

ALASKA AND VERGARA V. CALIFORNIA: EVALUATING THE CONSTITUTIONALITY OF TEACHER TENURE IN ALASKA

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ABSTRACT

In the summer of 2013, California's teacher tenure statutes were found to violate the equal protection clause of the state's Constitution. The statutes called for tenure to be granted after two years of teaching, contained significant due process protections in case of dismissal, and required that new hires be laid off before teachers with tenure. The group that brought the lawsuit, Students Matter, is considering filing lawsuits in other states. This Note examines Alaska's tenure statutes to assess the state's vulnerability to a copycat lawsuit. While most of Alaska's tenure statutes seem safe from challenge, the state should evaluate its tenure system to determine if it is leading to the best outcome for students.

INTRODUCTION

In June of 2013, Judge Rolf M. Treu of the Superior Court of California in Los Angeles County sent shock waves across the education landscape when he handed down his decision in *Vergara v. California*,¹ finding that the state's teacher tenure statutes violated the equal protection clause of the Constitution of California. The *New York Times* described the decision as "one that could radically alter how California teachers are hired and fired and prompt challenges to tenure laws in other states."² The San Francisco Chronicle asked "[i]s this the end of

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1. No. BC484642, 2014 WL 2598719, at *7 (Cal. Super. Ct. June 10, 2014).

2. Jennifer Medina, *Judge Rejects Teacher Tenure for California*, N.Y. TIMES (June 11, 2014), http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html?_r=1.

teacher tenure in California?”³

Although Education Secretary Arne Duncan enthusiastically supported the outcome of the case by saying that all students in California and in the rest of the United States should have the “equal opportunity to be taught by a great teacher,”⁴ teachers unions have condemned the decision.⁵ The National Education Association denounced the lawsuit as “never [being] about helping students, but [as] yet another attempt by millionaires and corporate special interests to undermine the teaching profession and push their own ideological agenda on public schools and students while working to privatize public education.”⁶ Calling the day the decision was handed down “a sad day for public education,” the American Federation of Teachers claimed that the *Vergara* decision “pitt[ed] students against their teachers.”⁷ Joshua Pechthalt, the president of the California Federation of Teachers, stated that “the judge fell victim to the anti-union, anti-teacher rhetoric and one of America’s finest corporate law firms that set out to scapegoat teachers for the real problems that exist in public education.”⁸

The effects of the *Vergara* decision do not stop at the California border. Students Matter, the well-heeled organization that brought the lawsuit, is “considering filing lawsuits in New York, Connecticut, Maryland, Oregon, New Mexico, Idaho and Kansas as well as other states with powerful unions where legislatures have defeated attempts to change teacher tenure laws.”⁹ Within months, two lawsuits, later consolidated, were filed in New York challenging the state’s tenure

3. Nanette Asimov, Bob Egelko & Melody Gutierrez, *Is This the End of Teacher Tenure in California?*, S.F. CHRONICLE (June 11, 2014), <http://www.sfgate.com/education/article/Is-this-the-end-of-teacher-tenure-in-California-5542577.php>.

4. *Statement from U.S. Secretary of Education Arne Duncan Regarding the Decision in Vergara v. California*, U.S. DEP’T OF EDUC. (June 10, 2014), <http://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-regarding-decision-vergara-v-califo>.

5. *See Statement from AFT President Weingarten on Vergara Decision*, AM. FED’N OF TEACHERS (June 10, 2014), <http://www.aft.org/press-release/statement-aft-president-weingarten-vergara-decision> [hereinafter *AFT President*] (calling the decision a sad day for public education); *NEA President: California Ruling Allows Corporate Interests to Trump Students’ Needs*, NAT’L EDUC. ASS’N (June 10, 2014), <http://www.nea.org/home/59351.htm> [hereinafter *NEA President*] (claiming that the ruling hurts students and undermines school districts’ recruitment and retention efforts of highly qualified teachers).

6. *NEA President*, *supra* note 5.

7. *AFT President*, *supra* note 5.

8. Medina, *supra* note 2.

9. *Id.*

laws.¹⁰

In the wake of the *Vergara* decision, all states that have teacher tenure laws should examine their policies to see if they are in danger of similar litigation. As Alaska has tenure statutes, a detailed comparison and analysis needs to be conducted to determine if Alaska's policies are vulnerable to a similar lawsuit, and the likelihood of success of such legal action.

The Alaska Legislature has already begun evaluating its teacher tenure laws. During the 2013–14 legislative session, the legislature considered in House Bill 278 extending the requirement for tenure from three years of teaching in a district to five years in urban areas, while keeping the requirement at three years in rural districts.¹¹ However, this provision died in the Senate¹² because the conference committee “found that three years for tenure is the norm for school districts in other states.”¹³ The final version of House Bill 278 that was signed into law instead compelled the Department of Administration to evaluate and make recommendations regarding teacher tenure by June 15, 2015.¹⁴ The Department of Administration partnered with the Center for Alaska Education Policy Research (CAEPR) at the University of Alaska Anchorage to “explor[e] the purpose and value of tenure, alternatives to the current structure in Alaska, and the value of tenure to teachers including how it affects the teacher labor market.”¹⁵ Yet, according to the Department of Administration's website, this report has been delayed due to “some unexpected challenges related to the technical and original requirements of the project,” and has not yet been released.¹⁶

10. Blake Neff, *NY Tenure Lawsuit Wracked By Feuding Parties*, THE DAILY CALLER (Sept. 13, 2014), <http://dailycaller.com/2014/09/13/ny-tenure-lawsuit-wracked-by-feuding-parties/>.

11. H.B. 278, 28th Leg., 1st Reg. Sess., at §§ 25–26 (Alaska 2013), available at http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=HB0278C&session=28.

12. S.B. 278, 28th Leg., 2nd Reg. Sess., at §§ 25–26 (Alaska 2013), available at http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=HB0278E&session=28.

13. Tim Bradner, *Compromise Splits School Funding Increase*, ALASKA JOURNAL OF COMMERCE (May 14, 2014), <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/May-Issue-3-2014/Compromise-splits-school-funding-increase/> (quoting Senator Kevin Meyer, R-Anchorage).

14. H.B. 278, *supra* note 11, at §§ 25–26.

15. Ctr. for Alaska Educ. Policy Research, *Salary and Benefits Schedule and Teacher Tenure Study*, UNIV. OF ALASKA ANCHORAGE 2 (Dec. 2, 2014), http://www.iser.uaa.alaska.edu/CAEPR/home/docs/2014_12AASB2014HB278Presentation.pdf.

16. *Salary and Benefits Schedule for School Districts*, PERSONNEL AND LABOR RELATIONS, ALASKA DEP'T OF ADMIN. (2015), <http://doa.alaska.gov/dop/HB278SchoolStudy/>.

While the State of California is appealing the *Vergara* decision,¹⁷ Alaska should not wait for the final outcome of the appeal to examine its own approaches to teacher hiring and firing. A challenge to Alaska's tenure laws may face an uphill battle, as differences in California's and Alaska's jurisprudence and statutes could limit the probability of a potential lawsuit's success. Nevertheless, the Alaska State Legislature should reexamine its tenure laws to ensure that they will lead to the most positive outcomes for students.

I. THE VERGARA DECISION

The plaintiffs in *Vergara*, nine students from across the state,¹⁸ challenged five California statutes relating to teacher tenure¹⁹: the California Education Code §§ 44929.21(b) ("Permanent Employment Statute"),²⁰ 44934,²¹ 44938(b)(1) and (2),²² 44944 ("Dismissal Statutes"),²³ and 44955 ("Last-In-First-Out (LIFO)").²⁴

The Permanent Employment Statute states that districts can grant tenure to teachers who have taught in the district for "two complete consecutive school years," with notice of the decision given to the employee by March 15th of the second year.²⁵

The Dismissal Statutes lay out the due process procedures in place in case of dismissal of a teacher with tenure.²⁶ Section 44934 requires districts to file written charges stating cause for the dismissal to the governing board, which then, upon majority vote, gives the teacher thirty days' notice of the decision, unless the employee demands a hearing.²⁷ The governing board may not act on charges of unsatisfactory performance unless the board or an authorized representative gave written notice of the unsatisfactory performance, with specific instances and particularity at least ninety calendar days before the date of filing, so that the employee has "an opportunity to correct his or her faults and

17. Adam Nagourney, *California Governor Appeals Court Ruling Overturning Protections for Teachers*, N.Y. TIMES (Aug. 30, 2014), <http://www.nytimes.com/2014/08/31/us/california-governor-fights-decision-on-teacher-tenure.html>.

18. *Meet the Plaintiffs*, STUDENTS MATTER (Jan. 23, 2014, 7:51 AM), <http://studentsmatter.org/meet-the-plaintiffs>.

19. *Vergara v. California*, No. BC484642, 2014 WL 2598719, at *2 (Cal. Super. Ct. June 10, 2014).

20. CAL. EDUC. CODE § 44929.21(b) (West 2012).

21. *Id.* § 44934.

22. *Id.* §§ 44938(b)(1)-(2).

23. *Id.* § 44944.

24. *Id.* § 44955.

25. *Id.* § 44929.21(b).

26. *Id.* §§ 44934, 44938(b)(1)-(2), 44944.

27. *Id.* § 44934.

overcome the grounds for the charge.”²⁸ If the employee requests a hearing, it must begin within sixty days of the employee’s demand and will be conducted by a Commission on Professional Competence.²⁹ Both the governing board and the employee can be represented by counsel, and may conduct discovery and depositions. The final decision of the Commission on Professional Competence can be appealed through the court system.³⁰

In the case of a staff reduction, the LIFO statute specifies that “the services of no permanent employee may be terminated . . . 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,” and employees are “terminated in the inverse of the order in which they were employed.”³¹

The Plaintiffs in *Vergara* challenged these tenure statutes (collectively, “Challenged Statutes”) under the California Constitution’s equal protection clause.³² Article 1, section 7(a) of the California Constitution reads that “[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.”³³ The California Supreme Court has determined that this section is “substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution.”³⁴ For that reason, the California courts analyze state equal protection claims using the same tiered levels of scrutiny as the federal courts.³⁵ In cases involving economic regulation, challenged statutes are presumed constitutional, and the distinctions must “bear some rational relationship to a conceivable legitimate state purpose.”³⁶ Statutes that involve “suspect classifications” or that touch on “fundamental interests” must survive strict scrutiny, where the state has the burden of establishing that there is a compelling interest for the law and that the distinctions are necessary to further its purpose.³⁷

The education provisions of the California Constitution were also relevant to the *Vergara* decision. Article 9, section 1 states that “[a] general diffusion of knowledge and intelligence being essential to the

28. *Id.* §§ 44938(b)(1)–(2).

29. *Id.* § 44944.

30. *Id.*

31. *Id.* § 44955.

32. *Vergara v. California*, No. BC484642, 2014 WL 2598719, at *2 (Cal. Super. Ct. June 10, 2014).

33. CAL. CONST. art. I, § 7(a).

34. *Dep’t of Mental Hygiene v. Kirchner*, 400 P.2d 321, 330 (Cal. 1965).

35. *Serrano v. Priest*, 487 P.2d 1241, 1249 n.11 (Cal. 1971), *en banc*.

36. *Id.* at 1249.

37. *Id.*

preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific . . . improvement.”³⁸ Article 9, section 5 directs the Legislature to “provide for a system of common schools by which a free school shall be kept up and supported in each district.”³⁹

The California Supreme Court previously tackled educational equality in the *Serrano v. Priest* cases⁴⁰ and in *Butt v. California*.⁴¹ In *Serrano I* and *II*, the court held that education was a “fundamental interest” and accordingly found the state’s school financing system did not stand up to the rigors of strict scrutiny under the state constitution’s equal protection clause.⁴² *Butt v. California*⁴³ held that a district could not end the school year six weeks early to remedy a revenue shortfall, and in doing so, the court stated that California could not deny “basic educational equality to the students of particular districts,” and that “[t]he State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity.”⁴⁴ The *Vergara* court noted that while *Serrano I* and *II* and *Butt* address “a lack of equality of education,” it was applying “these constitutional principles to the quality of the educational experience.”⁴⁵

The *Vergara* plaintiffs made three claims: (1) that the Challenged Statutes led to grossly ineffective teachers being granted and retaining tenure, (2) that grossly ineffective teachers are disproportionately placed in schools serving predominately low-income and minority student populations, and (3) that “the Challenged Statutes violate [the Plaintiffs’] fundamental rights to equality of education by adversely affecting the quality of the education they are afforded by the state.”⁴⁶

The court relied heavily in its opinion on expert testimony about the effect of grossly ineffective teachers on students. Judge Treu noted that “[t]he evidence is compelling. Indeed, it shocks the conscience.”⁴⁷ The plaintiffs defined “grossly ineffective teachers” as those teachers in the bottom five percent of performance of all teachers, although it was

38. CAL. CONST. art. IX, § 1.

39. *Id.* § 5.

40. 487 P.2d 1241 (Cal. 1971), *en banc* (“*Serrano I*”); 557 P.2d 929 (Cal. 1976), *en banc* (“*Serrano II*”).

41. 842 P.2d 1240 (Cal. 1992), *en banc*.

42. 487 P.2d at 1263; 557 P.2d at 951.

43. 842 P.2d 1240 (Cal. 1992).

44. *Id.* at 1251.

45. *Vergara v. California*, No. BC484642, 2014 WL 2598719, at *2 (Cal. Super. Ct. June 10, 2014) (emphasis added).

46. *Id.*

47. *Id.* at *4.

not clearly explained in the trial how teachers were determined to be in the bottom five percent.⁴⁸ Dr. Raj Chetty testified as an expert for the plaintiffs about the long-term effects of teachers on student outcomes, namely that “a single year in a classroom with a grossly ineffective teacher costs students \$1.4 million in lifetime earnings per classroom.”⁴⁹ Noting the importance of teachers, Dr. Chetty’s study found that above average teachers have beneficial effects on students in numerous areas, such as the probability that a student would attend college,⁵⁰ the quality of the college students chose to attend,⁵¹ earning potential,⁵² lower teenage birth rates,⁵³ and retirement savings.⁵⁴

The *Vergara* court also found the testimony of Dr. Thomas J. Kane, as to the effect of grossly ineffective teachers, to be persuasive.⁵⁵ Dr. Kane testified that in a single year, students in Los Angeles Unified School District (LAUSD) lost 9.54 months of learning in English language arts⁵⁶ and 11.73 months of learning in math when they were taught by a teacher in the bottom five percent of competence, rather than by an average teacher.⁵⁷ The negative impact of ineffective teachers was nearly twice as large for students in LAUSD as compared to New York City, although his testimony did not hypothesize the reason for this gap.⁵⁸ According to Dr. Kane’s testimony, black and Hispanic LAUSD students were disproportionately taught by teachers in the bottom five percent of competence, with black students forty-three percent more likely to be taught by a teacher in the bottom five percent and Hispanic students sixty-eight percent more likely.⁵⁹

The judge did not think that the defendants were able to dispute charges that “a significant number of grossly ineffective teachers [are]

48. *Vergara Trial Day 3: Testimony of Dr. Raj Chetty*, STUDENTS MATTER (Jan. 30, 2014, 2:04 PM), http://studentsmatter.org/event/vergara-trial-day-3/?instance_id=178 (discussed at 56:50 in video of Dr. Chetty’s testimony).

49. *Id.*

50. Raj Chetty et al., *The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood*, NAT’L BUREAU OF ECON. RESEARCH 36 (Dec. 2011), <http://www.nber.org/papers/w17699.pdf>.

51. *Id.* at 37–38.

52. *Id.* at 39.

53. *Id.* at 41.

54. *Id.* at 42.

55. *Vergara v. California*, No. BC484642, 2014 WL 2598719, at *4 (Cal. Super. Ct. June 10, 2014).

56. Thomas J. Kane, *Presentation on Measurements of Teacher Effectiveness and Teacher Effectiveness in the Los Angeles Unified School District*, STUDENTS MATTER 14 (Feb. 6, 2014), http://studentsmatter.org/wp-content/uploads/2014/02/SM_Kane-Demonstratives_02.06.14.pdf; *Vergara*, 2014 WL 2598719, at *4.

57. Kane, *supra* note 56, at 15.

58. *Id.* at 12.

59. *Id.* at 16.

currently active in California classrooms.”⁶⁰ Dr. David Berliner, an expert called by the State defendants, stated on cross-examination that probably one to three percent of teachers in California consistently has poor student outcomes.⁶¹ The court extrapolated that with roughly 275,000 teachers in California, this means that the number of grossly ineffective teachers likely ranges from 2,750 to 8,250.⁶² The court found that “the number of grossly ineffective teachers has a direct, real, appreciable, and negative impact on a significant number of California students, now and well into the future for as long as said teachers hold their positions.”⁶³

Because the court found that Plaintiffs had proven that the Challenged Statutes “impose[d] a real and appreciable impact on students’ fundamental right to equality of education,” the court applied strict scrutiny to the provisions of the tenure statutes to determine if they would survive equal protection analysis.⁶⁴ Under strict scrutiny analysis, the State Defendants bore the “burden of establishing not only that the State has a *compelling* interest which justifies the Challenged Statutes but that the distinctions drawn by the laws are *necessary* to further their purpose.”⁶⁵

The court began by analyzing the Permanent Employment Statute, finding that it did not present a “legally cognizable reason (let alone a *compelling* one)” for granting tenure after such a short period of time.⁶⁶ During the first two years of teaching, new teachers are required to successfully complete an induction program, a program that assesses and supports new teachers, in order to receive a clear teaching credential.⁶⁷ While the statute calls for districts to grant tenure after these two years, teachers must be given notice before March 15th of the second year, “eliminat[ing] 2–3 months of the ‘two year’ period.”⁶⁸

60. *Vergara*, 2014 WL 2598719, at *4.

61. *Id.* After the decision, Dr. Berliner told a Slate reporter that he “pulled [the one to three percent number] out of the air,” and that the number was “just a ballpark estimate, based on [his] visiting lots and lots of classrooms.” Jordan Weissmann, *Fuzzy Math: The Guesstimate That Struck Down California's Teacher Tenure Laws*, SLATE (June 12, 2014, 1:07 PM), http://www.slate.com/articles/business/moneybox/2014/06/judge_strikes_down_california_s_teacher_tenure_laws_a_made_up_statistic.html.

62. *Vergara*, 2014 WL 2598719, at *4.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at *5 (emphasis added).

67. CAL. EDUC. CODE § 44259(c)(2) (West 2012). See also *About Beginning Teacher Support and Assessment (BTSA)*, BEGINNING TEACHER SUPPORT AND ASSESSMENT (BTSA) INDUCTION, <http://www.btsa.ca.gov/about.html> (last visited Dec. 5, 2014) (describing BTSA's vision and goals).

68. *Vergara*, 2014 WL 2598719, at *4.

“Bizarrely,” teachers can thus be granted tenure before the end of the credential-granting induction program, resulting in the possibility that a teacher might be granted tenure in March, but not be recommended for credentialing at the end of the induction program in May.⁶⁹ This would leave the district with the awkward problem of having to figure out what to do with a non-credentialed teacher who has tenure.⁷⁰

The court found extensive evidence, including some from the defense, that the two year window was too short for districts to make informed decisions about permanent employment.⁷¹ The short window for tenure decision leads districts to grant tenure where they would not have if given more time, and to not grant tenure where more time could have given new teachers “an adequate opportunity to establish their competence.”⁷² Two of the State defendants agreed that a three to five year time frame for making the tenure decision would be mutually beneficial for both students and teachers.⁷³ The court noted that California is an “outlier state” by having a probationary period of only two years; the vast majority of states with a tenure system employ a three to five year probationary period.⁷⁴ For these reasons, the court found that the burden of the strict scrutiny test had not been met and held that the Permanent Employment Statute was unconstitutional under the equal protection clause of the California Constitution.⁷⁵

The court then turned its attention to the three Dismissal Statutes, which it found collectively did not meet the burden of strict scrutiny.⁷⁶ The court heard evidence that under the Dismissal Statutes, districts wishing to dismiss an ineffective teacher could spend anywhere from \$50,000 to \$450,000 over the course of two to almost ten years.⁷⁷ Accordingly, school officials do not want to spend the time and money on dismissal cases, leaving grossly ineffective teachers in the classroom.⁷⁸ Defense witness Dr. Susan Moore Johnson found that because administrators believe dismissing tenured teachers under the current system to be “impossible,” dismissals in California are “extremely rare.”⁷⁹ In fact, the court found evidence that LAUSD had “350 grossly ineffective teachers it wished to dismiss at the time of trial

69. *Id.*

70. *Id.*

71. *Id.* at *5.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at *6.

77. *Id.* at *5.

78. *Id.*

79. *Id.*

regarding whom the dismissal process had not yet been initiated.”⁸⁰ While the court was careful to be respectful of legitimate due process issues, it found that the current Dismissal Statutes were “*uber* due process.”⁸¹ Districts were able to resolve discipline cases of other classified public employees “with much less time and expense than those of teachers,” even though classified employees did not have a lesser property interest in continued employment than teachers.⁸² Finding “the current system required by the Dismissal Statutes to be so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory,” the court held the Dismissal Statutes unconstitutional under the equal protection clause of the California Constitution.⁸³

Finally, the court found the LIFO statute did not meet the burden of strict scrutiny.⁸⁴ It found fault in that the statute did not contain an exception or waiver for teacher effectiveness.⁸⁵ Because last-hired teachers are automatically the first ones laid off, gifted junior teachers are laid off before grossly ineffective senior teachers.⁸⁶ The court found it preposterous that the defendants could have a compelling interest “in the *de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetent ones.”⁸⁷ California is a “distinct minority” in that it is only one of ten states that use seniority as the sole factor to be considered in layoffs, whereas twenty states allow the possibility that seniority may be considered among other factors.⁸⁸ Because the LIFO statute did not survive strict scrutiny, the court held it unconstitutional under the equal protection clause of the California Constitution.⁸⁹

While not essential to its holding, the court was especially concerned that poor and minority students were disproportionately affected by the Challenged Statutes.⁹⁰ “Unfortunately, the most vulnerable students, those attending high-poverty, low-performing schools, are far more likely than their wealthier peers to attend schools having a disproportionate number of underqualified, inexperienced,

80. *Id.*; *Vergara Trial Day 31*, STUDENTS MATTER (Mar. 21, 2014, 6:14 PM), http://studentsmatter.org/event/vergara-trial-day-31/?instance_id=152.

81. *Vergara*, 2014 WL 2598719, at *5.

82. *Id.*

83. *Id.* at *6.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at *7.

89. *Id.*

90. *Id.*

out-of-field, and ineffective teachers and administrators. Because minority children disproportionately attend such schools, minority students bear the brunt of staffing inequalities.”⁹¹ The “Dance of the Lemons,” or the churning of teachers throughout the system, “greatly affects the stability of the learning process to the detriment of [high-poverty and minority] students.”⁹²

Finding all five of the Challenged Statutes unconstitutional, the court remanded the case to the Legislature to “enact legislation on the issues . . . that passes constitutional muster, thus providing each child in [California] with a basically equal opportunity to achieve a quality education.”⁹³ Citing Alexander Hamilton in Federalist Paper 78 and the separation of powers doctrine, the court did not make any recommendations for future legislation.⁹⁴ However, from the opinion it seems as though the court could be satisfied if California’s statutes on tenure fell more in line with the majority of other states, *e.g.*, tenure granted after a three to five year probationary period, less stringent due process, and a rejection of LIFO with seniority as the only factor considered in layoffs.

II. ANALYSIS OF POTENTIAL ALASKA COPYCAT CASE

A potential claim brought in Alaska would look similar to the claim brought in California in the *Vergara* case. Potential plaintiffs would need to establish that the Alaska Constitution affords a fundamental right to education, and that this fundamental right has been violated because the tenure statutes lead to inequality in education when students are taught by grossly ineffective teachers who have been granted and retain tenure.

A potential copycat case in Alaska will first identify relevant tenure statutes to challenge (“Potential Challenged Statutes”). Alaska Statute sections 14.20.150 (“Alaska Permanent Employment Statute”), 14.20.180 (“Alaska Dismissal Statute”), and 14.20.177 (“Alaska LIFO”) are the provisions that most closely mirror the Challenged Statutes in *Vergara*.

The Alaska Permanent Employment Statute states that a teacher acquires tenure rights through continuous employment in the same district for three full school years, contingent upon an evaluation stating that the teacher’s performance meets district performance standards.⁹⁵

The Alaska Dismissal Statute governs the procedures for dismissal

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. ALASKA STAT. § 14.20.150 (2012).

or non-retention.⁹⁶ Under the Alaska Dismissal Statute, before a teacher is dismissed, the district must give the teacher written notice and a pre-termination hearing that “comport[s] with the minimum requirements of due process,” if after the pre-termination hearing the employer continues with the dismissal, the teacher must again be provided with written notice. The dismissal is effective upon receipt of the notice.⁹⁷ Within fifteen days of receiving notice of dismissal, a teacher has the right to either request a hearing before the school board or to invoke grievance procedures.⁹⁸ If a teacher requests a post-termination hearing, the parties may be represented by counsel, cross-examine witnesses, and the teacher may subpoena persons whose statements were used in the dismissal decision.⁹⁹ The statute does not provide for any formal discovery. The results of the hearing may be appealed to the superior court for judicial review on the administrative record.¹⁰⁰ If a teacher requests grievance procedures, an informal hearing takes place in front of the board, the decision of which can be submitted to arbitration for a final and binding decision.¹⁰¹

The Alaska LIFO statute states that if a school district has a reduction in force, tenured teachers cannot be put on layoff status until the district has given notice to all non-tenured teachers.¹⁰²

In determining if any or all of the Potential Challenged Statutes violate the Alaska Constitution, it is essential to identify relevant constitutional provisions and case law that would govern a potential case. The equal protection clause of the Alaska Constitution states that “all persons are equal and entitled to equal rights, opportunities, and protection under the law.”¹⁰³ Alaska provides for the right of public education in article VII, section 1, requiring the legislature to “establish and maintain a system of public schools open to all children of the State.”¹⁰⁴

Rather than using tiered scrutiny levels for equal protection challenges, as do federal courts, Alaskan courts use “a sliding scale approach to determine the level of scrutiny that is required in reviewing a challenged statute.”¹⁰⁵ “As legislation burdens more fundamental

96. *Id.* § 14.20.180.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* § 14.20.177.

103. ALASKA CONST. art. I, § 1.

104. *Id.* art. VII, § 1.

105. *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 396 (Alaska 1997).

rights . . . it is subjected to more rigorous scrutiny at a more elevated position on our sliding scale.”¹⁰⁶ While the level of scrutiny is essentially the same where fundamental rights are infringed or suspect categories are involved, the courts “avoid[] outright categorization of fundamental and nonfundamental rights” with the goal of making “a more flexible, less result-oriented analysis.”¹⁰⁷

The courts use three steps in applying the sliding scale of scrutiny.¹⁰⁸ First, the court determines what weight to afford to the constitutional interest impaired by the challenged provision.¹⁰⁹ The greater the primacy of the interest involved, the greater a burden the state will have in justifying its legislation.¹¹⁰ “[W]hen a classification is based on a suspect factor . . . or infringes on fundamental rights (for example, voting, litigating, or the exercise of intimate personal choices) a classification will be upheld only when the enactment furthers a ‘compelling state interest’ and the enactment is ‘necessary’ to the achievement of that interest,” also known as strict scrutiny.¹¹¹ Next, the court examines the purposes served by the challenged legislation.¹¹² The level of review depends on the weight from the first step; at the low end of the continuum, the state need only show that its objectives were legitimate, and, at the high end, that a compelling state interest motivated the legislation.¹¹³ Finally, the court evaluates the particular means the state employed to further its goals.¹¹⁴ On the low end of the sliding scale, the state must show a substantial relationship between the means and ends, and on the high end, the state must show that it used the least restrictive means necessary.¹¹⁵

The Alaska Supreme Court has never directly applied fundamental rights equal protection analysis to an education issue. However, in *Breese v. Smith*,¹¹⁶ the court stated in dicta, without employing any reasoning, that the education clause of the Alaska Constitution “guarantees all children of Alaska a right to public education.”¹¹⁷ The court also did not rely on the education clause in the final holding, where it stated that the expulsion of a student whose long hair violated

106. *State v. Ostrosky*, 667 P.2d 1184, 1193 (Alaska 1983).

107. *Id.*

108. *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984).

109. *Matanuska-Susitna Borough Sch. Dist.*, 931 P.2d at 396.

110. *Id.*

111. *Public Emps.’ Ret. Sys. v. Gallant*, 153 P.3d 346, 349–50 (Alaska 2007).

112. *Matanuska-Susitna Borough Sch. Dist.*, 931 P.2d at 396.

113. *Id.*

114. *Id.*

115. *Id.* at 396–97.

116. 501 P.2d 159 (Alaska 1972).

117. *Id.* at 167.

school regulations violated that student's "natural right to 'liberty,'" as guaranteed under article I, section 1 of the Alaska Constitution.¹¹⁸

In *Hootch v. Alaska State-Operated School System*,¹¹⁹ the court looked at the issue of whether the state was constitutionally required to provide secondary schools in rural communities.¹²⁰ However, the court only analyzed the claim through the article VII, section 1 constitutional right to education, not through an equal protection lens.¹²¹ The *Hootch* court noted that the Alaska Constitution contains no uniformity requirement for the school system, likely because such a requirement would prove unworkable in Alaska's unique environment.¹²² For this reason, the court found that the article VII, section 1 education provision "permits some differences in the manner of providing education."¹²³ The court acknowledged that allowing differences in providing education may lead to disadvantages, but "[s]o long as they are not violative of equal protection, the nature and proper means of overcoming the disadvantages present questions for the legislature."¹²⁴ The court in *Hootch* reaffirmed the *Breese* dicta that children in Alaska have a right to education, and that the education clause "imposes a duty upon the state legislature, and it confers upon Alaska school age children a right to education."¹²⁵

In *Matanuska-Susitna Borough School District*,¹²⁶ the plaintiffs challenged the state funding laws under the equal protection clause, claiming that they and their children's interests in education were impaired by the laws.¹²⁷ The plaintiffs claimed that if local contribution to the operating costs of the Borough were eliminated, there would be more funding for the children's schools, which would lead to a better education.¹²⁸ However, the plaintiffs "failed to present any evidence arguably showing that the educational interests of their children [were] disparately affected by the local contribution to operating costs required of the Borough."¹²⁹ With no evidence of unequal treatment, the equal protection challenge was dismissed because "[i]n the absence of any

118. *Id.* at 168.

119. 536 P.2d 793 (Alaska 1975).

120. *Id.* at 796.

121. *Id.* at 798-99.

122. *Id.* at 803.

123. *Id.* at 804.

124. *Id.* at 804-05.

125. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 799 (Alaska 1975).

126. 931 P.2d 391, 396 (Alaska 1997).

127. *Id.* at 395.

128. *Id.* at 397.

129. *Id.*

evidence of disparate treatment, there is no basis for an equal protection claim, and we need not subject the challenged laws to sliding scale scrutiny.”¹³⁰

While the Alaska Supreme Court has not held education to be a fundamental right for equal protection analysis purposes, it also has not foreclosed this possibility. In fact, the superior court in *Kasayulie v. Alaska*¹³¹ did hold that education is a fundamental right.¹³² The court granted summary judgment on the plaintiffs’ claim that Alaska’s method of funding capital projects for education was void under the education and equal protection provisions of the Alaska constitution and violated Title VI of the Civil Rights Act of 1964.¹³³ The court acknowledged the value Alaska puts on education by guaranteeing all Alaskan children a right to education in article VII, section 1 of the state constitution,¹³⁴ and found that “[b]ecause the interest is expressly provided for in the Constitution, it is a fundamental right under the equal protection analysis.”¹³⁵

However, other states’ courts have determined that mere inclusion in the constitution does not automatically make an interest a fundamental right for equal protection purposes. For instance, article VIII, section 3 of the Oregon Constitution states that “[t]he Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.”¹³⁶ The Oregon Supreme Court in the school funding case *Olsen v. State*¹³⁷ declined to extend fundamental interest status to education simply because it was provided for in the state constitution.¹³⁸ The court noted that the Oregon Bill of Rights also has a “guaranteed constitutional right to sell and serve intoxicating liquor by the drink,” but the court did not see that as a fundamental interest.¹³⁹ While the court acknowledged the importance of education, it decided not to declare education to be a fundamental interest for equal protection analysis.¹⁴⁰ In fact, the Oregon court does not seem to have

130. *Id.*

131. No. 3AN-97-3782 CIV, 1999 WL 34793400 (Alaska Super. Ct. Sept. 1, 1999).

132. *See id.* at *5 (granting plaintiffs’ motion for partial summary judgment on facilities funding).

133. *Id.* at *1-2.

134. *Id.* at *6. *See also* Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972) (using the fact that “article VII, section 1 . . . guarantees all children of Alaska a right to public education” as a basis for summary judgment).

135. *Kasayulie*, 1999 WL 34793400 at *6.

136. OR. CONST. art. VIII, § 3.

137. 554 P.2d 139 (Or. 1976).

138. *Id.* at 144.

139. *Id.* at 144-45.

140. *Id.* at 145.

even embraced the idea of “categorizing an interest as a fundamental or nonfundamental interest.”¹⁴¹

New Jersey also declined to classify education as a fundamental interest in the *Robinson v. Cahill*¹⁴² school funding challenge. Article VIII, section 4, paragraph 1 of the New Jersey Constitution calls for the state legislature to “provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”¹⁴³ However, the New Jersey Supreme Court does not believe that the state’s decision to furnish a service makes that service a fundamental right.¹⁴⁴ The court seems wary of fundamental right analysis because “[t]he term ‘fundamental right’ has not been defined.”¹⁴⁵

While states such as Oregon and New Jersey do not consider education to be a fundamental right, despite provisions in each states’ constitutions, those states also seem to reject fundamental interest analysis altogether in the *Olsen* and *Cahill* decisions. However, Alaska’s sliding scale of scrutiny for equal protection claims actively examines the primacy of the constitutional interest impaired by challenged legislation to determine if an interest is fundamental, important, or less important.¹⁴⁶ Because the court has previously called education a right,¹⁴⁷ and because it examines the importance of interests in its equal protection analysis,¹⁴⁸ the Alaska Supreme Court may be more inclined to extend fundamental right status to education than were the supreme courts of Oregon and New Jersey.

A potential challenge to Alaska’s teacher tenure system would have the best chance of success if the court found that education is a fundamental right deserving of strict scrutiny under the equal protection clause. While Alaska has established that education is a right,¹⁴⁹ the Supreme Court has not declared that education is a fundamental right for equal protection purposes. *Hootch* acknowledges that choices in how education is provided will lead to differences, but that addressing those differences is a matter for the legislature unless

141. *Id.* at 144.

142. 303 A.2d 273 (N.J. 1973).

143. N.J. CONST. art. VIII, § 4, para. 1.

144. *Cahill*, 303 A.2d at 285-86.

145. *Id.* at 284.

146. *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 396 (Alaska 1997).

147. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 799 (Alaska 1975).

148. *Matanuska-Susitna Borough Sch. Dist.*, 931 P.2d at 396.

149. ALASKA CONST. art. VII, § 1; *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972).

they violate the equal protection clause.¹⁵⁰ For this reason, a potential challenge would need to be brought under article I, section 1, the equal protection clause, rather than under article VII, section 1, the education provision.

Even if the court did not decide that education is a fundamental right, it is still likely that an issue of this nature would get more than the minimal level of scrutiny on the sliding scale. In general, the courts apply minimal scrutiny to cases involving economic and commercial interests.¹⁵¹ Alaska's minimal scrutiny is slightly more stringent than the federal standard of rational basis review.¹⁵² Under minimal scrutiny, the state must show that "the means chosen . . . bear a 'fair and substantial' relation to the attainment of a legitimate government objective."¹⁵³ Alaska courts do not "hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard."¹⁵⁴ Under the argument that the current system of tenure disparately impacts the fundamental interests of students who are stuck in classrooms with grossly ineffective teachers, the statutes concern more than mere economic or commercial interests. For this reason, minimal scrutiny does not seem to be the best fit for a potential challenge to Alaska's teacher tenure laws.

*State, Departments of Transportation and Labor v. Enserch Alaska Construction, Inc.*¹⁵⁵ typifies a case that falls in between minimal scrutiny and strict scrutiny.¹⁵⁶ At issue in *Enserch* was whether the state could compel companies to give a "hiring preference to residents of economically distressed zones" to work on public works projects, thereby making it more difficult for those who lived outside of the economically distressed zones to be hired for these projects.¹⁵⁷ The court determined that "the right to engage in an economic endeavor within a particular industry is an 'important' right for state equal protection purposes."¹⁵⁸ Because the statute affected an "important" interest, the court applied close scrutiny, requiring the state to prove that "[its]

150. *Hootch*, 536 P.2d at 804-05.

151. *Pan-Alaska Constr., Inc. v. State, Dep't of Admin., Div. of Gen. Servs.*, 892 P.2d 159, 162 (Alaska 1995).

152. *Id.*

153. *Id.* (quoting *State, Dep't of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993)).

154. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976), *abrogated by Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980). *See Apokedak*, 606 P.2d at 1266 (stating that *Isakson* did not invalidate the gear license requirement in section 16.43.260(a) of the Alaska Statutes).

155. 787 P.2d 624 (Alaska 1989).

156. *Id.* at 633-34.

157. *Id.* at 625.

158. *Id.* at 632 (quoting *Apokedak*, 606 P.2d at 1266).

interest underlying the enactment b[e] not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close.”¹⁵⁹

Strict scrutiny of the Potential Challenged Statutes would almost certainly be necessary to win a case of this nature. According to *Public Employees' Retirement System v. Gallant*,¹⁶⁰ two types of cases automatically receive strict scrutiny analysis: cases involving laws with classifications based on a suspect class and cases involving laws that infringe on a fundamental right.¹⁶¹ A potential tenure challenger could not argue that the tenure statutes themselves classify based on race or another suspect classification, and so would not receive strict scrutiny under that prong. The challengers would instead want to argue for the court to declare education a fundamental right so that the laws that infringe the right automatically receive strict scrutiny.

If the court does not declare education to be a fundamental right, then the level of scrutiny would be determined using Alaska's sliding scale of scrutiny. The court would first look at what weight to give the constitutional interest impaired by the Potential Challenged Statutes. Plaintiffs have several arguments on their side that the court should place a high burden on the state to justify its legislation. First, in the landmark case, *Brown v. Board of Education*,¹⁶² the United States Supreme Court declared that “[t]oday, education is perhaps the most important function of state and local governments Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”¹⁶³ Additionally, the state of Alaska considers education to be important enough to enshrine the right to a public education in its constitution.¹⁶⁴ Furthermore, an analogy can be made between education and voting, which is considered a fundamental right both at the state¹⁶⁵ and federal level,¹⁶⁶ as “both are crucial to

159. *Id.* at 633.

160. 153 P.3d 346 (Alaska 2007).

161. *Id.* at 349–50.

162. *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954).

163. *Id.* at 493.

164. ALASKA CONST. art. VII, § 1.

165. See *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982) (stating that the right to vote is fundamental and that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live”) (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)).

166. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“Almost a century ago . . . the Court referred to ‘the political franchise of voting’ as ‘a fundamental political right, because preservative of all rights.’” [sic]) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

participation in, and the functioning of, a democracy.”¹⁶⁷ “At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civil and political activities.”¹⁶⁸ Education is crucial in supporting “each and every other value of a democratic society— participation, communication, and social mobility, to name but a few.”¹⁶⁹ The rationale California relied on in *Serrano I*,¹⁷⁰ declaring education a fundamental right, is equally applicable to Alaska. Education gives individuals an “opportunity to compete successfully in the economic marketplace, despite a disadvantaged background,” is “universally relevant” since all people benefit from education, and is unmatched in the extent to which “it molds . . . the youth of society.”¹⁷¹ Even if the court declines to analyze the Potential Challenged Statutes under strict scrutiny, these reasons form a compelling argument for using a close scrutiny standard instead.

After determining the level of scrutiny, the court would look at the purposes of the statute. If the court places the greatest possible weight on the constitutional interest infringed and analyzes the issues under the framework of strict scrutiny, then the state would need to show a compelling state interest in the tenure statutes.¹⁷² Under the standard of close scrutiny, the state would need to show that it has an important interest, and on the most relaxed end of the sliding scale of scrutiny, the state would only need to prove that it has a legitimate government objective for the challenged legislation.¹⁷³

Finally, the court would look at the means used to achieve the state’s interest. Under strict scrutiny, the state would need to show that it used the least restrictive means to achieve its ends, and if a less restrictive alternative would accomplish the purpose then the classification will be invalidated. Under close scrutiny, the state would need to show that the nexus between the enactment and the important interest it serves be close.¹⁷⁴ On the low end of the sliding scale of scrutiny, the state would need to show that there was a substantial

167. *Serrano v. Priest*, 487 P.2d 1241, 1258 (Cal. 1971).

168. *Id.*

169. *Id.* (quoting John E. Coons, William H. Clune, III & Stephen D. Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 362–63 (1969)).

170. *Id.* at 1258–59.

171. *Id.* at 1259.

172. *Pub. Emps.’ Ret. Sys. v. Gallant*, 153 P.3d 346, 349–50 (Alaska 2007).

173. *See State, Dep’t of Transp. and Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 633 (Alaska 1989) (explaining the sliding scale of scrutiny).

174. *Id.*

relationship between the means used in the Potential Challenged Statutes and the ends.

As in *Vergara*, a challenge to the tenure system in Alaska would also require potential plaintiffs to establish that grossly ineffective teachers have a detrimental effect on students as the basis of the equal protection claim. This could be accomplished using much of the research already conducted by the *Vergara* plaintiffs. For instance, potential plaintiffs could use the Chetty study cited in the *Vergara* decision showing the positive effects of having an effective teacher versus a grossly ineffective teacher.¹⁷⁵ However, that study and similar studies looked at data from “a large urban school district,”¹⁷⁶ and Alaska’s school system is primarily comprised of small, rural schools. Unfortunately, almost no research addresses the effects of teacher quality in rural schools.

California’s Permanent Employment Statute and the Alaska Permanent Employment Statute are different enough that a court would not likely find Alaska’s statute to violate equal protection. While the California statute grants tenure during the second year of teaching,¹⁷⁷ Alaska requires three full years of continuous teaching in a district before a teacher acquires tenure rights.¹⁷⁸ Though one extra year before granting tenure may not seem like a significant difference, one study found that while teaching quality improves significantly in the first year and makes smaller gains over the next few years, “there is little evidence that improvements continue after the first three years.”¹⁷⁹ For this reason, waiting to grant tenure after three years rather than two gives administrators important data as to what to expect from the teacher in the years to come. Additionally, the extra year makes Alaska fall in line with majority of states that require three or more years before making tenure decisions.¹⁸⁰ Thirty-one states make tenure decisions after three years, while only six states make tenure decisions after two or fewer years.¹⁸¹ Given these factors and the position of the Alaskan courts to accord deference to the state legislature in determining how best to

175. Chetty, *supra* note 50, at 36–42.

176. *Id.* at 13.

177. CAL. EDUC. CODE § 44929.21(b) (West 2012).

178. ALASKA STAT. § 14.20.150 (2012).

179. Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417, 449 (2005).

180. *Vergara v. California*, No. BC484642, 2014 WL 2598719, at *5 (Cal. Super. Ct. June 10, 2014); *State of the States 2012: Teacher Effectiveness Policies*, NAT’L COUNCIL ON TEACHER QUALITY 11 (2012), http://www.nctq.org/dmsView/State_of_the_States_2012_Teacher_Effectiveness_Policies_NCTQ_Report.

181. Rivkin, *supra* note 179.

overcome differences in educational quality,¹⁸² the Alaska Permanent Employment Statute will likely survive an equal protection challenge. If analyzed under strict scrutiny, the state can show that it has a compelling interest in granting tenure after three years: doing so may help the state retain good teachers and prevents teachers from being fired for arbitrary reasons. The three year period is narrowly tailored to achieve this end by giving administrators adequate time to inform their tenure decision as the gains in teacher quality are quite small after three years of teaching. Even if the Alaska Permanent Employment Statute were analyzed under a more relaxed method of scrutiny, it would still be able to survive if it can survive the strictest level of scrutiny.

Under California's Dismissal Statutes, removing ineffective teachers is a tedious, expensive, and time-consuming process that can take between two and ten years and cost between \$50,000 to \$450,000.¹⁸³ California's Dismissal Statutes went above and beyond the minimum due process that is accorded to other public employees of the state, so much so that Judge Treu referred to the procedures as "*uber* due process."¹⁸⁴ The Alaska Dismissal Statute, on the other hand, comports for the most part with the minimum due process given to other state public employees. The Alaska constitution parallels the federal constitution, providing due process protection to public employees who may only be terminated for just cause¹⁸⁵ because these employees "have a sufficient property interest in continued employment to warrant due process protection prior to termination."¹⁸⁶ At a minimum, the employee is entitled to notice of dismissal, an explanation of the evidence against him, and an opportunity to present his side at an adversarial pre-termination hearing.¹⁸⁷ A full judicial hearing is not necessary, but "the employee must be allowed to present a defense by testimonial and other evidence" before dismissal.¹⁸⁸ If the outcome of the pre-termination hearing is dismissal, then "federal law entitles a public employee to a formal evidentiary post-termination hearing within a reasonable time."¹⁸⁹

The Alaska Dismissal Statute comports with the minimum requirements of due process. The statute requires written notice, a

182. See *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 804-05 (Alaska 1975) (stating that it was a matter for the legislature to determine how best to address differences in educational quality).

183. *Vergara*, 2014 WL 2598719, at *5.

184. *Id.*

185. *Storrs v. Anchorage*, 721 P.2d 1146, 1150 (Alaska 1986).

186. *Id.* at 1148.

187. *Id.* at 1149.

188. *Id.* at 1150.

189. *Id.* at 1149.

statement of cause and a bill of the particulars, and an adversarial pre-termination hearing,¹⁹⁰ as is required by the minimum due process requirements of the Alaska Constitution.¹⁹¹ If the pre-termination hearing results in a notice of dismissal, the teacher may request a post-termination hearing, with the right to be represented by counsel, to cross-examine witnesses, and to subpoena witnesses,¹⁹² all of which are in line with minimum due process.¹⁹³ Instead of a post-termination hearing, a tenured teacher who has been dismissed may request grievance procedures with an optional informal hearing and a binding arbitration hearing.¹⁹⁴ While grievance procedures occur under arbitration rather than a hearing in front of the school board, grievance procedures perform basically the same function as the post-termination hearing.

Because the Alaska Dismissal Statute mirrors the requirements of minimal due process, the statute would be able to survive any potential challenge. Under strict scrutiny analysis, the compelling interest for the procedures in the Alaska Dismissal Statute is to comply with both state and constitutional requirements of minimum due process for dismissal of public employees who must have just cause to be dismissed. Because the statute would survive strict scrutiny, it would also be able to survive less exacting levels of scrutiny. Unlike the California Dismissal Statutes, Alaska does not require “*uber* due process” to dismiss its tenured teachers.¹⁹⁵

Alaska and California use almost identical last-in-first-out policies in the case of reductions in force to dismiss non-tenured recent hires before more senior tenured teachers without regard to teacher quality.¹⁹⁶ The court in *Vergara* found fault with California’s LIFO statute because “[n]o matter how gifted the junior teacher, and no matter how grossly

190. ALASKA STAT. § 14.20.180(a) (2012).

191. See *Storrs*, 721 P.2d at 1149 (stating that “[a]t a minimum, the employee must receive oral or written notice of the proposed discharge, an explanation of the employer’s evidence and an opportunity to present his position”).

192. ALASKA STAT. §§ 14.20.180(c)-(d).

193. See *Storrs*, 721 P.2d at 1149 (“When minimal pretermination procedures are followed, federal law entitles a public employee to a formal evidentiary post-termination hearing within a reasonable time.”).

194. ALASKA STAT. § 14.20.180(e).

195. *Vergara*, 2014 WL 2598719, at *5.

196. See ALASKA STAT. § 14.20.177(c) (“[A] school district may place a tenured teacher on layoff status only after the district has given notice of nonretention to all nontenured teachers.”); CAL. EDUC. CODE § 44955(b) (West 2012) (“[T]he 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.”).

ineffective the senior teacher, the junior gifted one . . . is separated from [his or her students] and a senior grossly ineffective one . . . is left in place.”¹⁹⁷ The California court boiled the issue down to the state’s requirement to assert a “compelling interest in the *de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetent ones,” which the court found “unfathomable” and “constitutionally unsupportable.”¹⁹⁸ Additionally, California and Alaska are in the “distinct minority among other states that have addressed this issue” as they are two of only ten states that rely solely on seniority in making layoff decisions.¹⁹⁹ Using the same reasoning as in *Vergara*, the court could find that laying off more gifted junior teachers before grossly ineffective senior teachers does not further a compelling state interest.

The *Vergara* court, in dicta, seemed particularly appalled that the effects of the difficulty of firing grossly ineffective teachers fell primarily on poor and minority students. Los Angeles Unified School District, for instance, is overwhelmingly Hispanic, with 84 percent of the district’s population comprised of black or Hispanic students and only 8.7 percent white students.²⁰⁰ The same clustering of students cannot be seen in Alaska schools. The five “urban” school districts of Anchorage, Fairbanks, Juneau, Kenai, and Matanuska-Susitna enroll more than 70 percent of students and 68 percent of teachers.²⁰¹ All of the schools in these districts display remarkable diversity from school to school.²⁰² None of the high schools in those districts are close to having student bodies that are almost exclusively white or exclusively minority.²⁰³ In the rural districts of Alaska, such as in the Northwest Arctic Borough, the schools have less diversity, and the student bodies are overwhelmingly made up of Alaska Native students.²⁰⁴ However, schools in rural districts are the ones least likely to face issues with

197. *Vergara*, 2014 WL 2598719, at *6.

198. *Id.*

199. *Id.* at *7.

200. DEP’T OF EDUC., *Los Angeles Unified LEA Summary of Selected Facts*, CIVIL RIGHTS DATA COLLECTION, <http://ocrdata.ed.gov/Page?t=d&eid=30388&syk=6&pid=736> (last visited Nov. 10, 2014).

201. DIANE HIRSHBERG & ALEXANDRA HILL, *TURNOVER AMONG ALASKA’S TEACHERS: HOW MANY LEAVE THEIR JOBS?* 3 (Inst. of Soc. and Econ. Research, Univ. of Alaska Anchorage 2006).

202. *See generally Sch. Enrollment by Ethnicity as of Oct. 1, 2013*, ALASKA DEP’T OF EDUC. AND EARLY DEV. ASSESSMENT (Mar. 6, 2014), http://education.alaska.gov/stats/SchoolEthnicity/2014_School_Ethnicity_Report.pdf (listing the ethnicities of students in various Alaska school districts).

203. *Id.*

204. *Id.* at 104-06.

tenured teachers because they have such high teacher turnover rates.²⁰⁵ Whereas the five urban districts have an average turnover rate of about ten percent of their teachers per year, rural districts face much higher rates, at about twenty-two percent.²⁰⁶ For this reason, urban districts are more affected by the tenure laws than rural districts are, and the urban districts do not see the same clustering of poor and minority students that could be seen in California.

A potential case challenging Alaska's tenure laws would face many obstacles to success. First, the Alaska Supreme Court has not declared education to be a fundamental right for equal protection purposes, as had the California Supreme Court. If the court failed to declare education a fundamental right in this potential case, getting to strict scrutiny to evaluate the tenure statutes would be difficult, but not impossible, under the sliding scrutiny scale. The Alaska Permanent Employment Statute and the Alaska Dismissal Statute are likely different enough from California's Permanent Employment Statute and Dismissal Statutes that a court would be able to find that they survive strict scrutiny. Because the LIFO Statutes of both California and Alaska are substantively identical, a court could readily strike down the Alaska LIFO statute under the equal protection clause. Poor and minority students in Alaska are generally not enrolled in de facto segregated schools, so they are not disproportionately affected by grossly ineffective teachers being shunted to their schools, as was the case in California. The uncertain and mixed results make a *Vergara*-like case in Alaska seem like a foolhardy path to pursue.

III. POTENTIAL LEGISLATIVE ACTION

The court challenge to the tenure statutes made sense in California because teachers were granted tenure too early in their careers to know if they were truly effective, and districts had difficulty dismissing ineffective teachers due to the burdensome dismissal procedures and the LIFO statute. Those policies led to grossly ineffective teachers disproportionately teaching poor and minority students. The same cannot be said about Alaska's tenure policies. Teachers in Alaska are granted tenure further into their careers and the procedures for dismissal conform with the minimum protections of due process. Poor

205. ALEXANDRA HILL & DIANE HIRSHBERG, ALASKA TEACHER TURNOVER, SUPPLY, AND DEMAND: 2013 HIGHLIGHTS 2 (UAA Ctr. for Alaska Educ. Policy Research, 2013).

206. ALEXANDRA HILL & DIANE HIRSHBERG, TURNOVER AMONG ALASKA TEACHERS: IS IT CHANGING? 1 (Inst. of Soc. and Econ. Research, Univ. of Alaska Anchorage, 2008).

and minority students are not disproportionately placed in classrooms with grossly ineffective teachers in Alaska the way they were in California. Alaska schools on the whole are not racially segregated, and the schools that do have high percentages of Alaska Native students are the schools least likely to be affected by tenure laws because those schools tend to have the most difficulty in retaining teachers. A court challenge of Alaska's tenure statutes is unlikely to affect students in Alaska's rural communities at all.

Even if Alaska is fairly insulated from a judicial attack on its tenure statutes, the legislature should nevertheless reexamine the statutes to ensure that they will lead to the most positive outcomes for students. Alaska is already considering making changes to teacher tenure because of the passage of House Bill 278 in 2014, and a full report on alternative tenure policies was due to the legislature on June 15, 2015. Although the results of this report have been delayed due to "some unexpected challenges related to the technical and original requirements of this project,"²⁰⁷ when it is released this report will surely be useful for the legislature to evaluate the impact of any changes on the tenure system, something the courts would not be able to do.

One area of focus for the legislature should be changing the LIFO policies for layoffs. This is the one area of Alaska's tenure system that basically mirrors California's unconstitutional statute. Rather than laying off the teachers with the least seniority before teachers with tenure, the legislature should instead allow districts to consider teacher effectiveness in making layoff determinations.

Other areas that the legislature could focus on, with the goal in mind of improving student outcomes, include attracting and retaining teachers in rural areas, supporting and evaluating new teachers, and building a teacher pipeline in Alaska so that the state is not so dependent on attracting teachers from outside the state.

Ultimately, public education is a tricky area for courts to wade into. Researchers do not have definite answers on what policies lead to the best student outcomes. Courts that have gotten involved in school financing issues often find themselves bogged down for years in determining whether their lofty goals have been met. State legislatures are in a much better position to evaluate and determine which policies will work best in their state. Accordingly, potential challengers to Alaska's tenure statutes may be better served by trying to change policy through the legislature, rather than through the courts.

207. *Salary and Benefits Schedule for School Districts*, PERSONNEL AND LABOR RELATIONS, ALASKA DEP'T OF ADMIN. (2015), <http://doa.alaska.gov/dop/HB278SchoolStudy/>.

CONCLUSION

A copycat challenge to Alaska's tenure system would have to overcome significant hurdles to have any chance of success. Unlike California, Alaska does not currently have jurisprudence that has declared education to be a fundamental right for equal protection purposes. Without that, it would be harder for the tenure system to be analyzed under strict scrutiny, and more likely that the system would survive a legal challenge.

Additionally, Alaska's tenure system differs from that of California in a few key respects. Alaska's teachers are granted tenure after three years of teaching, not less than two years as in California, which falls in line with what the majority of other states do. While California teachers are protected from dismissal by "uber due process," in Alaska, teachers are protected at the minimal due process level allowable by law.

The one area where Alaska's and California's laws are essentially identical is in their "last-in, first-out" policy that does not allow administrators to consider a teacher's ability and effectiveness in deciding who should be laid off. The Alaska legislature should consider changing this policy to align the state with how most other states govern teacher layoffs.

Because of the difficulties a court challenge would face, a better route to change the teacher tenure system of Alaska would be through the legislature.