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## TOTAL RECALL: THE RISE AND FALL OF TEACHER TENURE

*Laura McNeal\**

### I. INTRODUCTION

As the economic crisis of Wall Street has permeated throughout the various business sectors of society, the effects are starting to be felt in our nation's public schools. Although news commentary, financial forecasts, policy briefs, and government officials foreshadowed the harms associated with the recession, little attention was given to the potential impact on education, especially its teachers. Now that the recession has entered the schoolhouse doors, school leaders throughout the country are confronted with the formidable task of meeting the No Child Left Behind Act's (hereinafter "NCLB") prescribed student achievement benchmarks amidst deep cuts in federal aid.<sup>1</sup>

School districts have resorted to drastic reform measures in an effort to comply with NCLB such as massive teacher layoffs, school closures, and efforts to eradicate teacher collective bargaining rights. At the heart of the school reform movement is an increased focus on teacher quality.<sup>2</sup> As a result, states throughout the country have enacted sweeping reforms to teacher tenure in an effort to improve overall

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1. See Alyson Klein, *Obama Calls for NCLB Fix, Warns Against Ed. Cuts*, EDUC. WK., Mar. 14, 2011, <http://www.edweek.org/ew/articles/2011/03/14/26obama.h30.html>.

2. See Elizabeth Holland, *Teacher Tenure is Under Increased Attack*, STLtoday.COM (Jan. 20, 2012, 7:45 AM), [http://www.stltoday.com/news/local/education/teacher-tenure-is-under-increased-attack/article\\_78f8e536-b2a4-5d78-aea7-77fd94c7c696.html](http://www.stltoday.com/news/local/education/teacher-tenure-is-under-increased-attack/article_78f8e536-b2a4-5d78-aea7-77fd94c7c696.html).

teacher quality. The recent influx of teacher tenure laws have either severely limited or eliminated tenure altogether. Many teacher unions have viewed teacher tenure reform measures as an attack on their profession and have responded with organized protests.<sup>3</sup>

This article will examine the evolution of tenure in K-12 public schools and explore new pathways of protecting teachers from unfair labor practices while advancing education reform.<sup>4</sup> In this article, I argue that the Reauthorization of the Elementary and Secondary Education Act should include an increased federal role in teacher quality through the creation of a uniform teacher evaluation system. Additionally, I will propose a collaborative framework for teachers and school districts that will maintain teacher rights while employing an evaluation system that affords school districts a means for removing ineffective teachers, regardless of their seniority. The larger ambition of this article is to help illustrate that we can create laws that achieve education equity without unfairly targeting or infringing on teachers' employment rights. Part I will explore the evolution of teacher tenure in K-12 schools and the impact on teachers' employment rights. Part II will examine the intersection of school reform and teacher tenure, with a particular emphasis on how reform measures have contributed to the erosion of teacher tenure. Part III will highlight the recent wave of anti-tenure legislation and discuss the implications for teacher rights in K-12 schools. Part IV will synthesize the current labor law landscape for teachers and argue that the Reauthorization of the Elementary and Secondary Education Act should include procedural safeguards such as a uniform teacher evaluation system to ensure that teacher's employment rights are not violated. Part V will conclude with discussion of the future of teacher tenure in K-12 public schools and the implications for school reform.

## II. THE EVOLUTION OF TEACHER TENURE IN K-12 SCHOOLS

Approximately 2.3 million teachers in the U.S. currently have

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3. See Elisabeth Harrison, *Providence Mayor Defends Firings As Teachers Protest*, NPR (Mar. 3, 2011, 12:01 AM), <http://www.npr.org/2011/03/03/134209567/providence-mayor-defends-firings-as-teachers-protest>.

4. For future works, I intend to write a piece which highlights the intersection of collective bargaining and school reform with a particular focus on the recent anti-union movement. I will highlight the significance of laws passed in Indiana, Wisconsin, and Michigan with a particular focus on Michigan's Right to Work law.

tenure.<sup>5</sup> Tenure legislation emerged in New Jersey in the early 1900s with the granting of fair dismissal rights to college professors.<sup>6</sup> In the years that followed, tenure rights were extended to both elementary and secondary teachers as well.<sup>7</sup> Tenure may be defined as “a status afforded to a teacher or professor as a protection against summary dismissal without sufficient cause.”<sup>8</sup> Tenure was initially established to provide “job protection . . . because of prevalent nepotism, political favoritism, and arbitrary dismissals.”<sup>9</sup> Therefore, although tenure does not guarantee continued employment, it does ensure that teachers are not dismissed without due process of law.<sup>10</sup> Tenured teachers can only be dismissed if they fail to fulfill their agreed upon contractual duties.<sup>11</sup> More specifically, teachers protected under the umbrella of tenure legislation can only be terminated for the following reasons: incompetence, inadequate performance, immoral conduct, insubordination, willful neglect of duties, or any other sufficient cause.<sup>12</sup> Ideally, tenure is intended to provide a degree of permanency, stability, and high level of expertise within the teaching force from which students ultimately benefit. The court in *Donahoo v. Board of Education*<sup>13</sup> best describes the purpose of tenure: “[T]o improve the [school] system by assuring teachers of experience and ability a continuous service. . . based upon merit” and by protecting them against dismissal for “reasons that are political, partisan or capricious.”<sup>14</sup>

Most states maintain tenure legislation, which grants job protection and due process rights to teachers who have completed a probationary period of employment. This period typically lasts the first two to three years.<sup>15</sup> School boards are afforded broad discretion in determining whether tenure should be granted.<sup>16</sup> In addition to acquiring tenure

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5. M.J. Stephey, *A Brief History of Tenure*, TIME (Nov. 17, 2008), <http://www.time.com/time/nation/article/0,8599,1859505,00.html>.

6. Id.

7. Id.

8. BLACK'S LAW DICTIONARY 1194 (7th ed. 2000).

9. Michael Colasanti, *Teacher Tenure/Continuing Contract Laws*, ECS.ORG (AUG. 2007), <http://www.ecs.org/clearinghouse/75/64/7564.htm>.

10. See *id.*

11. See DENNIS W. VAN BERKUM, PROFESSIONAL DEVELOPMENT IN EDUCATIONAL ADMINISTRATION PROGRAMS: WHERE DOES IT EXIST? (1994).

12. Id.

13. *Donahoo v. Bd. of Educ.*, 109 N.E.2d 787 (Ill. 1952).

14. Id. at 789.

15. DAVID SCHIMMEL ET AL., SCHOOL LAW: WHAT EVERY EDUCATOR SHOULD KNOW 13 (2007).

16. Id. at 14.

based on the terms specified in state tenure statutes (i.e., completing probationary period), a teacher may also acquire the right to tenure through an employment contract that explicitly states the teacher's right to continued employment.<sup>17</sup> These types of contractual agreements that are designed to protect teacher tenure also specify set procedures that must be followed before the dismissal of a tenured teacher.<sup>18</sup> As a general rule, tenure is usually not transferable to another school district or state.<sup>19</sup>

### *Collective Bargaining*

Similar to the movement on tenure, collective bargaining affords protections to teachers as well. The practice of collective bargaining first emerged in 1935 with the adoption of the National Labor Relations Act (Wagner Act), which solidified the right of private employees to form and join unions for the purposes of collective bargaining.<sup>20</sup> These rights were later extended to public employees (e.g., teachers and public school districts).<sup>21</sup> Collective bargaining became more prevalent in the educational milieu through a series of teacher strikes that occurred in the 1960s.<sup>22</sup> During this time period, teachers were fighting for higher wages, better working conditions, and fair treatment from administrators. Collective bargaining agreements are negotiated between school district boards and teacher unions, and establish the terms and conditions of employment.<sup>23</sup> While some states require school districts to engage in collective bargaining with teachers or union representatives, other states explicitly prohibit collective bargaining

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17. *Id.*

18. *Id.*

19. Richard S. Vacca, *Teacher Tenure: Legal and Policy Issues*, CEPI EDUC. L. NEWSLETTER (Commonwealth Educ. Pol'y Inst., Richmond, VA), May 2012, available at <http://www.cepi.vcu.edu/newsletter/2011-2012/2012-May-Teacher-Legal-And-Policy-Issues.html>.

20. See generally JAMES A. RAPP, *EDUCATION LAW* (2001).

21. See *id.*

22. David M. Orta, *Public Employee Collective Bargaining in Florida: Collective Bargaining or Collective Begging?*, 23 STETSON L. REV. 269, 276 (1993).

23. Jonathan P. Krisbergh, *Marginalizing Organized Educators: The Effect of School Choice and 'No Child Left Behind' on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025, 1031 (2006) ("The collective bargaining agreements negotiated between teachers' unions and the school district board of education govern the terms and conditions of employment for bargaining unit member employees. Some contracts include a management provision maintaining policymaking and management authority of school operations to the school board. The scope of these responsibilities reserved for the board varies across districts. However, teacher contracts may contain provisions that state that the management and control of the school board may be limited by express clauses in the contract").

among any public employees, including teachers. Collective bargaining is currently permitted in every state except for Georgia, North Carolina, South Carolina, Virginia and Texas.<sup>24</sup>

Although often controversial, the practice of collective bargaining has become an intricate part of the employment landscape. As collective bargaining has become more widespread so has the influence of teacher unions such as the National Education Association (NEA) and the American Federation of Teachers (AFT).<sup>25</sup> The basic premise behind collective bargaining is to create shared power between educators and school boards.<sup>26</sup> Many educators view collective bargaining as a means to attain a greater role in the daily operation and administration of public schools.<sup>27</sup> While there are varying degrees among states in terms of what items are negotiable under the state's collective bargaining law, the majority of issues addressed during the collective bargaining process typically focus on employee rights and the terms and conditions of employment, such as wages, grievance procedures, retirement benefits, evaluation procedures, hours, workload, and teaching responsibilities.<sup>28</sup>

Due to the sensitive nature of many of these employment terms, it is common for a contentious relationship to exist between school boards and union representatives. Proponents of collective bargaining in schools assert that children benefit because collective bargaining promotes strong salary and benefit structures, which in turn, attract highly qualified teachers.<sup>29</sup> Additionally, teachers unions lobby for smaller class sizes and greater classroom resources, which directly benefit students.<sup>30</sup> Whereas, opponents of collective bargaining practices argue that the process is a breeding ground for cumbersome contracts and animosity between teachers and school administrators because both sides possess competing interests.<sup>31</sup>

24. MICHAEL IMBER & TYLL VAN GEEL, *A TEACHER'S GUIDE TO EDUCATION LAW* 246-68 (2000).

25. See Krisbergh, *supra* note 23, at 1027 ("Though the right of teachers to organize was not recognized at the time, teachers began organizing at the end of the 19th Century. The National Education Association (NEA) was founded in 1857 and the American Federation of Teachers (AFT) was founded in 1916. The NEA and the AFT remain the two major teachers' unions. The first collective bargaining contract for public school teachers is believed to have been negotiated in 1944 in Illinois.").

26. IMBER & VAN GEEL, *supra* note 24, at 254.

27. See Krisbergh, *supra* note 23.

28. IMBER & VAN GEEL, *supra* note 24, at 254-55.

29. Howard Fuller & George A. Mitchell, *A Culture of Complaint*, EDUC. NEXT, Summer 2006, at 18, 19, available at <http://educationnext.org/a-culture-of-complaint/>.

30. See *id.*

31. See *id.*

The tensions between school administrators and teachers regarding collective bargaining also permeate the teacher tenure system as well. As the context of schooling has evolved over the years, the purpose and role of teacher tenure has become increasingly complex as stakeholders in education try to provide an education system that meets the needs of today's student demographics while balancing those needs against the fiscal realities. At the intersection of school reform and teacher quality, unexpected and monumental changes to teacher tenure are emerging that will have a lasting impact on the educational landscape in the years to come.

### III. SCHOOL REFORM AND THE EROSION OF TEACHER TENURE

With the increased pace and scope of governmental focus on school reform, the significant role of teachers in eradicating the achievement gap has come under intense scrutiny. The federal government's response to public outcry for substantive school reform has an increased emphasis on teacher quality. This is evidenced by the highly qualified teacher mandate embedded within the most recent update of the Elementary and Secondary Education Act, No Child Left Behind Act.<sup>32</sup> The highly qualified mandate requires teachers that teach in core subject areas to meet federally prescribed standards. A teacher is classified as highly qualified if they have passed a state licensing examination or obtained full state certification, hold a bachelor's degree or higher, and exhibit content knowledge in the subject area in which he or she teaches, as demonstrated by passing the state's subject test or possessing a degree in that subject area.<sup>33</sup> Additionally, the increased governmental focus on teacher quality is evidenced by the Obama Administration's Race to the Top Initiative.<sup>34</sup> The primary goal of this \$4.35 billion contest administered by the U.S. Department of Education, is to foster innovative reforms in state and local district K-12 school systems.<sup>35</sup> At the heart of this initiative is the availability of federal funding to schools for the purpose of incentivizing teachers to enhance the quality of classroom instruction through merit pay and linking their performance

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32. 20 U.S.C. § 6319(a)(1) (2006).

33. 20 U.S.C. § 7801(23) (2006).

34. See Maurice R. Dyson, *Are We Really Racing to the Top or Leaving Behind the Bottom?* Conventional Wisdom and Dismantling Institutional Repression, 40 WASH. U. J.L. & POL'Y 181, 238-39 (2012).

35. *See id.*

evaluations to student performance.<sup>36</sup> This funding scheme has led many states to change their teacher tenure laws to hold teachers responsible for the academic performance of their students in order to receive additional federal funding.<sup>37</sup> Considering the endemic budgetary challenges faced by public schools, the Race to the Top Initiative was viewed by many as a path to increased resources.

Currently approximately twenty-five states use student achievement data to assess teacher quality.<sup>38</sup> Despite this growing trend there are divergent views regarding the reliance on student standardized test scores to evaluate teacher performance.<sup>39</sup> Proponents of including student test scores in the teacher evaluation process assert that since the ultimate goal of teaching is to educate our children, it is logical to measure the attainment of that goal by student achievement outcomes.<sup>40</sup> Opponents of assessing teachers based on student test scores are supported by the broad consensus among economists, statisticians, and psychometricians who view the dependence on student test scores as unreliable and invalid indicators of teacher effectiveness, including when employing innovative statistical applications such as “value-added modeling.”<sup>41</sup>

Essentially, the question driving teacher reform efforts is, “What makes a teacher effective and how can we measure it?” Presently, the federal government does not regulate the criteria used to evaluate teachers. Defining and measuring teacher effectiveness has been left to the sole discretion of state and local officials who are typically elected politicians with no teaching experience.<sup>42</sup> Scholars suggest that the lack

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36. Dan Goldhaber, et al., *Teacher Attitudes About Compensation Reform: Implications for Reform Implementation*, 64 *INDUS. & LAB. REL. REV.* 441, 443 (2010-11).

37. See e.g., *TEX. EDUC. CODE ANN.* § 21.7015 (West 2012) (instituting a performance-based pay system); *OHIO ADMIN. CODE* 3302.021 (West 2012) (including the value-added formula for evaluating teacher classroom performance); *ARIZ. REV. STAT. ANN.* § 15-977 (West 2012) (allocating an increase in teacher compensation based on performance and employment related expenses); *MINN. STAT. ANN.* § 122A.60 (West 2012) (implementing the Q Comp program); *MISS. CODE ANN.* § 37-19-7(4)(a)-(b) (West 2012) (maintaining the original single salary schedule, but beginning the process of implementing performance-based pay by allowing monetary incentives for teachers to become mentor teachers and improved test scores for school districts); *S.C. CODE ANN.* § 59-18-1500 (2012) (implementing performance-based pay by statute); *FLA. STAT. ANN.* § 1012.98(4)(b)(4.) (West Supp. 2012) (employing performance-based pay by statute).

38. Regina Umpstead, et al., *An Analysis of State Teacher Evaluation Laws Enacted in Response to the Race to the Top Initiative*, 286 *ED. LAW REP.* 795, 804 (2013).

39. See, e.g., Eva L. Baker et al., *Econ. Pol’y Inst.*, Problems with the Use of Student Test Scores to Evaluate Teachers 5 (Aug. 29, 2010) (Briefing Paper #278).

40. See *id.* at 1.

41. *Id.* at 2.

42. See *supra* note 37 and accompanying text.



of uniformity regarding how to accurately measure teacher effectiveness in K-12 schools occurred “because of the lack of a clear consensus in the literature on how to measure teacher effectiveness beyond the shift from subjective to objective measures and a commitment to allowing local solutions to national issues.”<sup>43</sup>

The lack of consensus in the field regarding what constitutes teacher effectiveness is representative in the recent teacher tenure statutes passed throughout the country which all take a distinctly different approach to evaluating teacher performance. A cursory review of the wave of anti-tenure legislation reveals the grave differences among state tenure statutes. Specifically, the various state tenure laws differ with respect to the probationary period for new teachers, criteria for assessing teacher quality, and the availability of tenure as opposed to contract renewal.<sup>44</sup> Despite the aforementioned differences in state tenure statutes, they share a common overall theme, which is limiting or eliminating tenure and creating a more expeditious process for eliminating ineffective teachers.<sup>45</sup>

#### A. State Tenure Laws

Colorado was one of the first states to lead what became a national movement to initiate robust tenure reform and essentially set the precedent for other states. In May 2010, Colorado’s S.B. 191 became law, which mandates annual teacher evaluations in which at least 50% will be determined based upon student performance during the year.<sup>46</sup> Previously, teachers were only required to work for three years to gain tenure,<sup>47</sup> but under the new Colorado law, teachers will need to demonstrate three consecutive years of improving student performance in order to earn tenure.<sup>48</sup> Furthermore, this bold initiative greatly diminished the job security of tenured teachers by requiring them to achieve two consecutive years of improvement in student achievement outcomes or risk losing their tenure status.<sup>49</sup> Essentially, this legislation virtually eliminates tenure status by providing school leaders with a framework for rescinding tenure when a teacher fails to meet the

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43. See Umpstead et al., *supra* note 38 at 796.

44. See discussion *infra* Part II.A.

45. See discussion *infra* Part II.A.

46. S.B. 10-191, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010).

47. Colo. Rev. Stat. § 22-63-103(7) (West 2012).

48. S.B. 10-191.

49. *Id.*

proscribed criteria.

Alabama's teacher tenure law, The Students First Act of 2011, is not as radical as Colorado's, but still makes significant changes to the State's procedures for dismissing ineffective teachers, irrespective of their tenure status. The Students First Act of 2011 maintains Alabama's three-year tenure requirement, but simplifies the process for firing tenured teachers.<sup>50</sup> Prior to the passage of the Alabama tenure law, the process for a teacher to appeal a school board's termination decision involved a lengthy federal arbitration process where the teacher continues to receive compensation until resolution.<sup>51</sup> Under the new law, a teacher must appeal dismissal decisions to an independent administrative law judge and their compensation may not extend beyond seventy-five days.<sup>52</sup> In light of the current budgetary constraints that many school districts are experiencing, the seventy-five day limit to teacher compensation during the appeal process may be attractive to other states as well, due to the immense costs associated with dismissing an ineffective tenured teacher.<sup>53</sup> For example, in Illinois, the average cost of terminating a tenured teacher is more than \$200,000 in legal fees.<sup>54</sup> Many school administrators choose to retain ineffective teachers and avert the legal fees that would have been incurred during the dismissal process to classroom resources.<sup>55</sup> Some school districts have taken more drastic measures by attempting to discourage costly dismissal procedures by instituting an unstated policy that prohibits firing tenured teachers.<sup>56</sup> These types of policies are a disservice to students and undermine school reform efforts by retaining ineffective teachers. Additionally, under the new Alabama law, deference is given to the school district employment decisions for the purpose of increasing the likelihood of removing ineffective teachers more expeditiously.<sup>57</sup> While giving deference to school district employee dismissal decisions may promote a more efficient system for removing ineffective teachers,

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50. ALA. CODE § 16-24C-4 (2013).

51. Kim Chandler, *Alabama Senate Committee OKs Bill to Make it Easier to Fire Teachers*, AL.COM, (Apr. 21, 2011), [http://blog.al.com/spotnews/2011/04/alabama\\_senate\\_committee\\_oks\\_b.html](http://blog.al.com/spotnews/2011/04/alabama_senate_committee_oks_b.html).

52. ALA. CODE § 16-24C-6 (2013).

53. Michelle Rhee, *What it Takes to Fix Our Schools: Lessons Learned in Washington*, 6 HARV. L. & POL'Y REV. 39, 55 (2012) (discussing how the costs associated with dismissal proceedings for tenured teachers may lead the school administration to retain inferior teachers).

54. *Id.*

55. *Id.*

56. *Id.*

57. ALA. CODE § 16-24C-6(e) (2013).

it also creates an environment ripe for the type of arbitrary and capricious decisions that tenure laws were historically designed to protect.<sup>58</sup>

Michigan and Indiana have similar teacher tenure bills that employ a simplified rating system to evaluate teacher performance in an effort to streamline the evaluation process and provide a better system for identifying ineffective teachers. Indiana's "Putting Students First" tenure bill followed a nationwide trend of teacher accountability by moving to the popular four-category rating system to assess teacher performance: "effective" and "highly effective," to "ineffective" and "highly ineffective."<sup>59</sup> After the passage of the law, Indiana teachers, even those with tenure, now face dismissal if they receive two consecutive evaluations of "ineffective."<sup>60</sup> Michigan reformed its tenure laws by moving from a four-year probationary period to five years and requiring an assessment of "effective" or better in the final three years to receive tenure.<sup>61</sup> The new law also mandates annual performance evaluations for tenured teachers,<sup>62</sup> which previously were required every three years.<sup>63</sup> Following the recent trend toward accountability, the new Michigan law also bases teacher evaluations and effectiveness ratings on student performance. During the additional probationary period, if the teacher fails to receive a rating of "effective" or better for three consecutive years, he or she must be terminated.<sup>64</sup> Finally, the new Michigan law modified the "reasonable and just cause" standard imposed on a school district firing a teacher to simply requiring that such action was not "arbitrary and capricious."<sup>65</sup>

Nevada also entered the wave of anti-tenure legislation and passed a number of bills aimed at reforming tenure and ending the "last-in, first-

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58. Michael Colasanti, *Teacher Tenure/Continuing Contract Laws*, EDUC. COMM'N OF STATES

(August 2007), <http://www.ecs.org/clearinghouse/75/64/7564.htm> ("The first tenure law was enacted about 75 years ago in New Jersey. At that time, job protection was seen as necessary because of prevalent nepotism, political favoritism and arbitrary dismissals. Teacher tenure is, therefore, not a job guarantee but rather a job security device protecting against termination of employment in cases where there are not grounds for termination or where the teacher has no fair opportunity to present a defense").

59. IND. CODE § 20-28-11.5-4(c)(4) (2013).

60. IND. CODE § 20-28-6-7.5(d) (2013).

61. MICH. COMP. LAWS § 38.83(b)(1) (2013).

62. *Id.*

63. MICH. COMP. LAWS § 38.93 (2011) (repealed 2011).

64. MICH. COMP. LAWS § 380.1249(h) (2013).

65. MICH. COMP. LAWS § 38.101(1) (2013).

out” seniority system traditionally utilized during school layoffs.<sup>66</sup> Although seniority may be considered during layoffs, the primary consideration under the new law must be teacher effectiveness, which is assessed under the same four-category rating system employed in Michigan and Indiana.<sup>67</sup> At least 50% of a teacher’s evaluation is now based on growth in student achievement.<sup>68</sup> Tenure is still available, but only for those teachers who receive a score of “effective” or greater for three consecutive years.<sup>69</sup> Finally, tenured teachers can lose their tenure after two consecutive unsatisfactory evaluations.<sup>70</sup> Tennessee’s teacher tenure law increased the time frame for evaluating teacher effectiveness by extending its tenure probationary period from three to five years.<sup>71</sup> During the fourth and fifth year the probationary teacher must receive an evaluation of “effective” or greater in order to receive tenure.<sup>72</sup> This heightened review process for obtaining tenure is designed to help eliminate ineffective teachers prior to the awarding of tenure. Additionally, Tennessee’s tenure bill includes heightened consequences for tenured teachers who demonstrate a pattern of ineffective classroom performance. Under this law, teachers who achieve tenure status after July 1, 2011, will revert back to probationary status upon two consecutive years of “ineffective” or “highly ineffective” performance evaluations.<sup>73</sup>

At first glance, New Hampshire’s teacher tenure bill appears to have some of the same characteristics of other states’ tenure bills, such as increasing the probationary period from three to five years.<sup>74</sup> However, unlike the majority of other states that passed sweeping tenure reform laws, New Hampshire’s reforms do not require student performance to be considered in teacher evaluations.<sup>75</sup> A school district is free to formulate its own policy as long as it complies with any existing collective bargaining agreement.<sup>76</sup> Thus, the New Hampshire tenure bill distinguishes itself from other states by deferring to local

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66. See, *eg.*, NEV. REV. STAT. § 391.312 (2013).

67. NEV. REV. STAT. § 391.3125 (2013) (effective July 1, 2013); *see supra* notes 60-64 and accompanying text.

68. See § 391.3125.

69. NEV. REV. STAT. § 391.3197 (2013) (effective July 1, 2013).

70. NEV. REV. STAT. ANN. § 391.3129 (2011 & West Supp. 2013).

71. TENN. CODE ANN. § 49-5-503 (3) (2009) *amended by* TENN. CODE ANN. § 49-5-503 (3) (Supp. 2012)

72. TENN. CODE ANN. § 49-5-503(4) (2009 & Supp. 2012)

73. TENN. CODE ANN. § 49-5-504(e) (2009 & Supp. 2012)

74. See N.H. REV. STAT. ANN. § 189:14-a (2008 & Supp. 2012).

75. See *id.*

76. See N.H. REV. STAT. ANN. § 273-A:4 (2010 & Supp. 2012).

officials to determine the criteria for evaluating classroom instruction. In one sense, local school leaders are in a better position to develop their own evaluation process because they possess in-depth knowledge regarding the contexts and unique instructional needs of their respective school districts. However, the lack of state oversight regarding how local school districts evaluate teachers may also promote intra-district disparities regarding the quality of classroom instruction because some school district may have higher standards than others.

Although the majority of states passed teacher tenure legislation that limited tenure in K-12 schools, a few states passed more aggressive tenure legislation which completely eliminated tenure prospectively. The passage of these controversial laws was met with a great deal of resistance by teacher unions as evidenced by massive protests that were chronicled by the media.<sup>77</sup> Idaho and Florida are examples of states that have radically changed the labor and employment landscape within their states by eliminating teacher tenure. Idaho's teacher tenure bill, "Students Come First," phases out tenure for all current and future teachers in exchange for one- to two-year contracts based on classroom performance following a three-year probationary period.<sup>78</sup> The teacher evaluation process under the "Students Come First" bill also factors in student academic progress and input from parents.<sup>79</sup> The inclusion of parental input regarding the quality of classroom instruction is a relatively new concept that demonstrates efforts by stakeholders in education to increase parental involvement.<sup>80</sup> The law also eliminates

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77. See Andrew J. Rotherham, *Fixing Teacher Tenure Without a Pass-Fail Grade*, TIME (Jan. 27, 2011) <http://www.time.com/time/nation/article/0,8599,2044529,00.html> ("People protest in Miami in April 2010 after the state senate passed a bill that would end teacher tenure"); MSNBC.com, *Teacher Protest Closes Schools in Louisiana*, U.S. NEWS (Mar. 14, 2012, 12:38 PM), [http://usnews.nbcnews.com/\\_news/2012/03/14/10685511-teacher-protest-closes-schools-in-louisiana?lite](http://usnews.nbcnews.com/_news/2012/03/14/10685511-teacher-protest-closes-schools-in-louisiana?lite) ("Hundreds of Louisiana teachers converged on the state Capitol. . . to try to give state lawmakers and Republican Gov. Bob Jindal a lesson in education reform. They were protesting Jindal's proposed changes to teacher evaluations, tenure and retirement plans"); Sam Dillon, *States Create Flood of Education Bills*, N.Y. TIMES (May 31, 2010), <http://www.nytimes.com/2010/06/01/education/01educ.html> ("In Florida, teacher protests over a bill that would have linked teacher pay to student test scores and eliminated the tenure system for all newly hired teachers. . .").

78. See S. B. 1327, 61st Leg., 2d Reg. Sess. (Idaho 2012); The Students Come First Bill was repealed by voters on Nov. 6, 2012. See Vol. 13-1 Idaho Admin. Bull 35 (Jan. 2, 2013).

79. See Idaho S. B. 1327.

80. See generally Joan M. T. Walker et al., *Why Do Parents Become Involved in Their Children's Education? Implications for School Counselors*, 14 PROF. SCH. COUNSELING, no. 1, 27 (2010) ("This article discusses a theoretical model of the parental involvement process that addresses (a) why parents become involved in their children's education, (b) the forms their involvement takes, and (c) how their involvement influences both proximal (e.g., motivation) and

cash incentives for tenured teachers to retire early and severely curtails the scope of collective bargaining by eliminating the negotiation of working conditions such as course loads and classroom sizes.<sup>81</sup> Legislation passed in Florida, S.B. 736,<sup>82</sup> provides another example of tenure legislation which eradicated teacher tenure. For new teachers hired after July 1, 2011, tenure after three years on the job is no longer available.<sup>83</sup> Instead, all incoming teachers are given one-year contracts, allowing a school district the flexibility to fire a teacher for any reason specified under the contract at the end of the school year.<sup>84</sup> Teachers who were employed before the law was enacted will have the option of remaining under the previous tenure system or switch to a one-year contract in exchange for more money.<sup>85</sup> The law also established a statewide teacher evaluation system, which bases at least 50% of a teacher's evaluation on student test scores.<sup>86</sup>

New Jersey also implemented robust and controversial measures related to teacher tenure. Governor Chris Christie signed the Teacher Effectiveness and Accountability for the Children of New Jersey (hereinafter "TEACHNJ Act") into law on August 6, 2012.<sup>87</sup> Recognized as the first successful reform effort to overhaul New Jersey's tenure system since 1909, the bill received unanimous bipartisan support in the Democratic-controlled legislature and from teachers' unions who helped draft its language.<sup>88</sup> The new law will go

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distal (e.g., achievement) student outcomes. The authors describe how school counselors can use this model to enhance schools' and parents' capacities to engage parents effectively in children's education. Specifically, they articulate how school counselors can educate teachers and parents about the importance of teacher and school invitations to involvement, productive forms of involvement, and students' active role in shaping their own educational outcomes. The authors briefly discuss future directions for research on parental involvement in the school counseling context.").

81. S.B. 1108, 61st Leg., 1st Sess. § 14 (Idaho 2011).

82. S.B. 736, 2011 Sess. (Fla. 2011).

83. See *id.* See also Leslie Postal, *Teachers with No Tenure by July 1 Likely Out of Luck*, ORLANDO SENTINEL (May 2, 2011), [http://articles.orlandosentinel.com/2011-05-02/features/os-teacher-contract-fl-changes-20110502\\_1\\_merit-pay-bill-statewide-teachers-union-florida-teachers](http://articles.orlandosentinel.com/2011-05-02/features/os-teacher-contract-fl-changes-20110502_1_merit-pay-bill-statewide-teachers-union-florida-teachers).

84. FLA. STAT. ANN. § 1012.335(a) (West 2013).

85. FLA. STAT. ANN. § 1012.334(a) (West 2013).

86. Greg Toppo, *Florida Teachers Sue Over New Rating System*, USA TODAY (April 16, 2013, 2:40 PM), <http://www.usatoday.com/story/news/nation/2013/04/16/florida-teacher-lawsuit-evaluations-student-scores/2086169/>.

87. Teacher Effectiveness and Accountability for the Children of New Jersey, 2012 N.J. LAWS ch. 26 (codified at 18A:6-117), available at [http://www.njleg.state.nj.us/2012/Bills/PL12/26\\_.PDF](http://www.njleg.state.nj.us/2012/Bills/PL12/26_.PDF).

88. Steve Kornacki, *What Chris Christie Didn't Tell You*, SALON (August 29, 2012, 11:53 AM), [http://www.salon.com/2012/08/29/what\\_chris\\_christie\\_didn%E2%80%99t\\_tell\\_you/](http://www.salon.com/2012/08/29/what_chris_christie_didn%E2%80%99t_tell_you/).

into effect beginning in the 2013-2014 school year.<sup>89</sup>

Teacher tenure still exists under the new New Jersey law, albeit in a watered down form. Traditionally, tenure was practically guaranteed to incoming teachers in New Jersey after three years, without regard to their effectiveness as educators.<sup>90</sup> Now, four years are required, the first of which involves mentoring by an established teacher, followed by at least two positive evaluations over the next three years, before tenure is received.<sup>91</sup> These evaluations have also been revamped under TEACHNJ to take into account student performance, so that teachers' assessments will now range from "ineffective" to "partially effective," "effective" and "highly effective," the latter two being the requisite positive scores needed to attain tenure.<sup>92</sup>

Fortunately for teachers, who traditionally have complained of being subjected to arbitrary decisions being made by school administrators, the new law provides for tenure decisions to be determined by school improvement panels consisting of a teacher, assistant principal, and principal, who leads the panel.<sup>93</sup> The panel will also oversee the mentoring program and conduct teacher evaluations.<sup>94</sup> The evaluations are to be developed by the school board and must be approved annually by the New Jersey Department of Education.<sup>95</sup>

Another hallmark of TEACHNJ is that once tenure has been attained, it can still be taken away; no teacher is immune from having his or her tenure status revoked for ineffectiveness.<sup>96</sup> The goal is to both identify and remove underperforming teachers and to motivate consistent results from talented teachers.<sup>97</sup> If a tenured teacher fails to

89. Salvador Rizzo, *Sweeping N.J. Teacher Tenure Bill Passes Legislature, Heads to Governor Christie's Desk*, NJ.COM (last updated June 26, 2012, 7:06 AM), [http://www.nj.com/news/index.ssf/2012/06/sweeping\\_nj\\_teachers\\_tenure\\_bi.html](http://www.nj.com/news/index.ssf/2012/06/sweeping_nj_teachers_tenure_bi.html).

90. Jarret Renshaw, Gov. Christie Hails Signing of Tenure Reform Bill as 'A Great Day for Good Teachers', NJ.COM (Aug. 07, 2012, 6:30 AM), [http://www.nj.com/news/index.ssf/2012/08/gov\\_christie\\_hails\\_signing\\_of.html](http://www.nj.com/news/index.ssf/2012/08/gov_christie_hails_signing_of.html).

91. Kate Zernike, *Christie Signs Bill Overhauling Job Guarantees for Teachers*, N.Y. TIMES (Aug. 6, 2012), <http://www.nytimes.com/2012/08/07/nyregion/christie-signs-bill-overhauling-teacher.html>.

92. P.L. 2012 Ch. 26 (N.J. 2012) available at [http://www.njleg.state.nj.us/2012/Bills/PL12/26\\_.PDF](http://www.njleg.state.nj.us/2012/Bills/PL12/26_.PDF); N.J. STAT. ANN. § 18A:6-123 (West 2012).

93. N.J. STAT. ANN. § 18A:6-120 (West 2012).

94. *Id.*

95. N.J. STAT. ANN. § 18A:6-122 (West 2012).

96. Teresa Shumay, *NJ's Christie Signs Teacher Tenure Reform into Law*, THE HERITAGE NETWORK: THE FOUNDRY (Aug. 7, 2012, 3:00 PM), <http://blog.heritage.org/2012/08/07/njs-christie-signs-teacher-tenure-reform-into-law/> ("[A]ny teacher who receives two consecutive negative evaluations can lose tenure.").

97. *Id.*

receive “effective” or “highly effective” scores after two consecutive annual evaluations, a superintendent is obligated to file dismissal charges of inefficiency.<sup>98</sup> However, a teacher may dispute the charges by showing exceptional circumstances, which will defer the filing until the next year’s evaluation.<sup>99</sup> If the teacher receives a third consecutive unsatisfactory evaluation, the superintendent must file charges of inefficiency for dismissal.<sup>100</sup>

Under the previous system, school districts could dismiss tenured teachers for inefficiency only after a lengthy and expensive administrative appeals process that often discouraged attempts to remove bad teachers.<sup>101</sup> Now under TEACHNJ, teachers have 105 days to challenge a district’s inefficiency charges, and it must be done through a randomly selected arbitrator from a pool of arbitrators selected by teachers and school administrators.<sup>102</sup> The arbitration costs will be capped at \$7,500 and will be paid by the state.<sup>103</sup> There are several innovative and progressive components to the TEACHNJ law that demonstrate how procedural safeguards can be integrated into existing teacher evaluation systems to promote a fair and equitable process, such as the use of unbiased arbitrators to deter teacher dismissals based on arbitrary and capricious reasons.<sup>104</sup> Additionally, TEACHNJ’s mandate that each school district’s teacher evaluation criteria obtain approval by the New Jersey Department of Education will help standardize what criteria is used to identify ineffective teachers.

Collectively, the teacher tenure laws highlighted in this section provide a glimpse into the seminal shift in the labor and employment law milieu as a result of the passage of these progressive statutes. The wave of anti-tenure laws symbolizes a growing consensus for eliminating tenure in K-12 public schools. It is important to note that from a historical perspective, tenure was necessary to protect teachers from falling victim to wrongful dismissals for arbitrary and capricious reasons such as political affiliations.<sup>105</sup> However, today’s stakeholders in education argue that teacher tenure is no longer necessary where civil rights laws shield teachers from egregious labor abuses.

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98. N.J. STAT. ANN. § 18A:6-17.3 (West 2012).

99. *Id.*

100. *Id.*

101. Zernike, *supra* note 92.

102. *Id.*

103. *Id.*

104. See Teacher Effectiveness and Accountability for the Children of New Jersey Act, P.L. 2012 Ch. 26 (N.J. 2012), available at [http://www.njleg.state.nj.us/2012/Bills/PL12/26\\_.PDF](http://www.njleg.state.nj.us/2012/Bills/PL12/26_.PDF); N.J.

105. See Rhee, *supra* note 53, at 54.



There is a misconception among the general public that tenure guarantees job security for life, irrespective of ineffective classroom performance.<sup>106</sup> While tenure does not guarantee teachers continued employment, it does protect teachers from dismissal without sufficient cause.<sup>107</sup> As referenced earlier, examples of unprotected behaviors are incompetence, inadequate performance, immoral conduct, insubordination, willful neglect of duties, or any other sufficient cause.<sup>108</sup> The implementation of these anti-tenure laws raises questions regarding the fairness of evaluating teacher performance based on student test scores. A wealth of social science research documents the factors external to the schooling environment that significantly influence students' academic performance.<sup>109</sup> Thus, the essential questions are: How do we accurately measure teacher effectiveness in a way that does not offend traditional notions of fair play and substantial justice? How do we work within the existing legal framework to promote substantive education reform that accurately identifies and removes *ineffective* teachers while supporting and encouraging the sustained employment of *effective* teachers? Until these essential questions are addressed the ultimate goal of our education system, which is to educate our youth, will not be achieved.

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106. See notes 9-12 and accompanying text.

107. See notes 9-12 and accompanying text.

108. See note 12 and accompanying text.

109. See, e.g., Sharon E. Paulson & Gregory J. Marchant, *Background Variables, Levels of Aggregation, and Standardized Test Scores*, 17 EDUC. POL'Y ANALYSIS ARCHIVES, n. 22, Nov. 20, 2009, at 1, 3 ("In the accountability system established by No Child Left Behind, annual standardized testing in every state has been heralded as *the* universal tool for accountability. However, to be effective, the system must be based on a number of assumptions: It assumes that the tests reflect important standards of learning that are being taught in the schools. It assumes that students who do not reach proficiency are inadequate in their knowledge and skills, regardless of their performance on other forms of assessment; and it assumes that these tests are better indicators of students' ability than the judgments of the teachers. It assumes that the collective scores of teachers' students reflect the quality of their instruction and it assumes that the collective scores of schools and districts reflect the quality of their educational programs. It even assumes that the collective scores of test-takers from a state represent the quality of education and educational policies of the state. With little if any evidence that these assumptions are valid, policy makers have chosen to use these scores as the sole means of accountability for student, teacher, school, district, and even state-level performance"); Robert L. Linn, *Validity of Inferences from Test-based Educational Accountability Systems*, 19 J. PERSONNEL EVALUATION IN EDUC., 2006, at 5, 9 ("There are a host of possible explanations other than differences in school quality that might explain the differences in student performance on tests administered in the spring of 2006. For example, students at school A might receive more educational support at home than students at school B. The composition of peer groups at the two schools might differ in the degree to which they create an atmosphere where learning is valued and respected. The student bodies attending different schools can differ in many ways that are related to performance on tests, including language background, socio-economic status, and prior achievement").

### B. *Charting New Pathways Toward Substantive Reform*

Maintaining the protections of teacher tenure, while guaranteeing the quality of classroom instruction, requires collaboration, compromise, and a more pronounced federal role in teacher evaluation. Although the path to ensuring that every child has equal educational opportunity requires a multitude of substantive changes to our current education system, a core element involves re-envisioning our teacher evaluation system.

A myriad of states have passed legislation designed to improve the quality of instruction by conditioning teacher tenure or teacher evaluations.<sup>110</sup> However, as discussed earlier, each state's evaluation system has salient differences in the way it defines teacher effectiveness and the criteria used to assess teachers. This lack of uniformity is problematic because it undermines efforts to eradicate the gross disparities in education outcomes currently permeating K-12 public schools.<sup>111</sup> A central component in the quality of education is teacher effectiveness.<sup>112</sup> Different measurements to assess teacher quality will result in variances in the quality of classroom instruction.<sup>113</sup> Under the current legal framework, a teacher that is deemed eligible for tenure in one state may not qualify in another due to the grave differences in state teacher evaluation criteria. The lack of uniformity in teacher evaluations for tenure and promotion allow a dual system of education to persist, in which students receive differing qualities of classroom instruction depending on their individual state's teacher evaluation standards. How can we close the achievement gap in K-12 public schools across the nation with disparities in the quality of instruction?

Although, the No Child Left Behind Act provided a compelling legal framework for addressing gross disparities in achievement outcomes, such as the "highly qualified" teacher mandate,<sup>114</sup> the ambitious legislation failed to include criteria for defining individual teacher effectiveness and guidelines for granting tenure. Instead, the federal law focused significantly on school level accountability as

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110. See *supra* Part II.A.

111. See generally PAUL E. BARTON & RICHARD J. COLEY, EDUC. TESTING SERV., WINDOWS ON ACHIEVEMENT AND INEQUALITY, (Apr. 2008), available at <http://www.ets.org/Media/Research/pdf/PICWINDOWS.pdf>.

112. See, e.g., Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 390 (2012).

113. See Umpstead et al., *supra* note 38 at 800-803.

114. See 20 U.S.C. § 6319(a)(2) (2006).

opposed to individual teacher accountability. This is evidenced by the law's mandate that all *schools* demonstrate 100% student proficiency by 2013.<sup>115</sup> One could argue that the law's focus on school accountability inextricably includes teacher accountability by identifying low performing classrooms. However, this argument fails to recognize that identifying failing classrooms does not necessarily connote inadequate classroom instruction. Numerous empirical research studies document the numerous factors external to classroom teacher performance that can directly impact student performance on standardized tests such as inadequate school resources, large classroom sizes, parental education attainment, and high populations of English language learners.<sup>116</sup> Thus, in essence it appears that some states have embraced the presumption that teacher competence is the primary contributor to student performance without examining its validity, and developed their education policies accordingly. In lieu of this critique, many stakeholders in education question whether it is fair for state teacher tenure statutes to evaluate teachers based on student performance on standardized tests.<sup>117</sup> Many have challenged these new teacher tenure laws, often based on technical issues related to enactment and implementation.<sup>118</sup> For example, in Louisiana, the Louisiana Federation of Teachers challenged Governor Bobby Jindal's teacher tenure reform arguing that it violates an article of the Louisiana Constitution requiring that an act only deal with one object.<sup>119</sup> After a December ruling finding a portion of the act unconstitutional, Judge Michael Caldwell reconsidered the case in March and found the entire act unconstitutional.<sup>120</sup> This is yet another illustration of the critical need for Congress to include a uniform teacher evaluation system in the

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115. Philip T.K. Daniel & Maurice R. Dyson, *Bringing Every Child Forward: Lessons Learned Under No Child Left Behind & A Roadmap for Obama's Educational Reform*, 19 TEMP. POL. & CIV. RTS. L. REV. 63, 66 (2009).

116. See e.g., William H. Jeynes, *A Meta-Analysis of the Relation of Parental Involvement to Urban Elementary School Student Achievement*, 40 URB. EDUC., no. 3, 237 (2005), available at <http://uex.sagepub.com/content/40/3/237.abstract>; Kelli Ballard & Alan Bates, *Making a Connection between Student Achievement, Teacher Accountability, and Quality Classroom Instruction*, 13 THE QUALITATIVE REP., no. 4, 560 (2008); PAUL E. BARTON, EDUC. TESTING SERV., *PARSING THE ACHIEVEMENT GAP: BASELINES FOR TRACKING PROGRESS* (2003), available at <http://wwets.org/Media/Research/pdf/PICPARSING.pdf>.

117. See Ballard & Bates, *supra* note 116 at 563-64.

118. See, e.g., Simone Pathe & Jaywon Choe, *A Brief Overview of Teacher Evaluation Controversies*, PBS NEWSHOUR (Feb. 4, 2013, 11:25 AM), <http://www.pbs.org/newshour/rundown/2013/02/teacher-evaluation-controversies.html>.

119. See Sue Lincoln, *Louisiana Tenure Law Ruled Unconstitutional*, S. EDUC. DESK (Mar. 4, 2013, 2:33 PM), <http://www.southerneddesk.org/louisiana-tenure-law-ruled-unconstitutional>.

120. See *id.*

Reauthorization of the Elementary and Secondary Education Act that evaluates teachers based on fair and accurate assessments, as opposed to leaving the future of effective teachers at the mercy of poorly designed state performance evaluations.<sup>121</sup>

Presently, given the ad hoc nature of the standards upon which teachers are evaluated, the current legal framework leaves effective teachers vulnerable to arbitrary dismissals and impairs student learning. Revising the current law, through the inclusion of a uniform teacher evaluation system in the Reauthorization of the Elementary and Secondary Education Act would provide additional procedural safeguards to ensure that teachers are afforded their full Constitutional due process rights during the dismissal process. Additionally, standardizing teacher evaluation criteria would mitigate the possibility of teachers being subject to the “capricious and arbitrary whims of administrators who may have personal or political agendas.”<sup>122</sup> A cursory review of the education milieu and current state of teacher employment suggests procedural due process issues are likely to become relevant in many of the disputes involving school restructuring<sup>123</sup> and the reliability and validity of the assessments used to evaluate teacher performance for dismissal purposes. This is primarily due to the difficulty school districts experience in trying to afford each teacher due process in the context of mass firings. Due process hearings are quite burdensome and expensive for school systems experiencing budgetary shortfalls due to the personnel costs associated with providing, in some cases, hundreds of teachers with due process hearings.<sup>124</sup>

Lastly, a federally mandated uniform teacher evaluation system would not only help shield effective teachers from dismissals due to flawed assessment criteria, but would also provide a more accurate mechanism for identifying and removing *ineffective* teachers from the classroom. For example, currently only a select number of state tenure statutes require that school administrators receive some type of training on how to evaluate school staff.<sup>125</sup> There is an assumption that school

121. See generally Pathe & Choe, *supra* note 118.

122. MISSOURI HAS A 5-YEAR PROBATION PERIOD FOR TEACHERS. . . DON'T LET IT HAPPEN HERE!, Ca. Teachers Assoc., [HTTP://LEGACY.CTA.ORG/MEDIA/PUBLICATIONS/EDUCATOR/ARCHIVES/2005/200509\\_CAL\\_ED\\_FEAT\\_URE02.HTM](http://legacy.cta.org/media/publications/educator/archives/2005/200509_CAL_ED_FEAT_URE02.HTM) (LAST VISITED FEB. 24, 2013).

123. Andrew Spitser, *School Reconstitution Under No Child Left Behind: Why School Officials Should Think Twice*, 54 UCLA L. REV. 1339, 1342, 1353-57 (2007).

124. See *id.* at 1353-57.

125. See, e.g., S.B. 7, 97th Gen. Assemb. at 4 (Ill. 2011); Chris Christie, Exec. Order No. 42 (Sept. 28, 2010), available at <http://www.state.nj.us/governor/news/news/552010/pdf/EO-42.pdf>.

administrators possess the knowledge to evaluate school staff without the influence of common subjective errors, such as the halo effect<sup>126</sup> and implicit bias.<sup>127</sup> A halo effect is a cognitive bias which asserts an automatic contribution of positive attributes to a person based on a person's appearance.<sup>128</sup> Whereas implicit bias is discriminatory, unconscious biases based upon stereotypes are associated with a particular group.<sup>129</sup> The inherent unfairness caused by subjective errors such as the halo effect and implicit bias and the harmful effects of untrained administrators evaluating staffs are well documented in the human resources literature.<sup>130</sup>

Relying on untrained school administrators to identify ineffective teachers undermines the legislative goals of the No Child Left Act, which is to ensure that every child receives a quality education.<sup>131</sup> How can we achieve this goal with untrained administrators assessing the key component to substantive school reform, teacher effectiveness? The dire consequences of allowing state control over teacher evaluation criteria also have global implications for our nation's economy. Currently, the

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126. See generally Richard E. Nisbett & Timothy DeCamp Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments*, 35 J. OF PERSONALITY AND SOC. PSYCHOL., no. 4, 250 (1977); Sandy J. Wayne & Gerald R. Ferris, *Influence Tactics, Affect, and Exchange Quality in Supervisor-Subordinate Interactions: A Laboratory Experiment and Field Study*, 75 J. OF APPLIED PSYCHOL., no. 5, 487 (1990); Arup Varma & Linda K. Stroh, *The Impact of Same-Sex LMX Dyads on Performance Evaluations*, 40 HUM. RESOURCE MGMT., no. 4, 309 (2001); Mark C. Bolino & William H. Turnley, *Counternormative Impression Management, Likeability, and Performance Ratings: The Use of Intimidation in an Organizational Setting*, 24 J. OF ORGANIZATIONAL BEHAV., no. 2, 237 (2003).

127. In a future article, I will explore how implicit bias shapes and influences school administrators' teachers' performance evaluations. Currently, there is not any literature or empirical studies that directly explore the intersection of implicit bias and teacher evaluations and the implications for teacher quality and substantive education reform. Exploring the influence of implicit bias on teacher evaluations is crucial to ensuring that effective classroom teachers are not being dismissed due to unconscious bias by school administrators.

128. See Nisbet & Wilson, *supra* note 126, at 250 (1977).

129. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. no. 3, 827, 833 (2012) ("Implicit biases' are discriminatory biases based on either implicit attitudes—feelings that one has about a particular group—or implicit stereotypes—traits that one associates with a particular group. They are so subtle that those who hold them may not realize that they do. Implicit bias operates in areas such as gender, nationality, and social status, but strong levels of implicit racial bias relating to African-Americans have drawn the most attention. African-Americans, for example, are stereotypically linked to crime and violence; their behavior is more likely to be viewed as violent, hostile, and aggressive than is the behavior of whites; and they are more readily associated with weapons than are whites.").

130. See, e.g., Donald L. Haefele, *Evaluating Teachers: A Call for a Change*, 7 J. OF PERSONNEL EVALUATION IN EDUC. 21 (1993); Benjy Levin, *Teacher Evaluation: A Review of Research*, 37 EDUC. LEADERSHIP, no. 3, 240 (1979).

131. 20 U.S.C. § 6319(a)(1) (2006).

United States is ranked 17<sup>th</sup> in the developed world for education, which is highly problematic because it raises concerns regarding our ability to compete in an increasingly global market.<sup>132</sup> We simply cannot continue to allow a teacher evaluation system to continue that further exacerbates our weak standing globally by failing to employ accurate, uniform criteria to identify ineffective teachers that need to be removed from the classroom. Furthermore, we cannot continue to allow school administrators, although well intentioned, to have the discretionary authority to retain ineffective teachers to avoid the litigation costs associated with the teacher dismissal process. Under the proposal advanced in this essay, if the teachers fail to meet the proposed federally proscribed criteria for classroom effectiveness, then school administrators should be required to remove them from the classroom.

A federally mandated uniform teacher evaluation system would ensure that all public school administrators be required to complete a teacher evaluation planning program through the U.S. Department of Education to assess teachers' professional skills and assess student growth data. Furthermore, applying the same standards to evaluate each teacher minimizes the appearance of impropriety and serves as deterrence for wrongful dismissal lawsuits. Finally, a uniform teacher evaluation system promotes a review process that adheres to the traditional notions of fair play and substantial justice and promotes a better quality of education for *all* children.

#### IV. CONCLUSION

Tenure, as originally designed, only protects teachers from frivolous dismissals, not for legitimate reasons such as incompetence, inadequate performance, immoral conduct, insubordination, willful neglect of duties, or any other sufficient cause.<sup>133</sup> Therefore, it is essential that we demystify hegemonic notions that teacher tenure guarantees employment indefinitely and integrate more procedural safeguards into recently enacted teacher tenure statutes. This will enable us to strike a balance between removing *ineffective* teachers while protecting the rights of *effective* teachers. As evidenced by the current

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132. ECONOMIST INTELLIGENCE UNIT, THE LEARNING CURVE: LESSONS IN COUNTRY PERFORMANCE IN EDUCATION 2012 REPORT 40 (Pearson 2012), available at [http://thelearningcurve.pearson.com/content/download/bankname/components/filename/FINALLEarningCurve\\_Final.pdf](http://thelearningcurve.pearson.com/content/download/bankname/components/filename/FINALLEarningCurve_Final.pdf).

133. MICHAEL COLASANTI, EDUC. COMM'N OF STATES TEACHER TENURE/CONTINUING CONTRACT LAWS (2007), available at <http://www.ecs.org/clearinghouse/75/64/7564.htm>.

achievement gap in K-12 schools, there is some validity regarding the need to raise standards for granting tenure by increasing the probationary period. If we are going to raise the bar for classroom instruction then higher standards for awarding tenure are justified. The only way to achieve systemic education reform is to create a uniform federal teacher evaluation system to standardize teacher quality. This can be achieved by revising the upcoming Reauthorization of the Elementary and Secondary Education Act to require Title I funded schools to utilize a uniform teacher evaluation system developed by the Department of Education. Additionally, the Reauthorization of the Elementary and Secondary Education Act should also require school administrators that evaluate teacher performance to undergo evaluation training through the U.S. Department of Education to educate them on how to avoid subjective errors during the evaluation process and assess teacher performance in a fair and objective manner. Training on how to properly evaluate teacher performance will increase the promotion of effective teachers and provide a more accurate framework for identifying ineffective teachers.

At the end of the day, although it is true that teaching is a work of “heart,” an effective teacher must also possess the skills and attributes to educate, motivate and engage today’s diverse student populous. The important role of teachers in our society is best described in the following quote by Henry Adams,

“A teacher affects eternity; he can never tell where his influence stops.”<sup>134</sup>

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134. HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* ch. XX (Library of America 2010).