies. The first, of course, is money.¹⁸⁰ The primary challenge and desired remedy has been additional funding for needy school districts, either by expanding the educational pot statewide or redistributing existing resources.¹⁸¹ This focus has been so dominant that constitutional education litigation is more popularly termed school finance litigation.

The second goal is to improve educational opportunities. Additional funding for needy districts is not an end in and of itself.¹⁸² Rather, additional funding serves goals pertaining to the actual educational experiences and instruction students receive.¹⁸³ Those experiences depend on critical educational inputs: teachers, technology, facilities, and support services, to name a few. As a practical matter, improving these inputs often includes or boils down to more money, but not necessarily. A state or district may need to adopt policies to reallocate, more efficiently deliver, or prioritize these inputs within the existing budget, as opposed to, for instance, devoting time and resources to athletics or central administration.¹⁸⁴ In fact, plaintiffs in *Sheff v. O'Neill* successfully demonstrated that the organization of school districts and segregation within them was the cause of educational inequality in the state.¹⁸⁵ In short, although money may be implicated, the precise legal challenge in many cases is based on inadequate educational inputs and opportunity, not money.

The third overarching goal in constitutional education litigation is to place various important educational responsibilities on the state.¹⁸⁶ Traditionally, local districts have carried the primary financial and academic responsibility for education.¹⁸⁷ Through litigation, school districts and students have shifted this responsibility to the state.¹⁸⁸ They have established that although the practical responsibility for delivering education is delegated to districts, the

180. See generally Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483 (1998); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1074–75 (1991).

181. *Unfulfilled Promises*, *supra* note 180, at 1074–76.

182. Ryan, *supra* note 17, at 308.

183. *Id.*

184. See, e.g., *Abbott v. Burke*, 575 A.2d 359, 377–82 (N.J. 1990) (discussing the variance in how efficiently districts use their funds); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 388–89 (N.C. 2004) (discussing strategic resource allocation).

185. 678 A.2d 1267 (Conn. 1996).

186. Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 328 (1991).

187. Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 781 (1992); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

188. See *Rebell*, *supra* note 8, at 1527 (noting plaintiff victories against the state in over half of the states).

ultimate constitutional responsibility for education remains with the state.¹⁸⁹ This requires not only that the state provide necessary financial and other resources, but also that it establish standards and policies designed to ensure the proper implementation of those resources. In other words, courts have mandated that the state adopt academic standards to guide local districts in carrying out their delegated duties and oversight standards by which the state can hold local districts accountable.¹⁹⁰

C. Separation of Powers Limits on Education Remedies

The foregoing challenges and remedies always operate within the context of separation of powers limitations. Courts in some states have refused to even entertain plaintiffs' claims because they believe doing so would encroach on the discretion in policy making that is reserved entirely to the legislature.¹⁹¹ Even when courts intervene, separation of powers concerns limit the scope of their intervention.¹⁹² Courts may find a constitutional violation based on inadequate funds or standards, but refrain from specifying the means by which to remedy the violation.¹⁹³ Where more than one reasonable solution to the problem is possible, courts find it is the state's province, not the court's, to exercise discretion in selecting a solution.¹⁹⁴ As the Washington Supreme Court wrote after finding a constitutional violation, "This court defers to the legislature's chosen means of discharging its [education] duty" and will give the legislature "the greatest possible latitude to participate in the full implementation of the constitutional mandate."¹⁹⁵

189. *See id.*

190. *See, e.g.,* *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212–13 (Ky. 1989); *Campaign for Fiscal Equity v. State*, 861 N.E.2d 50 (N.Y. 2006); *see also* *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1157 (Mass. 2005) (noting that proposed remedies addressed only funding and not the "failing administrative and financial management").

191. *See, e.g.,* *McDaniel v. Thomas*, 285 S.E.2d 156, 160–61 (Ga. 1981); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996).

192. *See generally* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010).

193. *Id.*; *see also* *McCleary v. State*, 269 P.3d 227, 232 (Wash. 2012) (refusing "to specify standards for staffing ratios, salaries, and other program requirements").

194. *See Campaign for Fiscal Equity, Inc.*, 861 N.E.2d at 59–60; *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 397 (N.C. 2004).

195. *McCleary*, 269 P.3d at 231–32 (quoting *Seattle School District No. 1 v. State*, 585 P.2d 71, 93 (Wash. 1978)); *see also* *Rose*, 790 S.W.2d at 212 ("It is [the General Assembly's] decision how best to achieve efficiency."); *Campaign for Fiscal Equity, Inc.*, 861 N.E.2d at 58 ("[I]n fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government."); *Leandro v. State*, 488 S.E.2d 249, 261 (N.C. 1997) ("[T]he administration of the public schools of the state is best left to the legislative and executive branches of government. [Courts] must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a . . . sound basic education.").

Even the most aggressive courts have stopped short of dictating remedies at a level of detail that encroaches on legislative prerogative.¹⁹⁶ When lower courts have peremptorily mandated specific remedies, some higher courts have been quick to strike them down, particularly when there was more than one way to solve the problem.¹⁹⁷ When states have implemented their own remedy, courts have tended to apply a reasonableness standard to the remedy rather than substituting their judgment for that of the legislature.¹⁹⁸ In short, while constitutional litigation to enforce the right to education has clear goals, separation of powers dictates leaving the exact manner in which those goals are met to the state.

D. The Framework for Adjudicating Constitutional Education Claims

1. The Constitutional Duty and Right

The first step in any equity or adequacy litigation is to articulate the state's constitutional duty. In an adequacy case, for instance, the Kentucky Supreme Court found that the General Assembly had an "obligation . . . to provide for a system of common schools"¹⁹⁹ and proceeded to describe the necessary characteristics of that system. The system must be "efficient," provide equal opportunity, and be "substantially uniform" throughout the entire state.²⁰⁰ The specific goal of an efficient education is to "develop[], as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and do[] so economically."²⁰¹ Other courts speak of their states' obligation to meet students' needs so that these students can achieve at the

196. See *Montoy v. State*, 138 P.3d 755, 763–64 (Kan. 2006); *Rose*, 790 S.W.2d at 212–14. Only in the face of a clear violation that demands a particular remedy, which the state has refused to implement after having been given the opportunity, will courts dictate specific remedies. Courts, however, have been willing to agree that a particular remedy is appropriate once the state has proposed it, or that a remedy proposed by the state is insufficient, based on evidence presented at trial. See, e.g., *Campaign for Fiscal Equity v. State*, 861 N.E.2d 50, 53, 59 (2006) (after ordering the State to ensure the resources necessary for a sound basic education, holding that the State's remedy was not "unreasonable").

197. See *Hoke Cty. Bd. of Educ.*, 599 S.E.2d at 393 (striking down a pre-kindergarten remedy because "there is a marked difference between the State's [conceding] a need to assist 'at-risk' students prior to enrollment in the public schools and a court order compelling the legislative and executive branches to address that need in a singular fashion"); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157 (S.C. 2014) (striking down trial court's specific remedy but upholding state liability).

198. See, e.g., *Campaign for Fiscal Equity, Inc.*, 861 N.E.2d at 59 (upholding State's plan because it was not "unreasonable"); see also *Serrano v. Priest*, 226 Cal. Rptr. 584 (Ct. App. 1989) (indicating disparities need only be reduced to insignificant levels and that many inequities are subject to only rational basis review).

199. *Rose*, 790 S.W.2d at 205.

200. *Id.* at 208.

201. *Id.* at 210.

requisite level or their states' obligation to deliver an adequate education,²⁰² but the general goal is the same—achieving some qualitative end. Equity cases follow a similar approach. There, the duty is to deliver some substantially equitable result or opportunity, rather than a qualitative one.²⁰³

After describing this general duty, courts often articulate structural obligations that might be necessary for the state to deliver an equal or adequate education. In *Rose*, for instance, the court indicated that the state's duty to deliver an efficient education required the state to implement, control, and maintain the education system.²⁰⁴ Various courts have indicated that this entails the state setting academic standards and goals that are connected to the constitutionally required education and supervising the implementation of these standards.²⁰⁵ The state might delegate implementation to school districts, but because education is the state's obligation, the state must monitor local conditions to ensure its obligation is met.²⁰⁶ It cannot leave local districts to sink or swim.

A structure for success, however, requires more than just state oversight of districts. It also requires the state to ensure local districts have the capacity to meet constitutional and statutory requirements. Courts speak of the state's obligation to adequately or equitably fund education. They rarely state the exact level of funds a district must have per pupil, but they routinely demand a specific approach to school funding. This approach entails breaking down the actual cost of delivering an equitable or adequate education into its constituent components of student need, school district need based on student need, and local funding capacity.²⁰⁷ Creating a funding system that meets student and district need is far from an exact science, but states have no excuse for funding systems that produce happenstance results. As the Kansas Supreme Court wrote, a state must develop a funding system that “is reasonably calculated to have all . . . students meet or exceed the standards.”²⁰⁸ In short, a state should determine how much it costs to deliver the constitutionally required education, account for variations based on student and district demographics, and create a funding system that it reasonably expects will meet that need.

202. See *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995); *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 538–39 (S.C. 1999).

203. See *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996).

204. See *Rose*, 790 S.W.2d at 208.

205. See *id.*

206. See *id.* at 212–14; *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

207. See *Montoy v. State*, 112 P.3d 923, 937 (Kan. 2005) (“[A] determination of the reasonable and actual costs of providing a constitutionally adequate education is critical.”); *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50 (N.Y. 2006).

208. *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); see also *McCleary v. State*, 269 P.3d 227, 231 (Wash. 2012) (requiring a system that provides “dependable and regular tax sources”).

Whether these constitutional duties also create individual rights is less clear. A state could have a constitutional duty to fund or deliver education without a student also having an individual right to, for instance, a quality teacher in math class or access to some particular curriculum.²⁰⁹ School finance cases regularly refer to a constitutional or fundamental “right to education” without necessarily enforcing it as an individual right.²¹⁰ A few courts have specifically rejected the notion of an individually enforceable constitutional right to education,²¹¹ and a few have specifically accepted the idea.²¹² But most courts simply obfuscate the distinction, speaking of rights while engaging in a mode of analysis and enforcement based nearly exclusively on a constitutional duty by the state.²¹³ Scholars are divided over how best to interpret this precedent.²¹⁴

209. The most poignant example of the distinction between rights and duties may be in torts, which has developed the concept of public duties. Courts hold that local governments have a duty to the public to deliver certain municipal services, such as fire and police protection, but those duties are not individually enforced. Thus, although local government has a duty to deliver services to the public at large, individuals cannot bring claims when the police department fails to send out an officer in response to a request, at least not until an individual officer forms a special relationship with an individual citizen or puts that citizen in a worse position than he or she otherwise would have been in. *See, e.g., Kircher v. City of Jamestown*, 543 N.E.2d 443 (N.Y. 1989); *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968).

210. *See, e.g., Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 235 (Conn. 2010) (holding that education is a fundamental right); *Rose*, 790 S.W.2d at 201; *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997).

211. *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (“The right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State’s duty.”); *see also Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 493–94 (Ark. 2002), *supplemented by* 189 S.W.3d 1 (Ark. 2004) (quoting the New Hampshire Supreme Court’s statement on individual rights versus public duties).

212. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 86–87 (Wash. 1978) (concluding that its state constitution’s education clauses were “guarantees of a personal nature” and reflect a “right”).

213. *See Bauries, supra* note 192, at 982–89 (discussing cases and pointing out, for instance, that in the seminal adequacy case in Kentucky, the supreme court announced a “right” but then proceeded to define it in terms of state duties).

214. Scott Bauries reasons that “both the evidence presented and the remedies the courts order focus on the state education system as a whole, rather than on any individual student rights-holders. Thus, other than as a means of surmounting threshold obstacles to relief, an *individual* right to education under state constitutions is more rhetoric than reality.” *Id.* at 952–53. Others reason that the precedent does create individual rights. Derek Black, *The Constitutional Fix for SC Schools*, STATE, Nov. 18, 2012 (reasoning that students had individually enforceable constitutional rights to education that the court should recognize); Weishart, *supra* note 161. While Bauries argues these decisions do not create individual rights, he argues new litigation should be designed to establish such rights. Bauries, *supra* note 192, at 954.

This question of whether a right exists is more directly implicated in cases in which individual students seek to use the constitutional “right to education” to challenge their expulsion from school or the lack of alternative education opportunities. The case law there is relatively undeveloped and unfavorable to students, but courts do appear to assume an individual right, even if they reason that plaintiffs have forfeited it or are not entitled to the relief they seek. *See Emily Bloomenthal, Inadequate Discipline: Challenging Zero Tolerance Policies as Violating State Constitution Education*

Conclusively resolving that debate is beyond the scope of this Article. It suffices to say that the fairest reading of school finance and other relevant precedent may simply be that the scope of any individual right to education is not clearly defined while state duties are. This means plaintiffs have strong legitimate bases upon which to pursue individual claims, but no definite basis on which to expect a court to respond positively. This point could prove particularly relevant in constitutional challenges to tenure, as they are, in effect, premised on the idea that individual students' have the right to demand that individual teachers be removed. Understood this way, a court could more directly be called on to recognize individual rights as opposed to just a constitutional duty.

2. *A Substantial and Systematic Deprivation of Education Rights*

To establish a violation of educational rights or duties, courts have required several distinct types of evidentiary showings by plaintiffs. A bare allegation that some policy, funding mechanism, or resource shortage produces inequality or inadequacy is insufficient. Courts generally presume the constitutionality of a state's educational program and, thus, the burden is on the plaintiff to prove otherwise.²¹⁵ First, a plaintiff must show a substantial deprivation of the constitutional right to education.²¹⁶ As the Connecticut Supreme Court emphasized, "plaintiffs must make a prima facie showing that the disparities . . . are more than de minimis in that the disparities continue to jeopardize the plaintiffs' fundamental right to education."²¹⁷ If the disparities are only incidental to some legitimate state goal or insubstantial, a court will not invalidate them.²¹⁸ Likewise, when courts speak of demonstrating inadequate or inequitable educational opportunities, they mean more than just some identifiable deficiency; they mean deficiencies that affect students' ability to obtain an overall adequate education.

Embedded in the concept of a substantial violation is also the existence of a systematic deprivation. Courts frame their analysis in terms of school systems and trends across them.²¹⁹ No court has ever recognized a claim against the

Clauses, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 329–35 (2011) (reviewing cases challenging school discipline based on a state constitutional right to education).

215. See *Leandro*, 488 S.E.2d at 261 ("Only such a clear showing [that students have not received an adequate education] will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches."); see also *Rose*, 790 S.W.2d at 209.

216. See *Serrano v. Priest*, 226 Cal. Rptr. 584, 606 (Ct. App. 1989) (indicating "an insubstantial burden" is insufficient to trigger heightened scrutiny); *Rose*, 790 S.W.2d at 197 (examining inequities throughout 177 local school districts); *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 520–22 (Mass. 1993) (examining violations spanning across twelve districts).

217. *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

218. *Id.*; *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004) (articulating a burden shifting test whereby the state might justify disparities).

219. See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50 (N.Y. 2006) (finding that test results and graduation rates reflected systemic failure, and the State's actions were a

state based on isolated inadequacies or inequalities. Plaintiff victories are always supported by evidence of violations stretching across multiple schools and districts. In effect, random—as opposed to systematic—deficiencies are almost necessarily substantial (although there are surely exceptions).²²⁰ None of the foregoing, however, is to suggest there are no circumstances under which a court could entertain remedies for individual students, but only that for a claim against the state to arise, the individual injury would need to arise from systemic and substantial violations.²²¹

3. *Input Causation: Proving State Policy Is the Cause of Local Deprivations*

Plaintiffs must demonstrate that the substantial education deprivation in question falls within the purview of state control or responsibility. This requires plaintiffs to establish two different and distinct types of causation. Plaintiffs must establish that a state statute or policy is the cause of some precise financial, resource, or other tangible deficiency in local school districts (which this Section discusses). Next, the plaintiffs must establish that the deficiency, not some other factor, causes harm to students (which the next Subsection discusses). The North Carolina Supreme Court emphasized in plain language: “[I]t is one thing for plaintiffs to demonstrate that a large number of Hoke County students are failing to obtain a sound, basic public education. It is quite another for plaintiffs to show that such a failure is primarily the result of action and/or inaction of the State.”²²²

substantial cause of the constitutional violation); *Hoke Cty. Bd. of Educ.*, 599 S.E.2d at 386–89 (finding that state act had caused systematic poor performance); *Pauley v. Bailey*, 324 S.E.2d 128, 132 (W. Va. 1984) (discussing lower court’s finding that “all county systems required improvement”); see also *DeRolph v. State*, 754 N.E.2d 1184, 1195–98 (Ohio 2001), *opinion vacated on other grounds on reconsideration*, 780 N.E.2d 529 (2002) (“[E]fficiency and thoroughness in Ohio’s system of common schools is a statewide goal rather than a local one.”).

220. Districts, or the state through vicarious responsibility, can be sued on narrower grounds, but the nature of such a claim is distinct from those discussed in this Article. Black, *supra* note 17, at 390–95 (concluding that local school districts have a constitutional responsibility to carry out the duties delegated to them by the state).

221. For instance, when a state refuses to remedy systemic violations, individual students theoretically should be entitled to transfer out of their inadequate schools to other public schools that are delivering a constitutional education. Black, *supra* note 214. Ordering this type of injunction remedy, moreover, would place pressure on the state to carry out its responsibility writ large. Courts have yet to take this step, although it does not appear that litigants have asked them to do so.

Scott Bauries devotes substantial analysis to the predicates of systemic violations in school finance precedent, citing them as a serious flaw in the precedent that impedes the vindication of individual rights: “This systemic focus leads to a systemic, rather than an individual, approach to remediation, which ultimately subverts any individual interests or rights that might have given rise to the claims in the first place.” Bauries, *supra* note 31, at 953. Weishart, however, postulates that the requirement of a systematic violation may be attributable to concerns other than warding off individual claims. Weishart, *supra* note 161. It may be, as the preceding paragraph suggests, in the absence of systemic action, the injury is not attributable to the state, but once systematic action is established, individual injuries are redressable.

222. *Hoke Cty. Bd. of Educ.*, 599 S.E.2d at 631.

In the earliest years of school finance litigation, some courts were willing to infer causal connections based on general social science or common sense.²²³ Subsequent courts increasingly parsed out distinct causal inquiries and required specific supporting statistical evidence.²²⁴ This step in a plaintiff's claim is far more challenging than establishing the existence of a substantial educational deprivation. The state might very well concede the existence of educational inequities or deprivations, but causation invites bitter contests on various points ranging from whether money matters to whether test scores accurately measure educational quality.²²⁵

The state, if not the court, will inevitably raise the possibility that state action is not the cause of local educational deficiencies.²²⁶ If plaintiffs allege schools do not have enough money to maintain their facilities, for instance, the state will question whether its action or inaction is the cause of the money shortfall. This causal inquiry frequently leads to lengthy judicial discussions of how school financing works and whether the financing system places too much burden on localities.²²⁷ It may be that some similarly situated districts can maintain adequate facilities, while others cannot. If this is the case, local action or random variables may be the cause of deprivations rather than the state.

The same causal analysis has ensued from claims of inadequate teaching in school districts. That inadequate teaching is occurring in a school does not mean the state is the cause of it. Poor leadership at the local level, poor professional development, overcrowded classrooms, or insufficient funds to hire or retain quality teachers could all be causal factors.²²⁸ Even within each of these factors, the cause might be state or local policy. The state, of course, might be responsible for rectifying problematic local policies, but this would, nonetheless, raise a distinct causal factor and challenge to the state.²²⁹

223. See *Hargrave v. Kirk*, 313 F. Supp. 944, 947 (M.D. Fla. 1970), *vacated sub nom.* *Askew v. Hargrave*, 401 U.S. 476 (1971); *Serrano v. Priest*, 557 P.2d 929, 939 (Cal. 1976). *But see* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43 (1973) (questioning whether “there is a demonstrable correlation between educational expenditures and the quality of education”).

224. See Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1743–46 (2012).

225. *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (recognizing dispute over whether and how money matters); *Hoke Cty. Bd. of Educ.*, 599 S.E.2d at 381–84 (responding to challenges to lower court's reliance on test scores).

226. See *Serrano v. Priest*, 226 Cal. Rptr. 584, 615–16 (Ct. App. 1989) (rejecting the premise that the State caused “no more than 10 to 30 percent” of disparities); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 343 (N.Y. 2003) (arguing that “inefficient management of personnel is the supervening cause . . . rather than the funding system”).

227. See, e.g., *Serrano*, 226 Cal. Rptr. at 593–600; *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Montoy v. State*, 112 P.3d 923, 932–37 (Kan. 2005) (detailing nine different aspects of school funding in the state).

228. The State in both New York and New Jersey raised these exact same issues as causal defenses, although the courts in both instances rejected the State's theory. *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1040 (N.J. 2011); *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 343–44.

229. *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 344 (writing that “the simple constitutional principle that the State has ultimate responsibility for the schools[] counsel[s] us against

Regardless, the point is that plaintiffs must pinpoint state policy that has causal effects at the local level.²³⁰ It is not enough to simply allege an education deficiency.

4. *Output Causation: Proving the Deprivation Affects Educational Outcomes*

In addition to establishing a causal connection between state policy and local deficiencies, plaintiffs must establish a causal connection between the deficiency—for instance, teacher qualifications—and educational outcomes. New York’s highest court provides one of the most poignant delineations of this two-step causation analysis. It analyzed various alleged inadequacies in inputs—teachers, class size, facilities, computers, libraries, and textbooks—and whether each one was causally connected to the deprivation of the constitutionally required education.²³¹ Plaintiffs’ burden was to establish “the necessary ‘causal link’ between the present funding system and the poor performance of City schools.”²³² This meant proving that: (1) increased funding leads to “better teachers, facilities and instrumentalities of learning” and (2) better teachers, facilities, and instrumentalities “yield better student performance.”²³³ Speaking of the second link in this causal chain, the court wrote: “[O]n this record it cannot be said that plaintiffs have proved a measurable correlation between building disrepair and student performance.”²³⁴ The court neatly summarized both causal steps in its discussion of teachers, finding that the evidence demonstrated “that better funded schools would hire

the State’s rebuttal arguments on causation” that suggest local personnel management failures were the cause of educational inadequacies).

230. The West Virginia Supreme Court offers a glimpse of the complexities involved in pinpointing causation. It suggested no less than five causal factors and multiple different parties as explaining the educational deficiencies in the state:

[W]hether the lack of a high quality educational system is the result of a failure to follow existing statutes and standards or whether it is due to an inadequacy of the existing system; whether the financing of the existing educational system is equitable on the state and local levels, including investigation into the efficacy of state supplemental aid to county school systems and distribution of the State School Building Fund, and the disparity in property values and property assessment among the counties; whether various State agencies and officials are performing their constitutional and statutory duties with respect to education, including the State Board of School Finance, West Virginia Board of Education, State Superintendent of Schools and State Tax Commissioner; and whether local school officials are properly performing their statutory duties.

Pauley v. Bailey, 324 S.E.2d 128, 130 (W. Va. 1984).

231. *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 340–41.

232. *Id.*; see also *id.* at 335 (“[P]laintiffs had to show that insufficient funding led to inadequate inputs which led to unsatisfactory results.”).

233. *Id.* at 340.

234. *Id.* at 334–35. The court also indicated causal problems in regard to classroom supplies. *Id.* at 335–36.

and retain more certified teachers, and that students with such teachers would score better.”²³⁵

Other courts are less explicit in breaking causation into two steps, but the overarching question of whether money matters necessarily involves two steps, and has dominated school funding litigation for four decades. In *Serrano v. Priest*—one of the first school funding cases filed—the California Supreme Court analyzed whether “[t]here is a distinct relationship between cost and the quality of educational opportunities afforded,” or more precisely, whether “differences in dollars do produce differences in pupil achievement.”²³⁶ Likewise, in the seminal adequacy case—*Rose v. Council*—the Kentucky Supreme Court required “a definite correlation between the money spent per child on education and the quality of the education received.”²³⁷ Each of these cases, along with various others, involved plaintiffs demonstrating that (1) state policy was the cause of resource deprivation at the local level, and (2) the resource deprivation played a causal role in student outcomes and achievement.

The second causal step is more complex than the first, and has been the source of significant study and debate for decades.²³⁸ To reliably address it, plaintiffs’ evidence should account for any number of variables, including, at the very least, locality costs, locality capacity, and student demographics (poverty, language status, race, and disability).²³⁹ The state, on the other hand, regularly argues that student characteristics are beyond its control, and that they—not state policy—are the primary causal factor in student outcomes.²⁴⁰ The outcome in most cases ultimately rests on this second causal question. Plaintiffs’ inability to adequately answer it initially hampered school finance litigation, while later social science developments helped shift the overall trajectory of the litigation.²⁴¹

235. *Id.* at 340–41. “[I]n districts where teachers perform badly on teacher certification tests, student performance declines as student grade level rises—and, conversely, that where teachers test well, student performance at higher grade levels surpasses student performance at lower grade levels.” *Id.* at 334.

236. *Serrano v. Priest*, 557 P.2d 929, 939 (Cal. 1976).

237. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 198 (Ky. 1989).

238. See generally Jennifer King Rice & Amy Ellen Schwartz, *Toward an Understanding of Productivity in Education*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 125 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015) (discussing production function studies that find correlation between specific levels of resource inputs and student outcomes); Clive R. Belfield, *Cost-Benefit Analysis and Cost-Effectiveness Analysis*, in HANDBOOK OF RESEARCH, *supra*, at 141.

239. See, e.g., *Abbott v. Burke*, 575 A.2d 359, 378, 380, 382 (N.J. 1990); *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50 (N.Y. 2006).

240. *Sheff v. O’Neill*, 678 A.2d 1267, 1287 (Conn. 1996) (stating that “defendants stress . . . the significant role that adverse socioeconomic conditions play”); *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 341 (examining State’s argument that “children come to the New York City schools ineducable, unfit to learn”); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 384 (N.C. 2004) (arguing that “students . . . failing to obtain a sound basic education . . . is due to factors other than the educational offerings provided by the State”).

241. Compare *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43 (1973), with *Rose*, 790 S.W.2d at 197; see also Black, *supra* note 224, at 1747–79 (discussing the evolution of

5. *Establishing That the State Can Remedy the Problem*

In addition to establishing that the state has caused a substantial and systematic harm that affects educational outcomes, some courts may also require plaintiffs to show that the constitutional violation is susceptible to a solution that is within the state's control and power. Plaintiffs might make this showing in conjunction with two-step causation. For instance, demonstrating that money affects educational outcomes would implicitly demonstrate the availability of a remedy: more money. For some courts, this is enough because money can be the catchall remedy to a myriad of problems.²⁴² As the California Supreme Court explained, money dictates whether districts have the capacity to respond to the particular challenges in their communities.²⁴³ Thus, it is the state's duty to ensure access to the necessary resources.²⁴⁴

Demonstrating non-monetary remedies, however, may require additional evidence, which might be developed as part of plaintiffs' initial case or after a finding of state liability. For instance, *Sheff v. O'Neill* involved a challenge to inter-district segregation.²⁴⁵ While plaintiffs' initial case demonstrated a constitutional violation by the state, subsequent proceedings were necessary for plaintiffs to demonstrate that a particular remedy was in order.²⁴⁶ Even if plaintiffs demonstrate the efficacy of a remedy—money or otherwise—it is important to reiterate that working out the details of that remedy will remain with the state.²⁴⁷ Such an approach is consistent with general separation of

approaches to the causal role of money). The issue, however, continues as a point of scholarly and legal debate. See *Horne v. Flores*, 557 U.S. 433, 474–75 (2009) (Breyer, J., dissenting); see also Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 *ECON. J.* F64, F69–F70 (2003) (reviewing U.S. data regarding funding and school performance); *Rebell*, *supra* note 8.

242. See, e.g., *Brigham v. State*, 692 A.2d 384, 390 (Vt. 1997) (“Money is clearly not the only variable affecting educational opportunity, but it is one that government can effectively equalize.”).

243. See *Serrano v. Priest*, 557 P.2d 929, 947 (Cal. 1976) (reasoning that different schools have different challenges and, thus, spend their money differently, but “the ability of a school district to meet those problems peculiar to it depends in large part upon the taxable wealth of that district”).

244. *Id.* at 957.

245. 678 A.2d 1267 (Conn. 1996).

246. See *id.* at 1290–91.

247. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 214 (Ky. 1989) (“It is now up to the General Assembly to re-create, and re-establish a system . . . which will be in compliance with the Constitution.”). Courts do, however, intervene after state recalcitrance or negligence. See, e.g., *Abbott v. Burke*, 710 A.2d 450, 458–61 (N.J. 1998), *opinion clarified sub nom. Abbott ex rel. Abbott v. Burke*, 164 N.J. 84, 751 A.2d 1032 (2000); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995); see also Bauries, *supra* note 192, at 746–54 (analyzing the separation of powers problems that arise when a court orders a remedy in school finance litigation); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *YALE L.J.* 635, 694 (1982) (“The only legitimate basis for a [] judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body.”).

powers limits on the judiciary and the specific language of numerous state constitutions.²⁴⁸

*E. Theorizing Teacher Tenure as an Impediment to Delivering a
Constitutional Education*

The scope of rights and duties declared in equity and adequacy decisions is sufficiently broad to theoretically capture almost any education policy imaginable. School finance challenges have been the dominant means of employing the rights and duties, but plaintiffs have used the constitutional right to and duty of education in other contexts, including challenges to school districting, intra-district student assignment, student expulsions, and school consolidation.²⁴⁹ Plaintiffs have also used the precedent to affirmatively demand alternative schools and pre-kindergarten education.²⁵⁰ In fact, for the past two decades, scholars have called for a fourth wave of litigation that moves entirely beyond money to challenge the racial and socioeconomic isolation in schools. While that fourth wave has not materialized, the constitutional challenges to teacher tenure draw on a similar interpretation of and approach to the precedent.

The first constitutional challenge to tenure, *Vergara*, was filed in California in 2012.²⁵¹ After a trial and a favorable ruling in 2014, a second case, *Dauids v. State*, identical in almost all important respects to *Vergara*, was filed in New York.²⁵² The highest courts in California and New York will soon decide the fate of teacher tenure, and the effects of those decisions will ripple across numerous other states, including the other states where litigation is already promised.²⁵³ Just as *Serrano* and *Rose* played an enormous role in

248. See, e.g., R.I. CONST. art. XII, § 1 (“[I]t shall be the duty of the general assembly . . . to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education.”).

249. See, e.g., *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996); *Pendleton Citizens for Comty. Sch. v. Marockie*, 507 S.E.2d 673 (W. Va. 1998); *Phillip Leon M. v. Greenbrier Cty. Bd. of Educ.*, 484 S.E.2d 909, 911 (W. Va. 1996); Second Amended Complaint by Plaintiff-Intervenors CMS Students & Charlotte-Mecklenburg NAACP at 3–5, *Hoke Cty. Bd. of Educ. v. Charlotte-Mecklenburg Bd. of Educ.*, No. 95 CVS 1158 (N.C. Super. Ct. Sept. 30, 2005).

250. See, e.g., *King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ.*, 704 S.E.2d 259, 260–61 (N.C. 2010); James E. Ryan, *A Constitutional Right to Preschool?*, 94 CALIF. L. REV. 49 (2006).

251. *Vergara* Complaint, *supra* note 11.

252. Verified Amended Complaint at 4, *Dauids v. State*, No. 101105/14 (N.Y. Sup. Ct. June 30, 2014) [hereinafter *Dauids* Complaint].

253. See generally *Edwards*, *supra* note 6 (noting potential additional litigation beyond California and New York in Connecticut, Oregon, and New Jersey); Kim McGuire, *California Teacher Tenure Ruling Is Likely to Be Felt in Minnesota*, STAR TRIBUNE (June 12, 2014, 9:49 PM), <http://www.startribune.com/california-teacher-tenure-ruling-is-likely-to-be-felt-in-minnesota/262971701> [<http://perma.cc/82Z4-FLSZ>] (discussing potential litigation in Minnesota). See also Motoko Rich, *Celebrated Trial Lawyer to Head Group Challenging Teacher Tenure*, N.Y. TIMES (Aug. 3, 2014), <http://nyti.ms/1lr0fMW> [<http://perma.cc/FLK5-FY4P>] (discussing the litigation’s connection to StudentsFirst, a national organization); *Where We Work*, STUDENTSFIRST, <https://www.students>

shaping the reasoning of other state court decisions that followed, so too will these first two teacher tenure cases shape future tenure fights in other states. In addition, the way in which courts decide to expand or retract the nature of the constitutional right to education will have significant ramifications on the viability of other claims beyond school finance. In short, the stakes of the outcomes in California and New York could not be any higher.

In California, plaintiffs' tenure claims rest on four primary factual allegations: (1) it is easy to get tenure; (2) easy tenure perpetuates the retention of ineffective teachers; (3) tenure and reduction-in-force rules make it impossible or too costly for districts to terminate ineffective teachers; and (4) these ineffective teachers cause unequal, and therefore unconstitutional, educational opportunities.²⁵⁴ Plaintiffs also add that statutory seniority rights make things worse during reductions-in-force because "last-in-first-out" policies require districts to retain senior teachers, even if they are grossly ineffective, and dismiss junior teachers, even if they are highly effective.²⁵⁵ The trial court agreed and declared all of California's challenged tenure and seniority statutes unconstitutional.²⁵⁶

In New York, plaintiffs make the same core factual allegations, but add a few local details. They claim that out of 75,000 teachers in New York City, "only 12 teachers were dismissed 'for incompetent teaching' over the entire decade from 1997 to 2007."²⁵⁷ They further claim the low dismissal rate is a result of "'super' due process" that drives "the average cost of dismissing a teacher for ineffectiveness in New York [to] \$313,000, and takes an average of 830 days."²⁵⁸ They also emphasize that New York's highest court previously identified teachers as a crucial part of delivering an adequate education, and the plaintiffs reasoned that due process protections for teachers are the cause of inadequate education in many schools.²⁵⁹ The courts in New York have yet to reach the merits of these claims, but the trial court held that plaintiffs' claims were sufficient to survive a motion to dismiss.²⁶⁰

first.org [<https://perma.cc/7UCR-QBH8>] (scroll over "Where We Work" tab; then follow individual state hyperlinks) (indicating the organization is working in ten states).

254. Vergara Complaint, *supra* note 11.

255. *Id.* at 3.

256. Vergara v. State, No. BC484642, 2014 WL 6478415 (Cal. Super. Ct. Aug. 27, 2014).

257. Davids Complaint, *supra* note 252, at 4. A second suit, *Wright v. State*, was also filed in New York, but quickly consolidated with *Davids*. See *Davids v. State*, No. 10115/14 (N.Y. Sup. Ct. Mar. 12, 2014), <http://lawprofessors.typepad.com/files/2015-march-motion-to-dismiss-denied--a-043--davids-wright.pdf> [<http://perma.cc/V9VT-P7AC>] (order denying motions to dismiss).

258. Davids Complaint, *supra* note 252, at 11 (citing N.Y. STATE SCH. BDS. ASS'N, ACCOUNTABILITY FOR ALL (2007)).

259. *Id.* at 2, 11.

260. *Davids*, No. 10115/14 (N.Y. Sup. Ct. Mar. 12, 2014).

1. A Facially Valid Theory

The first question courts must answer is whether challenges to teacher tenure and seniority fit within existing precedent—a question, given its novelty, that can only be conclusively answered by the highest courts in the states. Theoretically, the foregoing tenure, retention, and seniority claims would fit easily within the education rights and duties articulated by various state courts. The theory and rights of those prior cases are not limited to school funding or academic standards.²⁶¹ Moreover, a substantial number of cases already emphasize the importance of teachers in providing adequate or equitable educational opportunities.²⁶² Thus, at the highest level of abstraction, teacher tenure, retention, and seniority claims fall within equity and adequacy precedent.

Tenure challenges also roughly allege the necessary aspects of the five-pronged framework for establishing a constitutional violation described in Part III.D. First, the plaintiffs in tenure cases cite to the constitutional duty in their state. Second, they allege a constitutional deficiency: certain schools are straddled with substantial numbers of low-quality teachers.²⁶³ Third, they allege state statutes cause the deficiencies: schools cannot efficiently remove ineffective teachers because of state policies on teacher tenure, retention, and seniority.²⁶⁴ Fourth, they allege the second step of causation: ineffective teachers cause inadequate or inequitable educational outcomes. They base this causal assertion on research findings that the “key determinant” of educational outcomes “is teacher quality.”²⁶⁵ Finally, they assert a remedy is possible based on social science: removing these teachers and replacing them with just average teachers would produce enormous positive short- and long-term

261. See, e.g., Black, *supra* note 17; Ryan, *supra* note 17.

262. See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 498 (Ark. 2002), supplemented by 189 S.W.3d 1 (Ark. 2004) (“Well-paid and well-motivated teachers are what make the education engine run.”); Abbott v. Burke, 710 A.2d 450, 458–59 (N.J. 1998), *opinion clarified sub nom.* Abbott *ex rel.* Abbott v. Burke, 751 A.2d 1032 (N.J. 2000) (discussing the role of teachers and smaller classes in whole-school reform); Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 53 (N.Y. 2006) (indicating that an adequate education includes access to quality teachers); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 336 (N.Y. 2003) (“[T]ens of thousands of students are placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment. The number of children in these straits is large enough to represent a systemic failure.”); Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 386–87 (N.C. 2004) (reviewing the trial court’s finding that inadequate access to teachers deprived students of an adequate education); DeRolph v. State, 677 N.E.2d 733, 745 (Ohio 1997) (directing the state to ensure an “appropriate student-teacher ratio”); Tenn. Small Sch. Sys. v. McWherter, 91 S.W.3d 232 (Tenn. 2002) (mandating that the state’s budget be based on the actual cost of teacher salaries so as to ensure access to equal educational opportunities).

263. See Vergara Complaint, *supra* note 11, at 18–20 (arguing that students of color and language minorities have disproportionate numbers of ineffective teachers and can lose 30 percent of their teaching staff, which will be replaced by senior teachers from other schools in the “dance of the lemons”); Davids Complaint, *supra* note 252, at 3.

264. Vergara Complaint, *supra* note 11, at 3; Davids Complaint, *supra* note 252, at 3.

265. Vergara Complaint, *supra* note 11, at 3; Davids Complaint, *supra* note 252, at 2.

benefits in education and employment.²⁶⁶ Thus, they say, tenure, retention, and seniority policies violate students' constitutional right to an equal or adequate education.²⁶⁷

Notwithstanding the foregoing similarities, three major conceptual distinctions between prior precedent and the tenure and seniority challenges can be identified. First, prior cases sought to expand the teaching pool and/or the resources available to recruit, compensate, and retain teachers.²⁶⁸ But tenure lawsuits seek to remove teachers and, thereby, shrink or hold constant teaching ranks. Noticeably absent from the tenure challenges is any serious discussion of the labor market or disparities in teacher salaries, which prior suits identified as a problem.²⁶⁹

Second, in prior cases, teachers were only one piece of a much larger puzzle of inadequate or inequitable education.²⁷⁰ In the tenure and seniority suits, teachers are removed from the much larger puzzle of educational opportunity and examined in isolation. In fact, the *Vergara* plaintiffs argue they need not identify the primary or overall causes of the constitutional violation.²⁷¹ They need only demonstrate that tenure and seniority are factors in causing a violation.²⁷² They justify their isolated analysis of tenure and seniority based on the premise that teachers matter most.²⁷³ Regardless, the tenure and seniority claims present only part of the story of inequitable and inadequate education, whereas prior cases examined the entire education system.

Third, the theory of prior cases was not that the state's teacher policies were themselves flawed, but that the state's financial policies indirectly undermined the teaching profession.²⁷⁴ Again, teachers were part of a larger puzzle. The tenure lawsuits, in contrast, focus on specific teacher tenure, removal, and seniority policy as the flaw in state policy, not the overall structure in which tenure and seniority operate.

266. Vergara Complaint, *supra* note 11, at 10; Davids Complaint, *supra* note 252, at 8–9.

267. Vergara Complaint, *supra* note 11, at 4–5; Davids Complaint, *supra* note 252, at 3.

268. Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 53 (N.Y. 2006) (discussing the need to “attract and retain qualified teachers”); see also DeRolph v. State, 677 N.E.2d 733, 744 (Ohio 1997) (finding schools were so starved for funds that they could not comply with the required student-teacher ratios); Tenn. Small Sch. Sys. v. McWherter, 91 S.W.3d 232, 233 (Tenn. 2002) (discussing the equalization of teacher salaries).

269. See, e.g., Welner, *supra* note 31, at 128.

270. See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 500 (Ark. 2002), supplemented by 189 S.W.3d 1 (Ark. 2004) (finding “discrepancies in curriculum, facilities, equipment, and teacher pay”); Campaign for Fiscal Equity, Inc., 861 N.E.2d at 52–53 (examining multiple aspects of education in assessing overall adequacy).

271. Vergara Complaint, *supra* note 11, at 6–7.

272. *Id.*

273. *Id.* at 3; Davids Complaint, *supra* note 252, at 2–3.

274. See, e.g., Campaign for Fiscal Equity, Inc., 861 N.E.2d at 53; Hoke Cty. Bd. of Educ. v. State, No. 95 CVS 1158, 2000 WL 1639686 (N.C. Super. Ct. Oct. 12, 2000), *aff'd in part as modified, rev'd in part*, 599 S.E.2d 365 (2004).

These distinctions, while meaningful, are not necessarily fatal at a prima facie level to plaintiffs' claims. Precedent does not require a wholesale attack on a state's education system, and all educational deficiencies certainly are not equal. Most would agree that quality teachers are a centerpiece of a constitutional education.²⁷⁵ Thus, narrowing one's claim to teachers is logical. For instance, if a state statute is the lynchpin of depriving students of access to quality teachers, that statute might very well warrant singular focus. Moreover, school finance equity suits have a singular focus of their own—how state finance statutes deprive students of an equal or adequate education. Finance questions just involve a more complex set of statutes.

One might counter that prior cases do not presuppose a singular solution to the problem or the per se unconstitutionality of state statutes.²⁷⁶ Prior cases identify state statutes as causing inadequate funding, but the fundamental problem is not necessarily the reliance on local funds that some state statutes embody. A state could theoretically retain local funding so long as it sufficiently offset the inadequacies it caused or supplemented local funding in some locations. The tenure, retention, and seniority claims, in contrast, present a per se challenge to state policies that clearly envision another approach the state must take.²⁷⁷

However, that plaintiffs may overstate their claim or presuppose a specific remedy to which they may not be entitled does not outweigh or eliminate the otherwise strong similarities between tenure challenges and prior cases. To reject plaintiffs' claims outright, a court would have to draw artificial distinctions between the cases that would likely do harm not only to tenure claims in the future but also to the other important uses to which education rights might be put. To the extent plaintiffs' claims are flawed, they are flawed on a deeper level that requires a consideration of the facts. Thus, the ability to raise a challenge to teacher tenure under precedent should be easily answered in the affirmative.

2. *Flaws and Assumptions in the Constitutional Challenge to Teacher Tenure*

Alleging and proving a constitutional violation are, of course, entirely distinct. Plaintiffs' claims, and the trial court's adjudication, proceed with a set of assumptions that are neither currently established in facts nor easily

275. See HANDBOOK OF RESEARCH ON TEACHER EDUCATION: ENDURING QUESTIONS IN CHANGING CONTEXTS 527 (Marilyn Cochran-Smith et al. eds., 3d ed. 2008) (discussing the consensus regarding the importance of quality teachers).

276. Scott Bauries argues that the polycentric nature of reforming education policy is what makes institutional reform litigation so fraught with peril. Bauries, *supra* note 192, at 960–61, 977 (“[T]he nature of an education clause claim gives rise to all of the dangers that Fuller warned us of when courts attempt to solve polycentric problems through judicial orders. . . .”).

277. Vergara Complaint, *supra* note 11, at 4 (asserting state statutes are unconstitutional both facially and as-applied).

susceptible to proof in the future.²⁷⁸ The first and most problematic set of assumptions relates to the heart of any constitutional education claim: causation. While most agree that ineffective teaching is a serious problem, the cause of and solution to ineffective teaching is far from clear.²⁷⁹ Plaintiffs, nonetheless, jump to the conclusion that, of all the interrelated aspects and potential causes of ineffective teaching, tenure is the main cause, if not the only one.

Second, plaintiffs assume the number of ineffective teachers the current system produces rises to the level of a substantial and systematic educational deprivation. This may be possible, but it is unlikely. By narrowing their claim solely to teacher tenure and retention policies, and excluding the broader educational system and teacher policies, plaintiffs place enormous weight on one aspect of education policy. Neither the general inadequacies in a school system, nor the general ineffectiveness of teachers in that system, can be marshaled in support of their claim of a deprivation. They must establish that the ineffective tenured teachers, who otherwise would have been dismissed, create a substantial and systematic violation. In effect, plaintiffs' tenure theory gives rise to a more difficult practical evidentiary burden than the one carried by prior adequacy and equity litigants.

Finally, plaintiffs' claims assume the existence of some reliable evaluation and retention system that could replace current policies and produce a better result. As demonstrated in Part II, better and more reliable policies are not yet available. Plaintiffs overlook the possibility that ineffective teaching is a result of ineffective evaluation and support systems, not the existence of tenure.²⁸⁰ Removing tenure would not resolve administrators' evaluation challenges or cure the flaws of student growth percentile models and value-added models. Moreover, due process protections could prohibit states from eliminating tenure and simply replacing it with unreliable evaluation methods. The following Sections address each of the foregoing sets of assumptions regarding tenure. The claims about seniority or the last-in-first-out statute are addressed separately in Section E.3.

a. Tenure Has Not Been Established as a Cause of Ineffective Teaching

While voluminous, social science research on teacher quality has produced only generalized findings regarding teachers' effect on student outcomes. It does not resolve the far more complicated question of how to

278. The trial court's basic finding "by a preponderance of the evidence, that the Challenged Statutes impose a real and appreciable impact on students' fundamental right to equality of education" is an entirely unsatisfying response to several distinct and complicated questions. *Vergara v. State*, No. BC484642, 2014 WL 6478415, at *4 (Cal. Super. Ct. Aug. 27, 2014).

279. See *Welner*, *supra* note 31, at 130–34 (discussing the various complex factors that play a role in ineffective teaching).

280. See *id.* at 135 (discussing the role that poorly designed evaluation systems can play in undermining teacher effectiveness).

identify those specific teachers who are ineffective, nor whether teachers lacking in effectiveness can or should be helped or fired.²⁸¹ The research certainly does not speak to whether tenure has a positive or negative effect on individual teachers and the overall quality of the teaching profession, nor does the research answer these specific questions for California or New York.

Plaintiffs' claims rest principally on the study by Raj Chetty et al. and his subsequent testimony that analyze whether "teachers' impacts on students' test scores ("value-added") [are] a good measure of their quality" and "whether high-VA [value-added] teachers improve students' long-term outcomes."²⁸² Chetty concludes the answer to both questions is yes, and he offers the awe-inducing conclusion that "[r]eplacing a teacher whose VA is in the bottom 5% with an average teacher would increase the present value of students' lifetime income by more than \$250,000 for the average class-room."²⁸³ The study's assumptions, methodology, and data have all been subject to extensive critiques that call some of its findings into question.²⁸⁴ But even assuming the study's validity, the study on its face does not answer many questions central to plaintiffs' claim. The study even concedes points that are inconsistent with or insufficient to substantiate the challenge to tenure.

First and foremost, the study does not even include the word "tenure," much less analyze its impact. Thus, it cannot establish a general causal connection between tenure and teacher quality or effectiveness. The study examines one large urban school district in some state other than California.²⁸⁵ It does not examine California or any particular school district in it, which

281. See generally Baker et al., *supra* note 30. Even the earliest proponent of value-added assessments recognized the limitations of identifying effective teachers. William L. Sanders & Sandra P. Horn, *Educational Assessment Reassessed: The Usefulness of Standardized and Alternative Measures of Student Achievement as Indicators for the Assessment of Educational Outcomes*, EDUC. POL'Y ANALYSIS ARCHIVES, Mar. 3, 1995 (cautioning against relying on any single factor to evaluate teachers).

282. See Chetty et al., *supra* note 26.

283. *Id.*

284. See, e.g., ADLER, *supra* note 109, at 9 (identifying seven different methodological and assumption flaws in Chetty's study); Audrey Amrein-Beardsley, *Unpacking DC's Impact, or the Lack Thereof*, VAMBOOZLED! BLOG (Nov. 25, 2013), <http://vamboozled.com/unpacking-dcs-impact-or-the-lack-thereof-consumer-alert> [<http://perma.cc/X7KB-78FV>]; Bruce D. Baker, *Fire First, Ask Questions Later? Comments on Recent Teacher Effectiveness Studies*, SCH. FIN. 101 BLOG (Jan. 7, 2012), <https://schoolfinance101.wordpress.com/2012/01/07/fire-first-ask-questions-later-comments-on-recent-teacher-effectiveness-studies> [<https://perma.cc/L7RX-WATM>]; Diane Ravitch, *Chetty-Friedman-Rockoff Nonsense*, DIANE RAVITCH'S BLOG (April 17, 2013), <http://dianeravitch.net/2013/04/17/chetty-friedman-rockoff-nonsense> [<http://perma.cc/9UXK-ZJ2V>]; *Unpacking IMPACTS's Impact, or the Lack Thereof: Fatal Flaws and Limitations with the National Bureau of Economic Research (NBER)'s IMPACT Study*, VAMBOOZLED! BLOG (2013), vamboozled.com/wp-content/uploads/2013/11/IMPACT_Critique.docx [<http://perma.cc/G7PR-TSKQ>].

285. Chetty et al., *supra* note 26, at 1.

makes extrapolating the study's findings to prove specific causation for the entire state of California highly problematic.²⁸⁶

Second, Chetty and his coauthors make no pretenses of how the study could or should be a basis for adopting or eliminating education policies in a particular state or district.²⁸⁷ Their claim is only that value-added models should matter.²⁸⁸ They emphasize "that improving teacher quality is likely to yield substantial returns for students," but admit that "the best way to accomplish that goal is less clear."²⁸⁹ The authors further admit that attaching some high stakes consequence to value-added models might degrade their usefulness and validity.²⁹⁰ Thus, the authors concede that the value of their study "is to illustrate the magnitudes of teachers' impacts [on student achievement] rather than evaluate selection as a policy to improve teacher quality."²⁹¹

In other words, the research on which plaintiffs and the California trial court rely make a point on which almost all agree: quality teaching matters. But the research does not establish the more precise points for which plaintiffs seek to use it. This lack of specificity is crucial given that courts have required past litigants to present evidence regarding how policies and resources operate in a particular state and in particular schools.²⁹² Teacher tenure challenges give no indication that such evidence is forthcoming or necessary.

Plaintiffs and the trial court in *Vergara* simply assert a causal connection between tenure policy and the prevalence of ineffective teaching in schools. They are not alone. Several reports and anecdotal stories make the same assertion.²⁹³ But at this point, it is no more than an assertion. To date, no research-based evidence substantiates the assertion, and as Sections III.D.3 and III.D.4 demonstrate, specific causation, demonstrated through statistical

286. Given methodological flaws, a third-party reviewer of the Chetty study questioned whether its conclusions were even true in regard to the sample it analyzed. ADLER, *supra* note 109, at 7–9. The study also pointed out that Chetty excluded conflicting evidence from his sample. *Id.* at 3–4.

287. Chetty et al., *supra* note 26, at 3–4.

288. *See, e.g., id.* at 3 ("We therefore conclude that our value-added measures provide unbiased estimates of teachers' causal impacts on test scores despite the grouping of students on lagged gains documented by Rothstein.").

289. *Id.* at 6.

290. *Id.* at 5 ("[T]eachers were not incentivized based on test scores in the school district and time period we study. The signal content of value-added might be lower when it is used to evaluate teachers because of behavioral responses such as cheating or teaching to the test. Our results quantify the gains from higher VA teachers in an environment without such distortions in teacher behavior" (citations omitted)).

291. *Id.* at 47.

292. Given the generally rigorous requirements of causation in education cases and the relative weak evidence in *Vergara*, Kevin Welner characterizes the judge's causal finding as a gift to the plaintiffs. Welner, *supra* note 31, at 143.

293. *See, e.g.,* Beth Barrett, *LAUSD's Dance of the Lemons*, LA WEEKLY (Feb. 11, 2010), <http://www.laweekly.com/news/lausds-dance-of-the-lemons-2163764> [<http://perma.cc/6NZ7-JKRC>]; CHAIT, *supra* note 39; N.Y. STATE SCH. BDS. ASS'N, ACCOUNTABILITY FOR ALL (2007).

correlations with actual data from within the state, is necessary to sustain a claim against education statutes that courts presume constitutional.

Establishing such a causal link is no easy task. The challenges in closing the causal gap between money and student outcomes—and the need to wait on social science progress—stymied school finance litigation from its infancy. In fact, some courts and scholars still contest the causal link today.²⁹⁴ Social science evidence in regard to tenure is no more definite than what was available for school funding in the 1970s. Likewise, owing in part to the same causal weakness that plagues tenure claims, state courts have consistently proven resistant to education malpractice litigation. In a series of cases dating back to 1976, individual students have argued that egregiously ineffective teaching prevented them from graduating or progressing to a subsequent grade.²⁹⁵ Courts have consistently rejected those claims, reasoning that too many factors affect an individual student’s educational outcomes and the harm suffered as a result of ineffective teaching is too indefinite to infer a causal connection.²⁹⁶

A recent article by Ethan Hutt and Aaron Tang argues that student growth percentile models and value-added models provide a means for overcoming the causal uncertainty that previously blocked education malpractice plans.²⁹⁷ If so, the same would be true for the constitutional challenge to tenure. Hutt and Tang rely heavily on the fact that student growth percentile models and value-added models will create a baseline for acceptable teacher performance, allow schools to objectively rank teachers, and put schools on notice of individual ineffective teachers.²⁹⁸ Hutt and Tang, however, do not seriously engage the flaws in those evaluations systems that Section II.B of this Article points out. They suggest it is enough that the models are data based and the best currently available.²⁹⁹ While they may be correct that the data these models produce is the best we have, it does not establish a causal connection between particular teachers and students, nor tenure and teaching effectiveness. At best, the data puts schools and teachers on notice of a potential problem in teaching effectiveness without demonstrating that there is a problem. Thus, current

294. See, e.g., *Horne v. Flores*, 557 U.S. 433, 464 (2009).

295. See *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Ct. App. 1976); see also *D.S.W. v. Fairbanks North Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981); *Bell v. Bd. of Educ.*, 739 A.2d 321 (Conn. App. Ct. 1999); *Donohue v. Copiague Union Free Sch. Dist.*, 408 N.Y.S.2d 584 (Sup. Ct. 1977), *aff’d*, 407 N.Y.S.2d 874 (App. Div. 1978), *aff’d*, 391 N.E.2d 1352 (N.Y. 1979); *Poe v. Hamilton*, 565 N.E.2d 887, 888 (Ohio Ct. App. 1990).

296. See, e.g., *D.S.W.*, 628 P.2d at 556 (“The level of success which might have been achieved had the mistakes not been made will, we believe, be necessarily incapable of assessment, rendering legal cause an imponderable.”); *Smith v. Alameda Cty. Soc. Servs. Agency*, 153 Cal. Rptr. 712, 718–19 (Ct. App. 1979) (indicating precedent had rejected such claims because of “the difficulties of assessing the wrongs and injuries involved”).

297. Hutt & Tang, *supra* note 36, at 447–56.

298. *Id.*

299. *Id.*

student growth percentile models and value-added models do not establish that tenure and retention policies play a causal role in ineffective teaching.³⁰⁰

b. Retaining Small Numbers of Ineffective Teachers May Not Rise to a Constitutional Deprivation

The constitutional challenges to tenure also fail to sufficiently address the requirement of a substantial and systematic constitutional violation. The current challenges assume that the constitutional rights at stake can be personalized at a level that does not require such a violation. Or the challenges assume that tenure policies retain a sufficiently high number of ineffective teachers that a constitutional violation occurs. No case law supports the former, and the latter is factually problematic.³⁰¹

No one doubts that schools employ ineffective teachers. Many would allow that there are a large number of ineffective teachers.³⁰² But it does not automatically follow that the number of ineffective teachers is high enough to amount to a substantial and systematic constitutional violation. The complaints in California and New York allege variances in teaching quality from classroom to classroom and school to school,³⁰³ but variance alone does not create a constitutional violation.³⁰⁴ If a group of thirty students are taught by six different teachers over the course of a semester, one ineffective teacher does not automatically deprive the group of an adequate education. The adequacy of education will depend on the subject taught by the ineffective teacher and the quality of the group's other teachers.

Even if individual teachers could cause a substantial educational deprivation, the deprivation may not be systematic. Plaintiffs estimate that Los Angeles Unified School District employs approximately 1,000 grossly ineffective teachers,³⁰⁵ which might sound systematic on its face, but the

300. Plaintiffs' tenure challenge, reduced to its essence, claims a right to remove those ineffective teachers that randomly appear in the education system, which more closely aligns with an education malpractice claim. Hutt and Tang may be correct that it is time to revisit malpractice claims. Plaintiffs in New York and California, however, appear to go much further and transform what would otherwise be a malpractice claim into a wide-scale constitutional claim. Whether this is their specific intent is unclear. But pursuing malpractice concerns through constitutional tenure litigation is problematic because while students have a constitutional right to an equal and adequate education, they have no right to choose their teachers, set the terms of their employment, or alter education policy judgments outside of the ballot box.

301. See generally Welner, *supra* note 31, at 136–37 (emphasizing that the theory in *Vergara* rests on a selective quotation of precedent and that it fails to look at the effect on education on the whole as required).

302. Even a leading liberal think tank, the Center for American Progress has raised the issue. CHAIT, *supra* note 39.

303. Vergara Complaint, *supra* note 11; Davids Complaint, *supra* note 252.

304. See, e.g., *Serrano v. Priest*, 226 Cal. Rptr. 584, 606 (Ct. App. 1989).

305. Vergara Complaint, *supra* note 11, at 11.

district employs approximately 30,000 teachers in 900 schools.³⁰⁶ Thus, plaintiffs claim amounts, on average, to one grossly ineffective teacher per school, or one out of thirty teachers. This number could be higher and hence more troubling in individual schools, but even then, the problem becomes isolated and more likely a result of local than state policy.

To be clear, ineffective teaching is necessarily problematic, but not necessarily a constitutional violation by the state. Unless a substantial problem repeats itself across whole schools and districts, establishing a causal link to state policy is difficult.³⁰⁷ At the statewide level, plaintiffs' even more speculative estimate was even more diluted. They estimated one to three grossly ineffective teachers out of one hundred,³⁰⁸ which is far from a systematic and substantial problem.

Chetty's research does not establish the requisite harm either. Chetty claims that removing these ineffective teachers would produce a \$250,000 lifetime increase in earnings per classroom, which sounds like a meaningful harm and the trial court agreed.³⁰⁹ But Bruce Baker points out that what Chetty is really talking about are daily individual earnings that would not buy a cup of coffee.³¹⁰ Chetty's maximum estimated additional earnings per classroom is \$266,664.³¹¹ His minimum is half that. Apply his maximum estimate to an average class of 26.6 students who work for about forty years after graduation, the harm is only \$250 of annual earnings per student ($\$266,000/26.6$ students/40 years = \$250) or about sixty-eight cents a day ($\$250/365.25$ days = 0.6844).³¹² Those numbers pale in comparison to the type of harm and inequity demonstrated in all other successful school finance cases.³¹³

306. LAUSD, DISTRICT ACCOUNTABILITY REPORT CARD 2006–2007 (2007). Plaintiffs' expert, based on the assumption that 1 to 3 percent of teachers are ineffective, estimated that 2,750 to 8,250 grossly ineffective teachers were employed across the state. *Vergara v. State*, No. BC484642, 2014 WL 6478415, at *4 (Cal. Super. Ct. Aug. 27, 2014).

307. It may be that a claim could be brought against the school district on some other theory, such as failure to properly manage teachers or to enforce existing tenure standards, or that the state is liable for local mismanagement. But that claim is not made by the instant plaintiffs and is predicated on a different theory. For a discussion of local districts' duty to deliver a constitutional education and the state's responsibility for supervising it, see generally Black, *supra* note 17.

308. *Vergara*, 2014 WL 6478415, at *4.

309. *Id.*

310. See Baker, *supra* note 284.

311. Chetty et al., *supra* note 26, at app. tbl.14.

312. An independent review of the Chetty study found that even these numbers are significantly inflated because they are based on false assumptions about wage growth and teacher impact. While Chetty's study assumes a constant effect of quality teaching and a constant level of wage growth across an individual's working years, the evidence shows that the effects of teaching fade across time, as does the average percentage of wage growth. ADLER, *supra* note 109, at 5–6.

313. See, e.g., *Serrano v. Priest*, 487 P.2d 1241, 1248 (Cal. 1971) (finding that "in Los Angeles County, where plaintiff children attend school, the Baldwin Park Unified School District expended only \$577.49 to educate each of its pupils in 1968–1969; during the same year the Pasadena Unified School District spent \$840.19 on every student; and the Beverly Hills Unified School District paid out \$1,231.72 per child"); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 198 (Ky. 1989) ("Our

c. Plaintiffs Have Not Established Who the Ineffective Teachers Are or That They Can Be Replaced

Even if tenure was connected somehow to ineffective teaching, and the effects were substantial and systematic, plaintiffs assume that these teachers can be readily and reliably identified. That, however, is the primary ongoing and unresolved challenge of public policy discussed in Parts I and II of this Article. Not even Chetty and his coauthors, who fully support the consideration of value-added models in general, claim to know who to terminate or what processes should be followed prior to termination. Chetty's termination and replacement assumption is about theoretical modeling, not making real decisions about particular teachers. Chetty et al.'s study relies on averages to conclude that teachers with certain value-added model scores are, on average, ineffective teachers, and that dismissing teachers with certain value-added model scores would raise student scores on average.³¹⁴ This does not mean that scores will rise for all students, for all classrooms, or that all dismissed teachers are ineffective.

Chetty is clear that the value-added estimates of teaching effectiveness are "noisy,"³¹⁵ which in laymen's terms means the estimates include a substantial level of uncertainty and randomness.³¹⁶ At the aggregate level, this is not necessarily problematic. But the noise is highly problematic if value-added methods are going to be used to grant tenure, de-tenure, terminate, or pass over a particular teacher. A U.S. Department of Education study found that "error rates for comparing a teacher's performance to the average are likely to be about 25 percent with three years of data and 35 percent with one year of data. Corresponding error rates for overall false positive and negative errors are 10 and 20 percent, respectively."³¹⁷ Even Chetty has acknowledged "there are going to be mistakes [in relying on value-added scores]—teachers who get fired who do not deserve to get fired."³¹⁸

classroom teacher average salary is 84.68% of the national average and our per pupil expenditure is 78.20% of the national average.").

314. See, e.g., Chetty et al., *supra* note 26, at abstract ("On average, a one standard deviation improvement in teacher VA in a single grade raises earnings by about 1% at age 28. Replacing a teacher whose VA is in the bottom 5% with an average teacher would increase the present value of students' lifetime income by more than \$250,000 for the average class-room in our sample.").

315. *Id.* at 49.

316. Statistical noise refers to unexplained variation in a sample. See generally 2 DAVID C. LEBLANC, STATISTICS: CONCEPTS AND APPLICATIONS FOR SCIENCE 318–19 (2004).

317. See PETER Z. SCHOCHET & HANLEY S. CHIANG, U.S. DEP'T OF EDUC., ERROR RATES IN MEASURING TEACHER AND SCHOOL PERFORMANCE BASED ON STUDENT TEST SCORE GAINS, at i (2010), <http://ies.ed.gov/ncee/pubs/20104004/pdf/20104004.pdf> [<http://perma.cc/HT6Q-65HF>]; see also ADLER, *supra* note 109, at 4–8 (questioning Chetty's findings because they are based on unreliable value-added model scores and because Chetty's own study incorporates flawed methodology).

318. Annie Lowrey, *Big Study Links Good Teachers to Lasting Gain*, N.Y. TIMES, Jan. 6, 2012, at A1.

If law and policy were, nonetheless, willing to accept this level of error to achieve an average greater good, Chetty and his coauthors still admit that the positives of dismissing teachers with low value-added model scores are theoretical. Their study “assume[s] that deselected teachers are replaced by teachers with the same amount of experience rather than rookies.”³¹⁹ It also assumes that a teacher who has an average or high value-added score based on teaching high achieving students can translate that teaching effectiveness to another group of students.³²⁰ Even if the second assumption is true—and it is not clear it is—an overwhelming scholarly record indicates that the teachers who replace dismissed teachers in the schools that need them most are likely to be rookie teachers with lower credentials than teachers in other schools.³²¹ The foregoing analysis is not a direct critique of the Chetty study, or of using value-added models in general, but to distinguish the study’s general findings about value-added models from the plaintiffs’ attempts to use Chetty’s research to justify the elimination of tenure or removal of particular teachers.³²²

319. Chetty et al., *supra* note 26, at 48 n.60 (calculating that “hiring inexperienced teachers to replace those deselected” would only reduce “the expected benefits of deselection . . . by less than 3%”).

320. *Id.* at 50 (“One important caveat to these calculations is that they assume that teacher effectiveness [] does not vary with classroom characteristics. Our estimates of VA only identify the component of teacher quality that is orthogonal to lagged test scores and the other characteristics that we control for to account for sorting. That is, teachers are evaluated relative to the average quality of teachers with similar students, not relative to the population.”).

321. See, e.g., Charles Clotfelter et al., *High-Poverty Schools*, *supra* note 35; Charles Clotfelter et al., *Who Teaches Whom?*, *supra* note 35; Eric A. Hanushek & Steven G. Rivkin, *Pay, Working Conditions, and Teacher Quality*, *FUTURE CHILD.*, Spring 2007, at 69; Hanushek et al., *supra* note 51 (finding that a 10 percent salary increase would be necessary for each increase of 10 percent in minority student enrollment to induce white females to teach in the school); Susanna Loeb et al., *supra* note 52; Parker, *supra* note 21; HEATHER G. PESKE & KATI HAYCOCK, *THE EDUC. TRUST, TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY 2* (2006); see also FRANKENBERG, *supra* note 51 (revealing that teacher dissatisfaction tends to rise as the percentage of minority students in a school rises, making it more likely that teachers will leave).

322. Bruce Baker concludes:

[T]he implications of this study for practice – for human resource policy in local public (or private schools) [are] not much! A study like this can be used to guide simulations of what might theoretically happen if we had 10,000 teachers, and were able to identify, with slightly better than even odds, the “really good” teachers – keep them, and fire the rest (knowing that we have high odds that we are wrongly firing many good teachers . . . but accepting this fact on the basis that we are at least slightly more likely to be right than wrong in identifying future higher vs. lower value-added producers). As I noted on my previous post, this type of big data – this type of small margin-of-difference finding in big data – really isn’t helpful for making determinations about individual teachers in the real world. Yeah . . . works great in big-data simulations based on big-data findings, but that’s about it.

Indeed it’s an interesting study, but to suggest that this study has important immediate implications for school and district level human resource management is not only naive, but reckless and irresponsible and must stop.

Bruce D. Baker, *Revisiting the Chetty, Rockoff & Friedman Molehill*, SCH. FIN. 101 BLOG (June 9, 2013), <https://schoolfinance101.wordpress.com/2013/06/09/revisiting-the-chetty-rockoff-friedman-mole-hill> [https://perma.cc/B4QA-X4GR].

d. Tenure Policies Intersect with Several Other Factors and Policies That Must Be Considered

While assuming causal connections regarding tenure, plaintiffs ignore the potential causal effects of other policies and factors. Plaintiffs need not challenge the overall structure of education, but a reliable causal analysis requires that they account for the causal role of other policies and factors. Tenure might very well correlate with educational outcomes, but without accounting for other important variables, one cannot reasonably determine whether tenure is masking some other underlying or overarching causal factors. Disaggregating outcomes by multiple core variables is standard practice in education research and litigation. In the challenge to tenure, at least, four other significant factors that intersect with teaching quality and student outcomes must be accounted for: (i) race, (ii) money, (iii) the teaching market, and (iv) principals' decision-making role. The current lawsuits do not fully account for these factors.

i. Racial Inequalities, Funding Gaps, and Teacher Market Forces

The most obvious factors for which causal analysis must account are student demographics. "Numerous empirical research studies document the numerous factors external to classroom teacher performance that can directly impact student performance on standardized tests such as inadequate school resources, large classroom sizes, parental education attainment, and high populations of English language learners."³²³ Some states, however, "have embraced the presumption that teacher competence is the primary contributor to student performance without examining its validity."³²⁴

The *Vergara* plaintiffs' only allusion to the relevance of demographic factors is their allegation that racial minorities are disproportionately exposed to ineffective teachers.³²⁵ This allegation is certainly consistent with social science literature on differential exposure to ineffective teaching,³²⁶ but this allegation does not disaggregate the potential causes of that exposure or its effects. To statistically assess the impact that a teacher's instruction has on students and whether it rises to the level of ineffective, the demographics of that teacher's students, as well as the demographics of the students to whom teacher's students are to be compared, must be known.³²⁷

323. McNeal, *supra* note 110, at 506.

324. *Id.*

325. Vergara Complaint, *supra* note 11, at 1.

326. *See, e.g.,* Parker, *supra* note 21.

327. The Chetty study does control for ethnicity, gender, age, receipt of special education services, limited English proficiency, and poverty in some respects, *see* Chetty et al., *supra* note 26, at 14, but the study also includes certain assumptions and biases that would prevent plaintiffs from using it to make the conclusions they seek. *See id.* at 2 n.4 ("This quasi-experimental test relies on the assumption that teacher departures and arrivals are not correlated at a high frequency with student

The second set of factors for which plaintiffs do not account are those relating to teacher hiring. For teacher tenure to cause ineffective teaching, plaintiffs need to establish, for instance, that there are other qualified teachers in the market to replace those whom districts would fire, and that those qualified teachers would accept positions in the disadvantaged schools.³²⁸ As noted above, studies suggest neither is the case.³²⁹ One of the most intractable problems in our current education system is expanding the pool of qualified teachers.³³⁰ There simply are not enough good teachers to go around.³³¹ Until an oversupply of qualified teachers occurs, disadvantaged schools will have to compete to hire them, and they will often lose out to other schools.

Money and race play significant roles in this competition. First, disadvantaged schools have fewer resources to hire teachers.³³² Second, research shows that, independent of money, teachers with choices—those that are highly qualified—choose to teach in schools with fewer poor and minority students.³³³ These findings are entirely consistent with plaintiffs' claims that "grossly ineffective teachers are disproportionately situated in schools that serve predominantly low-income and minority students."³³⁴ But plaintiffs ignore the precedent causes of these inequalities: race and money. Instead, plaintiffs assume that the antecedent occurrence of tenure is a causal factor. In short, school funding and segregation play a significant role in access to quality teachers, with which tenure may have absolutely nothing to do.

characteristics."); *id.* (assuming that teacher effectiveness remains constant across student groups, but only making in group comparisons).

328. Plaintiffs are relatively forthright in this assumption. They indicate the problem is not the pool but an inability to correct bad initial hires once tenure and due process protections kick in. Vergara Complaint, *supra* note 11, at 11 ("[G]rossly ineffective teachers are routinely hired into the California school system and granted [tenure]. Even after their grossly ineffective performance is discovered, such teachers are not dismissed for their poor performance.>").

329. See *supra* note 321; see also Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 119 (2009) (discussing the inequitable access to quality, experienced teachers in predominantly poor and minority schools).

330. CASSANDRA GUARINO ET AL., RAND EDUC., A REVIEW OF THE RESEARCH LITERATURE ON TEACHER RECRUITMENT AND RETENTION (2004); U.S. CHAMBER OF COMMERCE, LEADERS & LAGGARDS: A STATE-BY-STATE REPORT CARD ON K-12 EDUCATIONAL EFFECTIVENESS 9 (2014) ("States consistently scored higher in the ability to identify teacher quality, retain good teachers, and exit bad ones . . . but scored extremely low on preparing teachers and expanding the pool of good teachers."); see also LINDA DARLING-HAMMOND, THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE 163-93 (2010) (discussing how other countries make the teaching profession more attractive).

331. See Oluwole, *supra* note 33, at 184 (advocating for the transfer of teachers to high-need schools). A U.S. Department of Education study found that transfers are an effective solution. See U.S. DEP'T OF EDUC., TRANSFER INCENTIVES FOR HIGH PERFORMING TEACHERS: FINAL RESULTS FROM A MULTISITE RANDOMIZED EXPERIMENT (2013).

332. THE EDUC. TRUST, FUNDING GAPS 2006, at 7 tbl.4 (2006).

333. See generally David, *supra* note 52; FRANKENBERG, *supra* note 51 (as the percentage of minority students in a school rises, the qualification and experience level of teachers therein tends to decrease); Hanushek et al., *supra* note 51, at 337 ("[T]eachers systematically favor higher achieving, nonminority, non low-income students."); Parker, *supra* note 21.

334. Vergara Complaint, *supra* note 11, at 11.

Because plaintiffs' causal premises are so simplistic, they also ignore the possibility that terminating ineffective teachers might make matters worse for the students they seek to help. If all other factors stayed the same, terminating more teachers would most likely leave poor and minority schools with fewer teachers than they currently have,³³⁵ or potentially force those schools to replace terminated teachers with even lower quality teachers. Of course, it is possible that eliminating unqualified teachers might have a positive effect on the overall teaching pool and, thus, present schools with more hiring options. Hence, terminations may produce a net gain. But the effects of teacher terminations are simply unknown. It is also possible that the teaching pool might shrink even further, as current teachers—including quality ones—seek to escape a profession with rising pressures and risks, while others are discouraged from joining it in the first place.³³⁶ The net result of this effect would be negative for all schools but fall disproportionately on disadvantaged schools.³³⁷

In short, an underdeveloped teaching pool, school funding inequities, and racial segregation all indicate that the problem of ineffective teaching may not be tenure but the unequal distribution of ineffective teachers, which concentrates them in disadvantaged schools. Recognizing these larger structural inequalities, prior litigants have consistently and directly challenged funding inequality and segregation rather than the effects these first-order problems produce in teacher quality. Ignoring structural inequality not only oversimplifies causal analysis, it assumes that more effective teachers can be had for free in segregated environments.

ii. Principals' Reluctance to Evaluate or Terminate Teachers

Principals' decision making also plays an obvious role in the retention of ineffective teachers. Plaintiffs implicitly assume that these principals are ready, willing, and able to terminate ineffective teachers if tenure did not exist.³³⁸ This assumption ignores two key factors. First, research indicates that principals may not be willing to terminate teachers. Principals often hold low expectations

335. Some advocate that this is exactly what we need. *See, e.g.*, Dagostino, *supra* note 59, at 187 (advocating that it would be better to increase class size); MICHAEL HANSEN, THE THOMAS B. FORDHAM INST., RIGHT-SIZING THE CLASSROOM: MAKING THE MOST OF GREAT TEACHERS (2013) (advocating for larger class sizes).

336. *See generally* Superfine, *supra* note 53; *see also* Rebell, *supra* note 56, at 1948 (“Instead of carefully weighing the impact of budget reductions on school operations, many governors and leaders are undermining the prestige of the profession and the morale of current educators.”); Fernanda Santos, *Teacher Survey Shows Morale Is at a Low Point*, N.Y. TIMES, Mar. 8, 2012, at A13 (describing teacher morale at twenty-year low). *But see* Superfine, *supra* note 53 (summarizing the argument that focusing on teacher effectiveness would motivate many existing teachers).

337. *See, e.g.*, Baker et al., *supra* note 104 (finding no strong evidence to support the notion that evaluation systems based on student scores would improve teaching); Welner, *supra* note 31, at 135 (indicating removing tenure might make hard-to-staff schools even harder to staff).

338. Vergara Complaint, *supra* note 11; Davids Complaint, *supra* note 252.

for teachers and are reluctant to “rock the boat” by harshly evaluating teachers.³³⁹ In other words, principals may be uninterested in using the tools available to them to terminate teachers.³⁴⁰ Thus, even if terminating teachers could produce net gains for schools, the bigger causal problem may lie with principals, not teachers. At the very least, tenure is not the significant cause that plaintiffs assume.

Second, for tenure to play a significant causal role, it must be the case that principals would disregard and overcome the structural funding, poverty, and race challenges within which they make decisions.³⁴¹ Some might disregard these factors, but they will still be subject to them after they terminate a teacher. Thus, their ability to terminate a teacher may still have little effect on teacher quality as the other factors are left unaddressed.

In sum, this Article does not purport to know the precise causal role that race, funding, teaching markets, or principals play in teaching effectiveness. It is the plaintiffs who must answer these and other causal questions. They have not. Instead, they assume that causation exists or expect courts to draw causal inferences on supposition. Prior courts dealing with equity and adequacy litigation have refused to do so.

F. Last-in-First-out: A Narrower but Easier Case to Make

Last-in-first-out (LIFO) statutes ensure that senior teachers are retained during reductions-in-force over junior teachers, regardless of teaching effectiveness.³⁴² California’s statute not only requires that senior teachers in an individual school be retained, it requires district-wide reassignment if necessary.³⁴³ To be clear, however, LIFO statutes do not exist in many states, and even where they do, they are not necessarily as pro-seniority as the

339. See, e.g., EDWIN M. BRIDGES, *THE INCOMPETENT TEACHER: MANAGERIAL RESPONSES* 25–26 (rev. & extended ed. 1992); DANA GOLDSTEIN, *THE TEACHER WARS: A HISTORY OF AMERICA’S MOST EMBATTLED PROFESSION* (2014); Suzanne R. Painter, *Principals’ Perceptions of Barriers to Teacher Dismissal*, 14 J. PERS. EVALUATION IN EDUC. 253 (2000).

340. The districts for which principals work may also be resistant to certain teacher evaluations and terminations. See ALEJANDRO SANDOVAL, EDVOICE INST., *STUDENT PROGRESS IGNORED: AN EXAMINATION OF CALIFORNIA SCHOOL DISTRICTS’ COMPLIANCE WITH THE STULL ACT 4–5* (2015) (finding that most districts in the State had failed or refused to implement the new statutorily required teacher evaluation system based on student achievement).

341. Welner, *supra* note 31, at 132.

342. The statute specifically provides: “[e]xcept as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.” CAL. EDUC. CODE § 44955(b) (West 2015).

343. CAL. EDUC. CODE § 44955(c) (West 2015) (“The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.”).

California or New York statutes.³⁴⁴ But assuming a more stringent LIFO statute like that in California, the constitutional challenge to seniority protections has stronger potential merits than the challenge to tenure. In particular, the reassignment, retention, and dismissal of teachers pursuant to LIFO come far closer to meeting the substantial and systematic harm requirements than tenure claims currently do.

First, by definition, LIFO statutes have an immediate, direct, and district-wide effect on the teaching force because they require the reassignment, retention, and dismissal of teachers across and within schools. Second, California school districts have, in fact, previously initiated the process during times of recession, including the Great Recession of 2009.³⁴⁵ Third, this process is not optional. Rather, it is compelled and, thereby, caused by state statute. Fourth, the potential harm suffered by terminating and reshuffling teachers based on seniority is relatively clear. At best, studies indicate that experience has a bearing on teacher quality during the first few years, but beyond that, experience does not necessarily correlate with teaching quality.³⁴⁶ Thus, in many instances, a LIFO policy would require districts to dismiss and replace teachers based on a factor that has little, if any, bearing on teacher quality. In these four respects, the notion that the state is causing systematic and substantial educational harm is not merely speculative when LIFO procedures go into effect.

With that said, a few open questions remain. The first is whether the particular teachers actually transferred and dismissed under a LIFO policy produce a net negative result in teaching effectiveness. The trial court in *Vergara* did not engage this factual question, but assumed that the dismissal of highly qualified junior teachers before less effective senior ones would occur and produce significant harm.³⁴⁷ To their credit, plaintiffs, however, had alleged that a prior reduction-in-force in various districts in the California had “resulted in the retention of thousands of low performing teachers who happened to have more years of experience than the teachers included in the

344. See generally MARY DOWELL ET AL., NAT'L SCH. BDS. ASS'N, REFORM OF SENIORITY-BASED LAYOFF RULES FOR TEACHERS: A LEGAL ANALYSIS 7–17 (2011), http://www.lcwlegal.com/files/95049_NSBA-White-Paper-Reform-of-Seniority-Based-Layoff-Rules-for-Teachers.pdf [<http://perma.cc/7JY9-CWNK>].

345. See, e.g., UCLA INST. FOR DEMOCRACY, EDUC., & ACCESS, SHARING THE BURDEN? THE IMPACT OF PROPOSED TEACHER LAYOFFS ACROSS LAUSD (2009), <http://idea.gseis.ucla.edu/newsroom/newsroom-folder/april-13-2009> [<http://perma.cc/3DUP-F2PR>].

346. Muñoz & Chang, *supra* note 49, at 149, 157 (showing previous results are mixed as to whether experience matters and finding, based on a new examination, that years of experience “have little effect on student achievement”); JENNIFER KING RICE, NAT'L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RESEARCH, THE IMPACT OF TEACHER EXPERIENCE: EXAMINING THE EVIDENCE AND POLICY IMPLICATIONS (2010), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/1001455-The-Impact-of-Teacher-Experience.PDF> [<http://perma.cc/FS28-V3JD>].

347. *Vergara v. State*, No. BC484642, 2014 WL 6478415, at *6–7 (Cal. Super. Ct. Aug. 27, 2014). The court did not look further because it assumed a sufficient harm to trigger strict scrutiny and shift the burden to the state. *Id.*

layoffs. One study found that nearly 2,000 English Language Arts teachers and more than 1,500 math teachers in the lowest quartile of teacher performance kept their jobs, while 20 percent of the ELA and math teachers laid off were in the top quartile of teacher performance.³⁴⁸

These numbers, like those mentioned in regard to the tenure claims, do not necessarily amount to a substantial diminution of education quality.³⁴⁹ They could be dispersed across enough schools and students that they do not substantially degrade educational outcomes overall for schools.³⁵⁰ The way in which LIFO operates in California, however, gives it the potential to narrow and concentrate its effect more perniciously. The policy could easily result in the widespread dismissal of large swaths of the teaching force in hard-to-staff schools to make way for senior teachers from across the district. For instance, one Oakland, California, elementary school hired an entirely new teaching staff in 2007 and apparently saw significant improvements in student achievement.³⁵¹ But in the midst of a recession, the district planned to lay off every teacher in that school at the end of the 2010–11 school year.³⁵² This level of turnover, regardless of quality, comes with a cost for the school and its students.³⁵³ If turnover requires the school district to transfer more senior, but on average less effective, teachers to the school, a constitutional level harm may very well exist.

The second open question is whether a state's LIFO statute should be analyzed in the context of the overall challenge of ensuring teaching quality or in isolation. The tenure analysis in Part III.E pointed out the various flaws that flow from an isolated analysis of tenure. As a practical matter, the LIFO statute plays a relatively small role in access to quality teachers across time. While systematic in nature, one only finds a substantial harm from LIFO by narrowing the frame of reference to a single moment in time and the particular

348. Vergara Complaint, *supra* note 11, at 17–18.

349. See *supra* Part III.E.2.b.

350. Of course, an individual student might be harmed in some particular instance, but for such a claim to be actionable, it would implicate the right versus duty distinctions raised in *supra* note 216 and *infra* note 352.

351. Lillian R. Mongeau, *All Teachers and Administrators at Futures Elementary in Danger of Lay Offs*, OAKLAND N. (Mar. 17, 2011), <https://oaklandnorth.net/2011/03/17/all-teachers-and-admin-at-futures-elementary-in-danger-of-lay-offs> [<https://perma.cc/B4RT-WRWQ>]; Katy Murphy, *Poor Schools Bear Layoff Brunt: Campuses in Neediest Neighborhoods Could See Teaching Staff Slashed Under "Last-in, First-Out,"* OAKLAND TRIB., Mar. 16, 2011, at 11A; see also Dagostino, *supra* note 59, at 178–79.

352. See Mongeau, *supra* note 351.

353. See, e.g., *Reed v. United Teachers L.A.*, 145 Cal. Rptr. 3d 454, 473 (Ct. App. 2012) (quoting defendant's expert saying "schools with high teacher turnover can fall into a 'vicious cycle' in which the high turnover itself makes it more difficult to recruit and retain teachers, contributing to continued high turnover"); GARY BARNES ET AL., NAT'L COMM'N ON TEACHING & AM.'S FUTURE, THE COST OF TEACHER TURNOVER IN FIVE SCHOOL DISTRICTS: A PILOT STUDY (2007), <http://nctaf.org/wp-content/uploads/CTTFullReportfinal.pdf> [<http://perma.cc/X2P4-EU5Y>] (discussing the cost of turnover in general and noting, for instance, the cost of each teacher turnover in a North Carolina school district was \$10,000).

schools it will impact most at that time. Moreover, assuming no new large recessions in the immediate future, striking down a LIFO statute would have no foreseeable effect on teacher effectiveness while all the other factors that do affect teachers remain in effect.

A court looking for an ongoing, systematic harm may not find one in LIFO. These reservations aside, LIFO can easily be separated from the overall teacher management structure and is susceptible to isolated treatment. If it does, in fact, create a constitutional harm in a particular school at a particular time, no obvious doctrinal principles would limit a court from intervening.³⁵⁴ But again California's and New York's LIFO statutes are particularly stringent, and the problems they may create are less likely to arise in other states. Thus, the foregoing analysis suffices for the purposes of this Article. The next Part offers further discussion on the more important issue of how courts should respond to the constitutional challenge to tenure.

IV.

A REASONED JUDICIAL RESPONSE TO TEACHER TENURE CHALLENGES

The highest courts in California, New York, and other states will soon be called on to decide the validity of the constitutional challenge to tenure.³⁵⁵ Courts should, with caveats, recognize a cause of action, as plaintiffs have stated a theoretically valid claim within existing precedent. But courts should reject plaintiffs' challenge as applied because their claims cannot be substantiated. Law, facts, and important policy considerations all point to this conclusion.

A. *Plaintiffs Have Stated a Theoretically Valid Claim*

Plaintiffs' claims easily fall within existing school finance precedent and theory. State teacher tenure policies can theoretically violate students' right to either a quality or an equal education. A court would struggle to bar such a cause of action without also doing damage to the overall evolution of education rights. Those education rights are currently broad—sufficiently so that

354. It is possible, however, that the distinction between education rights and education duties might more clearly surface as the claim is narrowed to particular teachers, classes, or schools. As noted *supra* notes 161, 214, and 221, some debate exists as to whether state constitutions and school finance precedent establish individual education rights or only education duties. If they only establish general education duties, this might force a broader analysis on courts that precludes the consideration of individualized harms as constitutionally redressable harms. *See generally* Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 *GEO. MASON L. REV.* 301, 322 (2011) (distinguishing education claim-rights from duties); Scott R. Bauries, *The Education Duty*, 47 *WAKE FOREST L. REV.* 705 (2012) (distinguishing education claim-rights from duties).

355. Potential locations for litigation beyond California and New York include Connecticut, Oregon, New Jersey, and Minnesota. *See* Edwards, *supra* note 6; McGuire, *supra* note 253. That number could easily expand, given that StudentsFirst, a national non-profit that works in ten different states, is pushing the litigation. *See* Rich, *supra* note 253.

numerous prior adjudications have found that access to quality teaching is part of a state's constitutional obligation to students. To exclude plaintiffs' current tenure claims, a court would need to narrow the principles previously announced in school finance cases. This might cut short and eliminate currently flawed tenure claims, but it would also damage important claims other plaintiffs will likely press in the future in areas like discipline and segregation. The ability of state education rights to provide checks on school discipline and segregation depend on continued broad interpretations of the right to education.³⁵⁶ In short, the constitutional challenge to tenure is new but not entirely distinct. Courts should not alter important precedent just to avoid addressing the substantive issues involved in tenure challenges.

Courts should, however, narrow the circumstances under which they will entertain tenure challenges. First, courts should reject facial challenges to tenure statutes. No high court has previously invalidated education statutes under such circumstances. Those courts have always required school finance, and analogous litigants, to establish their cases on the facts. Reliance on local property tax to fund schools, for instance, is not per se unconstitutional; neither are funding levels well below the national average, nor funding disparities.³⁵⁷ There is no more reason to infer a facial violation based on teacher tenure than any other education policy.

Second, based on permissive pleading rules, a court should allow plaintiffs' current challenge to tenure to proceed. Under the traditional approach, plaintiffs' claim could survive a motion to dismiss for failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."³⁵⁸ While plaintiffs' claims are riddled with factual flaws and assumptions, the law would provide relief if the plaintiffs could establish their factual claims. It is not impossible that they might marshal the necessary evidence to do so.

Courts recognizing a properly stated claim, however, should signal implicitly or explicitly to plaintiffs that they need to establish more precise facts than their current complaints allege. In particular, plaintiffs would need to establish substantial and systematic violations (unless a court intends to personalize the claim, which would raise other issues)³⁵⁹ and demonstrate two-step causation. In *Vergara*, a trial has already occurred, so the appellate court can easily overturn the trial court's holding—as the facts insufficiently establish the claim—or remand for further factual findings on the necessary

356. See generally Black, *supra* note 17; Bloomenthal, *supra* note 214.

357. See *Serrano v. Priest*, 226 Cal. Rptr. 584, 606 (Ct. App. 1986) (requiring substantial disparities that affect outcomes); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996).

358. The traditional federal approach was "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

359. See *supra* note 354.

causal questions the trial court did not address. Upon analyzing those questions, the trial court itself could reject plaintiffs' claim on the facts. But in those cases yet to be tried, a clear indication of the necessary evidence would help cut short otherwise futile litigation.

A court adopting the new federal approach to pleading, however, might dismiss the current claims, as currently conceived. The new federal approach assesses whether the allegations are plausible and whether they include all of the necessary material elements of the claim.³⁶⁰ This approach would offer a court the ability to dismiss tenure challenges for failure to allege two-step causation, for instance, or for implausibility given the various causal uncertainties ignored or oversimplified by plaintiffs. With that said, even under a heightened pleading approach, plaintiffs allege causation, from which one could reasonably infer an allegation of two-step causation. Likewise, although current social science strongly indicates that plaintiffs will not be able to substantiate their claim, the claim itself is not implausible. Plaintiffs, now or in the future, might further develop the necessary evidence themselves. Courts looking to conserve judicial resources could dismiss the claims not on legal theory, but on the factual allegations themselves, leaving open the possibility of future litigation.

B. *Plaintiffs Have Not Proven a Constitutional Violation*

Barring new social science developments and a better appreciation of causation by plaintiffs, those courts that permit plaintiffs to proceed to trial should find that plaintiffs have failed to establish their claim. First, the general evidence alleged in the current complaints and presented at trial in *Vergara* fails to establish that ineffective teaching rises to the level of systemic and substantial deprivations of the constitutional right to education. Second, even if such a deprivation exists, plaintiffs have not shown that tenure is the cause of that deprivation, nor that the deprivation has a causal effect on student outcomes. Third, any showing or inference to that effect would be unreliable because plaintiffs' case fails to sufficiently account for many demographic factors and other state policies that affect teaching quality and student outcomes.

Of course, the challenge in New York and various other states must be tried. One cannot say for certain that plaintiffs will not be able to substantiate

360. The Court recently abrogated the traditional pleading approach. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). States, of course, have their own pleading rules, but they have generally followed the traditional approach and have been slow to change it. See A. Benjamin Spencer, Pleading in State Courts after *Twombly* and *Iqbal* (Pound Civil Justice Institute Forum for State Appellate Court Judges, 2010), <http://ssrn.com/abstract=2038349> [<http://perma.cc/E2NH-V4SR>]. According to Spencer, California and New York have not replicated the new federal standard, although California's standard is similar to the more demanding old "fact pleading" regime that preceded the permissive "notice pleading" regime from *Conley* and New York courts have cited *Iqbal* with approval. *Id.*

their case. The foregoing is simply to say it is highly unlikely that they can, not that plaintiffs should be denied the opportunity to try. To the contrary, allowing plaintiffs the opportunity to make their case has merit. Some courts were too quick to dismiss plaintiffs' school finance claims during the 1970s and 1980s³⁶¹ based on courts' own assumptions of what facts could be shown.³⁶² When social science and evidence later developed, plaintiffs were barred from bringing claims or, at least, seriously prejudiced in some states.³⁶³ While tenure challenges are seriously flawed on current facts, things may change in the future. Notwithstanding the flaws that plague value-added models and student growth percentile models, those systems are well positioned to make improvements, if not breakthroughs.³⁶⁴ Remaining open to those potential breakthroughs, as well as variations of plaintiffs' theory, is important to the continued development and enforcement of the constitutional right to education.

*C. The Multifaceted Nature of the Problem and Public Policy Deference
Caution Against Judicial Intervention in Tenure*

Even if plaintiffs could establish some generalized correlation between tenure and educational outcomes, it is not obvious that the solution is to eliminate tenure or terminate teachers. The solution to the problem is bound up in a complex set of public policies and market factors. Any number of different solutions or combined solutions is plausible. The call to eliminate tenure or accelerate teacher terminations is premised on the notion that there is a reliable means by which to achieve that end, but states are still in the experimental stages of altering teacher evaluations (which explains the numerous flaws in the new systems).³⁶⁵ Wading into the politics and efficacy of terminating teachers, without solid social science and causal evidence, could place courts'

361. This wait-and-see approach would appear to be what the trial court in New York is doing. See *Dauids v. State*, No. 10115/14 (N.Y. Sup. Ct. Mar. 12, 2014), <http://lawprofessors.typepad.com/files/2015-march-motion-to-dismiss-denied--a-043---davids-wright.pdf> [<http://perma.cc/V9VT-P7AC>] (order denying motions to dismiss) (recognizing the potential evidentiary problems with plaintiffs' claim, but emphasizing that the question at the dismissal stage is simply whether plaintiffs have made the required allegations, which plaintiffs had made).

362. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23–24 (1973) (“Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees’ argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”); *McDaniel v. Thomas*, 285 S.E.2d 156, 160–61 (Ga. 1981).

363. In Georgia, for instance, plaintiffs have struggled to restart litigation in their state, notwithstanding the theoretical and factual merits in the state. See *School Funding Cases in Georgia*, NAT’L EDUC. ACCESS NETWORK, <http://schoolfunding.info/2012/01/school-funding-cases-in-georgia> [<http://perma.cc/L4FC-PXKT>] (last visited Oct. 29, 2015).

364. Superfine, *supra* note 53, at 606 (“[T]eacher evaluation and accountability reforms appear to be moving in a positive direction.”).

365. See generally Baker et al., *supra* note 30.

institutional legitimacy in danger. Courts are ill equipped to mediate a political debate over experimentation with teacher evaluation.³⁶⁶

It is, likewise, nearly impossible for courts to predict the various indirect effects that altering teacher tenure and retention will produce, much less whether those effects do or do not outweigh the benefits.³⁶⁷ Some have already suggested that new teacher evaluation systems and attacks on teacher tenure are playing a role in the teacher shortage that developed in California in 2015.³⁶⁸ Likewise, in New Mexico, students recently challenged the State's new student growth percentile model teacher evaluation and removal system as a violation of their constitutional right to education. They allege that the "evaluation system . . . hinders Defendants' duty to provide a uniform and sufficient system for all students by unfairly evaluating good teachers and by not ensuring those teachers who need improvement have adequate support to improve their instruction."³⁶⁹ Furthermore, the system undermines "teacher recruitment and retention efforts, especially in districts and campuses with higher populations of minority and at-risk students. . . . [Q]uality teachers have requested transfers out of such schools, and they have refused transfers into such schools because of the punitive teacher evaluation system."³⁷⁰ Rather than helping these students, the student growth percentile model system often makes matters worse for the neediest students.³⁷¹ In short, teacher tenure and evaluation systems are in such flux that, in New Mexico, students challenge their existence as unconstitutional, while in California and New York, students challenge their absence as unconstitutional.

Analogous indirect effects of altering tenure may also move beyond teachers themselves. Teacher tenure policy intersects with any number of other education policies, including curriculum, funding, hiring, assessment, and student assignment. Any change in tenure has the capacity to produce ripple effects in these other areas. These effects may or may not support the end goal of delivering a constitutional education.³⁷² If not, resolving one problem—tenure—would just create another. Thus, while a challenge to teacher tenure

366. See generally Bauries, *supra* note 192, 961–65, 977 (emphasizing the polycentric nature of education policy and the problem of courts intervening).

367. See, e.g., Chetty et al., *supra* note 26, at 32 (pointing out that the study conducted a value-added method analysis after the fact on teachers who had never been held accountable for and their students' test scores and that moving to such a regime might actually undermine the reliability of value-added models themselves).

368. Valerie Strauss, *The Real Reasons Behind the U.S. Teacher Shortage*, WASH. POST (Aug. 24, 2015), <https://www.washingtonpost.com/blogs/answer-sheet/wp/2015/08/24/the-real-reasons-behind-the-u-s-teacher-shortage> [<https://perma.cc/927A-7A2E>].

369. Martinez Complaint, *supra* note 42, at 42.

370. *Id.*

371. See *id.*

372. See generally Rebell, *supra* note 56 (discussing policy approaches other than value-added models and student growth percentile models that detractors might consider).

may be theoretically valid, the polycentric nature of tenure may render an isolated judicial analysis practically unmanageable.³⁷³

Where multiple different problems—some of which are non-legal—and multiple different solutions are plausible, separation of powers principles dictate courts should be very cautious about intervening.³⁷⁴ Constitutional education litigation is not a vehicle for courts to second-guess policy decisions reserved for the legislature.³⁷⁵ School funding litigation has avoided these policy problems through a careful litigation strategy and an exacting judicial analysis missing from the tenure challenge. First, so-called school funding litigation is not just about funding.³⁷⁶ Rather, it involves a macro-assessment of the education system that is not about dictating specific solutions but dictating specific responsibility to the state for finding solutions.

Second, even when reduced to a financial dictate, prior litigation is primarily about expanding the financial pot. This may produce negative ripple effects in other areas of the state budget, but it is less likely to produce negative effects within education. Tenure and retention challenges are the equivalent of stirring or sifting the pot without knowing what the results will be. Third, adequacy and equity litigation focus on money because money places education systems in a position to address educational challenges in the myriad ways their local circumstances require.³⁷⁷ Thus, money is a concession to polycentric problems and that educators must address them based on local circumstances. The tenure challenge, in contrast, seeks to have plaintiffs define—as in eliminating or restricting tenure—rigid solutions.

Finally, any restrictions that a constitutional right to education might place on teacher tenure must comply with the Due Process Clause of the U.S.

373. See *McCleary v. State*, 269 P.3d 227, 247 (Wash. 2012) (“The legislature’s ‘uniquely constituted fact-finding and opinion gathering processes’ provide the best forum for addressing the difficult policy questions inherent in forming the details of an education system.”); see also Bauries, *supra* note 31, at 961–65, 977; William S. Koski, *The Politics of Judicial Decision-Making in Education Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1226 (2004). Polycentricity has been a dominant issue in products liability, where one scholar explains adjudication is ill-advised:

[T]he distinguishing characteristic of nonjusticiable cases is that the issues “are interrelated in such a way that sensible consideration of any issue, or element, requires the simultaneous consideration of most, or all, of the others.” Adjudication “requires problems the various issues and elements of which may be taken up in an orderly sequence,” and thus is ill-suited to the resolution of polycentric, nonlinear problems.

Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 552 (1982) (citations omitted).

374. See generally Bauries, *supra* note 192.

375. *McCleary*, 269 P.3d at 247; *Campaign for Fiscal Equity, Inc.*, 828 N.Y.S.2d 235, 243 (N.Y. 2006) (“The role of the courts is not, as Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State’s proposed calculation of that cost is rational.”).

376. See generally Black, *supra* note 17.

377. See *Serrano v. Priest*, 557 P.2d 929, 947 (Cal. 1976); *Brigham v. State*, 692 A.2d 384 (Vt. 1997).

Constitution.³⁷⁸ As discussed in Part II.C, systems that both effectuate the ends that plaintiffs desire and pass due process analysis are not currently available. Neither the plaintiffs nor the trial court in *Vergara* pay these due process concerns any attention. The failure to do so could be to replace the tenure system that violates the state constitution with another that violates the Federal Constitution. In sum, any or all of the foregoing policy problems caution against the judicial intervention that plaintiffs currently seek.

CONCLUSION

The constitutional challenge to tenure highlights a crucial point in social science research, school finance precedent, and the past decade of federal policy: the centrality of quality teachers to educational outcomes. While past policy reforms have recognized this point, none have managed to significantly improve teaching. Unfortunately, the current constitutional challenge to tenure does not either. The constitutional claim does, however, potentially achieve two other important ends. First, it elevates the concerns over ineffective teaching to a new plane. Rather than simply a policy prerogative, quality classroom teaching is part of students' constitutional right to education, which demands a remedy. Second, the constitutional challenge to tenure expands the theoretical boundaries of school finance precedent. That precedent, when read properly, provides a basis to reform educational inequality through means other than money.

The challenge to tenure, nonetheless, has not matured to a point that warrants judicial intervention to eliminate tenure. Currently available evidence does not establish the causal- and injury-related facts necessary to make out state responsibility for a constitutional violation. Moreover, even if a violation existed, any number of other remedies might be appropriate. Due to separation of powers limitations, the choice of permissible remedies must be left to legislatures. Both state and federal legislatures are already experimenting with ways to improve instruction; some involve tenure, some do not. While state constitutions guarantee students an equal and adequate education, those constitutions do not afford courts the authority to intervene with preordained remedies, especially in the context of factual uncertainty.

378. See generally *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. Unit B May 1981) (articulating the due process limits on graduation exam).