

June 2017

# Running the Race: An Evaluation of Post-Race-to-the-Top Modifications to Teacher Tenure Laws and a Recommendation for Future Legislative Changes

Kimberly M. Rippeth

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**RUNNING THE RACE: AN EVALUATION OF POST-RACE-  
TO-THE-TOP MODIFICATIONS TO TEACHER TENURE  
LAWS AND A RECOMMENDATION FOR FUTURE  
LEGISLATIVE CHANGES**

*Kimberly M. Rippeth<sup>1</sup>*

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1. Kimberly M. Rippeth is a J.D. Candidate, The University of Akron School of Law, 2017. The author would like to give special thanks to Professor Elizabeth Shaver for her guidance, feedback, and support throughout the writing process.

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## I. INTRODUCTION

Nationwide, teacher tenure laws are under attack. In recent years, there has been an increasing amount of discussion on the topic of teacher tenure laws and their impact on teachers' and students' performance in public primary and secondary schools. The case that recently brought the issue of teacher tenure laws to the forefront of the public's attention was *Vergara v. State*. In this case, a California Superior Court tentatively ruled that the state's teacher tenure laws were unconstitutional because they violated students' equal protection rights.<sup>2</sup>

The case was initiated by a group of nine students from a California public school who challenged five of California's teacher tenure statutes.<sup>3</sup> The students claimed that the five statutes granted "grossl[y]

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2. *Vergara v. State*, No. BC484642, 2014 Cal. Super. LEXIS 176, at \*14, \*18-19 (June 10, 2014) (tentative opinion).

3. *Id.* at \*4.

ineffective teachers” continued employment in public schools.<sup>4</sup> They also argued that a disproportionate number of ineffective teachers were located in schools serving “predominately low-income and minority students,” thus negatively affecting the students’ right to equal access to a quality education.<sup>5</sup> The court agreed with the students and found that “both students and teachers [we]re unfairly, unnecessarily, and for no legally cognizable reason (let alone a compelling one), disadvantaged by the current Permanent Employment Statute.”<sup>6</sup>

Reactions to this court’s ruling were strong, and many predicted that it would have negative consequences on future tenure law litigation.<sup>7</sup> While the trial court’s opinion was most recently overruled by the California Second District Court of Appeal, Division 2<sup>8</sup> many states had already made reforms to teacher tenure laws before and during the pendency of the case.<sup>9</sup>

The response to these changes has been a wave of litigation challenging the constitutionality of the laws, not only based on students’ constitutional rights—as in *Vergara*—, but also based on teachers’ interest in employment and due process rights. For example, a court in North Carolina ruled that the state’s teacher tenure modification, which eliminated the forty-year system by which teachers could be fired for only “poor performance, immorality, or insubordination” and after a

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4. *Id.*

5. *Id.*

6. *Id.* at 14.

7. See, e.g., Linda Deutsch, *Judge strikes down California teacher tenure*, AP TOP NEWS PACKAGE (June 10, 2014), <https://www.ebscohost.com> (search for “Judge strikes down California teacher tenure”); Juliet Linderman & Travis Loller, *Reaction to California teacher tenure ruling*, NEWSWIRES (June 10, 2014), <https://www.ebscohost.com> (search for “Reaction to California teacher tenure ruling”); Mike Corder, *Plaintiffs ask court to affirm teacher-tenure, layoff ruling*, NEWSWIRES (June 24, 2015), <https://www.ebscohost.com> (search for “Plaintiffs ask court to affirm teacher-tenure”); Kimberly Hefling, *Some states roll back teacher tenure protections*, AP FINANCIAL NEWS (June 12, 2014), <https://www.ebscohost.com> (search for “Some states roll back teacher tenure protections”); *PBS News Hour: Teacher tenure rules are in state of flux across the nation*, (PBS television broadcast Nov. 29, 2014), [www.pbs.org/newshour/updates/teacher-tenure-rules-state-flux](http://www.pbs.org/newshour/updates/teacher-tenure-rules-state-flux). Kevin G. Welner, *Silver Lining’s Casebook: How Vergara’s Backers May Lose by Winning*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 121, 137 (2015) (stating that the generally-accepted method for such a political and social shift is through legislation or executive action, and, by striking down California’s tenure laws, the *Vergara* Court has opened the door to other students who wish to exercise their rights to equal protection with respect to education).

8. *Vergara v. State*, No. B258589, 2016 WL 4443590, at \*1 (Cal. Ct. App. Aug. 22, 2016) (holding that “[p]laintiffs failed to establish that the challenged statutes violate equal protection, primarily because they did not show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students.”).

9. *PBS News Hour: Teacher tenure rules are in state of flux across the nation*, (PBS television broadcast Nov. 29, 2014), [www.pbs.org/newshour/updates/teacher-tenure-rules-state-flux](http://www.pbs.org/newshour/updates/teacher-tenure-rules-state-flux).

hearing to challenge their termination, was unconstitutional on the grounds that it violated constitutional protections of contract rights.<sup>10</sup>

This Comment analyzes the various legislative modifications and resulting judicial actions and commentaries to shed light on the underlying issues regarding teacher tenure and the practical application of those issues to school districts across the country. In doing so, this Comment reflects on the goals of the legislative modifications and the success with which those goals have been accomplished. Finally, in the general wave of changes to teacher tenure laws, this Comment seeks to determine the best scheme of teacher tenure laws and, in effect, propose modifications for states that might undertake a revision of existing teacher tenure laws.

In order to understand the issues at stake in drafting these laws and to identify the best method for addressing those issues, it is important to first understand the teacher tenure system and the reasons for its implementation, evolution, and preservation in American public school systems. Therefore, Section I of this Comment provides an explanation and history of the teacher tenure system as well as the attitudes toward it.<sup>11</sup> Section I also traces the impact that recent education reforms—namely the No Child Left Behind Act and the Race to the Top initiative<sup>12</sup>—have had on teacher tenure.

Section II reviews recent modifications to teacher tenure laws throughout the nation as a result of the push toward education reform. These modifications have been categorized and examined according to the effects that they seek to accomplish, as follows: 1) states that made it easier to dismiss tenured teachers;<sup>13</sup> 2) states that made it more difficult to achieve tenure status;<sup>14</sup> and 3) states that have eliminated consideration of tenure status from reduction in force decisions.<sup>15</sup>

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10. Emery P. Dalesio, *Judge strikes down new NC teacher tenure law*, NEWSWIRES (May 16, 2014), <https://www.ebscohost.com> (search for “Judge strikes down new NC teacher tenure law”).

11. See PROCON.ORG, *Should Teachers Get Tenure?*, <http://teachertenure.procon.org> (last visited Aug. 21, 2015). There is great debate over whether tenure should be offered to teachers at all. The debate for or against granting tenure to public school teachers turns on the conflict between wanting to protect teachers from being unjustly fired and, therefore, giving them more freedom in the classroom and wanting to ensure that bad teachers are not insulated from termination due to difficult procedures and expensive litigation.

12. See Hefling, *supra* note 7 (attributing the teacher tenure debate to the addition of teacher evaluation systems “propelled by Obama administration-led incentives”).

13. See, e.g., DEL. CODE ANN. tit. 14, § 1270 (West 2011); FLA. STAT. ANN. § 1012.33(3) (West 2011); IND. CODE ANN. § 20-28-7.5-1(b)(1-6) (West 2011).

14. See, e.g., MICH. COMP. LAWS ANN. § 38.81 (West 2011); MICH. COMP. LAWS ANN. § 38.83b (West 2011).

15. See, e.g., IDAHO CODE ANN. § 33-1275 (West 2016); 105 ILL. COMP. STAT. ANN. 5 / 24-

Next, Section III evaluates the different modifications based on their real-world application and the reactions of the public and judiciary. In the aftermath of wide-spread modification to teacher tenure laws, the courts have intervened to protect the rights of teachers negatively affected by arbitrary or wrongful termination. Thus, this section includes an analysis of judicial actions that highlight the legal principles at play in tenure reform, specifically, concerns for due process and contract rights. This section also highlights the advantages and disadvantages of each type of modification, while weighing the real-world costs and benefits.

Finally, Section IV culminates in a recommendation for states to follow in future modifications to teacher tenure laws. The proposal recommends that states continue to grant tenure only after a lengthy probationary period of five years. Additionally, tenure status should only be utilized by administrators and board members in reduction-in-force employment decisions where evaluations are unable to distinguish between two individuals.

Further, the recommendation provides for the use of performance-based evaluations such that standardized testing weighs minimally in determinations, while peer review evaluations constitute the bulk of the determining weight in the evaluations. In order to limit the reliance on performance-based evaluations, the proposal urges policymakers to combat the concerns of reliability and error in the objective measures of effectiveness by providing a subjective element. The proposal stresses the benefits of placing teachers back in control of their profession and encouraging both accountability and assistance among peer teachers.

## II. RACE TO THE TOP—SETTING THE SCENE FOR TENURE REFORM

### A. *Teacher Tenure Laws Explained*

Before one can understand the current issues related to teacher tenure laws and their implications for future policymakers, it is first necessary to examine the teacher tenure system as a whole: what it is, where it has been, and how it got to this critical juncture in its history. While tenure is an often-debated topic on university campuses, tenure has a presence in public elementary and secondary schools. Teacher tenure laws have been in place in American elementary and secondary public schools for almost 100 years.<sup>16</sup> During the early 20th century,

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12 (West 2015); MICH. COMP. LAWS. ANN. § 380.1248(a) (West 2011).

16. E.g. Molly Robertson, *Blaming Teacher Tenure is Not the Answer*, 44 J.L. & EDUC. 463, 464 (2015); Kathy Christie & Jennifer Dounay Zinth, Updated, *Teacher Tenure or Continuing*

there was demand for a system that would protect teachers from being terminated without cause or for wrongful reasons such as discrimination based on race, gender, age, marital status<sup>17</sup> or “nepotism, political favoritism, and arbitrary dismissals.”<sup>18</sup>

In order to protect teachers from such threats to their employment, states implemented tenure laws that provided protection in the form of due process protection as discussed herein. In other words, tenure laws granted teachers continued interests in employment until such time as dismissal was appropriate based on very limited causes. Teachers gained this protection after the successful completion of a designated term of service during which they could be dismissed without due process protections.

### 1. The Protections of Due Process

Essentially, after the prescribed probationary period, teacher tenure laws protect teachers from unfair firing by implementing safeguards that prevent termination once tenure status is achieved. In other words, tenure allows teachers the employment protections of due process. The Fourteenth Amendment’s Due Process Clause protects individuals from being deprived of “life, liberty, or property” without first being given due process under the law.<sup>19</sup> Accordingly, a tenured teacher must receive notice before the school district can terminate the teacher’s employment.<sup>20</sup> Additionally, the teacher must be given a statement describing the reasons for the termination, which in some states is limited to a list of certain acceptable reasons for termination.<sup>21</sup> Further, decisions to dismiss a tenured teacher are subject to a hearing process that allows the teacher to challenge or even appeal the school district’s decision.<sup>22</sup>

Proponents of teacher tenure laws praise the protections they

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*Contract Laws*, EDUCATION COMMISSION OF THE STATES, 1 (Aug. 2011) <http://www.ecs.org/clearinghouse/94/93/9493.pdf> (stating that the first teacher tenure law was passed in New Jersey more than 85 years ago).

17. Robertson, *supra* note 16.

18. Christie, *supra* note 16.

19. Elizabeth Powell, *The Quest for Teacher Quality: Early Lessons from Race to the Top and State Legislative Efforts Regarding Teacher Evaluations*, 62 DEPAUL L. REV. 1061, 1074-75 (2013).

20. Christie, *supra* note 16.

21. *Id.*; 2-6 EDUCATION LAW § 6.06, *FACULTY AND STAFF TENURE*, LexisNexis (2015).

22. Kathy Christie & Jennifer Dounay Zinth, Updated, *Teacher Tenure or Continuing Contract Laws*, EDUCATION COMMISSION OF THE STATES, 16 (Aug. 2011) <http://www.ecs.org/clearinghouse/94/93/9493.pdf>.

provide as a necessary way to combat the potentially harmful effects of arbitrary employment decisions and encourage better teaching practices.<sup>23</sup> One argument is that tenure fosters better teachers because the security makes them feel more comfortable innovating in the classroom and advocating for students without the fear of retribution in the form of termination.<sup>24</sup> Teachers who have achieved tenure “feel free to exercise leadership”<sup>25</sup> and to engage in classroom discussions and methodologies without “self-censoring” out of fear.<sup>26</sup>

On the contrary, opposition to teacher tenure policies is rooted in the idea that such policies constitute a method by which ineffective teachers are insulated from termination.<sup>27</sup> While most tenure laws provide a process for terminating ineffective teachers, those systems are often criticized as inefficient.<sup>28</sup> The procedures are often costly and time-consuming, and therefore, they do not act as a practical way to combat the fear that tenure prevents bad teachers from being terminated.<sup>29</sup>

Even early teacher tenure policies allowed for tenured teachers to be dismissed on grounds of misconduct (generally of an illegal nature) or poor performance.<sup>30</sup> However, even where tenure has been

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23. PROCON.ORG, *Should Teachers Get Tenure?*, 11, <http://teachertenure.procon.org> (last visited Aug. 21, 2015).

24. *Id.*; See also Julie Rowland, Vergara and the complexities of teacher employment policies, EDUC. COMM’N OF THE STATES, May 2015.

25. Margaret E. Harris, *Teachers are “Different,”* EDUCATIONAL LEADERSHIP 415, 416 (April 1944).

26. Martin Essex, *What Does Academic Freedom Mean for Elementary and Secondary Teachers?*, EDUCATIONAL LEADERSHIP 237, 238-39 (Jan. 1952) (describing the American education system as an environment conducive to an “honest search for the truth” that is threatened by groups wanting to “pre-empt the public school to teach [their] particular objectives”).

27. *Should Teachers Get Tenure?*, *supra* note 23.

28. See George Skelton, *California teacher tenure finally a major election issue*, LOS ANGELES TIMES (Sept. 10, 2014) <http://www.latimes.com/local/politics/la-me-cap-education-vergara-20140911-column.html> (stating that one expert testified in the Vergara case that a poor instructor costs a school district “\$1.4 billion in lifetime earnings,” while another testified that “the L.A. Unified School District wanted to fire 350 teachers, but couldn’t because of ‘torturous’ dismissal hurdles.”); Laurel Shaper Walters, *More states yank teacher-tenure rug*, LAS VEGAS SUN (May 6, 1996) <http://lasvegassun.com/news/1996/may/06/more-states-yank-teacher-tenure-rug/> (stating that tenure makes firing long-serving, but ineffective teachers “costly and time-consuming” and referencing an anecdote about a high school math teacher unable to do algebra whose termination cost the school \$700,000).

29. Patrick McGuinn, *The Time is Right for Teacher-Tenure Reform*, EDUCATION WEEK (May 3, 2010) <http://www.edweek.org/ew/articles/2010/05/03/31mcguinn.h29.html> (commentary) (the expansion of teacher tenure protections have “made it so difficult and costly for districts to dismiss tenured teachers that they now rarely attempt to do so, even when serious concerns about a teacher’s effectiveness arise.”).

30. Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75,

historically awarded to teachers deemed “satisfactory” or where teachers could be fired for “incompetence,” such ratings were rarely given.<sup>31</sup> One reason is that these terms were not clearly-defined.<sup>32</sup> Without a clear standard defining the acceptable reasons for dismissal, school districts faced considerable difficulty utilizing those standards to terminate ineffective teachers.<sup>33</sup> Historically, teacher evaluations were based on the subjective determinations of a principal or other administrator.<sup>34</sup> Further, these evaluations considered a variety of factors that were not always closely related to effectiveness.<sup>35</sup> In 2002, only six states required that student performance be considered in teacher evaluations. Instead, other considerations included: teaching methods and techniques, ability to maintain classroom behavior and discipline, and mastery of the class content.<sup>36</sup> However, modern education reforms, as discussed herein, have called upon school districts, and ultimately state legislatures, to utilize more objective and sophisticated measures of teacher effectiveness.<sup>37</sup>

Tenured teachers were also traditionally rewarded for their seniority when it came time for school districts to decrease their work force in response to reduction-in-force cuts.<sup>38</sup> Also referred to as “last-in, first-out” policies, these seniority policies required school districts to dismiss probationary and less-senior teachers before those with tenure and more years of service.<sup>39</sup> On its face, such a protection appears to protect senior teachers from being terminated in favor of less-expensive probationary teachers.<sup>40</sup> Further, last-in, first-out policies are also attractive for their seemingly objective approach to employment decisions.<sup>41</sup> However, such decisions are arbitrary and may result in effective teachers being

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89 (2016).

31. E.g. Elizabeth Powell, *The Quest for Teacher Quality: Early Lessons from Race to the Top and State Legislative Efforts Regarding Teacher Evaluations*, 62 DEPAUL L. REV. 1061, 1074-75 (2013).

32. Black, *supra* note 30, at 89-90.

33. *Id.* at 90.

34. Powell, *supra* note 31, at 1069 (stating that administrators believed that teacher effectiveness was based on observable traits like having “an open mind, a positive attitude, patience, dedication, flexibility, and high expectations for her students.”).

35. Carole A. Veir & David L. Dagley, *Legal Issues in Teacher Evaluation Legislation: A Study of State Statutory Provisions*, 2002 B.Y.U. EDUC. & L.J. 1, 7 (2002).

36. *Id.*

37. *Id.*

38. Julie Rowland, *Vergara and the complexities of teacher employment policies*, EDUC. COMM’N OF THE STATES, May 2015.

39. *Id.* at 2.

40. *Id.* at 3.

41. *Id.* at 4.

dismissed due only to their inexperience rather than their inefficiency.

## 2. Probationary Periods Before a Teacher is Awarded Tenure

While achieving tenure status may seem easy or “automatic,”<sup>42</sup> in reality, teachers must meet certain requirements before attaining tenure status, namely they must withstand multiple evaluations throughout a designated probationary period.<sup>43</sup> During this probationary period, which generally lasts two or three years, the probationary teacher will likely be subject to repeated observation and evaluation.<sup>44</sup> Moreover, during probationary years, a school district can choose not to renew a teacher without the protections of tenure safeguards.<sup>45</sup> It is only after that probationary period, during which the school district determines that the teacher is effective, that the teacher gains the security that comes with tenure status.<sup>46</sup> The school district generally has pretty significant liberty to make the decisions regarding whether or not to grant a teacher tenure, provided the decisions are not discriminatory in nature.<sup>47</sup>

Due to the importance of the probationary period in determining whether a teacher will be awarded permanent employment through tenure, the length of probationary periods has been the subject of debate since decades before the most recent wave of legislative changes.<sup>48</sup> The danger of a tenure track that is too short is two-fold: 1) the system “confuses competence with compliance” and 2) the system requires administrators “to make snap judgments” regarding a teacher’s qualification for tenure.<sup>49</sup> When the probationary period is too short, teachers are inclined to do whatever they determine necessary to achieve tenure status, rather than whatever is necessary to ensure that their

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42. Edwin C. Darden, *Firing a teacher is getting easier*, KAPPAN MAGAZINE, Dec.-Jan. 2013, at 68-9.

43. Kathy Christie & Jennifer Dounay Zinth, Updated, *Teacher Tenure or Continuing Contract Laws*, EDUCATION COMMISSION OF THE STATES, 1 (Aug. 2011) <http://www.ecs.org/clearinghouse/94/93/9493.pdf>.

44. Molly Robertson, *Blaming Teacher Tenure is not the Answer*, 44 J.L. & EDUC., 463, 468 (2015).

45. Christie, *supra* note 43.

46. Robertson, *supra* note 44.

47. Christie, *supra* note 43; 2-6 EDUCATION LAW § 6.06, *Faculty and Staff Tenure*, LexisNexis (2015) (courts “permit educational institutions ‘maximum flexibility in dealing with probationary’ employees.”).

48. See generally Ione L. Perry, *Suppose We Lost Tenure?*, EDUCATIONAL LEADERSHIP 183 (1977).

49. Paul S. Sutton, *Thinking Anew About Teacher Tenure*, EDUCATION WEEK, Dec. 15, 2009, at 20-21.

students are mastering classroom material.<sup>50</sup>

Further, with increased testing and available data, a longer probationary period would allow more time to gather evidence related to a probationary teacher's classroom effectiveness, which in turn would result in better-informed employment decisions on the part of the superintendents and boards of education.<sup>51</sup> As it stands, probationary periods are arguably too short. The inevitable questions when probationary periods are too short are: If during a two-year probationary period a teacher's students produce one year of excellent test results and one year of "miserable" test results, then how does the school board gauge the teacher's effectiveness in the classroom?<sup>52</sup> Might the board extend the evaluation period for a third year to "break the tie" so to speak?<sup>53</sup> These are the questions that critics of extended probationary periods must address.

Since its first publication in 2007, the National Conference on Teacher Quality (NCTQ) has continually urged states to extend the probationary period that teachers must complete before achieving tenure.<sup>54</sup> The NCTQ suggests a baseline of five years.<sup>55</sup> However, the 2007 NCTQ findings showed that many states fell below that number, as only two states required that teachers have completed five years of service before they could achieve tenure: Indiana and Missouri.<sup>56</sup> Connecticut, Illinois, Michigan, and North Carolina fell slightly below the NCTQ-prescribed standard, requiring four years of service before achieving tenure, and most states, as of 2007, granted tenure after three years of service.<sup>57</sup> More notably, California, Maine, Maryland, Mississippi, Nevada, Vermont, and Washington offered tenure after only two years, and North Dakota offered tenure after only one year of service.<sup>58</sup>

In 2008, Kentucky increased its probation period to four years,

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50. See *id.*

51. Marc F. Bernstein, *Is Tenure an Anachronism?*, EDUCATION WEEK, March 21, 2006, at 34.

52. *Id.*

53. Stephen Sawchuk, *California Turns Down District's Bid to Lengthen Pre-Tenure Period*, EDUCATION WEEK BLOG (May 9, 2014) [http://blogs.edweek.org/edweek/teacherbeat/2014/05/california\\_turns\\_down\\_district.html](http://blogs.edweek.org/edweek/teacherbeat/2014/05/california_turns_down_district.html).

54. National Council on Teacher Quality, 2007 STATE TEACHER POLICY YEARBOOK 6 (2008).

55. *Id.*

56. *Id.* at 12.

57. *Id.* at 97.

58. *Id.*

bringing it closer to the NCTQ's baseline suggestion.<sup>59</sup> Following that, in 2009, Ohio increased its probationary period to seven years, exceeding the five-year suggestion.<sup>60</sup>

Also, in 2008, the NCTQ Yearbook Summary advised states that, to enhance the effectiveness of their teachers, the legislatures should implement policies and procedures for identifying and retaining effective teachers.<sup>61</sup> In gauging the states' compliance with this objective, the NCTQ determined that "tenure occur[ed] virtually automatically in just about all states, with little deliberation or consideration of evidence of teacher performance."<sup>62</sup> While the NCTQ suggested that teacher effectiveness and performance be considered in awarding tenure in addition to a probationary period, it found that, as of the 2008 investigation, only Iowa and New Mexico schools required any evidence of teacher effectiveness in awarding tenure status.<sup>63</sup>

### *B. The Pendulum of Teacher Tenure Reform from 1990-2010*

Tenure was first implemented in New Jersey in 1909.<sup>64</sup> However, while tenure may have been beneficial—and even necessary—at the time, the threats to job security that plagued teachers almost one hundred years ago are no longer as prevalent. At the turn of the 21st century, tenure arguably provides too much protection to teachers. A 2007-2008 school year report showed that the number of tenured teachers actually removed through the processes inherent in teacher tenure laws was only 2.1 percent.<sup>65</sup> Recognizing that the need for tenure may have become obsolete towards the end of the twentieth century, some scholars and politicians called for reform of state teacher tenure policies.

#### 1. No Child Left Behind

This first wave of reform followed the implementation of President

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59. National Council on Teacher Quality, 2008 STATE TEACHER POLICY YEARBOOK 71 (2009).

60. National Council on Teacher Quality, 2009 STATE TEACHER POLICY YEARBOOK 175 (2010).

61. National Council on Teacher Quality, *supra* note 59, at 3.

62. *Id.* at 69.

63. *Id.* at 70; Additionally, the New York City Department of Education initiated a process of granting tenure by which principals worked with teachers and evaluated teacher performance, granting tenure to only those teachers that have a "significant professional skill." *Id.*

64. Patrick McGuinn, *Ring the Bell for K-12 Teacher Tenure Reform*, CENTER FOR AMERICAN PROGRESS, 4 (2010).

65. *Id.*

George W. Bush's No Child Left Behind Act (NCLB) of 2001.<sup>66</sup> When passed, the bill was seen as one of the most widespread education reforms implemented since the 1960s.<sup>67</sup> Among other education initiatives, this act required that only "highly qualified" teachers lead classrooms.<sup>68</sup> Highly qualified teachers were teachers who proved that they had knowledge of their subject matters, had bachelor's degrees, and were certified by the states in which they were employed.<sup>69</sup>

However, this initiative was criticized for its over-emphasis on certification rather than teacher effectiveness.<sup>70</sup> Therefore, in the decade that followed enactment of NCLB, the policy priority shifted from desiring highly-qualified teachers to desiring highly-effective teachers.<sup>71</sup>

## 2. Race to the Top

President Barack Obama's administration subsequently implemented Race to the Top, which embodied the desire to hire and retain effective rather than qualified teachers and marked "a historic moment in American education."<sup>72</sup> The American Recovery and Reinvestment Act of 2009 set aside \$100 billion for education funding.<sup>73</sup> Of that amount, \$4.35 billion fueled the interstate competition for federal education funding known as the Race to the Top (RTTT) program.<sup>74</sup> The program's design and implementation—as well as the distribution of funds—were largely the work of the United States Department of Education (DOE) and were divided into three separate phases.<sup>75</sup> During Phases 1 and 2, the DOE required states to submit an application describing how their state compared with the RTTT goals and their

66. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

67. *The New Rules: An overview of the testing and accountability provisions of the No Child Left Behind Act*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/schools/nochild/nclb.html> (last visited Jan. 23, 2016).

68. Robert Gordon, Thomas J. Kane & Douglas O. Staiger, *Identifying Effective Teachers Using Performance on the Job*, THE HAMILTON PROJECT, 5 (2006).

69. *Id.*; U.S. Department of Education, *Facts and Terms Every Parent Should Know About NCLB* (last modified Feb. 2, 2009) <http://www2.ed.gov/nclb/overview/intro/parents/parentfacts.html>.

70. Gordon, *supra* note 68, at 7.

71. Marc F. Bernstein, *Is Tenure an Anachronism?*, EDUCATION WEEK, March 21, 2006, at 34.

72. President Barack Obama, *Race to the Top*, <https://www.whitehouse.gov/issues/education/k-12/race-to-the-top> (last visited Nov. 22, 2015).

73. William G. Howell, *Results of President Obama's Race to the Top*, EDUCATION NEXT, Fall 2015, at 60.

74. *Id.*

75. *Id.*

state's future plans to comply with RTTT goals.<sup>76</sup> Then, in Spring 2011, a third phase of the competition, limited to only “losing finalists from Phase 2,” began.<sup>77</sup> Ultimately, “[a] significantly higher percentage of participating states won in Phase 3, although amounts of these grants were considerably smaller than those from Phases 1 and 2.”<sup>78</sup>

Essentially, RTTT was a grant program, offering monetary incentives—funding—to states that were “willing to spur systemic reform to improve teaching and learning in America’s schools.”<sup>79</sup> The express purpose of the RTTT Fund was to encourage, through an offer of competitive grants, state legislatures and policymakers to change the educational environment in their state by improving student performance and achievement, increasing graduation rates, and promoting preparation for college.<sup>80</sup> The initiative lists four areas in which the government sought to promote education reform in the states: a) the implementation of international standards and assessments with the goal of preparing students to successfully enter the workplace or a college classroom; b) the establishment of data systems to measure performance and provide meaningful statistics to inform teachers and administrators where and how they can improve; c) an increase in effective teachers and principals (as well as improved equity in the distribution of those effective educators) and d) the boosting of low-achieving school districts.<sup>81</sup>

Though RTTT participation was ultimately voluntary and states had to apply for a chance to receive funding, states rushed to enact education reform so as to comply with RTTT and secure federal funding for their states.<sup>82</sup> In the end, “40 states and the District of Columbia submitted applications to Phase 1 of the competition” in March 2010, and “[35] states and the District of Columbia submitted applications to Phase 2 of the competition in June 2010.”<sup>83</sup> Only four states chose not to apply.<sup>84</sup>

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76. *Id.*

77. *Id.* at 61.

78. *Id.*

79. President Barack Obama, *Race to the Top*, <https://www.whitehouse.gov/issues/education/k-12/race-to-the-top> (last visited Nov. 22, 2015).

80. Race to the Top Fund, 34 Fed. Reg. 74,221 (Nov. 18, 2009) (to be codified at 34 C.F.R. pt. 75).

81. *Id.*

82. Associated Press, *States Change Laws in Hopes of Race to the Top Edge*, EDUCATION WEEK, Jan. 20, 2010, at 19.

83. William G. Howell, *Results of President Obama’s Race to the Top*, EDUCATION NEXT, Fall 2015, at 61.

84. *Id.* at 64. However, even in those states, legislators felt that RTTT had an effect on policymaking decisions in their states. *Id.* at 65. Overall, “one-third of legislators” said that RTTT had a “massive or “big” impact on their states’ education policy reforms, and only 19 percent said

The result of education reform within the last 15 years—particularly with NCLB and also with RTTT—has been a wide-spread increase in standardized testing with the objective of measuring student success and college-readiness, as well as the efficiency and effectiveness of the teacher’s responsible for their results.<sup>85</sup>

### III. STATE LEGISLATURES’ RESPONSE TO RACE TO THE TOP—LINKING TEACHER EVALUATIONS AND TEACHER EMPLOYMENT

Although the last twenty years have seen federally-led movements in education such as those mentioned in the previous section, the decision to reform education policy is ultimately up to the individual state legislatures. However, motivated by the federal funding available through RTTT, state legislatures responded to the RTTT’s concerns for gauging and improving teacher effectiveness by reforming their education statutes.<sup>86</sup> In fact, between 2010 and 2015, 38 states plus the District of Columbia modified their education laws.<sup>87</sup> The central theme of these reforms was creating a link between student performance and the evaluation of teacher effectiveness.<sup>88</sup>

#### A. *Push Toward a Link Between Objective Data and Employment Decisions*

In response to RTTT’s commitment to addressing the performance of American students and the causes of students’ performances, participating states made evaluating and encouraging teacher effectiveness a legislative priority. For example, in 2011, Indiana replaced a teacher tenure statute that had been in effect for over 80

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that their states were not impacted at all by the RTTT competition. *Id.*

85. See, e.g., Diane Ravitch, *Marc Tucker: The U.S. DOE’s “Mea Culpa” Did Not Go Far Enough*, Diane Ravitch’s Blog: A site to discuss better education for all (Oct. 27, 2015) <http://dianeravitch.net/category/race-to-the-top/> (last visited Nov. 22, 2015) (discussing a Council of the Great City Schools report which discovered that, “on average, more than 122 standardized tests between pre-K and grade 12” are taken per year, with each student taking close to eight tests individually per year as a result of the federal requirements of No Child Left Behind and Race to the Top in addition to state and local policies).

86. News Desk, *Teacher tenure rules are in state of flux across the nation*, PBS NEWSHOUR (Nov. 29, 2014) <http://www.pbs.org/newshour/updates/teacher-tenure-rules-state-flux/>.

87. Regina Umpstead, Ann E. Blankenship & Linda Weiss, *The New State of Teacher Evaluation and Employment Laws: An Analysis of Legal Actions and Trends*, 322 ED. LAW. REP. 577, 581 (Dec. 3, 2015).

88. Bruce Baker, Joseph O. Oliwole & Preston C. Green, *The Legal Consequences of Mandating High Stakes Decisions Based on Low Quality Information: Teacher Evaluation in the Race-to-the-Top Era*, EDUCATION POLICY ANALYSIS ARCHIVES, Jan. 28, 2013, at 3.

years<sup>89</sup> with a system based on teacher evaluations<sup>90</sup> because the state had suffered a trend of low graduation rates, high drop-out rates, and “static” performance on national tests in the preceding years.<sup>91</sup> In light of studies, which the State Legislature perceived to indicate a relationship between teacher effectiveness and student performance, the Legislature determined that the best course of action was to “exercise its police power to ensure that the education of its citizens was based upon teacher effectiveness and student achievement and not seniority.”<sup>92</sup>

Similarly, many states throughout the country sought to link student performances and objective data with determinations of teacher effectiveness, and ultimately, tenure decisions in response to DOE directives.<sup>93</sup>

In general, implementation of objective measures of teacher effectiveness took form as either value-added models or student-growth percentile evaluations.<sup>94</sup> Value-added models use assessment data to estimate the extent to which the difference in a student’s test scores from the beginning of the year to the end of the year can be attributed to a specific teacher or the school in which he was educated.<sup>95</sup> The goal of value-added models is to determine what effect a teacher has on a student’s test scores.<sup>96</sup> Under the Tennessee model, for example, the evaluations use students’ test scores from previous tests to predict the success that the student will have on the next test.<sup>97</sup> The difference between the predicted score and the actual score constitutes the teacher’s effect on the students—whether positive or negative.<sup>98</sup>

Student growth percentile evaluations, on the other hand, act as “a descriptive measure of the relative change of a student’s performance

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89. *Elliott v. Bd. of Sch. Trs. of Madison Consol. Schs.*, 2015 U.S. Dist. LEXIS 30309, \*3-5 (S.D. Ind. March 12, 2015). The initial law was enacted in 1927 to “secure permanency in the teaching force.” *Id.* at \*3 (citing *Watson v. Burnett*, 216 Ind. 216, 222 (1939)).

90. *Id.* at \*6; *See also* IND. CODE ANN. § 20-28-7.5-1(d) (West 2011).

91. *Elliott*, 2015 U.S. Dist. LEXIS 30309 at \*24.

92. *Id.* at \*23-24 (citing the briefs for the Board and the State).

93. Regina Umpstead, Ann E. Blankenship & Linda Weiss, *The New State of Teacher Evaluation and Employment Laws: An Analysis of Legal Actions and Trends*, 322 ED. LAW REP. 577, 578 (2015); Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75, 92 (2016).

94. Black, *supra* note 93, at 89.

95. Bruce Baker, Joseph O. Oliwole & Preston C. Green, *The Legal Consequences of Mandating High Stakes Decisions Based on Low Quality Information: Teacher Evaluation in the Race-to-the-Top Era*, EDUCATION POLICY ANALYSIS ARCHIVES, Jan. 28, 2013, at 7.

96. *Id.*

97. *See generally* *Wagner v. Haslam*, 112 F.Supp.3d 673 (M.D. Tenn., June 12, 2015).

98. Baker, *supra* note 95, at 8.

compared to that of all students.”<sup>99</sup> These measures compare an individual student’s growth based on yearly test scores against the performances of students in other classrooms.<sup>100</sup>

Each type of evaluation is prevalent in teacher tenure laws and is used to assess the effectiveness of a teacher in order to determine either the teacher’s eligibility for tenure status or his eligibility for dismissal.

### *B. Legislative Changes in Response to Concerns Related to Effectiveness*

Due to the concerns that teacher effectiveness contributes to the success of a school district, the states have generally reformed their tenure laws to accomplish one or more of the following ends: 1) allowing districts to terminate a teacher’s employment based on the evaluations, 2) making it more difficult for teachers to attain tenure, and 3) eliminating seniority as a factor in determining which teachers should be terminated during times when the district must downsize its staff.

#### 1. Making it Easier to Dismiss Ineffective Teachers

In 2010, the NCTQ Yearbook reported that, although almost every state’s tenure laws provided grounds for dismissal, those laws were ineffective for dismissing under-performing teachers in practice because they were limited to either criminal behavior or issues of morality or they were too ambiguous in defining terms such as “incompetency” or “inadequacy.”<sup>101</sup> However, with new legislation, Oklahoma and Rhode Island led the states in enacting grounds and procedures for dismissing ineffective teachers.<sup>102</sup>

In 2010, New York enacted a law that, although tenured teachers could only be removed for just cause, “a pattern of ineffective teaching or performance” would constitute incompetence and would support the removal of tenured teachers.<sup>103</sup> By 2011, 17 states had modified their laws, providing for dismissal of teachers with unsatisfactory evaluations.<sup>104</sup> As of 2015, 28 states had added ineffectiveness as a

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99. *Id.* at 7.

100. *Id.*; Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75, 94 (2016).

101. National Center on Teacher Quality, 2010 STATE TEACHER POLICY YEARBOOK 12 (2011).

102. *Id.*

103. N.Y. EDUC. LAW § 3020 (McKinney 2015).

104. National Council on Teacher Quality, 2011 STATE TEACHER POLICY YEARBOOK 117 (2012).

cause for the dismissal of teachers.<sup>105</sup>

Each state determines for itself and varies in the way that it utilizes findings of ineffectiveness—some calling for mandatory dismissal, and others for discretionary dismissal.<sup>106</sup> For example, Alaska,<sup>107</sup> Delaware<sup>108</sup>, Connecticut,<sup>109</sup> Florida,<sup>110</sup> Georgia,<sup>111</sup> Indiana,<sup>112</sup> New Mexico,<sup>113</sup> New York,<sup>114</sup> Oklahoma,<sup>115</sup> West Virginia,<sup>116</sup> and Wyoming<sup>117</sup> modified laws to allow school districts to exercise discretion in determining whether an “ineffective” teacher may be terminated. In the alternative, Arkansas,<sup>118</sup> Colorado,<sup>119</sup> Michigan,<sup>120</sup> and North Carolina<sup>121</sup> modifications required public schools to terminate or dismiss “ineffective” teachers.

## 2. Making it More Difficult for Teachers to Achieve Tenure

Additionally, the new legislation responding to the RTTT initiative sought to make it more difficult for teachers to attain tenure. One way that legislatures have achieved this goal is by basing the final award of tenure on evaluations throughout the probation period. In 2009, when NCTQ began investigating the interplay of teacher effectiveness in teacher tenure decisions, none of the states utilized the teacher performance data in decisions of teacher tenure.<sup>122</sup> Then, by 2013, the

105. Kathryn M. Doherty & Sandi Jacobs, *State of the States 2015: Evaluating Teaching, Leading, and Learning*, NATIONAL COUNCIL ON TEACHER QUALITY, Nov. 2015, at 28.

106. Bruce D. Baker, Joseph O. Oluwole & Preston C. Green, *The Legal Consequences of Mandating High Stakes Decisions Based on Low Quality Information: Teacher Evaluation in the Race-to-the-Top Era*, EDUCATION POLICY ANALYSIS ARCHIVES, Jan. 28, 2013, at 4.

107. ALASKA STAT. § 14.20.149(E) (2016).

108. DEL. CODE ANN. tit. 14, § 1273 (2014).

109. CONN. GEN. STAT. § 10-151(D) (2015).

110. FLA. STAT. § 1012.335(5) (2011).

111. GA. CODE ANN. § 20-2-942(B) (2015).

112. IND. CODE ANN. § 20-28-7.5-1(B)(3)(B) (LexisNexis 2015).

113. N.M. STAT. ANN. § 22-10A-19E (West 2010).

114. N.Y. EDUC. LAW § 3020-B(2)(A) (McKinney 2015).

115. OKLA. STAT. tit. 6, § 101.22(A)(2),(4), and (6) (2014) (teachers may be dismissed in certain circumstances, but must be dismissed in others).

116. W. VA. CODE § 18A-3C-2(H) (2012).

117. WYO. STAT. § 21-7-110 (A)(VII) (2015).

118. ARK. CODE ANN. § 6-17-2807(G)(1)&(2)(A) (West 2015) (stating that upon accepting a subpar evaluation result, a superintendent “shall recommend termination or nonrenewal of the teacher’s contract.”).

119. See COLO. CODE REGS. § 301-87(5.01) (2012).

120. MICH. COMP. LAWS ANN. § 380.1249(d) (West 2016).

121. N.C. GEN. STAT. ANN. § 115C-325(e)(3) (West 2015).

122. Kathryn M. Doherty & Sandi Jacobs, *State of the States 2015: Evaluating Teaching, Leading, and Learning*, NATIONAL COUNCIL ON TEACHER QUALITY, Nov. 2015, at iii.

NCTQ reported that 20 states had implemented measures by which student performance was factored into decisions regarding awards of tenure status.<sup>123</sup> That number had grown to 23 by 2015.<sup>124 125</sup>

The other way that states made it more difficult to achieve tenure was by extending the probationary period that a teacher has to complete before obtaining the protections of tenure. Many states also increased the amount of time that a teacher served as a probationary period. As of 2011, only Mississippi granted tenure after one year and California, Hawaii, North Dakota, South Carolina, and Vermont offered tenure after two years.<sup>126</sup>

### 3. Eliminating Seniority as a Factor for School Districts to Consider When Downsizing

Finally, a more modest trend of modification to education policies is the elimination of seniority as a factor in determining who is retained and who is terminated in circumstances which required school districts to cut teachers.<sup>127</sup> A 2011 modification to Illinois's teacher tenure laws sought to eliminate consideration of seniority by providing that length of continued service must not be considered as a factor in terminating employment unless all other factors are equal.<sup>128</sup> Similarly, Michigan's Teacher Tenure Act contains a provision that the "length of service or tenure status shall not be a factor in a personnel decision" unless there are two equally-qualified candidates, where tenure status or seniority may be considered a "tiebreaker."<sup>129</sup> As of 2014, ten states prohibited

123. National Council on Teacher Quality, 2013 STATE TEACHER POLICY YEARBOOK 10 (2014).

124. Doherty, *supra* note 122.

125. *See, e.g.*, ALASKA STAT. § 14.20.150 (2016); ARIZ. REV. STAT. ANN. § 15-538.01(D) (2013); COLO. REV. STAT. ANN. § 22-63-203(2)(a) (West 2010); CONN. GEN. STAT. § 10-151(d) (2015); DEL. CODE ANN. tit. 14 § 1403(a)(2) (2014); FLA. STAT. § 1012.335(2)(C)(3) (2011); MICH. COMP. LAWS ANN. § 380.1249(d) (West 2016); MICH. COMP. LAWS ANN. § 38.81(Sec. 1) (West 2011); NEV. REV. STAT. ANN. § 391.3197(3) (West 2015); N.J. STAT. ANN. § 18A:28-5(b) (West 2012); N.Y. EDUC. LAW § 3012(2)(b) (McKinney 2015); N.C. GEN. STAT. ANN. § 115C-325(e)(3) (West 2015); OKLA. STAT. tit. 6, § 101.3 (2014); S.C. CODE ANN. REGS. 43-205.1(IV) (2016); TENN. CODE ANN. § 49-5-503(4) (West 2016); VA. CODE ANN. § 22.1-303(A) (West 2013); WYO. STAT. ANN. § 21-7-102 (ii) (West 2016).

126. National Council on Teacher Quality, 2011 STATE TEACHER POLICY YEARBOOK 76 (2012).

127. *See, e.g.*, ALASKA STAT. § 14.20.170 (2016); COLO. REV. STAT. ANN. § 22-63-202(3) (West 2010); GA. CODE ANN. § 20-2-948 (West 2012); MICH. COMP. LAWS ANN. § 380.1248 (West 2011); N.C. GEN. STAT. ANN. § 115C-325(2)(a)(2) (West 2015); OHIO REV. CODE ANN. § 3319.17(C) (West 2013); TENN. CODE ANN. § 49-5-511(b) (West 2014).

128. 105 ILL. COMP. STAT. ANN. 5 / 24-12 (West 2015).

129. MICH. COMP. LAWS ANN. § 380.1248(a) (West 2011).

using seniority status as a factor in reduction-in-force employment decisions.<sup>130</sup>

#### IV. EVALUATING THE MODIFICATION AND THE OPTIONS THAT STATES HAVE GOING FORWARD

##### A. *Eliminating Tenure Completely is an Impractical Option*

In response to RTTT and the criticisms of teacher tenure, the first, and most dramatic, option for state legislatures was to eliminate tenure altogether and contract with teachers only on a year-to-year basis.<sup>131</sup> One argument against implementing any form of tenure is that it directly conflicts with the importance that American society places on education.<sup>132</sup> For example, in an article in *The New Republic*, Michael Glenwood criticized tenure as illogical and an impediment “to improving the quality of education in our country.”<sup>133</sup> Instead, Glenwood would like to see prominent politicians and policymakers push to end tenure practices nationwide.<sup>134</sup>

However, this option is ultimately unrealistic and in states where legislatures have attempted such a feat, the laws were met by resistance. Though elimination of teacher tenure has been proposed in a number of states, such bills do not always make it past the floor in state senates or houses of representatives.<sup>135</sup>

Even when those bills do leave the floor and are presented to the

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130. Julie Rowland, Vergara *and the complexities of teacher employment policies*, EDUC. COMM’N OF THE STATES, May 2015, at 1, 5.

131. See The Florida Senate, *Committee on Education Pre-K – 12: 2011 Summary of Legislation Passed 4* (last visited Jan. 23, 2016) <http://www.flsenate.gov/PublishedContent/Session/2011/BillSummary/CombinedPDF/ed.pdf> (explaining that “the bill furthers the goals of Race to the Top by basing employment decisions on the evaluation of instructional personnel” by eliminating tenure).

132. Michael Glenwood, *Making the Grade*, 243 THE NEW REPUBLIC: A JOURNAL OF POLITICS AND THE ARTS 920 (April 5, 2012).

133. *Id.*

134. *Id.* The article, overtly aligning with the Democratic political party, explicitly calls “prominent Democrats, especially President Obama” to encourage the dissolution of teacher tenure laws.

135. See Virginia Young, *Missouri Senate sidelines bill abolishing teacher tenure*, ST. LOUIS POST-DISPATCH, (April 03, 2012) [http://www.stltoday.com/news/local/govt-and-politics/missouri-senate-sidelines-bill-abolishing-teacher-tenure/article\\_6d8296fc-7de9-11e1-8393-001a4bcf6878.html](http://www.stltoday.com/news/local/govt-and-politics/missouri-senate-sidelines-bill-abolishing-teacher-tenure/article_6d8296fc-7de9-11e1-8393-001a4bcf6878.html) (reporting that the Missouri Senate rejected a bill to eliminate teacher tenure, and instead voted “to set up a task force to study teacher salaries and effectiveness.”); Emma Brown, *Virginia teacher tenure bill dies in GOP-led Senate*, THE WASHINGTON POST, (March 8, 2012) [https://www.washingtonpost.com/blogs/virginia-schools-insider/post/virginia-teacher-tenure-bill-dies-in-gop-led-senate/2012/03/08/gIQAfjgXzR\\_blog.html](https://www.washingtonpost.com/blogs/virginia-schools-insider/post/virginia-teacher-tenure-bill-dies-in-gop-led-senate/2012/03/08/gIQAfjgXzR_blog.html).

public for a vote, they are often rejected by the electorate. For example, in 2011, the Idaho legislature sought to amend its education policies related to issuance and renewal of contracts.<sup>136</sup> The amendment provided that “no new employment contract between a school district and a certificated employee shall result in the vesting of tenure, continued expectation of employment or property rights in an employment relationship.”<sup>137</sup> Additionally, it provided that when a school district makes a reduction in its force, the school board must not consider seniority or tenure as factors in making termination decisions.<sup>138</sup> Thus, decisions in those circumstances were to be made based on the teachers’ performances rather than their date of hiring.<sup>139</sup>

Throughout the legislative process, the 2011 Amendment was known as “part of Idaho’s Students Come First legislation.”<sup>140</sup> The stated purpose of the bill was to give “locally elected school boards” the power to make decisions in their district and to “create a more professional and accountable work force” by “phasing out tenure,” incorporating parent feedback and student performance into the teacher evaluations, and “eliminating seniority as a factor in reduction in force decisions.”<sup>141</sup> Proponents of the “Students Come First” laws claimed that the changes spurred “great benefits” in Idaho’s education system by improving negotiations in local school districts and encouraging teachers to find new ways to “engage 21st century learners, repurposing the money raised for education to better serve students.”<sup>142</sup>

However, the bill was called “mean-spirited” and was alleged to have “turn[ed] teachers into powerless pawns of the political system.”<sup>143</sup> The public ultimately rejected the bill, voting it down in a November 2012 general election by a margin of 57.29 percent (371,228 voters) “No” to 42.71 percent (276,715 voters) “Yes.”<sup>144</sup>

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136. See IDAHO CODE § 33-515 (2016) (compiler’s note); 2011 Idaho Sess. Laws 208.

137. See 2011 Idaho Sess. Laws 214.

138. *Id.* at 220.

139. Idaho Secretary of State, *Proposition 1, Argument IN FAVOR of Proposition One*, 2012 GENERAL ELECTION REFERENDA BALLOT QUESTIONS, [http://www.sos.idaho.gov/elect/inits/2012/Prop1\\_statements.htm](http://www.sos.idaho.gov/elect/inits/2012/Prop1_statements.htm) (last visited Jan. 23, 2016).

140. Idaho Legislature, *Statement of Purpose / Fiscal Note RS20413*, <https://legislature.idaho.gov/legislation/2011/S1108SOP.pdf> (last visited Jan. 23, 2016).

141. *Id.*

142. Idaho Secretary of State, *supra* note 136.

143. *Id.* (quoting Twin Falls Republican Rep. Leon Smith’s statement in a debate regarding Proposition 1).

144. Election Center, *2012 Idaho General Election Proposition 1, Proposition 1: Teacher Contracts*, THE SPOKESMAN-REVIEW, (last updated Nov. 7, 2012), <http://www.spokesman.com/elections/2012/idaho-general-election-2012/measures/statewide/idaho/76/>.

Further, eliminating tenure altogether is impractical because doing so may violate the Contracts Clause of the both state constitutions and the United States Constitution.<sup>145</sup> Because eliminating tenure effectively eliminates teachers' rights to employment contracts that are guaranteed by the constitutions of both the United States and the individual states, such measures are unconstitutional.<sup>146</sup> Courts tend to defer to the state legislatures on state policy issues such as teacher tenure as the states are better-equipped to determine the benefits, costs, and consequences of different teacher tenure systems.<sup>147</sup> However, students and teachers have called upon the courts to challenge the constitutionality of these states' modified teacher tenure laws.<sup>148</sup>

In order to bring an action on a claim that the teacher tenure law violates the Contracts Clause, one must prove that a contractual right existed between the parties, that the new law "impaired" the contractual relationship between the parties, and that the law was not "reasonable and necessary to serve an important public interest."<sup>149</sup> These challenges are particularly likely where the law has eliminated rather than modified a prior right to continued employment.

In order to assert a claim that a law is unconstitutional on the grounds that it violates the Contracts Clause, the challenging party must first prove that a contractual obligation exists. In general, where teachers are entitled to the benefits of teacher tenure laws, there is a contractual

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145. See generally Case Comment, *Constitutional Law - Contract Clause - North Carolina Superior Court Holds That Law Eliminating Teacher Tenure Violates Tenured Teachers' Constitutionally Protected Contractual Rights*, 128 HARV. L. REV. 995 (2015) [hereinafter *Constitutional Law - Contract Clause*] (discussing the North Carolina decision and the Contract Clause at length); *Elliott v. Bd. of Sch. Trs. of Madison Consol. Schs.*, 2015 U.S. Dist. LEXIS 30309 (S.D. Ind. March 12, 2015); *N.C. Ass'n of Educators v. State*, 776 S.E.2d at \*9 (N.C. App. 2015) *modified and aff'd* by 786 S.E.2d 255 (2016) ("hold[ing] the repeal is unconstitutional in its retroactive application based on the Contract Clause of the United States Constitution).

146. U.S. CONST. art. I, § 10, cl. 1 provides that: "No State shall pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." See also, e.g., MICH. CONST. art. I, § 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted"); IDAHO CONST. art. I, § 16 ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed"); LA. CONST. art. I, § 23 ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted"); IND. CONST. art. I, § 24 ("No ex post facto law, or law impairing the obligation of contracts, shall ever be passed").

147. See Al Baker, *Lawsuit Challenges New York's Teacher Tenure Laws*, N.Y. TIMES (July 3, 2014), <http://nyti.ms/VjSbXY> (quoting education lawyer and professor at Columbia University's Teachers College Michael A. Rebell).

148. Edwin C. Darden, *Firing a teacher is getting easier*, KAPPAN MAG., Dec.-Jan. 2013.

149. See generally, e.g., *Constitutional Law - Contract Clause*, supra note 145; *Elliott v. Bd. Of Sch. Trs. Of Madison Consol. Schs.*, 2015 U.S. Dist. LEXIS 30309 (S.D. Ind. March 12, 2015); *N.C. Ass'n of Educators v. State*, 776 S.E.2d at \*9 (N.C. App. 2015), *modified and aff'd* by 786 S.E.2d 255 (2016).

relationship between the state and the teacher.<sup>150</sup> Though it is not in the nature of the legislatures' duties to create contracts, it is within their power to legislatively create them in the course of creating state policy.<sup>151</sup> Thus, where the state enacts legislation that makes a promise to an individual contingent on performance of an action—such as the promise of employment in exchange for serving a probationary period and being renewed as a permanent teacher—that promise creates a vested contractual interest in the individual who performs the required act.<sup>152</sup>

Perhaps the easiest element to prove, when teacher tenure cases come before the court challenging a law based on the contracts clause, is that of impairment.<sup>153</sup> However, in teacher tenure cases where the impairment is generally that, but for the legislative change, the teacher would have been entitled to renewal of a contract (in other words, continued employment)<sup>154</sup> or a hearing on the school board's reasons for termination,<sup>155</sup> the impairment is most likely substantial enough to support the claim.

The third element in proving a claim of a violation of the contract clause—that the law impairing a contractual relationship was a reasonable and necessary step in promoting a public interest—requires a two-step analysis.<sup>156</sup> The first question is whether there is a harm or a purpose that the state is trying to address.<sup>157</sup> In general, if the goal of these legislative reforms is to raise the level of performance of students and teachers in the states, it seems like there is a legitimate public interest being served. For example, in a case before the Southern District of Indiana, the Court considered this issue and reasoned that the Indiana General Assembly had a constitutional duty to “provide an education to the citizens of the state,”<sup>158</sup> and thus, where the General Assembly had a reasonable concern regarding the effects of teachers on low graduation rates and test scores, improving teacher quality was a legitimate public

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150. *Indiana ex. rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); see also *Constitutional Law - Contract Clause*, *supra* note 145.

151. *Id.*

152. See N.C. Ass'n of Educators, 776 S.E.2d at \*12.

153. Elliott, 2015 U.S. Dist. LEXIS 30309 at \*18 (stating that “There is no doubt that SB 1’s RIF provision, as Mr. Elliott notes, ‘is plainly the source of [the] impairment of Elliott’s contractual rights.’”); N.C. Ass'n of Educators, 776 S.E.2d at \*13 (stating with regard to the impairment issue, “This is not a difficult question.”).

154. Elliott, 2015 U.S. Dist. LEXIS 30309 at \*21; N.C. Ass'n of Educators, 776 S.E.2d at \*13.

155. N.C. Ass'n of Educators, 776 S.E.2d at \*13.

156. *Id.* at \*14.

157. *Id.*

158. Elliott, 2015 U.S. Dist. LEXIS 30309 at \*22.

purpose.<sup>159</sup>

The second step in the analysis is determining whether a law is reasonable and necessary, or whether there is another “less drastic” way in which the state could promote, protect, or achieve its legitimate purpose.<sup>160</sup> For example, when confronted with the question of whether the North Carolina State Legislature was able to accomplish its education objectives without completely eliminating tenure, the appellate court reasoned that the state’s strategy was not a reasonable and necessary means of effecting their legitimate state purpose because there were other means by which the same interest could have been accomplished.<sup>161</sup> The court said that the State could have accomplished the same goals using well-defined “teacher performance evaluation standards, teacher performance ratings, and teacher status, thus creating greater consistency in the determination of career status and the revocation of career status based on evaluations”<sup>162</sup>

In light of these challenges, completely eliminating tenure is not a viable option for legislatures in future modifications to teacher tenure.

#### *B. Use of Performance Evaluation Methods Present both Practical and Constitutional Problems*

The use of teacher evaluations in the classroom to assess teachers’ effectiveness and competence is not a novel or revolutionary idea.<sup>163</sup> What is noteworthy about the continued discussion regarding teacher

159. *Id.* at 27.

160. N.C. Ass’n of Educators, 776 S.E.2d at \*16.

161. *Id.*

162. *Id.* It is important to note here that the two cases, which have been examined in this section, address very different statutes, and thus, while their analyses address the same ideas, they differ. In *North Carolina Ass’n of Educators*, the North Carolina modification eliminated tenure completely, thus the idea that teacher evaluations were a “less drastic” way to ensure employment of quality teachers and the idea that the previous law allowed for termination of incompetent teachers showed that there was no legitimate purpose in eliminating tenure. On the contrary, in *Elliott*, the challenged law simply eliminated tenure as a factor in reduced force termination determinations. Accordingly, the fact that school boards could fire ineffective tenured teachers did not come into the analysis of whether there was a legitimate public interest because that power existed in a different set of circumstances.

163. Ione L. Perry, *Suppose We Lost Tenure?*, EDUCATIONAL LEADERSHIP 183, 185 (Dec. 1977) (stating that tenure is linked to assessing teacher quality, and therefore, “necessitates evaluation.”); Frank Gray & Margaret L. Burns, *Does “Management by Objectives” Work in Education?*, EDUCATION LEADERSHIP 414, 415-416 (March 1979) (discussing the prospects for school districts that utilize an objective-based system to evaluate management and teacher achievement); Joan L. Buttram & Bruce L. Wilson, *Promising Trends in Teacher Evaluation*, EDUCATIONAL LEADERSHIP 4, 5 (April 1987) (recognizing the need to reform the uses of annual evaluations).

performance evaluations is the states' apparent inability to effectively implement or appropriately utilize methods of evaluating their teachers even after almost 40 years of debate on the topic.<sup>164</sup> As far back as the 1970s, evaluations of teachers were conducted at the discretion of local school district leaders,<sup>165</sup> and generally provided that the evaluation processes afforded due process and were executed in accordance with the proscribed policy.<sup>166</sup> Courts generally upheld these evaluation procedures.<sup>167</sup> Evaluations became a topic of national discussion after publication of *A Nation at Risk*, a federal paper suggesting use of evaluations "as a potential school-reform strategy."<sup>168</sup>

However, implementing evaluation policies and procedures is exponentially more complicated now than it was in the early 1970s or 1980s.<sup>169</sup> Today, the discussion of teacher evaluations is complicated by availability of student performance data, the complex formulas and instruments whose validity depends on differing expert testimonies, and vendors who advertise the un-matched benefits of their particular method of evaluation.<sup>170</sup> In the wake of 21st century education movements—namely NCLB and RTTT—the use of performance-based evaluations in determining teacher effectiveness has taken center stage, and the debate continues over the appropriate methods of evaluating teachers and the appropriate use of the collected data.<sup>171</sup>

Unfortunately, though the methods utilizing student-performance data as an indicator of teacher effectiveness seem to be a facially objective way to make employment decisions,<sup>172</sup> such methods are not without their problems.

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164. As this section will illustrate, there are no concrete answers to the questions: "What types of evaluations have the most benefit in evaluating teachers' effectiveness?" and "How should the evaluations be utilized so as to ensure that school districts are identifying, retaining, and molding the most effective teachers?"

165. Helen M. Hazi, *Legal Challenges to Teacher Evaluations: Pitfalls and Possibilities in the States*, 87 THE CLEARING HOUSE 134, 134 (2014).

166. *Id.* at 135.

167. *Id.*

168. *Id.* at 134.

169. *Id.* at 137.

170. *Id.* at 137-138.

171. *Id.* at 134.

172. Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75, 94 (2016).

### 1. Using Performance-based Evaluations Poses Several Practical Concerns

While it is necessary for states to implement some type of measuring system to gauge teachers' effectiveness in the classroom to ensure that schools are identifying and retaining effective teachers and dismissing ineffective teachers, it is unclear what the best method is for accomplishing those goals. Scholars, administrators, and teachers often debate the pros and cons of teacher evaluations and their place in education.

One criticism of utilizing evaluations to gauge teacher effectiveness is that it has led to too much testing.<sup>173</sup> Standardized testing, which was ironically implemented to help objectively gauge student performance and teacher effectiveness, has now become a burden on teachers by requiring them to forfeit instructional time in order to prepare students for testing.<sup>174</sup> An important—and perhaps the most well-known—element of the NCLB Act was that it implemented a series of standardized tests that students took each year between third and eighth grade and “at least once in high school” in order to identify school districts in need of improvement.<sup>175</sup> These tests presented several problems: 1) the frequency of the testing<sup>176</sup> led states to opt for “easy and inexpensive tests” that were not a true representation of the state of the education system; 2) the pressure placed on schools to perform well on tests led teachers to ignore students that were likely to do either really poorly or really well in favor of attending to the borderline students to ensure that they passed the tests; and 3) the priority placed on testing reduced teachers' instructional time.<sup>177</sup> Further, the increase in testing seemed to have the most negative effects on minority communities and

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173. Jamie McKenzie, *Killing NCLB in 2007: 17 Reasons Why NCLB Must Go*, 4 NO CHILD LEFT 8 (Sept. 2006) <http://nochildleft.com/2006/sept06killing.html>.

174. Diane Ravitch, *Obama Administration Admits There is Too Much Testing*, DIANE RAVITCH'S BLOG: A SITE TO DISCUSS BETTER EDUCATION FOR ALL (Oct. 24, 2015) <http://dianeravitch.net/category/race-to-the-top/>. A recent survey revealed that test preparation in an average eighth grade class is 20 to 25 hours—which amounts to 2.3 percent—of class time. *Id.* (quoting a story in the Times).

175. U.S. Department of Education, *No Child Left Behind: Facts and Terms Every Parent Should Know About NCLB*, <http://www2.ed.gov/nclb/overview/intro/parents/parentfacts.html> (last visited Jan. 23, 2016).

176. As a result of NCLB, RTTT, and other state and local testing, students take and average of “more than 112 standardized tests between pre-K and grade 12.” Diane Ravitch, *Marc Tucker: The U.S. DOE's “Mea Culpa” Did Not Go Far Enough*, DIANE RAVITCH'S BLOG: A SITE TO DISCUSS BETTER EDUCATION FOR ALL (Oct. 27, 2015) <http://dianeravitch.net/category/race-to-the-top/>.

177. McKenzie, *supra* note 173.

students.<sup>178</sup> This result directly conflicts with the policymakers' intentions for implementing additional standardized tests.<sup>179</sup> Even the masterminds behind the RTTT initiative are recognizing that the resultant over-reliance on testing is not advantageous to children or schools in general.<sup>180</sup> However, it remains to be seen how subsequent education policy reforms will address this issue.<sup>181</sup>

Unfortunately, the methods utilizing student-performance data as an indicator of teacher effectiveness also have a reputation for being unstable and unreliable from year to year.<sup>182</sup> A 2010 report conducted for the United States Department of Education, Institute for Education Sciences<sup>183</sup> “found that there is about a 25% chance (if using three years of data) or a 35% chance (if using one year of data) that a teacher who is ‘average’ would be identified as ‘significantly worse than average’ and potentially be fired” due to the lack of reliability of value-added measures.<sup>184</sup> The study estimated that such inaccuracies might occur two out of ten times within a year.<sup>185</sup> In states that set rigid standards for evaluation results and connect those results to tenure and dismissal decisions, the stakes of substandard teaching are high, but the likelihood that the teacher’s results reliably illustrate the teacher’s standard of teaching leaves a large margin for error.<sup>186</sup> Further reliability issues result from the inability of objective performance measures to account for differences in student characteristics—such as family income, homelessness, divorce, tutoring, disabilities, language, after-school activities, and race—that might affect performance on standardized

178. Diane Ravitch, *BATs Respond to Arne’s Retreat on Testing*, DIANE RAVITCH’S BLOG: A SITE TO DISCUSS BETTER EDUCATION FOR ALL (Oct. 24, 2015) <http://dianeravitch.net/category/race-to-the-top/>.

179. *Id.*

180. Diane Ravitch, *FairTest Reacts to Duncan Statement on Testing*, DIANE RAVITCH’S BLOG: A SITE TO DISCUSS BETTER EDUCATION FOR ALL (Oct. 24, 2015) <http://dianeravitch.net/category/race-to-the-top/> (claiming that the Obama Administration recognizes the need to downsize the amount and frequency of testing and “admits that high-stakes exams are out of control in U.S. public schools.”).

181. Diane Ravitch, *Marc Tucker: The U.S. DOE’s “Mea Culpa” Did Not Go Far Enough*, DIANE RAVITCH’S BLOG: A SITE TO DISCUSS BETTER EDUCATION FOR ALL (Oct. 27, 2015) <http://dianeravitch.net/category/race-to-the-top/>.

182. Bruce D. Baker, Joseph O. Oluwole & Preston C. Green, *The Legal Consequences of Mandating High Stakes Decisions Based on Low Quality Information: Teacher Evaluation in the Race-to-the-Top Era*, EDUCATION POLICY ANALYSIS ARCHIVES, Jan. 28, 2013, at 9.

183. Baker, *supra* note 182, at 12 (see P.Z. Schochet & H.S. Chang, *Error rates in measuring teacher and school performance based on student test score gains*, (2010) <http://ies.ed.gov/ncee/pubs/20104004/pdf/20104004.pdf>).

184. Baker, *supra* note 182, at 12.

185. Baker, *supra* note 182, at 12.

186. Baker, *supra* note 182, at 11.

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tests.<sup>187</sup> Accordingly, utilizing standardized test outcomes is a better indicator of the effects of “student demographics” than a teacher’s performance.<sup>188</sup>

## 2. Using Value-added Models Poses Due Process Concerns

Judges have expressed another concern regarding the use of evaluations in predicting and assessing teacher effectiveness and the ultimate use of those determinations in dismissing teachers: due process.<sup>189</sup> Tenured teachers arguably have the most at stake in terms of the effects of performance evaluation method that the state elects to use.<sup>190</sup> It is a widely-recognized legal principle that teacher tenure laws create in the recipient a property interest in the benefits of tenure.<sup>191</sup> Therefore, it is a right that cannot be taken away unless the teacher is given the benefits of an “adequate legal process.”<sup>192</sup> The concern that the legislative modifications pose with regard to due process considerations is that the evaluations that are used to determine continued employment have the potential to be arbitrary in their application.<sup>193</sup>

In order to pursue a claim on a due process violation, a party must show that he has been deprived of an interest in life, liberty, or property in a way that is arbitrary and capricious.<sup>194</sup> Because a tenured teacher has a property interest in employment, he has to prove only that the deprivation of that right was arbitrary and capricious and did not allow an adequate legal process. Such claims could arise where there are questions of reliability or error in the use of performance-based evaluations.<sup>195</sup>

For example, due process claims might arise where the employment of certain teachers is based on the performance of students over which the teachers had no control.<sup>196</sup> In 2011, Florida passed the “Student

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187. Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75, 97-98 (2016).

188. *Id.* at 98.

189. *See, e.g.*, *Cook v. Bennet*, 792 F.3d 1294 (11th Cir. 2015).

190. Helen M. Hazi, *Legal Consequences to Teacher Evaluations: Pitfalls in the States*, 87 THE CLEARING HOUSE 134, 134 (2014).

191. *LaPointe v. Vermilion Parish Sch. Bd.*, 173 So.3d 1152, 1158 (La. 2015).

192. *Id.*

193. Bruce D. Baker, Joseph O. Oluwole, & Preston C. Green, *The Legal Consequences of Mandating High Stakes Decisions on Low Quality Information: Teacher Evaluation in the Race-to-the-Top Era*, EDUCATION POLICY ANALYSIS ARCHIVES, Jan. 28, 2013, at 10.

194. *Id.* at 10-11.

195. *Id.* at 11-16.

196. *See generally* *Cook v. Bennet*, 792 F.3d 1294 (11th Cir. 2015) (evaluating the constitutionality of Florida’s evaluation policy that subjected teachers to evaluation based on the

Success Act,” requiring that “[a]t least 50 percent of a performance evaluation must be based upon data and indicators of student learning growth assessed annually by statewide assessments.”<sup>197</sup> Accordingly, the Florida Commissioner of Education implemented a two-part value-added model of evaluation that determined a teacher’s effectiveness based on: a) the students’ scores for English and mathematics on a state standardized test (50 percent of the evaluation), and b) the score for the school, which was based on factors contributing to the school’s environment (the other 50 percent of the evaluation).<sup>198</sup> However, the test for whether such a policy could withstand a due process challenge is whether there is a rational basis for the policy.<sup>199</sup> Under such a review, evaluation policies need only be “rationally related to a legitimate governmental purpose.”<sup>200</sup> Therefore, the 11th Circuit Court of Appeals held that even where evaluations were based upon tests covering subjects or assessing students that the teacher does not teach, the policy should be upheld so long as the tests—or other method of evaluation—are rationally related to the purpose of the improving student performance by improving the state of public schools.<sup>201</sup>

### 3. Peer-Review Evaluations are a Viable Alternative to Value-Added Models

A more hands-on method of evaluating teacher performance that acts as an alternative to the unreliable value-added models is implementing a peer-review system by which teachers work closely with other teachers to evaluate and guide those teachers through the teaching process.<sup>202</sup> These Peer Assistance and Review (PAR) methods require that teachers act as “peer reviewers,” leaving their capacity as instructors in the classroom to serve for a number of years providing both

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results of standardized testing even though they taught subjects that were not tested on the exam); *Wagner v. Haslam*, No. 3:15-CV-115, 2015 WL 3658165, at \*12 (M.D. Tenn., June 12, 2015) (evaluating Policy 5.201, which uses state-wide value-added assessments to measure the effectiveness of all teachers regardless of their subject matter).

197. FLA. STAT. ANN. § 1012.34(3)(a)(1) (West 2015).

198. *Cook v. Bennet*, 792 F.3d 1294, 1297 (11th Cir. 2015).

199. *Id.* at 1300 (citing *Fresenius Med. Care Holdings v. Tucker*, 704 F.3d 935, 945 (11th Cir.2013)).

200. *Id.* (citing *FCC v. Beach Commc’ns*, 508 U.S. 307, 314 n. 6 (1996)).

201. *Id.* at 1301 (holding that because the rationale for the policy was improving performance by improving the quality of instruction, administration, and supervision, the policy applied to any teacher in a school where the students were subject to state testing).

202. Susan Moore Johnson & Sarah E. Fiarman, *The Potential of Peer Review*, 70 TEACHER EVALUATION: WHAT’S FAIR? WHAT’S EFFECTIVE?, Nov. 2012, 20-25.

evaluative and assistive functions for an assigned group of 15 to 20 teachers.<sup>203</sup> The efforts of the peer reviewer are supervised by a PAR panel made up of “union leaders and district administrators.”<sup>204</sup> Peer reviewers submit their finds to the panel and answer a series of questions in order to give the decision-making panel the most complete picture of the reviewed teacher’s effectiveness.<sup>205</sup>

In order to serve as peer reviewers, teachers must have completed at least five years of effective teaching and must pass a competitive application process.<sup>206</sup> An obvious disadvantage of this system is that it places a high-stakes decision upon the recommendations of one person.<sup>207</sup> Additionally, teachers must pursue additional training and learn to adapt to a large caseload to navigate the evaluation process.<sup>208</sup> However, there are also several advantages. The major advantage is that rather than supervisors, peer-teacher reviewers are able to provide assistance that principals or other evaluators are unable to provide.<sup>209</sup> Additionally, peer-review methods create smooth dismissal proceedings because the PAR panel serves as a requisite administrative review element, thus meeting the due process requirements.<sup>210</sup> Ultimately, peer reviewers allow for control over the profession of teaching to become vested in teachers.<sup>211</sup>

One example of a nationally recognized peer-evaluation system is found in the Cincinnati Public School System.<sup>212</sup> The Cincinnati Public School system and the Cincinnati Federation of Teachers developed a Peer Assistance and Evaluation Program in an attempt to not only evaluate its teachers, but also to improve the quality of their classrooms.<sup>213</sup> The program utilizes consulting teachers who evaluate and assist first-year teachers in the school district.<sup>214</sup> Additionally, where a principal expresses concern for an experienced teacher’s performance,

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*; Rick DuFour & Mike Mattos, *How Do Principals Really Improve Schools?*, 70 THE PRINCIPALSHIP, April 2013, 34-40.

210. Susan Moore Johnson & Sarah E. Fiarman, *The Potential of Peer Review*, 70 TEACHER EVALUATION: WHAT’S FAIR? WHAT’S EFFECTIVE?, Nov. 2012, 20-25.

211. *Id.*

212. Cincinnati Public Schools, *Teacher Evaluations*, <http://www.cps-k12.org/about-cps/employment/tes> (last visited Nov. 22, 2015).

213. *Id.*

214. *Id.*

a panel composed of both teachers and administrators assigns a consulting teacher to work with the teacher to improve the teacher's skills and performance.<sup>215</sup>

### C. Extended Probationary Periods

As discussed *supra*, Section II.B.2, several states have increased the time that a teacher must serve before he is able to achieve tenure status. The criticism regarding lengthy periods of probation are not rooted in the judiciary. On the contrary, in California, where the Board of Education has rejected such measures, the court in *Vergara v. State* determined that the two year probationary period was insufficient, and actually constituted a constitutional violation.<sup>216</sup> The court found that students and teachers were “unfairly, unnecessarily, and for no legally cognizable reason (let alone a compelling one) disadvantaged by the current Permanent Employment Statute” and accordingly found the statute unconstitutional.<sup>217</sup>

However, the view expressed in *Vergara* was unpopular, and the court of appeals eventually reversed the decision.<sup>218</sup> However, at the time, much of the resistance to the lower court's decision originated from other legislators, teachers, boards of education, and ultimately, teachers' unions.<sup>219</sup> For example, even before the *Vergara* decision, in California, the state with one of the shortest probationary periods—only two years—the San Jose school district sought to increase its probationary period from two to three years in furtherance of a new evaluation method.<sup>220</sup> However, the California Board of Education, “under heavy lobbying from the California Teachers Association—the

215. *Id.*

216. *Vergara v. State*, No. BC484642, 2014 Cal. Super. LEXIS 176, at \*13-14 (June 10, 2014) (tentative opinion).

217. *Id.*

218. *Vergara v. State*, No. B258589, 2016 WL 4443590, at \*1 (Cal. Ct. App. Aug. 22, 2016); California Teachers Association, *Vergara v. State*, ISSUES AND ACTION, <http://www.cta.org/en/Issues-and-Action/Ongoing-Issues/Vergara-Trial1> (last visited March 6, 2016). The parties began oral arguments on February 25, 2016.

219. See *Students v. Teachers Unions*, EDUCATION REPORTER (June 2014) <http://www.eagleforum.org/publications/educate/june14/students-v-teachers-unions.html>; Anthony Rebor, *Both Sides Now, Terminating Tenure, and a Sickening Ploy*, EDUCATION WEEK: TEACHER, Aug. 5, 2005 (stating that proponents of the 2005 California initiative to increase probationary periods from two to five years included principals and parents, while those opposed to the change included affected teachers).

220. Stephen Sawchuk, *California Turns Down District's Bid to Lengthen Pre-Tenure Period*, EDUCATION WEEK BLOG (May 9, 2014) [http://blogs.edweek.org/edweek/teacherbeat/2014/05/california\\_turns\\_down\\_district.html](http://blogs.edweek.org/edweek/teacherbeat/2014/05/california_turns_down_district.html).

parent of the San Jose union affiliate—decided not to permit the plan.”<sup>221</sup>

While the NCTQ has continued to be a proponent of extended probation periods (claiming that five years of probationary status is an ideal number of years of service to require before awarding tenure),<sup>222</sup> others find that longer periods of probationary status are “unnecessary” and may serve as a deterrent to new teachers.<sup>223</sup> The two major ways in which increased probationary periods might dissuade new teachers from entering the profession are: 1) the fear that longer probation periods lessen the chance of achieving tenure status, due to the number of factors that might change over an increased period of time, and 2) the added “perceived cost” in the form of stress from extended periods of evaluation and the extra effort from a pursuit of tenure.<sup>224</sup> One of the problems presented by extended probationary periods is the uncertainty that new teachers face without the guarantees afforded by gaining tenure.<sup>225</sup> Another concern is that increased probationary periods might lead to a decreased level of engagement due to the implied attitude that probationary teachers are “disposable.”<sup>226</sup>

While the concern that increased probation periods acts as a deterrent for new teachers entering the workforce, the concern can be combatted, and generally is combatted, by increasing wages for teachers statewide.<sup>227</sup> In a cross-sectional analysis of nationwide probation periods and corresponding wages, Professors Eric J. Brunner of Quinnipiac University and the University of Connecticut and Jennifer Imazeki of San Diego University found that states with longer probationary periods generally have higher teacher salaries as well.<sup>228</sup> Such measures help to combat the concerns and additional costs of a

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221. *Id.*

222. National Council on Teacher Quality, 2007 STATE TEACHER POLICY YEARBOOK 6 (2008).

223. See Eric J. Brunner & Jennifer Imazeki, *Probation Length and Teacher Salaries: Does Waiting Pay Off?*, 64 INDUSTRIAL AND LABOR RELATIONS REVIEW, Oct. 2010, 164; Molly Robertson, *Blaming Teacher Tenure is not the Answer*, 44 J.L. & EDUC. 463, 468 (stating that short probationary period are effective and beneficial).

224. *Id.*

225. Ione L. Perry, *Suppose We Lost Tenure*, EDUCATIONAL LEADERSHIP, Dec. 1977, 185.

226. Anthony Rebor, *Both Sides Now, Terminating Teacher Tenure, and a Sickening Ploy*, EDUCATION WEEK: TEACHER (Aug. 5, 2005) [http://www.edweek.org/tm/articles/2005/08/05/06webwatch\\_july22-aug4.html](http://www.edweek.org/tm/articles/2005/08/05/06webwatch_july22-aug4.html) (quoting art teacher Lisa Kantor, who said that as a probationary teacher “You know to a certain degree that you’re disposable. . .so you don’t speak up at staff meetings, you don’t get political, and you mind your P’s and Q’s.”).

227. Brunner, *supra* note 223.

228. *Id.* at 179.

prolonged period of evaluation and uncertainty. Though the professors encourage state policymakers to remember that the state will bear the costs of longer probationary periods (particularly in school districts that lie close to the border of another state with a shorter probationary period),<sup>229</sup> the costs of these measures, when compared to the benefits of additional evaluation time free from judicial consequences, are arguably justifiable. A system with a limited probationary period “rewards longevity, not results.”<sup>230</sup>

#### V. RECOMMENDATION: A ROAD MAP FOR FUTURE TEACHER TENURE MODIFICATION

As it becomes necessary for states to either join the states who have already made gains in improving their teacher tenure systems or to revise recent modifications due to the problems like the ones previously described, state legislatures will likely engage in a second wave of legislation. Thus, having evaluated the different modifications that have already been implemented, identifying their strengths and weaknesses, this Comment concludes with a proposition for legislatures as they consider the next wave of tenure reform. That proposition is a system that awards tenure after a five-year probationary period based on evaluations that measure teacher effectiveness by calculating a teacher’s effect on student learning outcomes based on standardized testing in comparison with those of the median across the state while evaluating the effectiveness of classroom procedures and interactions through peer-review.

##### A. *Require Teachers to Complete a Five-Year Probationary Period*

First, the probationary period of five years complies with the suggestion set forth by the National Council for Teacher Quality as an appropriate length for evaluating effectiveness of teachers.<sup>231</sup> Additionally, though there are definite constitutional implications to a probationary period that is too short,<sup>232</sup> there are no judicial ramifications for a probationary period that is “too long,” if any such

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229. *Id.*

230. Robert Gordon, Thomas J. Kane & Douglas O. Staiger, *Identifying Effective Teachers Using Performance on the Job*, THE HAMILTON PROJECT, April 2006, 16.

231. National Council on Teacher Quality, 2007 STATE TEACHER POLICY YEARBOOK 6 (2008).

232. *Vergara v. State*, No. BC484642, 2014 Cal. Super. LEXIS 176, at \*13-14 (June 10, 2014) (tentative opinion).

evaluation can be made.

One disadvantage to lengthening the probationary period is that potential future teachers will perceive a longer probationary period as a period of uncertainty and risk.<sup>233</sup> However, in states with longer probationary periods, an effective way to combat the potential risk is to offer higher salaries during the probationary period.<sup>234</sup>

### *B. Utilize Peer-Evaluations in Making Employment Decisions*

It is undeniable that test results and the accompanying statistics that they provide are inseparable from our evaluations of schools as a society. Being able to place an objective measure on something is understandably appealing to decision-makers. However, due to the inherent drawbacks regarding reliability and validity<sup>235</sup> of many standardized test results as well as the potential for costly litigation,<sup>236</sup> legislatures should allow these results to have only a marginal effect on whether a teacher attains and maintains tenure. Instead, this Comment propose that states implement peer-review evaluations. Such evaluations contribute substantial benefits to the overall achievement of the “effectiveness” of the teaching profession.

The element of assistance is one major advantage to peer evaluations because of the benefit it brings to the teachers, the school districts and administrators, and the teaching profession. Not only are peer evaluation methods less likely to lead to litigation, and therefore save school districts (and the state) money,<sup>237</sup> but they also are more likely to make ineffective teachers more effective. The added benefit of a mentor during the pivotal probationary years will help teachers who might be struggling to help their students perform well on standardized tests or master material by giving them a resource to utilize.<sup>238</sup> Additionally, placing the responsibility of evaluating teachers with other teachers, rather than administrators or principals, combats the negative

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233. Eric J. Brunner & Jennifer Imazeki, *Probation Length and Teacher Salaries: Does Waiting Pay Off?*, 64 INDUSTRIAL AND LABOR RELATIONS REVIEW, Oct. 2010, 165.

234. *Id.* at 178-179.

235. See generally Bruce Baker, Joseph O. Oliwole & Preston C. Green, *The Legal Consequences of Mandating High Stakes Decisions Based on Low Quality Information: Teacher Evaluation in the Race-to-the-Top Era*, 21 EDUCATION POLICY ANALYSIS ARCHIVES, Jan. 28, 2013.

236. See generally *infra* Section III.

237. Susan Moore Johnson & Sarah E. Fiarman, *The Potential of Peer Review*, 70 TEACHER EVALUATION: WHAT'S FAIR? WHAT'S EFFECTIVE?, Nov. 2012, 20-25 (reporting that districts avoided litigation that generally costs districts \$100,000 per teacher).

238. *Id.*

aspects of current subjective observations and evaluations because principals have neither the time nor the expertise to effectively evaluate, let alone to help and mentor, under-performing teachers.<sup>239</sup>

### *C. Prohibit Districts from Considering Seniority in Reduction-in-Force Decisions*

Finally, this Comment would propose that states follow the lead of states such as Indiana and Michigan and allow the teacher's tenure status or seniority to be a factor only in termination decisions where evaluations are insufficient to make a determination.<sup>240</sup>

By following these proposals, a state will be able to take advantage of a system that increases teacher effectiveness—which is the purported intent behind the modifications surveyed in this Comment—at a low cost to the state and local school districts. In terms of a cost-benefit analysis, these three elements address the areas that are most ripe for controversy in the teacher tenure debate in a way that downsizes the potential cost to the school by decreasing the likelihood of expensive litigation while also engaging teachers in innovative ways, thereby setting the environment for innovation in other areas such as teaching practices or other reforms.

## VI. CONCLUSION

As this Comment illustrates, the state of the nation with regard to education policies, and specifically teacher tenure policies, is undergoing an extensive shift. These shifts include a new emphasis on determining and fostering teacher effectiveness in the classroom. To that end, legislatures nationwide have implemented changes, such as: linking teacher tenure and dismissal decisions to student and teacher performance, increasing the probationary period before teachers can obtain tenure, and prohibiting consideration of seniority in employment decisions. However, some of these changes are not achieving the intended result and there is much room for improvement. Therefore, legislatures must consider other methods of increasing effectiveness and retaining effective teachers.

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239. See Rick DuFour & Mike Mattos, *How Do Principals Really Improve Schools?*, 70 THE PRINCIPALSHIP, April 2013, 34-40.

240. IND. CODE ANN. § 20-28-7.5-1(c) (West 2011); MICH. COMP. LAWS ANN. § 38.83b (West 2011); 105 ILL. COMP. STAT. ANN. 5 / 24-12 (West 2015).