DO CALIFORNIA’S TEACHER TENURE LAWS VIOLATE CALIFORNIA’S CONSTITUTIONAL RIGHT TO EDUCATION

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By Allen W. Hubsch and Michelle Roberts*

The U.S. Supreme Court in Brown v. Board of Education called education “the most important function of state and local governments,” “the very foundation of good citizenship,” “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”1 The California Supreme Court said four decades ago that education plays an “indispensable role” in the modern industrial state.2 Its role may be even more indispensable in an economy where the correlation between education and employment is growing stronger and more significant.3

Despite its crucial nature, education is not a fundamental right under the federal Constitution.4 State constitutions, however, are another matter. California and dozens of other states have recognized a fundamental right to education in their constitutions.5 Under those state constitutional rights, courts have struck down policies involving building maintenance, textbooks, transportation and even extracurricular activities for failure to provide students equal


2 Serrano v. Priest (Serrano I), 5 Cal.3d 584, 605 (1971).
5 Serrano v. Priest (Serrano I), 5 Cal.3d 584, 608-09 (1971); Michael Salerno, Reading Is Fundamental: Why The No Child Left Behind Act Necessitates Recognition Of A Fundamental Right To Education, 5 Cardozo Pub. L. Pol’y & Ethics J. 509, 511 (“[A] majority of states recognize a fundamental right to education.”)
access to education. Nothing, however, could be more central to the fundamental right to a quality education than good teachers. A system that protects underperforming teachers – particularly to the detriment of low-income schools – is no less violative of the fundamental right to education than policies that have already been declared unconstitutional.

This article will cover teacher tenure laws and their background, the difference between federal and state constitutional treatment of education, how the fundamental right has been treated by state courts, and the various contexts in which the education right has been applied to invalidate existing policies. Based on those other contexts and the essential role that teachers play in education, tenure laws that result in retention of underperforming teachers should be held unconstitutional.

I. TEACHER TENURE LAWS WERE INTENDED TO IMPROVE EDUCATION QUALITY.

Teacher tenure laws generally provide experienced teachers with additional due process rights before they can be terminated or laid off. In California, for example, certified teachers who work two consecutive years are deemed a “permanent” employee of the district. Before a teacher can be terminated for unsatisfactory performance, charges must be filed, written notice must be given, and the teacher must be provided an opportunity to correct faults. The tenure rules also prevent a school district from retaining a junior teacher, no matter how effective, over any more senior teacher who is even minimally qualified for the position. The law provides “bumping” rights for senior certified teachers when budget cuts or other factors require a reduction in staff. A district may only retain a less senior teacher if it establishes that it has a

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7 Cal. Educ. Code § 44938(b) (West).
specific need to teach a specific course and that the teacher proposed for retention has special training and experience necessary to teach the course.\textsuperscript{10} The rules can result in significant job security for senior teachers, regardless of their effectiveness,\textsuperscript{11} and can bring enormous uncertainty to schools with large numbers of junior teachers. In Los Angeles, those teachers are often concentrated in poorer schools, where students have the highest needs.\textsuperscript{12}

Tenure rules, which have existed in many states for more than a century, were originally intended to improve the teaching profession.\textsuperscript{13} Like civil service rules, tenure was designed to make teaching free of “personal or political influence, and made free from the malignant power of spoils and patronage.”\textsuperscript{14} The earliest teacher tenure laws were enacted by Massachusetts in 1886, and they rapidly developed around the nation starting in 1900.\textsuperscript{15} California adopted tenure rules starting in the 1920s.\textsuperscript{16} The rules were intended to attract better talent, to discourage annual contracts, and to prevent the discharge of good teachers for inadequate reasons.\textsuperscript{17} The additional


\textsuperscript{11} See e.g. Jason Felch, Jessica Garrison and Jason Song, \textit{Bar set low for lifetime job in LA schools}, L.A. Times (Dec. 20, 2009), http://www.latimes.com/news/local/education/la-me-teacher-tenure20-2009dec20,0,7941463,full.story (citing teacher Matthew Kim, whom the school district spent nearly $2 million in salary and legal costs trying to fire after reports of inappropriate contact with an aide and an ineffective teaching style).


\textsuperscript{13} \textit{McSherry v. City of St. Paul}, 202 Minn. 102, 106 (1938).

\textsuperscript{14} \textit{McSherry v. City of St. Paul}, 202 Minn. 102, 106 (1938).

\textsuperscript{15} \textit{McSherry v. City of St. Paul}, 202 Minn. 102, 106-107 (1938).


\textsuperscript{17} \textit{McSherry v. City of St. Paul}, 202 Minn. 102, 106-107 (1938).
procedural rights were thought to minimize “malice, political or partisan trends, or caprice.”

Tenure was meant for the public good.

These days, however, many have raised questions about whether tenure actually serves the public good or simply provides job protection for senior teachers regardless of their effectiveness. For years, nearly all probationary teachers received passing evaluations in the Los Angeles Unified School District, the nation’s second largest; fewer than 2 percent of rookie teachers were denied tenure, according to a 2009 investigation by the Los Angeles Times. Furthermore, whether students were learning was not relevant to teacher evaluations, and there was no requirement that testing data, student work or grades be considered before a teacher received permanent status. As a result, teachers who were evaluated with only cursory reviews were given status that allows them to bump junior teachers, regardless of whether they are more effective. The seniority rules and budget woes result in promising math and English teachers being been laid off, which disproportionately harms poorer schools. The Los Angeles Times found that in many LAUSD schools, top teachers were replaced by less effective teachers who had more seniority. This was true despite research showing that teacher quality has an

18 McSherry v. City of St. Paul, 202 Minn. 102, 108 (1938).
19 McSherry v. City of St. Paul, 202 Minn. 102, 108 (1938).
enormous effect on student performance and can impact outcomes well into adulthood.\textsuperscript{25}

According to education experts, “the longer students are exposed to good or bad teachers, the better or worse they perform.” \textsuperscript{26}

II. U.S. SUPREME COURT FOUND NO FUNDAMENTAL RIGHT TO EDUCATION UNDER THE FEDERAL CONSTITUTION, BUT STATE CONSTITUTIONS ARE DIFFERENT.

While teacher tenure is certainly a public policy concern, it does not rise to a constitutional concern unless it violates a fundamental right. The U.S. Supreme Court ruled nearly 40 years ago that there is no fundamental right to education under the U.S. Constitution.\textsuperscript{27}

In \textit{San Antonio Independent School District v. Rodriguez}, the court rejected a challenge to disparate funding between wealthy and low-income districts.\textsuperscript{28} It held that because wealth was not a suspect class and education was not a fundamental right under the U.S. Constitution, the funding policy would be reviewed under the highly deferential rational basis standard.\textsuperscript{29}

The Court held that there was no fundamental right to education because there was no explicit guarantee in the Constitution’s text, “nor do we find any basis for saying it is implicitly so protected.”\textsuperscript{30} The same is not true, however, with state constitutions.


\textsuperscript{26} Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893, 910 (2003).


\textsuperscript{28} \textit{San Antonio Ind. Sch. Dist. v. Rodriguez}, 411 U.S. 1, 37 (1973). Rational basis requires only a legitimate state interest and a means that is rationally related to that interest. The court noted that the complex nature of education suggests that there is more than one constitutionally permissible method to handling schools and that rational efforts by legislatures should be respected. \textit{Id.} at 2.


All 50 state constitutions include explicit references to the government’s obligation to educate its citizens.\(^{31}\) While the U.S. Constitution is one of restricted powers, state constitutions do not limit a state’s authority to the four corners of the document. \(^{32}\) The principle of federalism, which drives the U.S. Constitution and cautions against too much federal power, is not an issue with state constitutions.\(^{33}\) The federal constitutional rights are “framed as negative restrictions on government action. With respect to those rights, the role of the court is to police the outer limits of governmental power … This approach ultimately provides the wrong lens for analyzing positive constitutional rights, where the court is concerned not with whether the State has done too much, but with whether the State has done enough.”\(^{34}\) In state constitutional challenges over the last four decades, dozens of courts have held that states were, in fact, not doing enough for education. One state, Kentucky, found the entire education system was unconstitutional.\(^{35}\)

California was among the first, ruling in its influential \textit{Serrano v. Priest} (“\textit{Serrano I}”) decision that the “distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a ‘fundamental interest.’”\(^{36}\) While state constitutional provisions on education vary in breadth and coverage from state to state,\(^{37}\) the California Constitution requires


\(^{34}\) \textit{McCleany v. State}, 173 Wash.2d 477, 519 (2012).


\(^{36}\) \textit{Serrano v. Priest (Serrano I)}, 5 Cal. 3d 584, 608-09 (1971).

the Legislature to provide for a “system of common schools” which is to include free schools in each district at least six months out of the year. The state Constitution requires the Legislature to encourage “by all suitable means” the promotion of intellectual, scientific and moral improvement of Californians because “[a] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people.”

The California Supreme Court said that education is fundamental because (1) it is essential to give residents the ability to compete in a market economy, (2) it will be accessed by all residents, (3) it requires government to have “sustained, intensive contact with the recipient,” unlike many other government services, (4) it is unmatched in the way that it molds children, and (5) school attendance is compulsory. Because the education interest is so fundamental, its provision or adequacy cannot be conditioned on wealth; it must be provided equally to all students. The court called education an “absolute right” in California, a position that was unchanged by the U.S. Supreme Court’s ruling in the San Antonio school case. “Because access to a public education is a uniquely fundamental personal interest in California, our courts have consistently found that the State charter accords broader rights against State-maintained educational discrimination than does federal law.”

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38 Cal. Const., art. IX, § 5.
40 *Serrano v. Priest (Serrano I)*, 5 Cal. 3d 584, 609-10 (1971).
41 *Serrano v. Priest (Serrano I)*, 5 Cal. 3d 584, 589 (1971).
42 *Serrano v. Priest (Serrano I)*, 5 Cal. 3d 584, 618 (1971).
43 *Serrano v. Priest (Serrano II)*, 18 Cal. 3d 728, 768 (1977) (holding four years after *San Antonio Ind. Sch. Dist. v. Rodriguez* that the state’s school funding system was still subject to strict scrutiny).
III. THE FUNDAMENTAL RIGHT TO EDUCATION HAS RESULTED IN INVALIDATION OF SCHOOL FUNDING PLANS AND OTHER PROGRAMS.

State fundamental rights to education have been vigorously litigated in challenges to school funding schemes, but narrower services have also been found essential to the fundamental right to education. In an early funding challenge, the California Supreme Court held that the state violated the fundamental right to education by failing to provide adequate money to all schools. In *Serrano II*, the California Supreme Court held, “There is a distinct relationship between cost and the quality of educational opportunities afforded.” While the court said quality of education could not be defined solely based on student test results, “pupil output” was evidence of a fundamental rights violation. Courts in numerous other states have reached similar conclusions about school funding and the fundamental right to education.

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46 *Serrano v. Priest (Serrano II)*, 18 Cal. 3d 728, 745 (1977).

47 *Serrano v. Priest (Serrano II)*, 18 Cal. 3d 728, 748 (1977).

48 *Serrano v. Priest (Serrano II)*, 18 Cal. 3d 728, 748 (1977).

49 See, e.g., *Dupree v. Alma Sch. Dist.*, 279 Ark. 340, 347 (1983) (“For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution.”); *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 192 (1993) (“The right to an adequate education mandated by the constitution is … a right held by the public to enforce the State’s duty.”); *Abbott by Abbott v. Burke (Abbott II)*, 119 N.J. 297, 295 (1990) ([T]he evidence compels but one conclusion: the poorer the district and the greater its need, the less money available, and the worse the education. That system is neither thorough nor efficient [as required by the state constitution].)”
School funding formulas are not the only policy found to have violated the fundamental right to education. Courts have invalidated discrete policies for services ranging from transportation to textbooks to extracurricular activities. In one state, the entire educational system was ruled unconstitutional. The Kentucky Supreme Court said the state violated the fundamental right to education by failing to provide equal resources and educational opportunities for all students. The ruling invalidated the state’s financing system, school boards, construction and maintenance policies, teacher certification, “the whole gamut of the common school system in Kentucky.” “There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system – all its parts and parcels.”

Even narrower cases, however, support a finding that tenure laws that interfere with educational rights are unconstitutional. In more than one state, building construction and maintenance policies have been held to violate students’ education rights because school buildings and ancillary facilities are central to a sufficient education. In Arizona, some schools had dirt lots for playgrounds, while others had domed stadiums and indoor swimming pools because of a funding system that relied on property taxes. The Arizona Supreme Court held that the funding system’s gross disparities violated the state constitutional requirement to

50 Cases are covered in more detail later in this section.
establish and maintain “a general and uniform public school system.”⁵⁷ Such language recognizes the importance of proper buildings and maintenance to the educational right.

Likewise, a shortened school year has been held to violate the fundamental right to education. In Butt v. State of Calif., the Supreme Court refused to allow a financially strapped district to end the school year six weeks early.⁵⁸ The state argued that the plaintiffs failed to show that the threatened closure would harm the students’ fundamental right to educational equality.⁵⁹ While the court noted that a truncated school term would not violate the fundamental right in all circumstances, a shortened year that causes the quality of education to fall below prevailing statewide standards does violate the education right.⁶⁰ Accordingly, a plan to end the school year hastily and in a way that would be highly disruptive violated the students’ fundamental education rights.⁶¹

Numerous state supreme courts have held that the education right includes access to textbooks. The West Virginia Supreme Court held that a textbook user fee violated the fundamental right to education, despite an exemption for low-income students.⁶² Textbooks are an integral and fundamental part of education.⁶³ Thus, “hindering access to necessary materials would make the educational process nearly meaningless.”⁶⁴ Similarly, the North Dakota
Supreme Court held that a textbook rental fee for elementary school students violated their educational rights. After surveying textbooks cases in other states, the court concluded that state constitutions guaranteeing “free” public schools intended to cover textbooks as well.\textsuperscript{65} “No education of any value is possible without school books.”\textsuperscript{66} Other states, even without resorting to a fundamental rights analysis, are in accord because of the readily recognized role that textbooks play in fulfilling the education obligation of their respective state constitutional texts.\textsuperscript{67}

Even some ancillary services have been found by courts to be part of the fundamental right to education. Although California rejected transportation as an essential part of the constitutional right, West Virginia, with a larger rural population,\textsuperscript{68} found transportation was crucial to the education right. In California, the Supreme Court held that free transportation was not essential because students could use different methods to get to school.\textsuperscript{69} West Virginia, however, came to a different conclusion. The West Virginia Supreme Court held that because transportation “so closely touches” the fundamental right to education, school boards had a duty to ensure students could get to class.\textsuperscript{70} In one case, children who lived on a poorly maintained road had to pile into the back of a parent’s pickup truck, walk across an abandoned swinging

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  \item[65] \textit{Cardiff v. Bismarck Public Sch. Dist.}, 263 N.W.2d 105, 112 (N.D. 1978)
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  \item[67] \textit{See Paulson v. Minidoka Cnty. Sch. Dist.}, 93 Idaho 469, 472-73 (holding textbooks are a necessary expense peculiar to education and required to be provided free of charge under the state constitution); \textit{Bond v. Public Sch. of Ann Arbor Sch. Dist.}, 383 Mich. 693 (1970) (finding textbooks essential to the system of free public schools guaranteed by the state constitution). Note, however, that the Wisconsin Supreme Court, which in later cases recognized a fundamental right to education, held that textbook charges could be imposed without violating the state constitution because there was no custom of providing free books when the constitution was adopted. \textit{Bd. of Ed. v. Sinclair}, 65 Wis.2d 179, 182, 185 (1974).
  \item[68] California’s population is 95 percent urban, compared to 49 percent of West Virginia’s population. \textit{See} United States Census Bureau, 2010 Census Urban and Rural Classification and Urban Area Criteria (Aug. 17, 2010), population table available at http://www.census.gov/geo/www/ua/2010urbanruralclass.html.
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bridge and cross a railroad track, sometimes under parked rail cars, to get to school. The court concluded that “[t]he fundamental right to education is meaningful only if school children are able to get to school. … [The right] is no more important to children who live on a major public thoroughfare than it is to those on Sand Creek Hollow Road.”

Despite California’s stand on transportation, the state Supreme Court has taken a broader view of on-campus activities, including extracurricular ones. Extracurricular activities have been recognized as such an essential part of public education that they are included in the fundamental right guaranteed by the state constitution. Schools cannot impose a fee for extracurricular activities because they “constitute an integral component of public education.” “[G]roup activities encourage active participation in community affairs, promote the development of leadership qualities, and instill a spirit of collective endeavor. These results are directly linked to the constitutional role of education in preserving democracy …” The Montana Supreme Court similarly held that fees for certain courses and field trips could not constitutionally be levied. The court rejected the argument that a hardship economic waiver could make the policy constitutional. “Constitutional requirements are a matter of right and cannot be satisfied by their denial in the first instance and subsequent waiver of the effects of such denial.”

IV. NOTHING CAN BE MORE CENTRAL TO THE EDUCATION RIGHT THAN EFFECTIVE INSTRUCTION.

If the fundamental right to education covers buildings and playgrounds, school year length, textbooks, extracurricular activities and transportation, it must include quality teaching. The language used by courts in a number of cases assumes that quality teaching is essential. “Of course, providing a place of instruction and qualified teachers are extremely important,” wrote the West Virginia Supreme Court in its textbook decision. 79 No reasonable interpretation of the fundamental right to education could exclude an effective teacher.

Although the proper measure of effective teaching has long been an issue of debate, so-called “value-added” assessments now measure test-score gains and losses, adjusted for differences in student characteristics.80 Using that method, several analyses have shown which individual teachers produce the best results.81 A Los Angeles Times analysis of third-, fourth-, and fifth-grade teachers found that the most effective teachers could boost student performance by 12 percentile points in English and 17 percentile points in math, all in a single school year.82 In a much larger study, three economists from Harvard and Columbia Universities found that

teachers with high value-added scores contributed to a wide array long-term outcomes. In tracking 1 million children from fourth grade to adulthood, the researchers found that teachers with high-value added scores caused test scores to immediately rise. When those teacher left, scores fell. Furthermore, students taught by highly effective teachers were more likely to attend college, earn higher salaries, live in better neighborhoods and save more for retirement. They were less likely to have children as teenagers, too.

The opportunity for such outcomes is precisely what the fundamental right to education is intended to provide. The right is meant to benefit both society and the individual. As the California Supreme Court said in Serrano I, “education is a major determinant of an individual’s chances for economic and social success in our competitive society ... [E]ducation is a unique influence on a child’s development as a citizen and his participation in political and community life.”

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88 Serrano v. Priest (Serrano I), 5 Cal. 3d 584, 605 (1971).

89 Serrano v. Priest (Serrano I), 5 Cal. 3d 584, 605 (1971).
citizens for their role as participants in the marketplace of ideas.\textsuperscript{90} If states now have a way to measure how well teachers help students secure the benefits of their educational rights, any system that arbitrarily keeps less effective teachers in place cannot be constitutional.

V. TENURE LAWS THAT PROTECT INEFFECTIVE TEACHERS SHOULD BE FOUND TO VIOLATE THE FUNDAMENTAL RIGHT TO EDUCATION.

When tenure laws were adopted, they were thought to be in the public interest “in that most advantages go to the youth of the land and to the schools themselves, rather than the interest of the teachers as such.”\textsuperscript{91} A century later, the laws appear, in fact, to advantage senior teachers, sometimes at the expense of students. “[S]imple constitutional principle [dictates] that the State has ultimate responsibility for schools” regardless of tenure and collective bargaining agreements promoting seniority over effectiveness.\textsuperscript{92} Ultimately, states must ensure that the fundamental right to education is protected for all children, and tenure laws that interfere with that right should be held unconstitutional.

\textsuperscript{90} \textit{Claremont Sch. Dist. v. Governor (Claremont I)}, 138 N.H. 183 (1993).

\textsuperscript{91} \textit{McSherry v. City of St. Paul}, 202 Minn. 102, 107 (1938).