

RETHINKING TENURE: AN OVERVIEW AND ANALYSIS OF CHANGES TO
TEACHER TENURE LEGISLATION FROM JANUARY 2008-JUNE 2012

by

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(Under the Direction of John Dayton)

ABSTRACT

Teacher tenure regulations have been a part of the American elementary and secondary education system for over 100 years. By the late 1960s, nearly all states offered some sort of employment protection to their teachers, either in the form of formal tenure laws or automatically renewing contract policies. While there have been isolated challenges to tenure for K-12 public school teachers in the past, recent events have made it possible for the theoretical debate over tenure to turn into a large scale reform movement. For example, between 2008 and the end of June, 2012, 24 states made substantive changes to their teacher tenure laws and an additional 11 states had proposed legislation pending.

Using a legal scholarship framework, this study reviews the teacher tenure laws from the 50 states and the District of Columbia and accompanying news reports in order to identify the legislative changes that have been made in each state. The legislative data are organized by similarities in legislative change, providing categorizations and sub-categorizations of change. The study also provides a typography of legislative change

based on state geography, collective bargaining status, and Race to the Top application and award status. Chapter 3 of the study incorporates a modified version of Kingdon's Multiple Streams framework to analyze the political, economic, and social the external factors contributing to state level tenure reform. The legislative and contextual findings are used in considering how the teacher tenure reform movement will impact the teaching profession, teachers' employment rights, education law, and education policy.

INDEX WORDS: Education policy, State education reform, Teacher tenure, Probationary period, Teacher evaluation, Collective bargaining, Race to the Top, Teacher employment rights, Personnel law, Education law, Teacher termination

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DEDICATION

To my mom and dad. You are my cheering section, my therapists, and my best friends. I don't know how I would have made it through this adventure without you. Thank you for your unwavering support for all of my crazy ideas and your never ending supply of unconditional love. You make me feel truly cherished.

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CHAPTER 1

BACKGROUND AND RATIONALE

Introduction

Dissatisfaction with the nation's public education system seems to be coming from every quarter.¹ In an attempt to repair what is perceived by some as a broken system, federal and state policy makers have tried various legislative approaches to address declining student test scores and poor student achievement. As a result, legislators have passed a flood of education related legislation in the areas of national standards, national tests, school choice, teacher licensure, pay for performance, and teacher evaluations, all designed to increase student achievement. Educational practices that have been accepted as standard operating procedure for decades or, in some cases centuries, are being challenged.² One such practice is the application of tenure for elementary and secondary school teachers as an employment incentive and/or protection.

Tenure Defined

While the concept of tenure is most often associated with college and university faculty, similar employment protections are or have been available to elementary and

¹ See e.g., Joel Klein, *The Failure of American Schools*, THE ATLANTIC, June 2011; Nicholas Lemann, *Comment: Schoolwork*, THE NEW YORKER, Sept. 27, 2010.

² For example, historically public schools were expected to provide a well rounded educational experience, focusing on such things as culture, social skills, and citizenship in addition to academics. However, in the 21st century, the national educational goals have been distilled to strictly academic concerns, with a particular focus on reading and mathematics with a goal toward college and career readiness. Richard Rothstein, Rebecca Jacobsen, & Tamara Wilder, GRADING EDUCATION: GETTING ACCOUNTABILITY RIGHT (2008).

secondary teachers in all 50 states.³ Because tenure is a product of state law, it manifests itself differently in legislation depending upon the state. For example, while states generally require a probationary period of service before tenure protections take effect, probationary time periods range from one year (Hawaii⁴) to seven years (Ohio⁵).⁶ However, the basic principles remain the same. Therefore, for the purposes of this study, tenure is defined as the "expectation and provision of job security through the guarantee of due process, generally following a probationary period."⁷

Teacher tenure rights are triggered when a teacher's employment status is negatively impacted. Each state lists the grounds upon which a teacher may be removed from his or her position (either by termination, demotion, or suspension). For example,

³ Scott Grubbs, *Quality of Graduate Experience in a Georgia Case Study: The Elimination of Teacher Tenure in Georgia as Viewed Through the Policy Formulation Process Model Environment*, 3 GEORGIA EDUCATIONAL RESEARCHER 1 at 1(2005).

Note that Mississippi claims that it does not offer teacher tenure. According to general education provisions of Mississippi law, before being suspended or dismissed, all Mississippi teachers are entitled to a notification of the charges and a right to a public hearing on the charges. Miss. Code Ann. § 37-9-59. Mississippi also enacted the School Employment Procedures Law of 2001 which applies in situations in which a teacher's contract is not renewed. It requires that a teacher be provided with notice of the reasons for nonrenewal, an opportunity for the non-renewed teacher to respond to the "charges", and a hearing. Miss. Code Ann. § 37-9-101. Sub-section 101 specifically states: "It is the intent of the Legislature not to establish a system of tenure." By applying the definitions set forth in sub-section 103 of the School Employment Procedures Law, teachers are only entitled to the aforementioned employment protections in cases of non-renewal if they have been employed by the local school district for a period of two (2) continuous years (or two (2) years of employment in any Mississippi school district and one year of employment in the school district of current employment. Miss. Code Ann. § 37-9-103. Therefore, while Mississippi's intent is not to create tenure protections for its teachers, it has done so by default. All teachers are entitled to written notice and an opportunity to be heard before being suspended or dismissed. Furthermore, all teachers who have worked the number of years designated in sub-section 103 have the right to notice and a hearing in cases of non-renewal. Despite the difference in vocabulary, in application, Mississippi does offer its teachers all of the due process rights associated with teacher tenure.

⁴ H.R.S. § 302A-608 (read in conjunction with the 2008 Senate Bill No. 2449, which reduced the probationary period from four semesters to two semesters).

⁵ O.C.R. 3319.08. Teachers employed after January 1, 2011 are eligible for a "continuing contract" after working as a teacher for at least 7 years and some graduate education. It is important to note that the 7 year requirement is for licensure and is not a probationary period. Ohio also requires employment in a district for at least 3 years out of a five year period for receipt of tenure rights. This time period is more consistent with probationary periods in other states. O.C.R. 3319.08 (D)(3). Teachers who were licensed to teach in Ohio prior to January 1, 2011 can earn a continuing contract with just graduate coursework. O.C.R. 3319.08 (D)(2).

⁶ Additionally, the vocabulary and definitions used in each state may vary but have similar operations.

⁷ *Id.*; Holly Robinson, *Tenure: What are the Benefits for Children?*, GEORGIA PUBLIC POLICY FOUNDATION (Feb. 4, 2003).

in Georgia, a teacher may be dismissed for the following: (1) Incompetency; (2) Insubordination; (3) Willful neglect of duties; (4) Immorality; (5) Inciting, encouraging, or counseling students to violate any valid state law, municipal ordinance, or policy or rule of the local board of education; (6) To reduce staff due to loss of students or cancellation of programs; (7) Failure to secure and maintain necessary educational training; or (8) Any other good and sufficient cause.⁸ While each state is different, the reasons for dismissal addressed in Georgia's law are typical. Some grounds for dismissal are more straight forward than others. While insubordination and failure to secure the proper teacher training are fairly straight forward, teacher incompetence and issues concerning workforce reduction have proven controversial as of late. Consequently, those are areas in which many states have chosen to make legal changes.

Historical Context

Teacher tenure regulations have been a part of the American elementary and secondary education system for over 100 years.⁹ At the turn of the century, many teachers faced over-crowded classrooms, uncomfortable working conditions, and interference from demanding parents and administrators trying to dictate lesson plans and curriculum.¹⁰ Teachers were not only poorly paid, often with no pension or benefits, but teaching jobs were often subject to the whim of politicians.¹¹ Furthermore, by the turn of the century, nearly 75% of all American K-12 teachers were women, but few were

⁸ Georgia Fair Dismissal Act of 1975, O.C.G.A. § 20-2-940.

⁹ Julianne Coleman, Stephen T. Schroth, Lisa Molinaro & Mark Green, *Tenure: An Important Due Process Right or a Hindrance to Change in the Schools?* 18(3) J PERS EVAL EDUC 219 (2005); Josh Marshall, *Look at the Map*, TPM (TALKING POINTS MEMO), Feb. 18, 2011.

¹⁰ Coleman et al., *supra* note 9; M.J. Stephey, *A Brief History of Tenure*, TIME MAGAZINE, Nov. 17, 2008.

¹¹ Coleman et al., *supra* note 9; Thomas A. Kersten, *Teacher Tenure: Illinois School Board Presidents' Perspectives and Suggestions for Improvement*, 37 (3 & 4) PLANNING & CHANGING 234 (2006).

promoted to positions of authority.¹² Generally, teachers suffered poor working conditions but had little power to improve them. Near the end of the 19th century, the working conditions for teachers deteriorated to the extent that reform was necessary in order to preserve the profession.

Championed by the National Education Association (NEA), now the nation's largest teacher's union, teacher tenure laws inspired by federal legislation protecting the rights of United States civil service employees began to take shape.¹³ In 1909, New Jersey became the first state to grant teachers fair dismissal rights.¹⁴ By 1950, twenty-one states adopted some form of teacher tenure regulation. Twenty additional states had at least one school district that had tenure-like teacher contracts ranging from one to five years.¹⁵ By the late 1960s, nearly all states offered some sort of employment protection to their teachers, either in the form of formal tenure laws or automatically renewing contract policies.¹⁶

Procedural Due Process

As used today, tenure laws are designed to protect public school teachers from arbitrary dismissal without just cause and due process.¹⁷ Teacher tenure is not intended to be a guarantee of lifetime employment. Rather, it is a procedural due process which guarantees that teachers receive notice of the grounds for termination and a hearing

¹² Coleman et al., *supra* note 9.

¹³ Kersten, *supra* note 11.

¹⁴ *Id.*

¹⁵ Marshall, *supra* note 9. In 1950, only seven states had no state or district regulations providing continuing contracts and/or fair dismissal rights.

¹⁶ *Id.*

¹⁷ AM. FED'N OF TEACHERS, ASSURING TEACHER QUALITY: IT'S UNION WORK (1999); Sidney E. Brown, *Teacher Tenure*, 91(1) EDUCATION 12 (1978); Perry A. Zirkel, *Teacher Tenure Is Not the Real Problem*, 91(9) PHI DELTA KAPPAN 76 (2010).

before he or she can be terminated.¹⁸ Some jurisdictions also require that the teacher be provided names of witnesses, grant the power of subpoena to compel the production of supporting documents and witness testimony, allow the teacher to be represented by an attorney, and guarantee the right to appeal.¹⁹

In the 1972 Supreme Court case *Board of Regents of State College v. Roth*²⁰, the Court stated that the requirements of procedural due process apply only when a teacher has been deprived of his or her interests encompassed by the Fourteenth Amendment's protection of liberty or property. A tenured teacher has a vested property interest in that employment because he or she has a continued legal expectation of employment. Since the Fourteenth Amendment prohibits states from, "depriving any person of life, liberty, or property, without due process of law..."²¹ a tenured teacher is constitutionally entitled to due process before being terminated.²²

Teacher tenure is a product of state law. Teachers are granted tenure after a probationary period of varying length, with a majority of states granting tenure after only three years.²³ While some states require a record of satisfactory evaluations for teachers to be eligible for tenure, generally tenure is a right that has been automatically granted after the expiration of the probationary period.²⁴ During the probationary period, teachers are considered "at-will" employees and may be dismissed without cause at the end of any contract year. Teachers are generally not entitled to due process during the probationary

¹⁸ Zirkel, *supra* note 17; U.S. CONST. amend XIV, §1.

¹⁹ Andy Nixon, Abbot Packard & Gus Douvanis, *Non-Renewal of Probationary Teachers: Negative Retention*, 131(1) EDUCATION 43 (2010).

²⁰ *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 569 (1972).

²¹ U.S. CONST. amend XIV, §1.

²² *Bd. of Regents*, 408 U.S. at 569. See also Nixon, Packard, & Douvanis, *supra* note 19.

²³ Emily Cohen & Kate Walsh, *Invisible Ink in Teacher Contracts*, 10 EDUCATION NEXT 18 (2010); EDUC. COMM'N OF THE STATES, TEACHER TENURE/CONTINUING CONTRACT LAWS:UPDATED FOR .

²⁴ Cohen & Walsh, *supra* note 23; Educ. Comm'n of the States, *supra* note 22.

period.²⁵ However, a teacher's right to not have his or her reputation defamed is a constitutionally protected liberty interest. Therefore, if grounds for termination of a non-tenured teacher are made public, it may entitle that teacher to the protections of procedural due process.²⁶

Problem Statement

Teacher tenure legislation generally remained stable for nearly 50 years, despite tenure reform having been on the political agenda for decades. For example, in the 1970s, shortly after the enactment of the Elementary and Secondary Education Act of 1965²⁷, the relationship between "accountability" in education and tenure was considered.²⁸ The United States was going through a dramatic economic downturn and experiencing extreme political partisanship, not unlike the last 5 years. During this time period, education scholars addressed how the changes in political realities impacted or where impacted by teacher tenure laws.²⁹ For example, in his paper presented at the 1974

²⁵ A teacher has a property right for the period that he or she has a contract for employment. If a non-tenured teacher's employment is terminated mid-contract, he or she is entitled to due process of law. If, however, a non-tenured teacher's contract is simply not renewed, the non-tenured teacher is not entitled to due process.

²⁶ *Bd. of Regents*, 408 U.S. at 569. See also Nixon, Packard, & Douvanis, *supra* note 19.

²⁷ 20 U.S.C. §70 (1965).

²⁸ The Elementary and Secondary Education Act of 1965 called for annual evaluations of the programs it was funding which increased the focus on accountability. Worth (1972) notes that "in an era of tax revolt, inflation, recession, and social unrest, when the goals of education and the means used to achieve them are very much in question, funding sources...are demanding to know what we teachers are trying to do and how successful we are at it." George W. Worth, *Evaluation and Tenure*. 5 THE BULLETIN OF THE MIDWEST MODERN LANGUAGE ASS'N 21 (1972); See also, Charles L. Blaschke, *Should Performance Contracts Replace Tenure?* Paper presented at the 1974 ANNUAL CONVENTION OF THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS (1974, Feb 22-24).

²⁹ Sources indicate that the academic debate regarding the abolition of teacher tenure in the 1970s began at the annual convention of the American Association of School Administrators. The debate was soon joined by scholars in other forums. Frederick L. Hipp, *Resolved: That Teacher Tenure Should Be Abolished*. Paper presented at the 1972 ANNUAL CONVENTION OF THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS (1972); Kenneth Hansen & William J. Ellena, *Teacher Tenure "Ain't" the Problem*. Paper presented at the 1973 ANNUAL CONVENTION OF THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS (1973); Richard H. Escott, *Teacher Tenure -- Time for Change*. Paper presented at the 1973 ANNUAL CONVENTION OF THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS (1973); Robert

convention of the American Association of School Administrators, Charles Blaschke noted that political and economic changes led to and/or required a change in educational management, an increase in the popularity of accountability, and an increase in administrative flexibility.³⁰ Blaschke pointed out that tenure, as a concept and as a practice, conflicted with these changes. He stated that educational management requires change, adaptation, and achievement, while tenure is prescriptive.³¹ Tenure, he noted "is designed to protect teachers from being fired unless proven to be incompetent; yet, teachers don't have to demonstrate competencies to be given tenure."³² Blaschke went on to argue that tenure increasingly hampered the efficient allocation of school resources and that it was counterproductive as a tool for teacher motivation.³³ Blaschke was just one of many scholars discussing the value of teacher tenure. However, despite the fervent debate, tenure legislation remained largely unchanged.

Challenges to teacher tenure have not always been so academic; periodically, isolated changes have been made to state teacher tenure legislation.³⁴ For example, in the early 1990s, Colorado made significant revisions to its teacher tenure legislation³⁵ and in 1997 Oregon overhauled its teacher tenure system.³⁶ In 2000, under the direction of Governor Roy Barnes, Georgia repealed the Fair Dismissal Act of 1975 and its job

R. Sherman, *Teacher Tenure: Theory in Search of Facts*, 6 EDUC. STUDIES 3/4, 167 (1975); Ione L. Perry, *Suppose We Lost Tenure?* 35 EDUC. LEADERSHIP 3, 183 (1977); Brown, *supra* note 17.

³⁰ Blaschke, *supra* note 28, at 1. Blaschke's piece was actually written in response to Hansen & Ellena's paper cited in note 29.

³¹ *Id.* at 2.

³² *Id.*

³³ *Id.*

³⁴ See, e.g., Ann L. Elrod, *Teacher Tenure Reform: Problem Definition in Policy Formulation*. Paper presented at the 1994 ANNUAL MEETING OF THE AMERICAN EDUCATIONAL RESEARCH ASSOCIATION (1994, Apr 4-8).

³⁵ *Id.*

³⁶ In 1997, Oregon replaced its teacher tenure system with a "modified tenure" system in which teachers were offered two-year renewable contracts and provided with a rehabilitation program for teachers deemed ineffective. See Stephey, *supra* note 10.

protections for teachers as part of the state's educational reform efforts.³⁷ While Georgia teachers regained their tenure protections just four years later, Georgia's repeal of tenure is one of the more dramatic examples of isolated tenure legislation reform.

While tenure for K-12 public school teachers has been periodically challenged in the past, recent events have made it possible for the theoretical debate over tenure to turn into a large scale reform movement. Between 2008 and the end of June, 2012, 24 states made substantive changes to their teacher tenure laws and an additional 11 states have proposed legislation pending³⁸. There is no one explanation for the sudden widespread legislative reform. In fact, a reform movement of this magnitude is likely the result of an collision of many factors that alone would not cause the same result.

While both legal and social science scholars have written extensively about the birth, evolution, and application of K-12 teacher tenure legislation, the remarkable legislative changes that have taken place over the last 4 years have received limited scholarly attention. For example, Carter and Savoca provide a very thorough discussion of tenure's early history in this country.³⁹ Other scholars have written comprehensive overviews of the concept of tenure as applied to elementary and secondary education, including historical context, application, and implications of tenure in practice.⁴⁰ More recently, scholars have addressed the idea of tenure reform, in some cases using changes

³⁷ Barnes' victory in eliminating teacher tenure increased the resolve of Georgia teachers to run Barnes out of office. After winning the Georgia Governorship, in 2003 Sonny Perdue became the first Republican Governor of Georgia since Reconstruction. With Purdue's support, job protections for teachers were restored in 2004. Grubbs, *supra* note 3, at 1.

³⁸ Arizona has both passed tenure reform and has proposed legislation pending. For purposes of this paper, Arizona will generally be counted as a "change" state, rather than a "proposal" state.

³⁹ Susan B. Carter & Elizabeth Savoca, *The "Teaching Procession"? Another Look at Teacher Tenure, 1845-1925*, 29 EXPLORATIONS IN ECONOMIC HISTORY 401 (1992).

⁴⁰ For example, see Brown, *supra* note 17, at 47; Lafayette G. Harter, Jr., *Tenure and the Nonrenewal of Probationary Teachers*, 34 ARBITRATION J. 22 (1979).

in one or two states as examples.⁴¹ However, because of the limitations of the academic publishing process, the true extent of tenure reform has not been captured in peer reviewed academic journals.

Practicing attorneys and think tanks have been able to address the changes in the most timely manner. For example, in a conference publication distributed by the Michigan Association of School Boards entitled "Changes to Collective Bargaining and Tenure Laws: The New Era of Tenure," attorney Gary J. Collins provides a chart of changes that have been made to collective bargaining and tenure laws since 2010.⁴² However, because Mr. Collins only includes changes made over a one year period, he does not capture the true extent of the tenure reform movement. Similarly, in a policy piece published by the Center for American Progress, Patrick McGuinn addresses the changes that have been made to teacher tenure laws in six states and the District of Columbia and the their implications.⁴³ While these attempts by legal practitioners and think tanks are certainly more current than their peer reviewed counterparts, they are severely limited in scope. Additionally, because these kinds of pieces are sponsored by organizations that have their own policy agendas, the information and analyses contained therein may not be reliable.

This study is necessary in order for practitioners and scholars in education, law, and policy to fully appreciate the extent of the tenure reform movement and the practical and legal implications it may have on elementary and secondary educators' employment

⁴¹ See, e.g., Elrod, *supra* note 34; Edwin C. Darden, *The Lemon Dance*, 195 AMER. SCHOOL BD. J. 38 (2008); Coleman, et al., *supra* note 9.

⁴² Gary J. Collins, *The New Era of Tenure: What You Need to Know about Changes to Collective Bargaining and Tenure Laws*, Paper presented at the ANNUAL CONFERENCE OF MICHIGAN ASSOCIATION OF SCHOOL BOARDS (2011, Aug. 10).

⁴³ Patrick McGuinn, *Ring the Bell for K-12 Teacher Tenure Reform*, CENTER FOR AMERICAN PROGRESS (2010).

rights, including but not limited to procedural due process of law. This study examines all of the changes that have been made to state teacher tenure legislation in the 50 states and the District of Columbia from January 2008 through June 2012. The issues discussed herein include the role of teacher tenure legislation in education employment practices; the operation of the Fourteenth Amendment within education personnel law; the economic, social, and political context of the teacher tenure reform movement; the types of legislative change that are being made and the rate at which change is occurring; the trends in change, particularly with regards to geography, collective bargaining status, and Race to the Top application and award status; how legislative reforms will impact teachers' federal and state rights under the law; and the possible impacts such changes will have on the education system. Since this study is a legal analysis of legislative changes, the examination and evaluation of the changes will be primarily legal in nature. However, because legal change is often the consequence of political, economic, and/or social change, Chapter 3 provides a discussion of the non-legal factors that may be influencing the reform using a modified versions of John Kingdon's Multiple Streams framework.⁴⁴

Statement of the Purpose

In this study, I will review the teacher tenure legislation from all 50 states and the District of Columbia and accompanying news reports in order to identify the changes that have been made to state teacher tenure laws; organize the data by similarities in legislative change and the identified purpose of the reform (if stated); create a typography of legislative changes that have occurred in this reform movement; identify trends in change by comparing data on legislative change with data on state geography, collective

⁴⁴ JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 2003).

bargaining status, and Race to the Top application and award status; and analyze the political, economic, and social changes that have contributed to the legislative reform, all in order to evaluate the legislative changes, analyze the impact on teachers' employment rights, and determine how these changes will impact educational and legal practice.

Research Questions

This study investigates the following research questions:

- (1) What is the relevant legal history of teacher tenure for elementary and secondary public school teachers?
- (2) What changes have been made to state teacher tenure laws from January 2008 through June 2012? Are their trends in the changes that have been made?
- (3) Why have these changes occurred? What political, economic, and/or social movements are driving changes in teacher tenure legislation?
- (4) How have changes in teacher tenure legislation impacted teacher employment rights? What are the other implications of practice associated with changes in teacher tenure laws?

Procedures

This study is written using legal research methods and a legal scholarship framework. This section includes an overview of legal research, a discussion of the types of legal research, and a description of methods used in this study.

Overview of Legal Research

Research is any systematic, thorough, and rigorous process by which we increase our knowledge.⁴⁵ While there are many characteristics that distinguish legal research

⁴⁵ Adilah Adb Razak, *Understanding Legal Research*, 4 INTEGRATION & DISSEMINATION 19 (2009).

from other social science research⁴⁶, particularly with regards to the methods of data collection, the most distinctive feature of legal research and scholarship is its prescriptive voice.⁴⁷ Legal scholarship seeks to both identify significant legal issues, generally those issues that arise in judicial decisions or statutes, and to evaluate them on their merits.⁴⁸ This often involves a critique of a judicial decision or statute and the presentation of alternatives that would better address the particular legal issue(s). Rubin notes that the prescriptive voice operates as a conscious declaration of a "desire to improve the performance of legal decision-makers."⁴⁹

The prescriptive voice of legal scholarship is a natural byproduct of its purposes. In his article, Philip Kissam sets forth six purposes of legal scholarship.⁵⁰ The first purpose of legal research and scholarship is "to reduce, separate, and break down cases, statutes, and other legal materials into separate elements...for the primary purpose of legal analysis."⁵¹ This most minimal level of legal analysis is not favored by academics, but is, however, widely used by legal practitioners. The next level of legal scholarship, legal synthesis, is used "to fuse the disparate elements of cases and statutes together into coherent or useful legal standards or general rules."⁵² Like legal analysis, this level of

⁴⁶ Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1850-51 (1988). Rubin notes that in addition to its prescriptive voice, legal scholarship is distinguished from scholarship in other fields by its intended audience. While legal scholarship does seek to persuade other scholars, its primary goal is the persuasion of practitioners and law-makers.

⁴⁷ *Id.* at 1847-48. In comparing legal scholarship to scholarship in other areas, Rubin notes "This prescriptive voice distinguishes legal scholarship from most other academic fields. The natural sciences and the social sciences characteristically adopt a descriptive stance, while literary critics adopt an interpretive one. Only moral philosophers seem to share the legal scholar's penchant for explicit prescription." *Id.* at 1848.

⁴⁸ *Id.* at 1848.

⁴⁹ *Id.* at 1847. Rubin points out that legal scholarship often includes description and interpretation as a basis for prescription rather than an independent goal. *Id.* at 1849.

⁵⁰ Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 230 (1988).

⁵¹ *Id.* at 231.

⁵² *Id.* at 232.

legal scholarship generally provides direct practical benefits for practitioners, highlighting "what the law is" on a particular issue.⁵³

The third purpose of legal scholarship is the "resolution of doctrinal issues."⁵⁴ In order to achieve this purpose, several methods may be used in concert, including legal analysis, legal synthesis and policy analysis. Doctrinal resolution may be used for practical purposes such as advising courts or clients as to how a legal doctrine should be applied to a particular set of facts. However, it can also be used in more theoretical arenas, such as in discussing unresolved issues of constitutional law.

For the purposes of this study, the fourth purpose, "production of teaching materials," is not particularly applicable, at least in its present form. However, the fifth and sixth purposes, "understanding" and "critique" respectively, will be addressed in this study. Kissam notes that "understanding of legal doctrine and legal practices involved the explanation of causes, the analysis of consequences, and the interpretation of meaning, or some combination of these functions."⁵⁵ This new scholarship recognizes the necessary relationship between legal doctrine and the political context in which it occurs. The sixth and final purpose of legal scholarship is to critique legal doctrine and practice. This is generally done from a "perspective outside the framework of legal doctrine....[in order] to understand some legal subject and then argue for a better way of doing things."⁵⁶ Since critique has emerged as a form and/or purpose of legal scholarship recently, the methods associated with it are still being tested. Work in this area must be

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 237.

⁵⁶ *Id.* at 238. This approach was instituted by legal realists. Kissam notes that "[i]ts contemporary forms include the extensive normative work in economic analysis of law, the analysis of doctrine and practices from varying perspectives in moral philosophy, and the attempts of both critical legal studies and feminist scholars to argue that the legal system should be changed fundamentally to promote egalitarian and more contextual perspectives about social justice." *Id.* at 238-39.

assessed for validity on a case by case basis. This study will address four of the six purposes set forth by Kissam: legal analysis; legal synthesis; resolution of legal doctrine (to a limited extent); and legal understanding.

Types of Legal Research

Within legal research, there are two types of legal research that are commonly used: "black letter law" and "law in context." While both methods use similar procedures, their ultimate goals differ to some extent. Black letter law is the older, and more traditional of the two methods. It focuses on evidence from the field of law, in the form of Constitutions, statutes, court opinions, and other legal treatises.⁵⁷ The legal resources collected are then reassembled into a coherent framework that provides "order, rationality, and theoretical cohesion" for future legal practice.⁵⁸

Alternatively, compared to black letter law, law in context is a relatively new method of legal research. Growing out of the post-realist legal academy, it focuses on problems in society that may be solved in whole or in part by law or policy.⁵⁹ Also called socio-legal research, it incorporates social science methods, including both qualitative and quantitative analysis, with more traditional legal research methods.⁶⁰ The goal is to "explain legal phenomena (though not necessarily all legal phenomena) in terms of their social setting."⁶¹ As a result, research conducted using the law in context method both informs legal practice and examines how the law operates in context.

⁵⁷ Mike McConville & Wing Hong Chui, RESEARCH METHODS FOR LAW (2007) at 1.

⁵⁸ *Id.*

⁵⁹ Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 INDIANA L. J. 141, 144 (2006).

⁶⁰ *Id.* at 144-45.

⁶¹ *Id.* at 145.

Methods Used in this Study

This study employs the law in context method of legal research. In part, it relies on traditional legal research resources, in the form of constitutions, statutes, legal opinions, and legal scholarship. Specifically, the research included in this study includes a review of the following evidence: (i) all state laws and statutes pertaining to teacher tenure in public elementary and secondary schools; (ii) any legislative changes that have been made to state teacher tenure laws between January 2008 and April 2012; (iii) any state legislative records indicating why changes were made to teacher tenure laws; (iv) any federal policies (including incentive grants) that encourage alterations to teacher tenure regulations; and, (v) any other legal documents or scholarly research that seeks to explain why changes are being made to state teacher tenure statutes. The resources were analyzed, organized, and then reassembled to create a coherent framework, providing orderly and cohesive categorization of legislative change.

However, this study also relies on resources more commonly associated with qualitative and quantitative resources, including academic writings from social science, media reports, speeches, demographic data, and polling and/or survey data. By incorporating these less traditional resources, this study provides a more complete context for the teacher tenure reform movement. It also allows for a more expansive and dynamic examination of the data.

Consistent with the purposes of legal scholarship and law in context research, this study is designed to inform both practice and policy development. In particular, this study seeks to educate scholars in both law and education, attorneys, education practitioners (teachers and administrators), teachers unions, and lawmakers.

CHAPTER 2

LEGAL AND HISTORICAL FOUNDATIONS OF TEACHER TENURE

Introduction

This chapter reviews relevant constitutional, statutory, regulatory, and case law related to the development, application, and amendments to teacher tenure law. The first section of this chapter summarizes the legal and historical foundations of teacher tenure. The first part of this section concentrated on the legal foundations of teacher tenure legislation. The concept of teacher tenure is built upon the procedural protections provided by the due process doctrines (both substantive and procedural). Therefore, this section first provides a thorough discussion of the origins of the concept of due process, beginning with the Code of Hammurabi. It follows the concept through the Magna Carta and the United States Bill of Rights and concludes with an overview of how the Supreme Court of the United States has handled questions regarding substantive and procedural due process from the late nineteenth century to the present.

This chapter then turns to the issue of the constitutional rights of government employees. Historically, government employment was considered a privilege rather than a right. In exchange for the privilege of working for the government, public servants relinquished any fundamental rights that interfered with their duties of employment. However, in the mid-twentieth century, the Court's view on the rights of public servants began to shift and by the 1970s, the Court recognized that government employees has rights to free speech, religion , property, and liberty. In this line of cases, in 1972 the

Supreme Court issued its opinion in the *Board of Regents of State College v. Roth*⁶², recognizing that a teacher may have a constitutionally protected right to property in continued government employment, particularly as a tenured teacher. Even without tenure, the Court recognized that a public servant has a liberty interest in his reputation and ability to find employment. Any interference with this liberty interest, by defamation during the dismissal process or otherwise, may entitle the public servant to certain procedural protections. The Court's expansive views on property and liberty rights laid the groundwork for teacher tenure as we know it today.

The second part of the first section focuses on the historical foundations of teacher tenure legislation. It provides an overview of how teacher tenure legislation first came into being at the turn of the twentieth century and how it grew in popularity with the support of the national teachers' unions. This section then looks at some of the additional policy considerations and unintended consequences that arise as the result of teacher tenure laws. The political and social context surrounding the changes that have been made to teacher tenure legislation in the last four years will be discussed in more depth in Chapter 3 of this study.

The second section of this chapter provides an overview of the changes made to teacher tenure legislation from January 2008 through June 2012. Table 1 provides information regarding each states teacher tenure policy, including: applicable probationary period; statute citation; proposed and/or enacted changes to tenure legislation; and a description of changes to tenure legislation (based on the nature of the change). An analysis of the changes will be provided in Chapter 4 of this study.

⁶² 408 U.S. 564 (1972).

Legal Foundations of Teacher Tenure

Due Process: Historical Context

Due process of law is not only a concept of law familiar in the United States, but has historical roots going back thousands of years. In fact, principles of due process can be traced back to ancient Chinese, Egyptian, and Hebrew laws.⁶³ The concept of due process is built upon the basic principle of fairness that is necessary in the formation of any just legal system.⁶⁴ Due process is based upon the premises that there are some fundamental individual rights that supersede the power of the government and that when the government interferes in certain rights, individuals are entitled to procedural protections.

Code of Hammurabi. Historical texts confirm the use of procedural protections in the Mesopotamian Code of Hammurabi (circa 1772 BCE) that include concepts similar to that of our due process. For example, the ancient legal writing provided for fair notice of the law and established a common rule of law for its citizens.⁶⁵ The well preserved Babylonian Code's stated purpose was "to give the protection of right to the land...and brought about the well-being of the oppressed."⁶⁶

Magna Carta. The concepts of due process in the Anglo-American tradition were first codified in the Magna Carta (1215).⁶⁷ This document, also known as the "Great Charter of liberty," is one of the earliest western enumerations of individual rights

⁶³ John Dayton, EDUCATION LAW: PRINCIPLES, POLICY, AND PRACTICE 240 (2012). The essential elements of due process, including fairness, standardized application of the law, and hearings before neutral decision-makers may go back much further to tribal law.

⁶⁴ *Id.* at 240.

⁶⁵ *Id.* See also, C.H.W. Johns, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS (1904).

⁶⁶ L.W. King, THE CODE OF HAMMURABI: TRANSLATED BY L.W. KING (2005).

⁶⁷ Dayton, *supra* note 63, at 240.

and freedoms.⁶⁸ While the idea of liberty set forth in the Magna Carta did not extend to the masses⁶⁹, it provided inspiration for the individual liberties conceived by America's founding fathers.

As applied to teacher tenure issues, the Magna Carta laid the ground work for American property rights. At the time of its drafting, the Magna Carta applied very literally to personal property. However, as it was adopted in the United States and was later interpreted by the courts, property rights grew to include rights to contracts and continued employment.⁷⁰ Additionally, the Magna Carta included one of the first codifications of the concept of due process. Paragraph 39 of the Magna Carta reads:

No freeman shall be taken or imprisoned, or disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell no man, we will not deny or defer to any man either justice or right.⁷¹

In the thirteenth century, this guaranteed some level of fairness in how the law was applied, as opposed to arbitrary ruling by the King. The concept of due process matured over the centuries and eventually manifested itself in American law as the 5th and 14th Amendments.

The Declaration of Independence. In 1776, the Second Continental Congress adopted the Declaration of Independence, announcing the American colonies'

⁶⁸ David W. Saxe, *Teaching Magna Carta in American History: Land, Law, and Legacy*, 43 HISTORY TEACHER 329 (2010).

⁶⁹ *Id.* at 330. The Magna Carta generally granted rights and liberties to those with wealth and power, particularly landowners. It did not include rights for the common Englishman. In fact, some argue that the Magna Carta was not drafted in order to protect national democratic ideals or individual legal rights. Instead, it was created to provide a contemporary solution to a political crisis concerning feudal governance, taxation, justice and royal authority - issues that were commonly abused by English monarchs. Chris Sharp, *Magna Carta: The Supremacy of Law and the Concept of Legal Rights Owe their Origin to the Great Charter of 1215*, 27 BRITISH HERITAGE-HARRISBURG 26, 28 (2006).

⁷⁰ Not all contracts or employment trigger property rights. The extent to which property rights do exist in these situations, please see the discussion of due process below.

⁷¹ MAGNA CARTA of 1215, ¶ 39.

independence from Great Britain. Predominantly written by Thomas Jefferson, the Declaration of Independence not only laid out the overall framework for the American government, making the people the highest authority in the land, but it provided our first, and most basic statement of unalienable rights. The Declaration states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain and unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."⁷² The framers of the Constitution expanded upon these rights when they drafted the Declaration of Independence. While the entire Bill of Rights is thought to address the pursuit of "life, liberty, ...and happiness," the similarity in language used in the Due Process Clause, guaranteeing "life, liberty, and property," makes it easy to see the maturation of rights.

The Constitution and the Bill of Rights. The United States Constitution lays out the framework for the organization and operation of the federal government. In part, it lists the powers of the federal government. Alternatively, the Bill of Rights, the collective name for the first ten amendments to the Constitution, is dedicated to the individual rights of the people. Because the powers of the people are paramount in American law, the Bill of Rights also serves to limit the powers of the government.

The Due Process Clause is one of the Constitutional guarantees provided for in the Fifth and Fourteenth Amendments. Read together, the two amendments guarantee due process of law when there is a government interference with an individual's right to life, liberty or property. The Fifth Amendment limits federal government actions, while the Fourteenth Amendment controls the actions of state governments. The whole concept

⁷² DECLARATION OF INDEPENDENCE of 1776. The phrase "life, liberty, and pursuit of happiness" is now one of the most recognized phrases in the English language.

of teacher tenure legislation rests, in large part, on the concept of due process of law as it is laid out in the Bill of Rights. When state governments began to adopt teacher tenure statutes, they looked to the Bill of Rights and constitutional law for guidance on what process should be guaranteed to teachers upon termination and when due process was required. Due process, both procedural and substantive, is discussed at great length in the sections that follow.

State Constitutions. In addition to the federal constitution, each state has its own constitution. While each state's constitution includes particular provisions that conform with the particular needs or values of that state's citizens, state constitutions protect many of the same rights found in the United States Constitution. In some cases states will adopt the actual language used in the United States Constitution. For example, in the State of Georgia, the state constitution protects an individual's right to due process in the first and second paragraphs of the Georgia Bill of Rights which reads:

Paragraph I. ***Life, liberty, and property.*** No person shall be deprived of life, liberty, or property except by due process of law.

Paragraph II. ***Protection to person and property; equal protection.***

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.⁷³

The due process and equal protection guarantees provided for in the Georgia Constitution closely resemble the rights enumerated in the Fifth and Fourteenth Amendments of the United States Constitution.⁷⁴

⁷³ GA. CONST. art. I, § 1, ¶¶ 1 & 2.

⁷⁴ Since the majority of teacher tenure litigation concerns some infringement on an individual's right to due process, protected by both state and federal constitutions, they may be heard in either federal or state court. Federal courts may hear any case involving a question of federal law. In the case of teacher tenure litigation, a plaintiff could file his case in federal court because his right to due process is protected by the Fifth and Fourteenth Amendments to the United States Constitution. In nearly all circumstances, any claim that can be heard in federal court may also be heard in state court, even if the case involved a question of federal law. Therefore, in lawsuits concerning teacher tenure, where due process rights are at issue, a

Due Process: Legal Foundations

The concept of due process of law is incorporated into United States law through the Fifth and Fourteenth Amendments.⁷⁵ Both Amendments prohibit government actions which interfere with an individual's "life, liberty or property without due process of law."⁷⁶ In its most basic form, the due process clause requires that the government act fairly and consistently in matters concerning an individual's life, liberty, or property. Due process protects individuals from abuse of power by government agents and capricious or arbitrary application of the law.⁷⁷

The concept of due process is multi-faceted. The due process clause has procedural aspects that guarantee individuals a certain "process" if they are denied of life, liberty, or property.⁷⁸ Alternatively, substantive due process restricts the ways in which governments may impede the exercise of individual freedoms. Nowak & Rotunda note:

Part of the substantive impact of the due process clause of the fourteenth amendment is the 'incorporation' of certain guarantees in the Bill of Rights. Thus state legislatures cannot pass legislation which denies freedom of speech, for to do so would violate due process in that the liberty it protects includes the freedom of speech guaranteed by the first amendment.⁷⁹

Issues that arise in teacher dismissal issues may involve either procedural or substantive due process issues, depending upon the tenure status of the teacher.

Procedural due process. When life, liberty, or property are at stake, an individual has the right to fair procedure. When a government action adversely affects an individual but does not interfere with his fundamental rights, the individual is not entitled

plaintiff may file suit in either state or federal court. When faced with such a decision, a plaintiff may consider the location of the courthouse, statutes of limitations, judges, and jury panels.

⁷⁵ Dayton, *supra* note 63, at 240.

⁷⁶ U.S. Const. amend. V; U.S. Const. amend. XIV.

⁷⁷ Dayton, *supra* note 63.

⁷⁸ John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW 487 (4th ed. 1991).

⁷⁹ *Id.*

to any procedural protections.⁸⁰ Given these guidelines, the questions become: 1) What procedure is "fair" or "due" under the Due Process Clause?; and 2) What aspects of an individual's life qualify as life, liberty, or property?

What process is due? When a person is deprived of life, liberty, or property, the government is required to follow some procedure or process to ensure that the government action complies with the Due Process Clause. However, the exact procedure that is required is unclear and depends upon a number of factors.⁸¹ Currently, the Supreme Court uses a rather utilitarian approach to determine whether an individual has been denied procedural due process of law. Using this approach, the justices determine the scope of the procedures required for a particular deprivation of rights by balancing the worth of the procedure to the individual against the cost of the procedure to society as a whole.⁸²

When considering the sufficiency of a particular procedure, the Court may consider the basic elements of due process, the type of case at issue, and burden of proof. The essence of the due process clause is the concept of fairness. The procedure that the government uses to resolve factual and legal disputes associated with an individual deprivation of life, liberty, or property must be fundamentally fair to the individual. While the exact procedures required by the due process clause may vary depending on

⁸⁰ *Id.* at 488.

⁸¹ *Id.* at 524.

⁸² *Id.* However, many scholars have criticized this approach. For example, in his article *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, Professor Jerry L. Mashaw notes that the Supreme's Court's approach has five major flaws. His main criticism is that the Court should be more focused with procedural safeguards rather than adversary procedures. He notes that the utilitarian approach degrades the nature of the procedural rights and argues that the Court is not particularly well suited to conduct such a balancing test. 59 CORNELL L.REV. 772 (1972).

the circumstances, the basic elements which must be afforded an individual deprived of life, liberty, or property are:

- (1) adequate notice of the charges or basis for government action;
- (2) a neutral decision-maker;
- (3) an opportunity to make an oral presentation to the decision-maker;
- (4) an opportunity to present evidence or witnesses to the decision-maker;
- (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual;
- (6) the right to have an attorney present the individual's case to the decision-maker;
- (7) a decision based on the record with a statement of reasons for the decision.⁸³

If the case at issue involves criminal charges or a formal judicial process of some type, the following elements may also be required:

- (1) the right to compulsory process of witness;
- (2) a right to pre-trial discovery of evidence;
- (3) a public hearing;
- (4) a transcript of the proceedings;
- (5) a jury trial;
- (6) a burden of proof on the government greater than a preponderance of the evidence standard.⁸⁴

⁸³ Nowak & Rotunda, *supra* note 78, at 525.

⁸⁴ *Id.*

In applying its balancing test, the Court also considers the burden of proof required and by whom it is born. In a limited number of cases, the Court may consider an individual's right to appeal an adverse decision.⁸⁵

What qualifies as "life, liberty, or property"? At the end of the nineteenth century and the beginning of the twentieth century, there was a distinction in constitutional law between "rights" and "privileges."⁸⁶ A right was specifically protected by the Constitution, while a privilege was granted through legislation or regulation. Accordingly, a government deprivation of "rights" was controlled by constitutional standards. However, the government could deny "privileges" for any reason with almost no restrictions.⁸⁷ The Supreme Court used this rationale to uphold groundless denials of professional licenses⁸⁸ and restrictions on university admissions⁸⁹.

However, the Court realized that the right-privilege distinction failed to adequately protect individual rights from the power of the government. It began to chip away at the doctrine over time. The first sign of erosion came in the form "constitutional conditions."⁹⁰ Under this doctrine, governments were prohibited from doing indirectly what they were prohibited from doing directly. Consequently, the government could no longer deny "privileges" if it resulted in the denial of a constitutional "right"; the state

⁸⁵ *Id.* While the Court has never held the right to appeal as inherent to due process law, the requirements that individuals be treated equally where fundamental rights are at issue has created some rights of access to the courts.

⁸⁶ *Id.* at 489.

⁸⁷ *Id.* For example, in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892), the Supreme Court of Massachusetts upheld the termination of a police officer who was fired for engaging in political activities. Justice Oliver Wendell Holmes noted: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

⁸⁸ See *Barsky v. Board of Regents*, 347 U.S. 442 (1954).

⁸⁹ See *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934).

⁹⁰ Nowak & Rotunda, *supra* note 78, at 489. See also, Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935).

could no longer make the receipt of "privileges" dependent upon the relinquishment of constitutionally protected rights.⁹¹

The "constitutional conditions" doctrine did not resolve the debate. Application of substantive due process and equal protection further complicated issues. The Court sought a more logical approach to defining and protecting individual freedoms. However, in recent years it seems to be regressing towards the rights-privilege distinction. Since 1972 the Court has adopted a literal and restrictive approach to procedural due process, applying it only in situations directly involving life, liberty, or property.⁹² Therefore, in recent years the Court has permitted government actions that adversely impact individual rights without any procedural protections. The Court has also permitted the states to define the benefits to which its citizens are "entitled" and therefore constitute a property interest.⁹³ While the Court no longer uses the right-privilege distinction, the application of the procedural due process clause is limited to cases of certain interest in life, liberty, or property. For the purposes of this study, only liberty and property interests are at stake. Therefore, the Court's interpretation of "life" will not be discussed herein.

Liberty. The term "liberty" may encompass "any form of freedom of action or choice which is accorded constitutional recognition by the Court."⁹⁴ In fact, it is the

⁹¹ Nowak & Rotunda, *supra* note 78, at 489. For example, a provision that government housing would only go to those who agreed not to speak out against the policies of the state or federal government violated the "unconstitutional conditions" doctrine. While there is no right to public housing, such a policy is clearly an attempt by the government access to public housing as a tool to stifle political speech, which is a fundamental right.

⁹² *Id.* at 490.

⁹³ *Id.*

⁹⁴ *Id.* at 496. *See also*, Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 411-16 (1977).

concept of "liberty" that is the primary restraint upon state action.⁹⁵ Under the Fourteenth Amendment, liberty includes all of the provisions of the Bill of Rights that the Court deems incorporated into the Due Process Clause in addition to the "fundamental rights" derived from the concept of liberty or other constitutional values.⁹⁶ Since procedural due process protections are intended to protect individuals from being deprived of a constitutional liberty without a fair "process," one can focus on the procedural aspects of "liberty" by considering what types of individual freedom of action "cannot be limited by the government except with a fair procedure to determine the basis for, and legality of, the limitation."⁹⁷

There are three ways in which an individual may be deprived of liberty. First, a person may be physically restrained as the result of a government action. Since this type of liberty interest is not at issue in this study, it will not be discussed further. Second, a government action may result in a limitation of an individual's constitutional freedom of choice or action, making it illegal for the individual to engage in certain constitutionally protected activities.⁹⁸ Finally, a government action may preclude an individual from engaging in certain activities that do not qualify as constitutional rights.⁹⁹

When a government action seeks to interfere with an individual's right that is considered "fundamental" because it is constitutionally guaranteed, the individual is entitled to due process of law. The fundamental nature of a right can be either explicit¹⁰⁰

⁹⁵ The concept of "liberty" is also the basis for the requirement that government action must relate to a legitimate state purpose or function used in substantive due process analyses.

⁹⁶ Nowak & Ronald, *supra* note 78, at 496.

⁹⁷ *Id.*

⁹⁸ *Id.* at 497.

⁹⁹ *Id.*

¹⁰⁰ Many of the rights listed in the Bill of Rights have been incorporated into the due process clause, such as freedom of speech, freedom of assembly, freedom of religion, etc.

or implicit¹⁰¹, has some contextual basis in the Constitution, and is essential to American society.¹⁰² "The Court recognized the concept of fundamental rights when it incorporated most of the guarantees of the Bill of Rights into the due process clause of the fourteenth amendment and applied them to the states."¹⁰³ Therefore, when the government intends to punish an individual for engaging in a constitutionally protected activity, a hearing is first required.

While the Court has not determined the scope of liberties protected by the due process clause, the Court has recognized that they go beyond physical restraint and constitutional rights.¹⁰⁴ The due process clause also guarantees that individuals will have some freedom of action in important personal matters. The Court notes that the term "liberty" also:

[D]enotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.¹⁰⁵

However, the Court was careful to note that not all human activity could fall under the definition of "liberty" and that some activities could be denied without procedural protections.¹⁰⁶ Some areas which are not constitutionally protected but have been recognized as "liberties" include but are not limited to restrictions on employment, issuance or withdrawal of professional licensure, and injury of reputation. These liberties

¹⁰¹ The most significant implied "fundamental" freedoms include the right to freedom of association, the right to interstate travel, the right to privacy (including privacy of marriage, family, and sexual matters), and the right to vote.

¹⁰² *Id.* at 505.

¹⁰³ *Id.* See e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1987).

¹⁰⁴ Nowak & Rotunda, *supra* note 78, at 509.

¹⁰⁵ *Roth*, 408 U.S. at 572, quoting *Meyer*, 262 U.S. at 390.

¹⁰⁶ *Roth*, 408 U.S. at 569-70.

do apply to issue of teacher tenure and will be discussed in greater detail in the section on *Board of Regents v. Roth*.

Property. While states do control all property because the state is responsible for defining or limiting property, both state and federal governments are subject to constitutional limitations. The Constitution includes substantive limitations which limit the way governments can define or limit property, such as the equal protection clause and substantive due process. But where the state does have the freedom to define or limit property, the government is still required to follow certain procedures if it is depriving an individual from any property.¹⁰⁷ Consequently, there are two main questions concerning procedural due process and property. First, what constitutes a deprivation of property? Second, what constitutes property?¹⁰⁸

In response to the first question, procedural due process only applies to government deprivations of property, not private actions.¹⁰⁹ Defining property is a more complicated issue. Of course the traditional concepts of real and personal property fall within the definition. However, government distributions which do not fit within the classical concept of property may be harder to define.¹¹⁰ Under the right-privilege distinction, it would be fairly simple to determine how to treat government benefits. Because the government was under no duty to provide social welfare services, they would be defined as a "privilege" and there would be no procedural due process required if the government deprived an individual or group of individuals from the government

¹⁰⁷ Nowak & Rotunda, *supra* note 78, at 513.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Included in the definition of "state action" are situations in which the government enforces a private claim of property of one person against another. Therefore, procedural due process comes in to play in foreclosure cases and cases in which the government takes personal property for public use.

¹¹⁰ *Id.* at 514.

service.¹¹¹ However, since the Court no longer follows the rights-privilege doctrine, now when the government undertakes to provide a benefit, it must do so in accordance with the restrictions of the Constitution.

In 1972, the concept of property was expanded to include government "entitlements."¹¹² In *Roth*, the Court recognized an interest in a government entitlement as constitutional "property" when the individual is deemed "entitled" to it. In other words, a government benefit can fall within the definition of "property" triggering procedural due process, if an individual has a legal expectation to continued receipt of that benefit.¹¹³ This concept extends to government employment when an individual has already received a government position and applicable law guarantees him continued employment.¹¹⁴ However, if the individual either has not yet been hired or has no legally grounded expectation of continued employment, the individual does not have an entitlement-property interest in continued employment.¹¹⁵ This concept will be discussed in more depth later in this chapter.

Substantive due process. Early legal theorists from both England and America considered the concept of due process to be a largely procedural concept.¹¹⁶ However, following the civil war, with the rise of the natural rights philosophy, theorists began to intimate that due process should have a substantive element.¹¹⁷ Under this theory, legislation or state action that interferes with an individual's fundamental rights, presumably those set forth in the Bill of Rights, constitutes an encroachment upon an

¹¹¹ *Id.*

¹¹² *Roth*, 408 U.S. at 564.

¹¹³ *Id.* at 576.

¹¹⁴ *Perry v. Sindermann*, 408 U.S. 593 (1972).

¹¹⁵ *Id.*

¹¹⁶ Nowak & Rotunda, *supra* note 78, at 355.

¹¹⁷ *Id.*

individual's right to be free from state action that interferes with his or her rights.¹¹⁸

Perhaps the clearest example of substantive due process under state law is *Wynehamer v. People*.¹¹⁹ In *Wynehamer*, the New York Court of Appeals held the state's prohibition law unconstitutional¹²⁰ to the extent that it applied to liquor owned prior to the passage of the statute. The court concluded that the legislature was not vested with the right to subvert the fundamental right to property of individual citizens in such a manner.

Federal decisions applying the concept of due process were far more complicated. The Supreme Court first used the idea in its decision in *Dred Scott v. Stanford*.¹²¹ As one of its grounds for finding against Mr. Scott, the Court held that Congress did not have the authority to pass legislation interfering with an individual's right to own slaves. As a consequence, the Court held the Missouri Compromise to be in violation of the Constitution because it deprived slave owners of their rights without due process. However, because of the complicated nature of the *Dred Scott* opinion and the legal factors associated with the Civil War, substantive due process did not reappear in constitutional law until after the passage of the Fourteenth Amendment. Even then, the Court used discretion in its interpretation of the Fourteenth Amendment.¹²²

¹¹⁸ *Id.* For example, "the Marshall court indicated that state laws which interfere with the free use of property by a chartered corporation violated not only the contract clause but also an inherent right of individuals to be free of legislation which interfered with vested property rights."

¹¹⁹ 13 N.Y. (3 Kern.) 378 (1856).

¹²⁰ The court's decision was based on the New York state constitution, not the Constitution of the United States.

¹²¹ 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1856). *Dred Scott* was taken as a slave into Illinois by his owner and the northern part of the Louisiana Purchase territory. By this time, Illinois has outlawed the practice of slavery and the territory to which Mr. Scott was taken had been declared a "free territory" by the Missouri Compromise. Mr. Scott sued his owner, claiming that by having been taken into the "free territory," he had been made a free man. See Nowak & Rotunda, *supra* note 78, at 356.

¹²² For example, in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872), the Supreme Court considered a Louisiana state law that prohibited the operation of slaughter-houses within the city of New Orleans with the exception of one particular company, the Crescent City Company. Adversely affected slaughter-houses and butchers brought suit against the state, claiming that the law violated both the Thirteenth and Fourteenth Amendments. Specifically, they claimed that the law constituted a violation of

Finally, in 1887, in *Mugler v. Kansas*¹²³, the Supreme Court explicitly stated that it would use substantive due process as an evaluative tool for determining the constitutionality of government regulations. While the Court upheld the particular statute at issue in the case, it stated that there were limits to governmental legislative authority and that the courts had a duty to determine when the legislature exceeded its authority.¹²⁴ The *Mugler* opinion put lawmakers on notice that "the Court would begin evaluating the relationship of a law to its purported purposes. A statute had to have a substantial relation to the protection of the public health, morals, or safety before the Court would sustain the measure as a valid exercise of the state's police power."¹²⁵

Throughout the first third of the twentieth century, the court used the concept of substantive due process to restrict individual freedom of action (regarding life, liberty, or property) of all persons.¹²⁶ However, in the late 1930s, the Court began to distinguish between cases in which legislation interfered with the natural rights of all citizens from those cases in which it interfered with the rights of a particular group or category of citizens. Where the Court previously focused generally on the denial of rights by applying the Due Process Clause, it began to apply the Equal Protection Clause in cases in which a particular class was impacted by a regulation. Additionally, in the late 1930s, the Court began to distinguish between cases concerning general economic and social welfare¹²⁷ from those cases in which a fundamental constitutional right is at issue.

the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court dismissed all of the plaintiff's contentions. In part, it concluded that the Fourteenth Amendment's Due Process Clause only guaranteed that states would enact laws in accordance with procedural due process, not substantive.

¹²³ 123 U.S. 623 (1887).

¹²⁴ Nowak & Rotunda, *supra* note 78, at 360-61.

¹²⁵ *Id.* at 361.

¹²⁶ *Id.* at 369.

¹²⁷ In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court set a new course for the judiciary. Whereas the judiciary had been rather liberal in its oversight of economic and social regulations

Today, substantive due process and equal protection do not place significant restraints on legislation concerning economic or social welfare. Now, only fundamental rights, which include life, liberty, and property, are actively protected by the Supreme Court.¹²⁸

Constitutional Rights of State Employees

Public school teachers, like all government employees, have two different relationships with the government. As a member of the public, teachers are citizens. They have all of the rights and responsibilities that come with that relationship.¹²⁹ However, they are also employees. The employer/employee relationship carries with it rights and responsibilities that go beyond that of an ordinary citizen.¹³⁰ In the case of teachers, as government employees, there must be a balance between their rights and duties and citizens and their rights and duties as employees.

The Privilege Doctrine. Historically, government employees have had to relinquish some or all of their individual rights in order to acquire and retain government employment.¹³¹ Until the twentieth century, government service was considered a privilege rather than a right.¹³² Under the privilege doctrine, when a citizen accepted government employment, he also accepted all of the conditions that went along with it;

to that point, in *Parrish*, the Court required the judiciary to give great deference to lawmakers at the federal, state, and local levels. The Court held that legislation concerning economic or social welfare should not be overturned unless the law has no rational relationship to the legitimate interest of the government.

¹²⁸ Nowak & Rotunda, *supra* note 78, at 378.

¹²⁹ Jennifer Friesen, *The Public Employee's Stake in State Constitutional Rights*, 496 ANNALS OF THE AM. ACAD. OF POLITICAL AND SOC. SCI. 88, 89(1988). Citizens are responsible for paying taxes and following the laws of the land. However, they also have rights associated with citizenship, such as voting and a protection of fundamental rights.

¹³⁰ *Id.* Some employee duties, often those associated with the particular actions of the job, are concrete. Others may be more vague, such as loyalty to an employer or efficiency. These duties are more generally common for all employees and are not tied to any one particular job or position.

¹³¹ *Id.* Friesen notes that "[t]he rights they had possessed as citizens they lost as servants."

¹³² This view towards government employment is a vestige of royal rule, when all government service was done at the pleasure of the King.

even if that meant the surrender of certain individual rights and freedoms. The doctrine's central tenet states:

[T]hat office is held at the pleasure of the government. Its general effect is that the government may impose upon the public employee any requirement it sees fit as conditional to employment. From the point of view of the state, public employment is maintained as an indulgence; from the position of the citizen, his job as a grant concerning which he has no independent rights.¹³³

Under these circumstances, the individual's rights were not considered violated in the constitutional sense because he voluntarily accepted the restriction of his rights, he was not compelled.¹³⁴

Therefore, while the privilege doctrine guided judicial rulings, government employees were made to choose between continued employment and the exercise of their fundamental rights.

In perhaps the most widely cited case concerning the privilege doctrine, *McAuliffe v. Mayor of New Bedford*, the Supreme Court of Massachusetts considered whether a police officer could be fired for engaging in "political canvassing" in his off-duty hours.¹³⁵ In upholding the officer's termination, Justice Oliver Wendell Holmes noted:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control.¹³⁶

¹³³ Arch Dotson, *The Emerging Doctrine of Privilege in Public Employment*, 15 PUB. ADMIN. REV. 77 (1955).

¹³⁴ David Rosenbloom, *The Constitution and the Civil Service: Some Recent Developments, Judicial and Political*, 18 KAN. L. REV. 839, 840 (1970).

¹³⁵ 155 MASS. at 217.

¹³⁶ *Id.* at 220. For other examples of cases in which courts upheld employment decisions that limited the exercise of individual rights, see *Bailey v. Richardson*, 182 F.2d 46, 59 (1950) in which the court stated, "The plain hard fact is that so far as the Constitution is concerned, there is no prohibition against the dismissal of Government employees because of their political beliefs, activities, or affiliation...The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ." See also, *Adler v. Board of Education*, 342 U.S. 488, 492-93 (1952), in which the Court determined that faculty "may work for the school system upon reasonable terms laid down by the proper authorities of New York."

As discussed in the above section on substantive due process, during this time, the courts would only interfere into government actions that directly interfered with individual rights. Government actions that indirectly deprived individual rights were permitted.¹³⁷ In order to justify its decisions, the courts embraced the privilege doctrine, relying on the precept that individuals are not entitled to due process protections when they are deprived of something to which they have no right.¹³⁸

In 1939, Congress sought to codify certain limitations on the rights of federal employees to engage in political speech when it passed the Political Activity Act¹³⁹, more commonly known as "the Hatch Act" after its author, Senator Carl Atwood Hatch. The Act's goal was to enforce political neutrality among civil servants by prohibiting employees of the federal government, the District of Columbia, and some state and local employees¹⁴⁰ from engaging in certain activities while on duty, in a government office, in uniform, or in a government vehicle.¹⁴¹ While the Act has been criticized as being an intrusion upon the First Amendment freedoms of government employees, the Supreme Court has disagreed. Twice the Court has upheld the constitutionality of the Act.¹⁴² The Court determined that such restrictions to the First Amendment rights of government

If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

¹³⁷ Additionally, in 1892 there was no property right associated with continued government employment.

¹³⁸ Steven W. Hays & Luther F. Carter, *The Myth of Hatch Act Reform*, 4 S. REV. OF PUB. ADMIN. 340, 343(1980).

¹³⁹ 5 U.S.C.A. 7324 (1939).

¹⁴⁰ The Act applied to state and local employees who work in connection with federally funded programs.

¹⁴¹ Some of the activities prohibited by the Act include: the use of official authority or influence to interfere with an election; the solicitation or discouragement of political activity of anyone with business before the employees agency; the solicitation or receipt of political contributions; running for public office in partisan elections; etc. Employees of some agencies (like the Department of Justice, Federal Elections Commission, Federal Bureau of Investigations and the National Security Agency, to name a few) have more extensive restrictions than government employees in other departments and agencies.

¹⁴² See *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973).

employees were reasonable and necessary to ensure neutral and effective public administration.¹⁴³

The Substantial Interest Doctrine. Shortly after the passage of the Hatch Act, in the 1940s, the popularity of the privileges doctrine began to decline.¹⁴⁴ A new constitutional doctrine began to emerge, "grounded in the premise that public employees retain substantive constitutional rights which government cannot abridge without a showing of actual necessity."¹⁴⁵ Under the doctrine of substantial interest, the removal of government employees could violate the procedural due process requirement of the Constitution.¹⁴⁶ Unlike the doctrine of privilege, the doctrine of substantial interest encourages compatibility between the roles of citizen and civil servant.¹⁴⁷

There are two lines of cases that gave rise to the substantial interest doctrine. The first line of cases concerns the issue of political neutrality. The concept emerged as mildly worded dicta in *United Public Workers v. Mitchell*.¹⁴⁸ In this case, various labor unions and federal employees wishing to participate in political campaigns and management filed suit, claiming that the prohibitions set forth in the Hatch Act were vague, indefinite, arbitrarily discriminatory, and constituted a deprivation of liberty.¹⁴⁹ While the Court did rely on the privilege doctrine in finding in favor of the government, it made one short statement that indicated a possible turning of the tides. The Court noted:

¹⁴³ The Hatch Act, as amended in 1993, still applies to government employees. The president and vice president of the United States are exempt from the restrictions set forth in the Act.

¹⁴⁴ Hays & Carter, *supra* note 138, at 343.

¹⁴⁵ *Id.*

¹⁴⁶ Dotson, *supra* note 133, at 840.

¹⁴⁷ *Id.* The doctrine of substantial interest is also politically important because it provided courts with the means of taking a more active role in determining the nature of public employment.

¹⁴⁸ 330 U.S. at 75.

¹⁴⁹ *Id.* at 82-83.

Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on Congressional power but because there are some limitations it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid.¹⁵⁰

While the above admission did nothing to help the plaintiffs in *Mitchell*, it was an acknowledgement by the Court that the authority of Congress to abridge the rights of government employees was limited by the Constitution.¹⁵¹

The second line of cases that gave rise to the adoption of the substantial interest doctrine concerned loyalty and security. Just five years after the *Mitchell* opinion was released, the Court rendered its opinion in *Wieman v. Updegraff*.¹⁵² In *Wieman*, the plaintiffs challenged an oath of loyalty that required Oklahoma state employees to swear that they did not belong to any organization that sought to overthrow the government by force or violence.¹⁵³ In its opinion, the Court used the *Mitchell* dicta to guide its decision to overturn the loyalty oath.¹⁵⁴ It stated, "[w]e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is

¹⁵⁰ *Id.* at 100.

¹⁵¹ Hays & Carter, *supra* note 138, at 344.

¹⁵² 344 U.S. 183 (1952). See Hays & Carter, *supra* note 138, at 344-45. The *Wieman* case followed a series of Supreme Court cases dealing with the issue of loyalty and security. In 1946, the Court ruled in *United States v. Lovett*, 328 U.S. 303, regarding a provision of the 1943 Urgent Deficiency Appropriations Act which prohibited the payment of future compensation to three civil servants because of their alleged disloyalty. The Court likened the Act to a bill of attainder and concluded that such government action violated the employees constitutional rights by not proscribing to the procedures set forth in the sixth amendment. In 1950, a federal circuit court upheld the termination of an employee under President Truman's Loyalty Order in *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950). The plaintiffs sued for damages associated with the release of information regarding her dismissal proceedings that were supposed to be kept confidential. The circuit court opinion was later upheld by the Court of Appeals for the District of Columbia and the Supreme Court. See also, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Garner v. Los Angeles*, 341 U.S. 716 (1951); and *Adler v. Board of Education*, 342 U.S. 485 (1952).

¹⁵³ *Wieman*, 344 U.S. at 186-87.

¹⁵⁴ *Id.* at 191-92.

patently arbitrary or discriminatory."¹⁵⁵ The *Wieman* decision marks the turning point between the privilege doctrine and the substantial interest doctrine. While the Court did not classify the right to continued government employment as a constitutional right (that would come later), it did establish the principle that constitutional rights do apply to citizens employed by the government. Consequently, this case provided the basis for several decisions which declared unconstitutional certain curtailments of the substantive constitutional rights of citizens in public employment.¹⁵⁶

For the next sixteen years, the Court continued to struggle with the balance between individual freedoms and employment restrictions for public servants. In 1968, the Court issued its opinion *Pickering v. Board of Education*.¹⁵⁷ Mr. Pickering, an Illinois public school teacher, was terminated from his employ after sending a letter to a local newspaper criticizing the local Board on Education and the District Superintendent of Schools in connection with a proposed tax increase. The Board claimed that Mr. Pickering's statements had a detrimental effect on the operations of the school district and that some of the statements made were false.¹⁵⁸ The Court held that Mr. Pickering's termination violated his first amendment rights. Writing for the majority, Justice Marshall noted that "...the threat of dismissal from public employment is...a potent means of inhibiting speech."¹⁵⁹ Justice Marshall presented the new standard test against which the speech of public employees would be measured:

...it cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differ significantly from those

¹⁵⁵ *Id.* at 192.

¹⁵⁶ Rosenbloom, *supra* note 134, at 846. See, e.g., *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

¹⁵⁷ 391 U.S. 563 (1968).

¹⁵⁸ *Id.* at 564.

¹⁵⁹ *Id.* at 574.

it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.¹⁶⁰

In its application of the balancing test to the facts at issue in this case, the Court stated:

...free and open debate is vital to informed decision making by the electorate. Teachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.¹⁶¹

The *Pickering* decision is hugely significant because it is the first time that the Court recognized that there "exists a range of apparently political activities that public employees may engage in."¹⁶² Additionally, it established a balancing test to govern such situations. That test is still applied by the Court to evaluate restrictions to public employees' free speech.

One year later, in *Tinker v. Des Moines Independent Community School District*,¹⁶³ the Court reaffirmed the notion that public school teachers do not relinquish their constitutional rights merely because they are government servants. In the majority opinion, the Court stated that it could "hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate."¹⁶⁴ Following the *Tinker* opinion, and its acknowledgement of government employees' First Amendment rights, the Court considered whether government

¹⁶⁰ *Id.* at 568.

¹⁶¹ *Id.* at 571-72. The Court recognized that the employee's position and/or nature of employment may also be relevant. Mr. Pickering's position as a teacher made him particularly qualified to discuss the actions of the Board of Education, not because of the academic nature of his employment but because of his familiarity with the Board and its activities.

¹⁶² Hays & Carter, *supra* note 138, at 346.

¹⁶³ 393 U.S. 503 (1969).

¹⁶⁴ *Id.* at 506.

employment itself, or at least the expectation of continued employment by the government, constituted a constitutionally protected right.

Continued Government Employment as a Property Right.

Under the current due process doctrines (substantive and procedural), the right to continued employment with the government can qualify as a property right, where interference with that right requires due process protections.¹⁶⁵ However, this is a rather new phenomenon. Up until the mid-twentieth century, courts defined property interests as they were defined in common law, through a lens of rights and privileges.¹⁶⁶

Government employment was seen as a privilege rather than a right, that the government could withdraw at any time without due process.¹⁶⁷ However, the Court significantly expanded the legal sources of property interests eligible for due process protections in *Goldberg v. Kelly*.¹⁶⁸ In *Goldberg*, the Court held that statutory benefits like welfare benefits amounted to a constitutionally protected property interest, not just a privilege conferred upon by the government.¹⁶⁹ Therefore, the welfare recipients at issue in *Goldberg* were entitled to a full adversarial-type hearing before those benefits could be terminated.¹⁷⁰

¹⁶⁵ Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHN'S L. REV. 797, 799(2007).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 800. See also, Robert Charles Ludolph, *Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discount Center*, 63 U. DET. L. REV. 609, 614 (1986), noting that "the early courts reasoned that, unless specifically provided for by statute, public employees occupied strictly employment-at-will positions."

¹⁶⁸ 397 U.S. 254, 261-63 (1970) (holding that an interest in continued welfare benefits qualified as a statutory entitlement that equated to a property interest under the Due Process Clause).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

In *Board of Regents of State Colleges v. Roth*¹⁷¹, the Court extended this new, inclusive definition of property to include public employee's interest in continued government employment.¹⁷² Mr. Roth was hired as an assistant professor at Wisconsin State University-Oshkosh (WSU) for a fixed term of one academic year.¹⁷³ WSU could renew Mr. Roth's contract until which time he received tenure (after four years with positive evaluations), or at the end of a contract period, terminate the employment relationship by failing to renew Mr. Roth's contract.¹⁷⁴ At the end of the 1968-69 academic school year, WSU informed Mr. Roth that he would not be hired for the following year but did not give him a reason for their decision.¹⁷⁵ Under Wisconsin law, the procedural protections afforded a university professor whose employment is terminated corresponds to his job security. A tenured professor is entitled to certain procedural protections that are not owed a non-tenured professor, at least at the end of a contract period.¹⁷⁶

Mr. Roth filed suit against the WSU Board of Regents alleging that their decision not to rehire him for the following year infringed upon his Fourteenth Amendment rights.¹⁷⁷ He attacked the decision on both substantive and procedural grounds. First, he alleged that the true reason for the Board's decision not to renew his contract was to punish him for certain statements he made that were critical of the University administration, and that the decision constituted a violation of Mr. Roth's freedom of

¹⁷¹ 408 U.S. at 576-78 (1972) (holding that a state college professor could have a property interest in his job if he had a government-created expectation in continued employment).

¹⁷² Garry, *supra* note 165, at 799.

¹⁷³ *Id.* at 566.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 567.

¹⁷⁷ *Id.* at 568.

speech.¹⁷⁸ Second, Mr. Roth alleged that the Board's failure to provide him with any reason for his non-renewal and an opportunity for hearing violated his right to procedural due process of law.¹⁷⁹ The Supreme Court was only asked to rule on the procedural due process issues at issue in this case.

The Court noted that the requirements of procedural due process apply only when an individual has been deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property.¹⁸⁰ But, the Court noted, "the range of interests protected by procedural due process is not infinite."¹⁸¹ The Court discussed the limits of liberty and property as they apply to due process. After examining its holdings in previous cases¹⁸², the court "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."¹⁸³ The Court went on to acknowledge that "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money,"¹⁸⁴ and could take many forms.¹⁸⁵ In the area of public employment, the Court held that government employees have interests in continued employment that are safeguarded by due process in some circumstances.¹⁸⁶ In order to determine when due process protections should apply, the Court states:

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 569.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 570.

¹⁸² *See National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting): "'Liberty' and 'property' are broad and majestic terms. They are among the [g]reat [constitutional] concepts...purposely left to gather meaning from experience....[T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."

¹⁸³ *Roth*, 408 U.S. at 571.

¹⁸⁴ *Id.* at 571-72.

¹⁸⁵ *Id.* at 576. *See also, Goldberg*, 397 U.S. at 254; *Flemming v. Nestor*, 363 U.S. 603 (1960).

¹⁸⁶ *Roth*, 408 U.S. at 576-78. *See Slochower v. Board of Education*, 350 U.S. 551(1956); *Wieman*, 344 U.S. at 183; *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971) (holding that proscribing summary dismissal

Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.¹⁸⁷

Given the above and the facts present in this case, the Court concluded that Mr. Roth did not have a property interest in his contract renewal sufficient to require WSU to give him a hearing when they declined to renew his contract.¹⁸⁸

While Mr. Roth was not successful in his pursuit for due process protections, the *Roth* case made it clear that the Court would be more expansive in its definitions of "property" and "liberty" as they apply to the due process clause. As a result of its expanded definition, not only tenured government employees have a property interest in continued employment, but non-tenured employees with a reasonable expectation of continued employment are entitled to due process procedural protections as well.

Liberty Interests Triggered by Dismissal.

Tenured teachers have a property interest in continued employment for the government, entitling them to procedural protections when there is an interference with that right. However, non-tenured teachers generally do not have the same property

from public employment without hearing or inquiry required by due process also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment).

¹⁸⁷ *Roth*, 408 U.S. at 577.

¹⁸⁸ *Id.* at 578.

right.¹⁸⁹ During the probationary period, teachers are considered "at-will" employees and may be dismissed without cause at the end of any contract period. Probationary teachers are generally not entitled to procedural due process protections. However, a teacher's right to not have his or her reputation defamed is a constitutionally protected liberty interest.

Regarding liberty interests, the Court notes:

While this Court has not attempted to define with exactness the liberty... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.¹⁹⁰

The *Roth* Court acknowledges that there may be cases in which a non-tenured teacher's liberty interest may be violated in the dismissal process. WSU did not impugn the reputation of Mr. Roth when it refused to renew his contract. However, if it had, Mr. Roth may have been entitled to due process protections for a violation of his liberty rights.¹⁹¹ The Court quotes¹⁹² *Wisconsin v. Constantineau*, which states, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the

¹⁸⁹ Regardless of tenure status, a government employee has a property interest in his or her continued employment as long as they have a valid contract guaranteeing that employment. Non-tenured teachers have a property interest in continued employment pursuant only to the terms of their contracts. However, they generally do not have an constitutionally protected property interest in the renewal of a contract. Note that there may be some circumstances in which government actions give a non-tenured employee cause to reasonably expect continued employment. In such cases, a court could determine that the employee was entitled to procedural due process protections. See *Roth*, 408 U.S. at 577.

¹⁹⁰ *Meyer*, 262 U.S. at 399. See also, *Bolling v. Shape*, 347 U.S. 497 (1954); *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹⁹¹ *Roth*, 408 U.S. at 573.

¹⁹² *Id.*

government is doing to him, notice and an opportunity to be heard are essential."¹⁹³ In such a case, the right to a hearing would give the terminated employee a right to dispute any challenges to the employees good name, reputation, honor, or integrity.¹⁹⁴

Historical Foundations of Teacher Tenure

History of Teacher Tenure Legislation

Teacher tenure regulations have been a part of the American elementary and secondary education system for over 100 years.¹⁹⁵ During the late 1800s and early 1900s, teachers were faced with mounting challenges in and outside of the classroom. Many teachers faced over-crowded classrooms, uncomfortable working conditions, and interference from demanding parents and administrators trying to dictate lesson plans and curriculum.¹⁹⁶ Teachers were not only poorly paid, often with no pension or benefits, but teaching jobs were often subject to the whim of politicians.¹⁹⁷ Furthermore, by the turn of the century, nearly 75% of all American teachers were women, but few were promoted to positions of authority.¹⁹⁸ Generally, teachers suffered poor working conditions but had little power to improve them. Near the end of the nineteenth century, the working conditions for teachers deteriorated to the extent that reform was necessary in order to preserve the profession.

¹⁹³ 400 U.S. 433, 437 (1971). *See also*, *Wieman*, 344 U.S. at 191; *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 123; *Lovett*, 328 U.S. at 316-17; *Peters v. Hobby*, 349 U.S. 331, 352 (1955) (Douglas, J., concurring); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1961).

¹⁹⁴ *Roth*, 408 U.S. at 573.

¹⁹⁵ Coleman et al., *supra* note 9, at 220; Patricia L. Marshall, Debra V. Baucom, & Allison L. Webb, *Do You Have Tenure, and Do You Really Want It?*, 71 CLEARING HOUSE 302, 303 (1998).

¹⁹⁶ Coleman et al., *supra* note 40, at 9; Stephey, *supra* note 10.

¹⁹⁷ Coleman et al., *supra* note 40, at 9; Kersten, *supra* note 11.

¹⁹⁸ Coleman et al., *supra* note 40, at 9.

In 1883, Federal legislation was passed to reduce the impact of political favoritism in the United States civil service system.¹⁹⁹ While this legislation did not apply to state employees such as public school teachers, it did lay the groundwork for future teacher tenure legislation. In 1885, the National Education Association (NEA), one of the two national teacher unions²⁰⁰, proposed extending the civil service protections to teacher.²⁰¹ A year later, the NEA formed the Committee on Salaries, Tenure, and Pensions to examine and advocate for teacher tenure laws.²⁰² In 1887, almost 10,000 teachers gathered in Chicago for the NEA's first national conference. Teacher tenure was a popular topic at the 1887 convention and remained so into the early twentieth century.²⁰³ In 1909, New Jersey became the first state to grant teachers fair-dismissal rights.²⁰⁴ Since the mid-1910s, the NEA has annually reaffirmed its position that tenure is an integral part of a teacher's employment agreement.²⁰⁵

Studies on teacher tenure were conducted by academics and the NEA throughout the 1920s and 30s. Initial studies found no difference in competency of teachers in tenure and non-tenure states.²⁰⁶ However, in 1924 the NEA examined a number of issues affecting teachers, including tenure. It found that teachers throughout the country faced significant problems with job security.²⁰⁷ In 1946, the NEA's Committee on Tenure and Academic Freedom introduced a "formal purpose for tenure" to identify procedures to

¹⁹⁹ Kersten, *supra* note 11, at 236.

²⁰⁰ The American Federation of Teachers, the second largest national teachers union in the United States, was not founded until April 15, 1916.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Stephey, *supra* note 10.

²⁰⁴ Kersten, *supra* note 11, at 236.

²⁰⁵ Marshall, Baucom, & Webb, *supra* note 195, at 303.

²⁰⁶ Coleman et al., *supra* note 9, at 221.

²⁰⁷ Marshall, Baucom, & Webb, *supra* note 195, at 303.

protect competent teachers from arbitrary dismissal while still allowing the dismissal of inept teachers.²⁰⁸

Tenure laws gained popularity during the mid-twentieth century. By 1950, twenty-one states adopted some form of teacher tenure regulation. Twenty additional states had at least one school district that had tenure-like teacher contracts ranging from one to five years.²⁰⁹ At that time, only seven states had no laws on tenure or teacher contracts. By the late 1960s, nearly all states offered some sort of employment protection to their teachers, either in the form of formal tenure laws or renewing contract policies.²¹⁰ By 2010, all fifty states had some form of teacher tenure law.²¹¹

Teacher Tenure: Policy Considerations

In its most direct application, teacher tenure provides teachers with procedural protections when there is an interference with their constitutional rights to property or liberty. However, as applied in K-12 schools, there is some debate as to its true purpose. Tenure also comes with some unintended consequences that warrant discussion, such as complicated union relations, additional managerial concerns associated with terminating teachers (such as litigation costs), and the public perception of teachers and their professionalism. In the following sections, some of these issues will be discussed in order to demonstrate just how complicated and multifaceted the debate concerning teacher tenure is.

Academic Freedom. The perceived purpose of tenure has varied throughout its history. It was originally conceived to protect academic freedom and provide teachers

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*; Coleman et al., *supra* note 9, at 221-22.

²¹¹ Cohen & Walsh, *supra* note 23, at 31.

with job security.²¹² The need for academic freedom arose first for college and university professors. In addition to teaching, professors are generally expected to conduct original research that contributes to their field of study. New research that pushes the bounds of what is known and accepted may offend the sensibilities of others in the professor's field and/or university administration. Tenure is necessary in the college and university setting to protect the intellectual integrity of professors' work in research and in the classroom.²¹³ In addition, generally colleges and universities draw from a broader population and are able to tolerate a wider range of opinions and free expression of ideas.²¹⁴

Whether such protections are necessary for elementary and secondary teachers is debatable. They are not expected to do research that challenges or expands their field of study.²¹⁵ In fact, today public school teachers have limited control over their curriculum and textbooks. Often what is taught and how it is taught is highly regulated by school administration, the school district, the state, and increasingly, the federal government.²¹⁶ Increased federal legislation, especially that which focuses on standards based testing like No Child Left behind, further curtails teachers' academic freedom. While political and social situations may arise during which it becomes necessary for a teacher to challenge

²¹² Brown, *supra* note 17, at 12. A survey of court decisions conducted in 1958 indicated that courts generally viewed the purpose of tenure legislation as improving schools by protecting competent teachers from arbitrary dismissal. John Lightenberg, *Courts Hold Tenure Improves School System*, 43 AMERICAN TEACHER MAGAZINE 13 (Oct. 20, 2958).

²¹³ William Perel, R.W. Rielke, & Philip D. Vairo, *Tenure and Academic Freedom for High School Teachers*, 50 HIGH SCH. J. 344 (1967).

²¹⁴ *Id.* at 345.

²¹⁵ *Id.* at 344.

²¹⁶ *Id.* at 345. Alternatively, college and university professors have a great deal of input in both creating the curriculum that is to be taught at their institutions and choosing the learning materials that are used to teach that curriculum.

the status quo, it appears that academic freedom and corresponding protections generally are not as imperative for elementary and secondary teachers.²¹⁷

The Role of the Union. It is difficult to have a discussion about teacher tenure without discussing the role of unions. Because the interests of teacher unions are so narrowly defined, they are able to focus on very specific issues. As a result, unions are often able to stimulate public support for teacher issues in spite of opposition from school districts or even state departments of education.²¹⁸ Teachers unions represent the nation's largest profession and can rely on a steady stream of revenue from its membership dues. Their massive budgets allow unions, both nationally and at the state level, to wield a great deal of political power.²¹⁹

Since the rise of the public-sector labor movement in the second half of the twentieth century, unions have been lobbying for collective bargaining rights. Union bargaining power increased substantially by the mid-1970s following state and federal orders allowing workers to bargain collectively.²²⁰ As of February 2011, collective bargaining for public sector employees is required in thirty-four states, permitted in

²¹⁷ *Id.* at 347-48.

²¹⁸ Cohen & Walsh, *supra* note 23, at 31. Cohen and Walsh note that "[b]ecause union interests are narrowly defined, teachers unions can go after an issue with laser-like focus and are adept at drawing on the public's generally supportive view of teachers." *Id.*

²¹⁹ *Id.* Teacher unions can use their membership and the accompanying dues to influence legislation in several different ways. For example, state union affiliates generally have full-time paid staff devoted to pursuing certain legislative goals. In state votes, unions can count on their members to create a block of votes to press for one outcome or another. Finally, unions can use their extensive resources to financially support particular political candidates and/or initiatives.

²²⁰ Katharine O. Strunk & Jason A. Grissom, *Do Strong Unions Shape District Policies? Collective Bargaining, Teacher Contract Restrictiveness, and the Political Powers of Teachers' Unions*, 32 EDUC. EVALUATION & POLICY ANALYSIS 389, 390 (2010). As the number of teachers' associations grew, so did the scope of the rights, protections, and benefits contained within collective bargaining agreements. For example, class size limits, mandated evaluation procedures and teacher input in school wide curriculum decisions. See RANDALL W. EBERTS & JOE R. STONE, UNIONS AND THE PUBLIC SCHOOLS: THE EFFECT OF COLLECTIVE BARGAINING ON AMERICAN EDUCATION (1984).

eleven states, and forbidden in five states.²²¹ In the states that allow collective bargaining, unions have the ability to control the collective bargaining agreements (CBAs), perhaps the most important set of regulations governing state education policy. In union states, CBAs determine or provide the framework for nearly all district policies, including teacher compensation, hiring, transfers, teacher evaluations, and teacher tenure.²²²

In the debate over teacher tenure, unions argue that their mission is to improve the quality of education in the United States by improving the quality of teachers.²²³ In support of this proposition, they argue that the purpose of tenure is to protect teachers from arbitrary dismissal without just cause or due process, not to protect and perpetuate poor teaching.²²⁴ However, some may perceive a disconnect between union's stated goals and its actions. For example, in its Convention Resolution (1998), the AFT stated that, "[it] believes that teacher quality is an essential union responsibility."²²⁵ The AFT goes on to admit that, "weak or incompetent teachers threaten the reputation of the profession and the quality of education children receive."²²⁶ The AFT further notes that, "[a]s long as unions apply consistent, reasonable and fair principles and procedures for determining whether to contest a grievance, and as long as they make an independent investigation of the grievance, it is well within their authority to reject a poorly performing teacher's request for union assistance in a termination for poor performance case."²²⁷

²²¹ Marshall, *supra* note 9.

²²² Strunk & Grissom, *supra* note 220, at 389.

²²³ AM. FED'N OF TEACHERS, *supra* note 17, at 5.

²²⁴ *Id.* at 6.

²²⁵ *Id.* at 5.

²²⁶ *Id.* at 9.

²²⁷ *Id.* at 10.

While the union notes that it has no obligation to defend teachers in dismissal hearings for misconduct, there have been a large number of documented incidents in which the union have defended teachers despite strong evidence of teacher misconduct.²²⁸ In the recent past, unions have defended felons, teachers who have had sexual relations with their students, teachers who have physically and verbally abused students, and teachers who have proven to be ineffective.²²⁹ Union participation in dismissal cases generally adds to the cost and complication of the dismissal process, making principals and school districts question the value of trying to dismiss even the most ineffective teachers. However, union participation in extreme misconduct cases, such as those mentioned above, may serve to discredit the union's intention of providing quality education for all children. Some may perceive such actions as an indication that the teachers' unions are more concerned with the interests of their adult members than the children they purport to serve.

Clearly, teachers unions have played a vital role in the initial adoption and growth of teacher tenure legislation around the county. Similarly, the unions have played an important part in the changes made to teacher tenure legislation in the recent past. Their role in the changes will be more thoroughly investigated and analyzed in Chapter 3 of this study.

Dismissal of Tenured Teachers. Generally, state tenure statutes include some sort of mechanism for continued employment, such as an automatically renewing contract, and procedural protections against arbitrary dismissal.²³⁰ As discussed above, the right to continued employment, whether provided as a continuing contract or through

²²⁸ Peter Schweizer, *Firing Offenses*, 50 NAT'L REV. 27 (1998).

²²⁹ *Id.*

²³⁰ Marshall, Baucom, & Webb, *supra* note 195, at 303.

another mechanism, also qualifies as a property right, entitling the teacher to due process of law under the Fourteenth Amendment. When a principal or school board seeks to terminate a tenured teacher, the grounds for dismissal must be based on the state statute's defined causes.²³¹ The most commonly identified causes for teacher dismissal are incompetence, insubordination, neglect of duty, and other good and just cause.²³² Teacher layoffs due to lack of funding or teaching position are not considered dismissal "for cause" and are therefore not subject to the same due process procedural requirements.²³³

While the dismissal process seems fairly straight forward, particularly because its procedure is outlined by law, in practice the dismissal of tenured teachers is often very complicated. Before a school district attempts to dismiss a teacher, tenure laws and teacher contracts often require the teacher to be notified of unacceptable behavior and/or performance and given an opportunity to remediate. School districts, and more accurately principals, must go through a series of steps to help the struggling teacher improve his or her performance by providing additional support and professional development. Each step of the process must be carefully documented in order to create a record of teacher performance.²³⁴

The dismissal process may take a very long time, often taking as much as two to three years to complete, and can be costly for a school district. Depending on the state law, dismissed teachers may be entitled to a number of appeals, compensation during the

²³¹ Coleman et al., *supra* note 9, at 226.

²³² *Id.* See also, EDUC. COMM'N OF THE STATES, *supra* note 23; Joseph O. Oluwole, *Tenure and the "Highly Qualified Teacher" Requirement*, 8 WHITTIER J. CHILD & FAM. ADVOC. 157 (2009).

²³³ Ralph Erickson, *How Firm Are Teacher Tenure Laws?*, 114 KAPPA DELTA PI RECORD 114 (1981).

²³⁴ Cohen & Walsh, *supra* note 23, at 33.

appeals process, and a right to stay in the classroom during their appeals.²³⁵ While each state controls the number of appeals to which each teacher is entitled, most states allow a teacher to appeal a school districts decision to dismiss at least twice. Some states, Washington for example, go even further, allowing a teacher to appeal a local school board's dismissal decision all the way up to the state supreme court.²³⁶ Lengthy dismissal proceedings can cost a school district tens of thousands of dollars. In fact, costs exceeding \$100,000 for dismissal proceedings are not unheard of.²³⁷ As a result of these challenges, some principals are inclined to tolerate incompetent teachers in order to avoid conflict.

Attitudes Towards Tenure. Despite the heavy criticism of tenure, teachers argue that tenure provides great benefit. Teaching as a profession, at least in the United States, offers limited extrinsic rewards. For their efforts, teachers earn neither high salaries nor a great deal of professional respect. Tenure is one benefit of teaching that may provide teachers with extrinsic reward. While tenure is not intended as a lifetime guarantee to employment, it does provide teachers with a certain amount of job security. Tenure ensures that a teacher will not be fired arbitrarily without just cause. It may ease some anxiety and permit a teacher to focus that energy on more productive pursuits, such as classroom work.²³⁸

Critics argue that while the intent of tenure may not be to provide lifetime employment to incompetent teachers, it often has that result. As discussed in more detail below, dismissing a tenured teacher can be expensive and time consuming. Principals

²³⁵ Coleman et al., *supra* note 9, at 22.

²³⁶ Cohen & Walsh, *supra* note 23, at 33.

²³⁷ Schweizer, *supra* note 228, at 27.

²³⁸ AM. FED'N OF TEACHERS, *supra* note 17, at 6-7; Brown, *supra* note 17, at 13.

may be deterred from initiating dismissal proceedings because of the time and effort required to properly document inadequate performance and participate in dismissal hearings and appeals.²³⁹ Peter Schweizer (1998) discusses some of the most outrageous examples of teachers who used the procedural protections of tenure to escape dismissal despite proven misconduct ranging from mere incompetence to the commission of felonies.²⁴⁰ For example, in 1997, North Junior High School in Collinsville, Illinois fired English teacher Wallace Bowers for failing to come to school for six weeks.²⁴¹ With the support of the Illinois Education Association, an affiliate of the NEA, Bowers challenged his dismissal. Relying on Illinois' tenure law, a judge ruled in favor of Bowers. He returned to the classroom and received full back pay.²⁴²

In addition to the direct consequences of tenure, critics have linked tenure to a number of indirect consequences. In order to save the time and money associated with dismissing a tenured teacher, administrators often find a way to transfer the employee to another school or district instead of firing him or her. Generally, teachers are given an opportunity to resign in lieu of being dismissed with the understanding that the teacher will receive good recommendations for future employment. This system allows bad teachers get passed from one school to another. Administrators call this "the dance of the lemons", or worse, "pass the trash."²⁴³

²³⁹ Nixon, Packard, & Douvanis, *supra* note 19, at 45-46.

²⁴⁰ Schweizer, *supra* note 228, at 27-28.

²⁴¹ *Id.* at 29.

²⁴² *Id.*

²⁴³ Darden, *supra* note 41 at 38; Schweizer, *supra* note 228 at 28.

Changes in Teacher Tenure Laws from January 2008-June 2012

Over the last 50 years, there have been isolated changes made to teacher tenure laws across the country.²⁴⁴ However, not until recently has there been a large scale reform movement. From January 2008 through June 2012, 24 states have made changes to their teacher tenure laws. As of June 30, 2012, an additional 11 states had proposed legislating changes pending. Table 1 includes a state by state review of changes to teacher tenure laws from 2008 through June 2012.

²⁴⁴ A more in-depth discussion of previous reform attempts is provided in Chapter 3.

Table 1: Changes to Teacher Tenure Legislation from 2008 through June 2012

State Name	Length of Time to Earn Tenure²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Alabama	3 years of continuous employment	"Students First Act of 2011," ALA. CODE §§ 16-24C-1 through 16-24C-14	July 2011 Replaced the Teacher Tenure Act; Streamlines termination procedure; Stops salary and benefits upon termination; No appellate rights for teachers who are laid off or transferred as a result of reductions in force.	<ul style="list-style-type: none"> • Procedural
Alaska	3 years of continuous employment + an acceptable performance evaluation	ALASKA STAT. ANN. §§ 14.20.150 through 14.20.215	None	N/A

²⁴⁵ Tenure is used as a general term used for this chart that should be read to mean the educator has received certain employment protections, such as continued expectation in employment, termination for just cause only, notice and hearing prior to termination. It is important to note that the term tenure is only used in a handful of states; the vocabulary used in each state to describe such employment protections for educators varies a great deal.

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Arizona	3 years of continuous employment	ARIZ. REV. STAT. ANN. §§ 15-538.01 through 15-548	<p>September 2011 Added "inadequacy of classroom performance as defined by the governing board" as a grounds for dismissal; tenure and seniority no longer a factor in making lay off decisions; When making salary reductions, teachers are considered individually (before it was equitable for all tenured teachers).</p> <p>Proposed Change (January 2012) HB 2497: Allows the school board to offer teaching contracts of 1 to 3 years.</p>	<ul style="list-style-type: none"> • Performance/bad evaluation grounds for dismissal • Tenure/seniority not a primary factor in lay offs • Longer individual teaching contracts

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Arkansas	3 years of continuous employment	"The Teacher Fair Dismissal Act of 1983," ARK. CODE ANN. §§ 6-17-1501 through 6-17-1510	None	N/A
California	2 years ²⁴⁶ of continuous employment	CAL. EDUCATION CODE § 44929.21	None ** However, in May 2012 non-profit groups Students Matter (SM) filed suit on behalf of eight students, challenging California laws governing teacher tenure rules, seniority protections, and the teacher dismissal process, claiming that it makes it too difficult to dismiss ineffective teachers.	N/A
Colorado	3 years of "demonstrated effectiveness"	COLO. REV. STAT. ANN. §22-63-103 and §22-9-105.5	May 2010 Teachers now need 3 years of positive evaluations to earn tenure (as opposed to just 3 years of consecutive service); teachers evaluated annually; student academic progress at least 50% of teacher's overall rating; teachers can lose tenure status by receiving "ineffective" evaluation ratings 2 years in a row (they return to probationary status and must re-earn tenure).	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision • Teacher can lose tenure status by receiving negative evaluations

²⁴⁶ The probationary period was originally three years but was dropped to two years for teachers whose probationary period commenced during the 1983-84 fiscal year or any fiscal year thereafter. CAL. EDUCATION CODE § 44929.21 (2012).

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Connecticut	40 months of full-time continuous employment (4 years)	Conn. Gen. Stat. Ann. §10-151	Proposed Change (February 2012) ²⁴⁷ Proposed by Governor; Tenure will have to be earned after 3 to 5 years of teaching, after a teacher receives a series of "exemplary" evaluations; Teachers will have to continue to prove effectiveness in order to keep tenure; Ineffectiveness added as a grounds for dismissal (in addition to "incompetence."	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision • Teacher can lose tenure status by receiving negative evaluations
Delaware	3 years of service in Delaware, receipt of at least 2 satisfactory evaluations	DEL. CODE ANN. tit. 14, §§ 1403, 1411-1414	July 2010 Teachers who began teaching in Delaware after the conclusion of the 2009/2010 school year gain tenure protections after 3 years of service with two "Satisfactory" ratings on the "Student Improvement" component of the teacher appraisal process. They do not have to be consecutive. Prior to 2009-2010 no rating was required to gain tenure protections.	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision

²⁴⁷ Governor Dannel P. Malloy, Address given at the Connecticut General Assembly, House of Representatives (Feb. 8, 2012). In 2000, the determination of incompetence for termination purposes was tied to teacher evaluation. CONN. GEN. STAT. ANN. §10-151(d).

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
District of Columbia	1 year ²⁴⁸	D.C. CODE §1-608.01a	None **However, in 2010, Michelle Rhee and the teachers' union agreed on a new contract that offered 20% pay raises and bonuses of \$20,000 to \$30,000 for increases in student achievement, in exchange for weakened teacher seniority protections and the end of teacher tenure for 1 year.	N/A

²⁴⁸ The District of Columbia has a one year probationary period, during which time a "probationary employee" can be terminated without notice or evaluation. After completion of the probationary period, in order to terminate an employee, he or she must be provided with a 15-day separation notice and been evaluated at least once within six months preceding notice (at least 30 days prior to notice), unless he or she has committed a crime that impacts job duties (including all felonies). D.C. CODE §1-608.01a(b)(2)(C) (2012).

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Florida	3 years for teacher hired before July 2011, No tenure for teachers hired after July 2011	FLA STAT. ANN. §§ 1012.33, 1012.335, and 1012.22	<p>July 2011</p> <ul style="list-style-type: none"> Teachers hired on or after July 1, 2011 have contracts that are renewed on an annual basis. Teachers may be terminated for 2 consecutive annual performance evaluation ratings of unsatisfactory; 2 annual performance evaluation ratings of unsatisfactory within a 3-year period; or 3 consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory. Probationary period increased from 97 days to one year. During the probationary period, the teacher can be fired at any time. New salary schedule introduced that ties salary to performance (based on evaluation). Teachers hired before July 1, 2014 may opt-in to the performance based compensation system by surrendering a continuing professional service contract. Teachers hired on or after July 1, 2014 are automatically enrolled in the performance based compensation system. 	<ul style="list-style-type: none"> No longer offering automatically renewing contracts Performance/bad evaluation grounds for dismissal Compensation tied to performance

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Georgia	3 years of continuous employment	GA. CODE ANN. §§ 20-2-940, 20-2-942, and 20-2-948	May 2012 The length of a teacher's service (including tenure status) is no longer the primary or sole determining factor when implementing a reduction in force. The local board of education may consider as a primary factor the teacher's performance which may be measured in part by student performance.	<ul style="list-style-type: none"> • Tenure/seniority not a primary factor in lay offs
Hawaii	1 year	HAW. REV. STAT. §§ 302A-608	2008²⁴⁹ Legislation requiring a 2 year probationary period repealed because it conflicted with the collective bargaining agreement in force from 2007-2009 that decreased the probationary period from 4 semesters (2 years) to 2 semesters (1 year).	<ul style="list-style-type: none"> • Decrease probationary period.

²⁴⁹ As part of its Race to the Top application, Hawaii's Board of Education pledged to overhaul Hawaii's teacher tenure policies by increasing the probationary period to a minimum of three years and by requiring probationary teachers to receive positive evaluations in order to earn tenure protections. Bills addressing these issues were proposed in both houses of Hawaii's legislature. The house voted to recommit Senate Bill 2789 and the senate voted to recommit the companion measure, House Bill 2527, in April 2012, effectively killing the bill. The bill's demise came just two weeks after a federal education official visited Hawaii to check on its Race to the Top progress. There will likely be additional attempts to pass a performance management system with some component of student growth in order to fulfill their Race to the Top pledges. In the meantime, the Hawaii Department of Education is offering its principals and vice principals training on how to terminate ineffective teachers without violating due process rights.

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Idaho	3 years of continuous employment earns a teacher the right to a Category B contract	IDAHO CODE ANN. §§33-514 and 33-515	July 2011²⁵⁰ After January 31, 2011, new employment contracts shall not vest in tenure, continued expectation of employment, or a property right in an employment expectation; Board of Trustees offer two categories of annual contracts: (1) Category A is limited to 1 year and is used for at least the first year of a teachers employment in a school district. At the conclusion of the contract term, the board can vote to not renew the contract. In this case, the teacher is entitled to written notice by July 1 but is not entitled to any hearing. Category A does not create any property right in continued employment. (2) Category B is a limited 2 year contract that may be offered in the teacher's 4th year of continuous employment or later. For termination, teacher entitled to written notice by July 1 and an employee may request a review in an informal hearing by the board of trustees. No entitlement to formal hearing or property right/continued employment.	<ul style="list-style-type: none"> • No longer offering automatically renewing contracts

²⁵⁰ Propositions 1, 2, and 3, also known as the Idaho Teachers' Collective Bargaining Veto Referendums, are on the ballot for the November 6, 2012 vote. The referendum, if passed, would repeal the 2011 law relating to teachers' collective bargaining agreements, reinstate tenure, and returns issues like workload and class size to contract negotiations.

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Illinois	4 years (evaluation requirements for teachers hired after a certain date)	105 ILL. COMP. STAT. 5/24-11	June 2011 A teacher hired prior to the PERA implementation date ²⁵¹ who is employed for 1 district consecutively for 4 school terms may enter into a contractual continued service; the probationary period for teachers hired on or after the PERA implementation date varies depending upon their performance evaluation (if they had a continuing contract in another Illinois district, must receive 2 annual evaluations of "Excellent" in order to acquire continuing contract in their current district; for new teachers, 3 consecutive terms of service in which the teacher receives annual evaluations of "Excellent"; 4 consecutive school terms of service in which the teacher receives an evaluation rating of at least "Proficient" in the last school term and at least "Proficient" in either the second or third school term.) ²⁵²	<ul style="list-style-type: none"> Teacher evaluation/performance considered in tenure decision

²⁵¹ "PERA implementation date" means the implementation date of an evaluation system for teachers as specified by 105 ILL. COMP. STAT. 5/24A-2.5. Therefore, this date will vary based on district but shall be no earlier than September 1, 2013.

²⁵² If, at the conclusion of four consecutive school terms, the teacher does not qualify for contractual continued service, the teacher shall be dismissed.

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Indiana	At least 3 years of service (depending upon evaluation)	IND. CODE. ANN. §§ 20-28-6-2 through 20-28-6-8	<p>June 2011</p> <p>Teachers who have earned contracts "for further service" (continuing) before July 1, 2012 shall be established teachers. A teacher who, after June 30, 2011, receives a rating of effective or highly effective rating (or a combination) for at least 3 years in a 5 year or shorter period, becomes a professional teacher. Established and professional teachers are entitled to continued employment. Other teachers are considered probationary teachers. A probationary teacher's contract may not be renewed if the teacher receives one ineffective rating, 2 consecutive "improvement necessary" ratings, or is subject to a reduction in force. After June 30, 2012, reduction in force decisions will be determined on the basis of performance instead of seniority or tenure status.</p>	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision • Performance/bad evaluation grounds for dismissal • Tenure/seniority not a primary factor in lay offs

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Iowa	3 years of consecutive employment	IOWA CODE ANN. §§ 279-13 and 279-19	March 2012 Decisions regarding reduction in force no longer made exclusively on seniority. Now they will first look at teacher effectiveness as demonstrated in evaluations and the needs of the school district (may include teacher licensure and endorsements). Seniority may be considered only when teachers' qualifications on the above factors are substantially equal.	<ul style="list-style-type: none"> • Tenure/seniority not a primary factor in lay offs
Kansas	At least 3 years of consecutive employment, with a possible 4th or 4th and 5th year	KAN. STAT. ANN. § 72-5445	July 2011 Every new teacher is required to complete a 3 year probationary period. If the teacher has not made sufficient progress to warrant receipt of tenure, the teacher and the board of education may enter into an additional contract for a 4th year or a 4th and 5th year. Teachers who receive contracts under this provision are entitled to a written plan of assistance from the district.	<ul style="list-style-type: none"> • Probationary period extended • Teacher evaluation/performance considered in tenure decision

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Kentucky	4 years of continuous active service	KY. REV. STAT. ANN. §§ 161.720 through 161.841	Proposed Change (January 2012) SB 122: Teachers hired after July 1, 2012 who have served 4 years of continuous active service may request that they be considered for continuing contract status. Continuing contracts will be awarded by a school based committee consisting of 4 faculty members with continuing contract status and the school principal. Teachers seeking continuing contract status will be judged on their effectiveness using evaluation data and a portfolio of other information. A teacher who is not awarded continuing contract status by the conclusion of his or her 6th year will not be offered a renewal contract for a seventh or subsequent year.	<ul style="list-style-type: none"> • Have to apply for tenure status • Teacher evaluation/performance considered in tenure decision • Performance/bad evaluation grounds for dismissal

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Louisiana	3 years if acquired before September 1, 2012, at least 5 years for teachers who have not acquired tenure before September 1, 2012	LA. REV. STAT. ANN. §§ 17:441 through 17:446	April 2012 Beginning on July 1, 2012, a teacher rated "highly effective" for 5 years within a 6-year period pursuant to the performance evaluation system shall be granted tenure; teachers who are not granted tenure remain at-will employees; beginning with the 2013-2014 school year, if a tenured teacher receives a performance rating of "ineffective," he or she shall lose tenure protections; such a teacher may reacquire tenure protections by receiving "highly effective" rating for 5 of 6 years; a teacher may be terminated for poor performance if he or she is found to be "ineffective" however that person is entitled to a grievance hearing with a tenure hearing panel; teacher pay and pay increased tied to performance evaluations.	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision • Teacher can lose tenure status by receiving negative evaluations • Performance/bad evaluation grounds for dismissal • Compensation tied to performance

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Maine	3 years of service	ME. REV. STAT. ANN. tit. 20-A, § 13201	<p>2011 Probationary period extended from 2 to 3 years.</p> <p>April 2012 New state evaluation system; reduction in force decisions must include the teacher's effectiveness rating as a significant factor (seniority may also be considered); effectiveness rating to be used in making strategic human capital decisions (recruiting, hiring, mentoring, compensation, assignment, dismissal, etc.); receipt of 2 consecutive ineffective ratings is grounds for non-renewal.</p>	<ul style="list-style-type: none"> • Probationary period extended • Tenure/seniority not a primary factor in lay offs • Compensation tied to performance • Performance/bad evaluation grounds for dismissal
Maryland	3 years of service	MD. CODE ANN., Education, § 6-202	<p>Proposed Change (February 2012) HB 1210; Performance evaluations shall account for at least 51% of the formula used to make layoff/reduction in force decisions.</p>	<ul style="list-style-type: none"> • Tenure/seniority not a primary factor in lay offs

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Massachusetts	3 years of continuous service	MASS. GEN. LAWS ANN. ch. 71, §§ 41 and 42	Proposed Change (January 2012) SB 2197; A teacher who has served for 3 consecutive years shall be eligible for professional teacher status provided that the teacher has achieved ratings of proficient or exemplary on each performance standard and for overall educator performance during his or her third consecutive year of service; a teacher who does not receive these ratings may be granted a 1 year extension; Reduction in force decisions will be made by a school committee who will consider certifications, merit and ability, including results from performance evaluations and secondarily on length of service (can be used for a tie breaker).	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision • Tenure/seniority not a primary factor in lay offs

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Michigan	5 years of continuous service (teacher must be rated as effective or highly effective on his or her 3 most recent annual year-end performance evaluations)	MICH. COMP. LAWS ANN. §§ 38.71, 38.81 through 38.93	July 2011 Probationary period increased from 4 to 5 years; teacher must be rated as effective or highly effective on at least 3 of the last 5 year-end performance evaluations; a rating of highly effective on 3 evaluations in 4 years of employment will earn a teacher tenure; seniority or tenure status cannot be used in reduction of force decisions unless all factors (teacher effectiveness) are equal (can be used as a tie breaker); if a teacher is rated ineffective 3 years in a row, the teacher shall be dismissed; a tenured teacher who received an ineffective or minimally effective rating shall be provided with an individualized plan of improvement, not to exceed 180 days.	<ul style="list-style-type: none"> • Probationary period extended • Teacher evaluation/performance considered in tenure decision • Tenure/seniority not a primary factor in lay offs • Performance/bad evaluation grounds for dismissal
Minnesota	3 years of continued service	MINN. STAT. ANN. §122A.41	None ²⁵³	N/A
Mississippi	2 years of continuous service ²⁵⁴	MISS. CODE ANN. §§ 37-9-103 through 37-9-113	None	N/A

²⁵³ The Minnesota legislature passed a bill requiring teacher evaluation to be considered in addition to seniority when making reduction in force decisions. House file 1870 was passed by both the house and the senate but was vetoed by the governor in April 2012.

²⁵⁴ Mississippi specifically states that it is not the legislatures intent to establish a system of tenure. Miss. Code Ann. § 37-9-101. However, in "The Education Employment Procedures Law," the word "employee" is defined as "any teacher, principal, superintendent or other professional personnel employed by the local

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Missouri	5 years of continuous service	MO. ANN. STAT. §§ 168.102 through 168.130	Proposed Change (April 2012) SB 806: Probationary period to increase from 5 to 10 years; reduction in force decisions would be made exclusively based on teacher performance (seniority no longer a factor).	<ul style="list-style-type: none"> • Probationary period extended • Tenure/seniority not a primary factor in lay offs
Montana	3 years of continuous service	MONT. CODE ANN. § 20-4-203	None	N/A
Nebraska	3 years of continuous service	NEB. REV. STAT. ANN. §§ 79-824 through 79-842	None ²⁵⁵	N/A

school district for a continuous period of two (2) years with that district and required to have a valid license issued by the State Department of Education as a prerequisite of employment..." Miss. Code Ann. § 37-9-103(1)(a). While the Act does not limit employee dismissal to "just cause" it does establish a system of due process, that provides written notice and a right to hearing. The Act does not address the rights of teachers employed less than 2 continuous years of service.

²⁵⁵ Legislative Bill 809, introduced on January 5, 2012 addresses evaluation for both probationary and permanent certified employees. Since it does not directly impact tenure or tenure related provisions, it is not listed as a proposed change. Additionally, on January 10, 2012, the Platte Institute for Economic Research issued a report, calling for Nebraska to adopt a teacher selection and evaluation process similar to the one now used in Florida. The study recommends that teacher pay and tenure status be tied tightly to student achievement (specifically based on standardized test results). No proposed legislation has emerged from this study as of the end of June 2012.

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Nevada	2 years of continuous service (for teachers hired before July 1, 2011); 3 years (for teachers hired on or after July 1, 2011)	NEV. REV. STAT. ANN. §§ 391.311 through 391.3197	July 2011 Probationary period extended from 2 to 3 years for teachers hired on or after July 1, 2011; in order to obtain post-probationary status, a teacher hired on or after July 1, 2011 must receive a designation of satisfactory on each of his or her performance evaluations for 2 consecutive school years; a post-probationary employee who receives an unsatisfactory evaluation for 2 consecutive school years shall be deemed a probationary period and must serve an additional probationary period; reduction in force decisions cannot be made based solely on seniority (may also consider school/district needs, teacher performance, etc.).	<ul style="list-style-type: none"> • Probationary period extended • Teacher evaluation/performance considered in tenure decision • Teacher can lose tenure status by receiving negative evaluations • Tenure/seniority not a primary factor in lay offs
New Hampshire	5 years of continuous service	N.H. REV. STAT. ANN. § 189:14-a	July 2011 Probationary period extended from 3 to 5 years.	<ul style="list-style-type: none"> • Probationary period extended

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
New Jersey	3 years of consecutive service	N.J. STAT. ANN. §§ 18A:6-11 through 18A:28-10	Proposed Change (February 2012) SB 1455: In order to receive tenure protections, a teacher has to serve 3 consecutive school years and be evaluated as effective or highly effective in 3 consecutive annual summative evaluations; tenured teachers who receive negative evaluations 2 out of 3 years would lose their tenure rights. ²⁵⁶	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision • Teacher can lose tenure status by receiving negative evaluations
New Mexico	3 years of continuous service	N.M. STAT. ANN. §§ 22-10A-21 through 22-10A-24	January 2012 Beginning with the 2013-2014 school year and the implementation of the state teacher, principal and head administrator evaluation program, a teacher who earns the lowest performance rating for effectiveness in teaching after participating in a peer intervention program shall be terminated.	<ul style="list-style-type: none"> • Performance/bad evaluation grounds for dismissal
New York	3 years of service	N.Y. Education § 3012	None ²⁵⁷	N/A

²⁵⁶ The bill originally included a revision to the state's "last in, first out" policy for teacher layoffs. However, that part of the bill was eliminated during the amendment process.

²⁵⁷ While the New York law has not changed, the application of the law is changing. Beginning in 2010, Mayor Bloomberg began advising principals to deny tenure to teachers unless their students have made two years of progress on state tests. Principals have discretion on granting tenure rights. They are moving away from automatic granting of tenure rights. In 2005, nearly 99% of teachers received tenure whereas in 2011, approximately 58% of teachers eligible for tenure received it.

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
North Carolina	4 years of consecutive service	N.C. GEN. STAT. ANN. §§ 115C-304 and 115C-325	Proposed Change (June 2012) HB 950; In lieu of continuously renewing contracts for teachers who have completed at least 3 years of service, teachers shall be offered 1 to 4 year contracts.	<ul style="list-style-type: none"> • No longer offering automatically renewing contracts
North Dakota	Not specified	N.D. CENT. CODE ANN. §§15.1-15-02 and 15.1-15-05	None	N/A
Ohio	3 of 5 years teaching in the school/district ²⁵⁸	OHIO REV. CODE ANN. §§ 3319-08 to 3319-11	October 2009 In addition to serving at least 3 of the last 5 years in a district or center, a teacher must also have held an educator license for at least 7 years and attained master's training in his or her area of licensure.	<ul style="list-style-type: none"> • Added requirements for tenure

²⁵⁸ There is a great deal of inconsistency in how different sources report the actual length of time it takes to earn a "continuous contract" (which is equivalent to tenure) in Ohio. Two statutes address the requirements. First, OHIO REV. CODE ANN. § 3319.08 requires that for teachers issued a teaching certificate after July 1, 2011 to be eligible for tenure, he or she must have held an educators license for at least seven years and master's level training in his or her area of licensure. Section 3319.11 also states, in addition to the aforementioned requirements, that "within the last five years [the teacher has] taught for at least three years in the district or center, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district or center." OHIO REV. CODE ANN. § 3319.11(B) (West 2012).

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Oklahoma	3 or 4 years of service (depending upon date hired and evaluation rating) ²⁵⁹	OKLA. STAT. ANN. tit. 70, §§ 6-101.22 and 6-101.3	May 2010 For teachers employed in an Oklahoma district before July 1, 2012, there was a probationary period of 3 years to attain "career teacher" status. As part of the "Oklahoma Teacher and Leader Effectiveness Evaluation System (TLE)," for teachers hired by an Oklahoma district on or after July 1, 2012, in addition to 3 years of consecutive service, a teacher must also receive positive evaluation ratings. Additionally, effective July 1, 2012, career and probationary teachers can be dismissed for receiving poor evaluations in consecutive years. ²⁶⁰	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision • Performance/bad evaluation grounds for dismissal

²⁵⁹ For teachers hired on or after July 1, 2012, in order to attain "career teacher" status, a teacher must meet the following criteria:

- (1) has completed three (3) consecutive complete school years as a teacher in one school district under a written continuing or temporary teaching contract and has achieved a rating of "superior" as measured pursuant to the Oklahoma Teacher and Leader Effectiveness Evaluation System (TLE) as set forth in Section 6 of this act for at least two (2) of the three (3) school years, with no rating below "effective",
- (2) has completed four (4) consecutive complete school years as a teacher in one school district under a written continuing or temporary teaching contract, has averaged a rating of at least "effective" as measured pursuant to the TLE for the four-year period, and has received a rating of at least "effective" for the last two (2) years of the four-year period, or
- (3) has completed four (4) or more consecutive complete school years in one school district under a written continuing or temporary teaching contract and has not met the requirements of subparagraph a or b of this paragraph, only if the principal of the school at which the teacher is employed submits a petition to the superintendent of the school district requesting that the teacher be granted career status, the superintendent agrees with the petition, and the school district board of education approves the petition. The principal shall specify in the petition the underlying facts supporting the granting of career status to the teacher.

OKLA. STAT. ANN. tit. 70 § 6-101.3(4)(b)(1)-(3) (West 2012).

²⁶⁰ See OKLA. STAT. ANN. tit. 70 §6-101.22 (C)(1)-(3) and (D)(1) and (2) (West 2012):

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Oregon	3 successive school years	OR. REV. STAT. ANN. §§ 342.815 through 342.895	None	N/A
Pennsylvania	3 years of service ²⁶¹	24 PA. CONS. STAT. ANN. §11-1121	None ²⁶²	N/A

C.1. A career teacher who has been rated as “ineffective” as measured pursuant to the Oklahoma Teacher and Leader Effectiveness Evaluation System (TLE) as set forth in Section 6 of this act for two (2) consecutive school years shall be dismissed or not reemployed on the grounds of instructional ineffectiveness by the school district, subject to the provisions of the Teacher Due Process Act of 1990.

2. A career teacher who has been rated as “needs improvement” or lower pursuant to the TLE for three (3) consecutive school years shall be dismissed or not reemployed on the grounds of instructional ineffectiveness by the school district, subject to the provisions of the Teacher Due Process Act of 1990.

3. A career teacher who has not averaged a rating of at least “effective” as measured pursuant to the TLE over a five-year period shall be dismissed or not reemployed on the grounds of instructional ineffectiveness by the school district, subject to the provisions of the Teacher Due Process Act of 1990.

D. 1. A probationary teacher who has been rated as “ineffective” as measured pursuant to the TLE for two (2) consecutive school years shall be dismissed or not reemployed by the school district subject to the provisions of the Teacher Due Process Act of 1990.

2. A probationary teacher who has not attained career teacher status within a four-year period shall be dismissed or not reemployed by the school district, subject to the provisions of the Teacher Due Process Act of 1990.

²⁶¹ The Pennsylvania probationary period was increased from 2 to 3 years as a result of a 1996 amendment.

²⁶² While no major legislation addressing teacher employment processes has been introduced to date, Republican Governor-elect Tom Corbett has encouraged schools to take student achievement into account when making tenure decisions.

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Rhode Island	3 annual contracts within 5 successive school years	R.I. GEN. LAWS ANN. § 16-13-3	Proposed Change (February 2012) HB 7863; Introduction of a statewide teacher evaluation system; in order to earn continuous contract, a teacher will have to receive ratings of effective or higher under the district evaluation system for 3 years in a continuous 5 year period; teachers who receive 3 consecutive ratings of effective or higher under the evaluation system may receive tenure through a fast-tracked probationary period; reduction of force decisions will be made using the district's evaluation system to rank teachers within certification are for retention by level of effectiveness then by inverse order of employment.	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision • Tenure/seniority not a primary factor in lay offs
South Carolina	1 year induction period plus a maximum of 4 years at the annual contract level	S.C. CODE ANN. §59-26-40	Proposed Change (May 2012) HB 3028: Induction period increased from 1 year to a flexible 1 to 3 years, at the discretion of the school district. The annual contract period and the continuing contract level do not change.	<ul style="list-style-type: none"> • Probationary period extended

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
South Dakota	3 years of consecutive employment ²⁶³	S.D. CODIFIED LAWS §§13-43-6 through 13-43-6.6	March 2012 Teachers who have not earned tenure (continuing contract status) before July 1, 2016 will not acquire it; teaching contracts will be for 1 year (previously they were offered for 1-3 years); 2 consecutive evaluation ratings of unsatisfactory constitutes grounds for termination of a tenured or non-tenured teacher.	<ul style="list-style-type: none"> • No longer offering automatically renewing contracts • Shorter individual teaching contracts • Performance/bad evaluation grounds for dismissal

²⁶³ For those teachers who is in or beyond his or her fourth consecutive term of employment as a teacher prior to July 1, 2016, they will be considered tenured teachers. Any teacher who is not in or beyond the fourth consecutive term of employment with a school district prior to July 1, 2016, they will not acquire tenure or continuing contract under South Dakota law. 2012 S.D. Sess. Laws Ch. 102 (HB 1234).

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Tennessee	5 school years within the last 7 year period and positive evaluations	TENN. CODE ANN. §§ 49-5-501 through 49-5-511	April 2011 In order to be eligible for tenure, a teacher must complete a probationary period of 5 years out of 7 (previously it was 3) and must receive evaluations demonstrating an overall performance effectiveness level of "above expectations" or "significantly above expectations" during the last 2 years of the probationary period; having evaluations demonstrating an overall performance effectiveness level that is below expectations or significantly below expectations constitutes inefficiency and may be grounds for termination; any teacher, after acquiring tenure status, who receives 2 consecutive evaluations demonstrating an overall performance level of below expectations or significantly below expectations shall be returned to probationary status until the teacher has received 2 consecutive years of above expectations or significantly above expectations evaluations.	<ul style="list-style-type: none"> • Probationary period extended • Teacher evaluation/performance considered in tenure decision • Performance/bad evaluation grounds for dismissal • Teacher can lose tenure status by receiving negative evaluations
Texas	1 to 3 school years ²⁶⁴	TEX. EDUC. CODE ANN. §§ 21.002 through 21.207	None ²⁶⁵	N/A

²⁶⁴ TEX. EDUC. CODE ANN. § 21.102(b) (West 2012) states: "A probationary contract may not be for a term exceeding one school year. The probationary contract may be renewed for two additional one-year periods, for a maximum permissible probationary contract period of three school years, except that the probationary

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Utah	3 consecutive school years (school district may extend for an additional 2 years)	UTAH CODE ANN. §§ 53A-8-102 through 53A-10-106.5	Proposed Change (February 2012) SB 67: "Tenure" status for teachers who attained employment protections before July 1, 2012 is called career status and after is called professional teacher status; in order to acquire professional teacher status after July 1, 2012, a teacher must receive 3 ratings in a 5 year period of effective or highly effective.	<ul style="list-style-type: none"> Teacher evaluation/performance considered in tenure decision
Vermont	2 school years	VT. STAT. ANN. tit. 16, § 1752	None	N/A

period may not exceed one year for a person who has been employed as a teacher in public education for at least five of the eight years preceding employment by the district."

²⁶⁵ Texas has not made any legislative changes but it is changing the way it is using its existing laws. After a teacher completes his or her probationary period, he or she is then eligible for either a term contract (of up to five years) or a continuing contract (tenure). For a time, Texas school districts were granting a large number of continuing contracts. However, in recent years, they are reserving continuing contracts for only the most qualified teachers or refusing to grant continuing contracts at all, opting instead for term contracts that are reviewable on a regular basis.

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Virginia	3 years in the same school division and completion of training ²⁶⁶	VA. CODE ANN. §§ 22.1-303 through 22.1-307	Proposed Change (February 2012) HB 576: Probationary period increased from 3 to 5 years; for those teachers who have not earned continuing contract status before the 2013-2014 school year, it will no longer be available; instead of continuing contract status, teachers who have completed the probationary period will be eligible for renewable 3 year term contracts; reduction in force decisions will no longer be made solely on seniority and must include consideration of teacher evaluations; one or more unsatisfactory performance evaluations constitutes "incompetency" and may be grounds for dismissal.	<ul style="list-style-type: none"> • Probationary period extended • No longer offering automatically renewing contracts • Tenure/seniority not a primary factor in lay offs • Performance/bad evaluation grounds for dismissal

²⁶⁶ VA. CODE ANN. § 22.1-303(A) requires any teacher hired on or after July 1, 2011, as a condition of achieving continuing contract status, completion of "training in instructional strategies and techniques for intervention for or remediation of students who fail or are at risk of failing the Standards of Learning assessments."

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Washington	At least 3 years within a 5 year period ²⁶⁷	WASH. REV. CODE. ANN. §§ 28A-405.100 through 28A-405.220	March 2012 Effective September 1, 2014, a teacher who receives 2 consecutive unsatisfactory evaluations is returned to provisional status; non-provisional status is granted based on performance evaluations.	<ul style="list-style-type: none"> • Teacher can lose tenure status by receiving negative evaluations • Teacher evaluation/performance considered in tenure decision
West Virginia	3 years of acceptable employment	W.VA. CODE ANN. §§ 18A-2-2 and 18A-2-6	None	N/A
Wisconsin	3 years of continuous service ²⁶⁸	WIS. STAT. ANN. §§ 118.23 and 119.42	None	N/A

²⁶⁷ Washington teachers must serve a provisional period of employment and are considered provisional employees until he or she fulfills one of the following:

- (1) If the employee is a teacher, until the employee has received one of the top two evaluation ratings under the four-level rating system for three years within a five-year period;
- (2) During the first year of employment with a new district if the employee has previously achieved nonprovisional status in another school district; or
- (3) Immediately after receiving a second consecutive annual personnel evaluation identified as unsatisfactory or with the lowest evaluation rating (in this case, the teacher would be terminated, or nonrenewed, in lieu of receiving nonprovisional status).

See 2012 Wash. Sess. Laws Senate Bill No. 5896; WASH. REV. CODE ANN. § 28A-405.220 (West 2012).

²⁶⁸ The decision of whether or not to grant tenure is up to the discretion of the school districts. However, despite the discretion, all of the school districts in Wisconsin have chosen to establish tenure.

State Name	Length of Time to Earn Tenure ²⁴⁵	Applicable Statute	Legislative Changes or Proposals since January 2008	Nature of the Change
Wyoming	3 consecutive years of service with positive evaluations	WYO. STAT. ANN. §§ 21-7-110 and 21-7-102	February 2011 Added satisfactory performance on evaluations as a requirement for eligibility to be a continuing contract teacher; the board may suspend or dismiss any teacher who gives inadequate performance as determined through annual performance evaluation tied to student academic growth.	<ul style="list-style-type: none"> • Teacher evaluation/performance considered in tenure decision • Performance/bad evaluation grounds for dismissal

CHAPTER 3

ECONOMIC, SOCIAL, AND POLITICAL CONTEXT

Introduction

Dissatisfaction with the nation's public education system seems to be coming from every quarter. In an attempt to repair what is perceived by some as a broken system, federal and state policy makers have tried various legislative approaches to address declining student test scores and poor student achievement. As a result, legislators have passed a flood of education related legislation in the areas of national standards, national tests, school choice, teacher licensure, pay for performance, and teacher evaluations, all designed to increase student achievement. Acknowledging that teacher quality does positively impact student achievement, recent reform efforts specifically have focused on ensuring that the most effective teachers are in the classroom.²⁶⁹

Some argue that part of getting the right teachers in the classroom is getting rid of the wrong ones, which has put teacher tenure under fire. While many perceive teacher tenure to be a lifetime guarantee of employment for teachers, it is actually a guarantee of due process when a teacher faces negative employment actions, such as demotion or termination. It is a product of state law. Generally, state tenure statutes include some sort

²⁶⁹ Elrod, *supra* note 34. See also, Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POLICY ANALYSIS ARCHIVES 1, 1-44 (2000); Eric A. Hanushek, *The Trade-Off Between Child Quantity and Quality*, 100 J. OF POLITICAL ECON. 1, 84-117 (1992); Eric A. Hanushek and Steven G. Rivkin, *Teacher Quality*, in HANDBOOK OF THE ECONOMICS OF EDUCATION (Eric A. Hanushek and Finis Welch eds. 2006); Barbara Nye, Spyros Konstantopoulos, & Larry V. Hedges, *How Large Are Teacher Effects?*, 26 EDUC. EVALUATION & POLICY ANALYSIS 3, 237-257 (2004).

of mechanism for continued employment, such as an automatically renewing contract, and procedural protections against arbitrary dismissal.²⁷⁰ Teachers are granted tenure after a probationary period of one (Hawaii²⁷¹) to seven (Ohio²⁷²) years teaching, with a majority of states granting tenure after only three years.²⁷³ While some states require a record of satisfactory evaluations for teachers to be eligible for tenure, historically tenure has been a right that has been automatically granted after the expiration of the probationary period.²⁷⁴

Generally teacher tenure legislation has remained stable since the 1960s, despite tenure reform having been on the political agenda for decades. For example, in the 1970s, shortly after the enactment of the Elementary and Secondary Education Act of 1965²⁷⁵, the relationship between "accountability" in education and tenure was considered.²⁷⁶ The United States was going through a dramatic economic downturn and experiencing extreme political partisanship, not unlike today. During this time period,

²⁷⁰ Marshall, Baucom, & Webb, *supra* note 195 at 303.

²⁷¹ H.R.S. § 302A-608 (read in conjunction with the 2008 Senate Bill No. 2449, which reduced the probationary period from four semesters to two semesters).

²⁷² O.C.R. 3319.08. Teachers employed after January 1, 2011 are eligible for a "continuing contract" after working as a teacher for at least 7 years and some graduate education. While the provision ensures that new teachers will not earn tenure status in less than 7 years, it is important to note that the 7 year requirement is for licensure and is not an actual probationary period. Ohio also requires employment in a district for at least 3 years out of a five year period for receipt of tenure rights. This time period is more consistent with probationary periods in other states. O.C.R. 3319.08 (D)(3). Teachers who were licensed to teach in Ohio prior to January 1, 2011 can earn a continuing contract with just graduate coursework. O.C.R. 3319.08 (D)(2).

²⁷³ Cohen & Walsh, *supra* note 23; EDUC. COMM'N OF THE STATES, *supra* note 23.

²⁷⁴ Cohen & Walsh, *supra* note 23 at 32; EDUC. COMM'N OF THE STATES, *supra* note 23. During the probationary period, teachers are considered "at-will" employees and may be dismissed without cause at the end of any contract year. Teachers are generally not entitled to due process during the probationary period. A teacher has a property right for the period that he or she has a contract for employment. If a non-tenured teacher's employment is terminated mid-contract, he or she is entitled to due process of law. If, however, a non-tenured teacher's contract is simply not renewed, the non-tenured teacher is not entitled to due process.

²⁷⁵ 20 U.S.C. §70 (1965).

²⁷⁶ The Elementary and Secondary Education Act of 1965 called for annual evaluations of the programs it was funding which increased the focus on accountability. Worth (1972) notes that "in an era of tax revolt, inflation, recession, and social unrest, when the goals of education and the means used to achieve them are very much in question, funding sources...are demanding to know what we teachers are trying to do and how successful we are at it." Worth, *supra* note 28; *See also*, Blaschke, *supra* note 28.

education scholars addressed how the changes in political realities impacted or where impacted by tenure laws.²⁷⁷ For example, in his paper presented at the 1974 convention of the American Association of School Administrators, Charles Blaschke noted that political and economic changes led to and/or required a change in educational management, an increase in the popularity of accountability, and an increase in administrative flexibility.²⁷⁸ Blaschke pointed out that tenure, as a concept and as a practice, conflicted with these changes. He stated that educational management was prescriptive, implying change and achievement, while tenure was prescriptive.²⁷⁹ Tenure, he noted "is designed to protect teachers from being fired unless proven to be incompetent; yet, teachers don't have to demonstrate competencies to be given tenure."²⁸⁰ Blaschke also argued that tenure increasingly hampered the efficient allocation of school resources and that it was counterproductive as a tool for teacher motivation.²⁸¹ Blaschke was just one of many scholars discussing the value of teacher tenure. However, despite the fervent debate, tenure legislation remained largely unchanged.

Challenges to teacher tenure have not always been so academic; periodically, isolated changes have been made to state teacher tenure legislation.²⁸² For example, in the early 1990s, Colorado made significant revisions to its teacher tenure legislation²⁸³

²⁷⁷ Sources indicate that the academic debate regarding the abolition of teacher tenure in the 1970s began at the annual convention of the American Association of School Administrators. The debate was soon joined by scholars in other forums. Hipp, *supra* note 29; Hansen & Ellena, *supra* note 29; Escott, *supra* note 29; Sherman, *supra* note 29 at 167; Perry, *supra* note 29 at 183; Brown, *supra* note 17.

²⁷⁸ Blaschke, *supra* note 28, at 1. Blaschke's piece was actually written in response to Hansen & Ellena's paper cited in note 29.

²⁷⁹ *Id.* at 2.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See, e.g., Elrod, *supra* note 34.

²⁸³ *Id.*

and in 1997 Oregon overhauled its teacher tenure system.²⁸⁴ In 2000, under the direction of Governor Roy Barnes, Georgia repealed the Fair Dismissal Act of 1975 and its job protections for teachers as part of the state's educational reform efforts.²⁸⁵ While Georgia teachers regained their tenure protections just four years later, Georgia's repeal of tenure is one of the more dramatic examples of isolated tenure legislation reform.

Since January 2008, teacher tenure legislation has come under particular scrutiny. While tenure for K-12 public school teachers has been periodically challenged in the past, recent events have made it possible for the theoretical debate over tenure to turn into a large scale reform movement. Between 2008 and the end of June, 2012, 24 states have made substantive changes to their teacher tenure laws and an additional 11 states have proposed legislation pending²⁸⁶. Using John W. Kingdon's²⁸⁷ Multiple Stream framework and focus on agenda formation, this paper will address how teacher tenure transitioned from the political agenda to the decision agenda. The first section of this paper will identify the political, economic, and sociological factors that led to the teacher tenure reform movement that began in 2008.²⁸⁸ The second section of this paper will discuss the educational and policy implications of the reform movement, particularly given the inciting events discussed in section one.

²⁸⁴ In 1997, Oregon replaced its teacher tenure system with a "modified tenure" system in which teachers were offered two-year renewable contracts and provided with a rehabilitation program for teachers deemed ineffective. See Stephey, *supra* note 10.

²⁸⁵ Barnes' victory in eliminating teacher tenure increased the resolve of Georgia teachers to run Barnes out of office. After winning the Georgia Governorship, in 2003 Sonny Perdue became the first Republican Governor of Georgia since Reconstruction. With Purdue's support, job protections for teachers were restored in 2004. Grubbs, *supra* note 3 at 1.

²⁸⁶ Arizona has both passed tenure reform and has proposed legislation pending. For purposes of this paper, Arizona will generally be counted as a "change" state, rather than a "proposal" state.

²⁸⁷ Kingdon, *supra* note 44..

²⁸⁸ Reform movement addressed in this paper will focus specifically on the time period from January 2008 through June 2012.

Theoretical Framework

Many government actions occur incrementally, building upon existing practices over time.²⁸⁹ However, each incremental change can ultimately be traced back to non-incremental innovation, when a government program or procedure was new to the adopting body.²⁹⁰ There are countless frameworks available for looking at legislative innovation. Some focus on internal factors within the governing body and some focus on external forces pushing reform. As Berry and Berry note in their discussion of policy diffusion, both internal and external factors work together to motivate governments to innovate.²⁹¹

With an ever increasing federal role in education policy, this study focuses on external factors pushing states' to reform (or innovate)²⁹² their teacher tenure legislation, particularly those factors that are present at a national level. This chapter uses Kingdon's Multiple Stream framework to organize and analyze the national factors that have impacted state level changes in tenure policy.²⁹³ A synthetic approach, Kingdon's Multiple Streams framework seeks to explain how and why some issues move onto or up the decision agenda while others do not.²⁹⁴ One of the most cited theories of policy formation, Kingdon's model has been applied to studies examining state and federal

²⁸⁹ See FRANCES STOKES BERRY & WILLIAM D. BERRY, *THEORIES OF THE POLICY PROCESS* (1999) at Chapter 8.

²⁹⁰ *Id.* See also, Jack L. Walker, *The Diffusion of Innovations among the American States*, 63(3) AMER. POL. SCI. REV. 880 (1969).

²⁹¹ Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84(2) AMER. POL. SCI. REV. 395, 396 (1990).

²⁹² Reform is a form of innovation. Particularly in an area of law that was stagnant for an extended period of time, significant change to existing laws creates a new system of operation. Therefore, it can be viewed as a "new" policy, not just an adjustment to an existing policy.

²⁹³ Kingdon developed the Multiple Streams model based upon case studies of federal policy making primarily in the areas of transportation and health care. The case studies incorporated 247 interviews with policy makers over a 4-year period.

²⁹⁴ Lora Cohen-Vogel & Michael K. McLendon, *New Approaches to Understanding Federal Involvement in Education* (Chapter 57), in *HANDBOOK OF EDUCATION POLICY RESEARCH*, eds. Gary Sykes, Barbara Schneider & David N. Plank (2009) at 738.

policy in healthcare, the environment, national defense, and PK-12 and higher education policy.²⁹⁵ Most often, these studies are single-case studies within the federal government or within a particular state, but some multi-case studies (across states) have been done.²⁹⁶

No one framework is the only lens through which to view an issue. Different frameworks have different strengths and weaknesses. Kingdon's Multiple Streams framework is no different. The first, and perhaps greatest, challenge to using the Multiple Streams framework to examine multi-state legislative change is that the model was designed to explain policy change in a single system (federal or state level). In order to use the framework for a multi-case²⁹⁷ and multi-system²⁹⁸ application, assumptions from other frameworks as well as some minor modifications were considered.²⁹⁹ In particular, this study was conducted using the following assumptions gleaned from Berry and Berry's policy diffusion framework³⁰⁰:

- State policy decisions are made as a result of both internal determinants and external forces;
- States are persuaded, and even coerced, to make policy changes by similar policy changes made in other states; and

²⁹⁵ *Id.* at 739. For example, see Joe Blankenau, *The Fate of National Health Insurance in Canada and the United States: A Multiple Streams Explanation*, 29(1) POLICY STUDIES J. 38 (2001); Robert F. Durant & Paul F. Diehl, *Agendas, Alternatives, and Public Policy: Lessons from the U.S. Foreign Policy Arena*, 9(2) J. PUB. POLICY 179 (1989); Arnal Kavar, *Issue Definition, Democratic Participation, and Genetic Engineering*, 17(4) POLICY STUDIES J. 719 (1989); Elizabeth DeBray-Pelot, *School Choice and Educational Privatization Initiatives in the 106th and 107th Congress: An Analysis of Policy Formation and Political Ideologies*, 109 TEACHERS COLLEGE RECORD 927 (2007); Michael K. McLendon, *Setting the Governmental Agenda for State Decentralization of Higher Education*, 74 J. OF HIGHER EDUC. 479 (2003).

²⁹⁶ Cohen-Vogel & McLendon, *supra* note 294 at 739.

²⁹⁷ This study consists of a review of legislative change in 51 unique jurisdictions.

²⁹⁸ This study looks at change on the state level as a reaction to circumstances/actions at the federal or national level.

²⁹⁹ The Multiple Stream framework provides an excellent organizational structure for the particular facts in this case. Further investigation is required in order to determine if the model is valid for examining other multi-state policy changes.

³⁰⁰ Berry & Berry, *supra* note 289; Berry & Berry, *supra* note 291.

- Given the increasing influence of the federal government on education policy, state level policy may also occur in reaction to persuasion or coercion by the federal government, particularly in the form of competition and/or conformity.³⁰¹

The second challenge to using the Multiple Streams framework in this particular study is its focus on external factors. Because the study focuses on major issues or events that occurred at a national level, the study does not take into account internal state issues that also contributed to the decision to change (or not to change) state teacher tenure laws. Further research on each state's decision process would provide additional insight into how internal and external factors impacted the legislative process.

Finally, Kingdon's Multiple Stream framework was originally developed in 1984 based on data collected over a period of years. Since that time, the landscape of policy making has changed. Interest groups have changed in their structure and how they influence policy.³⁰² New groups and collaborations of groups have emerged to influence the educational policy process, such as venture philanthropists, new political advocacy groups, and state level coalitions.³⁰³ Likewise, some groups, like the teachers' unions, have experienced a change in their influence.³⁰⁴ This study incorporates the new realities of interest group politics into Kingdon's original framework.

Despite the challenges of using the Multiple Stream framework, it provides a linear and rational structure similar to that used in legal research and analysis, the overall framework of this study, while also allowing for a level of policy analysis not present in

³⁰¹ This assumption is not an articulated part of Berry & Berry's model, but it is, I believe, a natural and logical extension of their model.

³⁰² Elizabeth DeBray-Pelot & Patrick McGuinn, *The New Politics of Education Policy: Analyzing the Federal Education Policy Landscape in the Post-NCLB Era*, 23(1) EDUC. POLICY 15 (2009).

³⁰³ *Id.* Charles Barone & Elizabeth DeBray, *Education Policy in Congress: Perspectives from Inside and Out*, in CARROTS, STICKS, AND THE BULLY PULPIT: LESSONS FROM A HALF CENTURY OF FEDERAL EFFORTS TO IMPROVE AMERICA'S SCHOOLS, eds. Frederick M. Hess & Andrew P. Kelly (2012) at 61-82.

³⁰⁴ *Id.*

traditional legal research. By incorporating the Multiple Streams framework, this study is able to provide a more holistic view of changes in teacher tenure legislation, from the actual changes themselves (using legal research and analysis) to the contextual factors leading to legislative change (using Multiple Streams framework).

Overview of Multiple Stream Framework

The transition of the teacher tenure debate from the political agenda, where it has been for decades, to the national decision agenda beginning in 2008 is best explained using Kingdon's Multiple Streams framework. Kingdon explains that public policy making can be broken down into a set of four processes: 1) agenda setting; 2) consideration of alternatives; 3) choosing amongst the alternatives; and, 4) decision implementation.³⁰⁵ This paper focuses specifically on the first process, agenda setting. The agenda is "the list of subjects or problems to which governmental officials, and people outside the government closely associated with those officials, are paying some serious attention at any given time."³⁰⁶ The governmental agenda includes subjects that are generally getting attention, while the decision agenda consists of the issues within the governmental agenda that are "up for an active decision."³⁰⁷ Agenda setting involves three processes or "streams": problems, policies, and politics.³⁰⁸ In the case of teacher tenure, the policy stream has remained fairly static.³⁰⁹ Therefore, this study focuses on the problems and politics streams.

³⁰⁵ Kingdon, *supra* note 44, at 2-3.

³⁰⁶ *Id.* at 3.

³⁰⁷ *Id.* at 4.

³⁰⁸ *Id.* at 16.

³⁰⁹ As previously discussed, abolition of or changes to teacher tenure legislation is not a new concept. Given that the issue has been actively debated at the national level since the 1970s, new or accumulated knowledge in this policy area does not seem to be the driving force behind this reform movement. See Kingdon, *supra* note 44, at 17. Additionally, the policy stream may vary in each state, relying on internal determinants. Since the goal of this chapter is to identify national factors leading to nationwide reform,

In the problems stream, problems arise on the political agenda, or in this case are elevated from the political agenda to the decision agenda, as a result of focusing events and systematic indicators.³¹⁰ Focusing events, like a crisis or disaster, can call attention to a particular problem.³¹¹ The event(s) may be so powerful that it overshadows other agenda items, demanding immediate attention.³¹² Meanwhile, systematic indicators, particularly budgetary changes, alert policy makers of changes in the state of the system that demand attention.³¹³

Moving independently of the problems and policy streams, the political stream is composed of such things as the national mood, organized political forces, and administrative turnover.³¹⁴ Kingdon notes that governmental participants may sense changes in the national mood³¹⁵ which may serve to promote or constrain particular agenda items.³¹⁶ However, the national mood does not necessarily reflect the perceptions of the mass public; it may be driven by a few driven and vocal advocates or by media coverage.³¹⁷ The influence of organized political forces may also impact agenda setting in the political stream. The position of organized forces often determines the cost (in resources, power, and/or reputation) to a political leader pursuing a particular agenda

focus on the problem and policy streams is appropriate for this study. However, further research into the policy streams leading to reform in each state would provide an additional level of analysis.

³¹⁰ *Id.* at 90-108.

³¹¹ *Id.* at 94-95.

³¹² *Id.* at 96.

³¹³ *Id.* at 90-94. Kingdon notes:

Policy makers consider a change in an indicator to be a change in the state of a system: this they define as a problem. The actual change in the indicator, however, gets exaggerated in the body politic, as people believe the change is symbolic of something larger and find that the new figures do not conform to their previous experience. Thus indicator change can have exaggerated effects on policy agendas. *Id.* at 92-93.

³¹⁴ *Id.* at 143. Kingdon employs a more narrow usage of the term political, stating "'political' factors in such parlance are electoral, partisan, or pressure group factors." *Id.*

³¹⁵ Also referred to as "the climate of the country, changes in public opinion, or broad social movements." *Id.* at 146.

³¹⁶ *Id.* at 147.

³¹⁷ *Id.* at 148-49.

item.³¹⁸ Finally, changes in government personnel can drive the political agenda. New leaders, particularly those in key administrative roles, bring with them new priorities and new agenda items.³¹⁹

When policy streams converge, policy windows, or "opportunities for action," open.³²⁰ Kingdon explains, "Participants dump their conceptions of problems, their proposals, and political forces into the choice opportunity, and the outcomes depend on the mix of elements present and how the various elements are coupled."³²¹ Policy windows open infrequently and are only open for a short time; if action is not taken while the window is open, policy makers must wait until the window reopens.³²²

Problems Stream

In the area of teacher tenure, problems have arisen, or entered the problems stream, as a result of focusing events and systematic indicators. The problems stream contributed to the initial opening of the policy window, allowing teacher tenure reform, specifically with respect to reduction in force decisions, to transition from a theory to a reform movement.

The Focusing Event

In the fall of 2008, the United States fell into a deep recession, often referred to as the 2008 Financial Crisis. Considered by many leading economists to be the worst economic downturn since the Great Depression of the 1930s,³²³ it resulted in the collapse of large financial institutions, downturns in the housing and stock markets, increased

³¹⁸ *Id.* at 150. The price for pushing an idea forward will be greater if it is opposed by strong, organized political forces.

³¹⁹ *Id.* at 153-54.

³²⁰ *Id.* at 166.

³²¹ *Id.*

³²² *Id.*

³²³ David Pendery, *Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression; Risks Increase if Right Steps are Not Taken*, REUTERS (Feb. 27, 2009).

unemployment, and decreased federal and state government revenue. It did not take long for the 2008 Financial Crisis to take its toll on education funding. Federal employment data indicate that school districts began cutting the overall number of teachers and support staff as early as September 2008.³²⁴ The following school years saw even greater cuts; by the fall of 2011, local school districts cut approximately 278,000 jobs nationally.³²⁵ During the same time period, at least 37 states decreased per pupil funding for local school districts, with 17 states cutting per-student funding by more than 10% from 2007 levels.³²⁶ Figure 1 on the following page depicts changes in per-pupil spending by state from 2008 to 2012.

The federal government made efforts to minimize the blow to state education budgets. With the passage of the American Recovery and Reinvestment Act (ARRA) in 2009³²⁷, a portion of the \$814 billion provided under the Act went to save the jobs of teachers and other local and state school personnel.³²⁸ Federal lawmakers hoped the funding would save states from having to make severe layoffs as a result of budget cuts. However, the ARRA money came with a clock; it had to be spent by the end of the 2011-2012 academic year.³²⁹ In an attempt to cushion the blow of having to operate on a smaller budget without large scale federal subsidies, Congress passed the \$10 billion

³²⁴ Phil Oliff & Michael Leachman, *New School Year Brings Steep Cuts in State Funding for Schools*, CENTER ON BUDGET AND POLICY PRIORITIES (Oct. 7, 2011).

³²⁵ *Id.* at 2. The number of people employed by local school districts dropped 278,000 from 2008 to 2011. See also, Kimberly Hefling, *School Budget Cuts: Educators Fear Deepest Cuts Are Ahead*, THE HUFFINGTON POST (Oct. 24, 2011) (stating that the U.S. lost an estimated 294,000 jobs in the education sector between 2008 and 2011).

³²⁶ *Id.* at 1. The CBPP study was conducted using budget information for the 46 states that publish education budget data in a way that allows historic comparisons. While the exact level varies by state, on average, approximately 47% of total education expenditures in the U.S. come from state funds.

³²⁷ American Recovery and Reinvestment Act (ARRA), P.L. 111-5 (2009).

³²⁸ Approximately \$100 billion of the \$814 billion was allocated to education-focused stimulus. Sean Cavanagh & Heather Hollingsworth, *Education Budget Cuts: Schools Face Fiscal Cliff as Stimulus Money Runs Out*, THE HUFFINGTON POST (Apr. 6, 2011). The American Reinvestment and Recovery Act also provided the \$4.35 billion for the Race to the Top incentive grant program discussed later in this paper.

³²⁹ *Id.*

Education Jobs Fund (EJF).³³⁰ While the EJF will not replace the funds provided by the ARRA, it will provided some limited relief.³³¹

However, it is important to note that stimulus funding did not protected states from severe budget cuts and layoffs; it merely staved off disaster. In addition to losing approximately 300,000 jobs in the education sector since 2008, school districts have also been forced to cut art, music, and physical education; extracurricular activities; sports programs; transportation; field trips; and after-school programs.³³² Schools continue to face stripped down budgets, operating on funding well below 2007 levels.

While the issue of teacher tenure was on the policy agenda for decades, it needed a push to move to the decision agenda. The 2008 Financial Crisis was a focusing event, reducing per pupil spending and calling attention to the problem of waste in public school expenditures.³³³ While the Financial Crisis generally acted as a focusing event, school budget cuts specifically served as an indicator of a problem.

³³⁰ Education Jobs Fund, P.L. 111-226 (2010).

³³¹ *Id.*

³³² Hefling, *supra* note 325. *See also*, Cavanagh & Hollingsworth, *supra* note 328.

³³³ Kingdon, *supra* note 44, at 94-95.

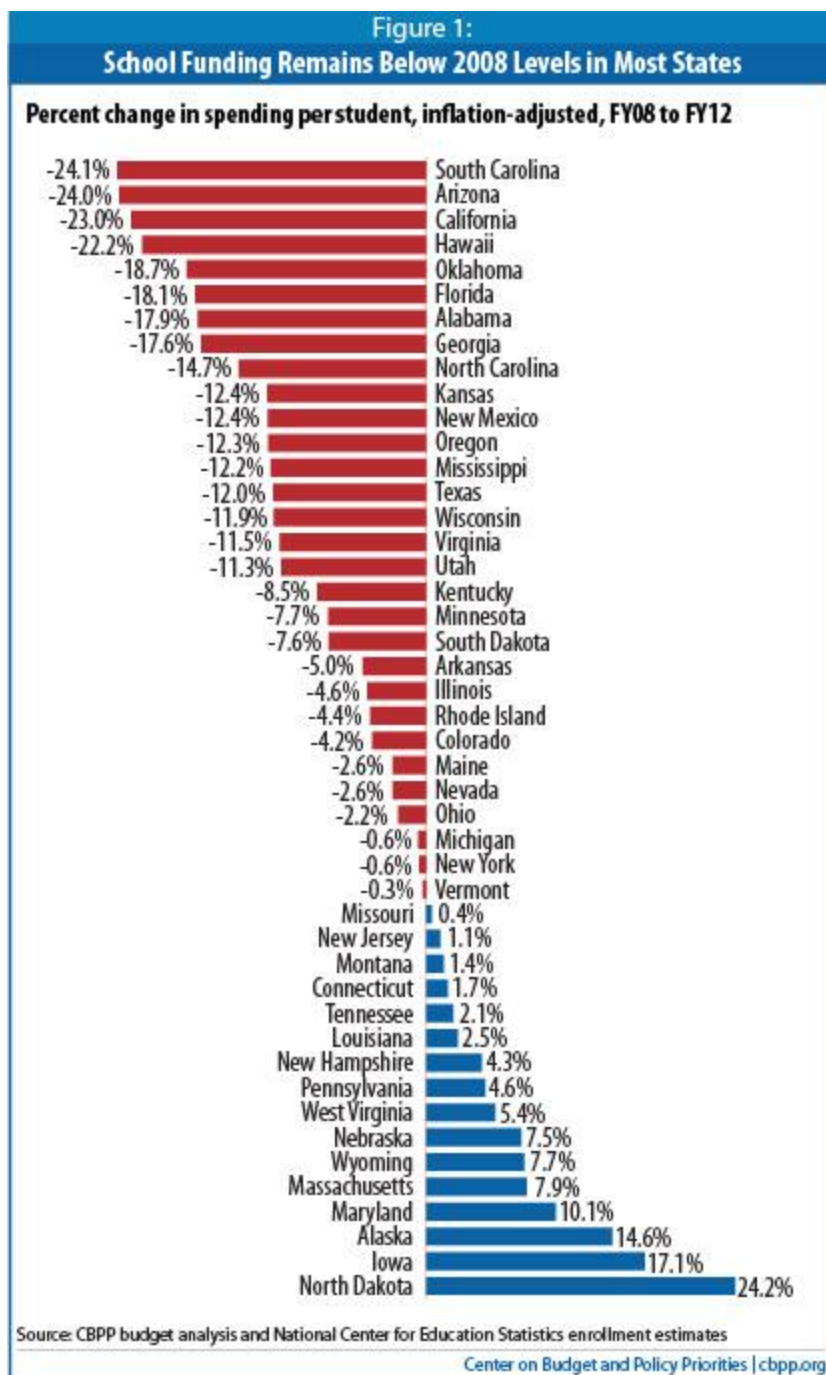


Figure 1: Changes in Per-Pupil Spending (2008-2012)³³⁴

³³⁴ *Id.* at 4.

The Indicator

Kingdon (1984) notes that "[p]eople in government know when their budgets are rising or falling, and problems directly affect them through the budget process."³³⁵

Education is no different. Since education is a largely labor driven industry, budget cuts can signal a looming crisis. The state education budget cuts resulting from the 2008 Financial Crisis required school administrators to look more closely at how they were spending their money and make some tough decisions. Teacher tenure became a particular concern for two distinct reasons. First, the cost to fire a tenured teacher was extremely expensive because of long, drawn out processes. Second, when faced with the prospect of having to layoff large numbers of teachers, administrators wanted to make sure that they were keeping the most effective, not just the most senior, teachers in the classroom. During the teacher tenure reform movement, some states were able to directly address these concerns through legislative change.

The Cost of Terminating a Tenured Teacher. The dismissal process may take a very long time to complete, often as much as two to three years, and can be costly for a school district. Depending on the state law, dismissed teachers may be entitled to a number of appeals, compensation during the appeals process, and a right to stay in the classroom during their appeals.³³⁶ While each state controls the number of appeals to which each teacher is entitled, most states allow a teacher to appeal a school districts decision to dismiss at least twice.³³⁷ Some states go even further; Washington for

³³⁵ *Id.* at 91.

³³⁶ Coleman, et al., *supra* note 9 at 226.

³³⁷ *Id.*

example, allows a teacher to appeal a local school board's dismissal decision all the way up to the state supreme court.³³⁸

Consequently, dismissal proceedings can cost a school district tens of thousands of dollars. In fact, costs exceeding \$100,000 for dismissal proceedings are not unheard of.³³⁹ One school district in Ohio reported spending more than \$900,000 to defend its termination of one tenured teacher.³⁴⁰ Similarly, in 2010, pursuing the termination of 550 tenured teachers cost the city of New York approximately \$30 million.³⁴¹ As a result of these challenges, some principals previously were inclined to tolerate incompetent teachers in order to avoid conflict. However, with budgets shrinking and the constant pressure of the accountability movement, administrators and state officials began to look for more long term solutions. In 2008, states began actually changing the systems that permitted such exorbitant costs.

Budget cuts pushed states to pursue more aggressively ways to cut costs. States took different approaches to addressing the difficulty and cost of terminating a tenured teacher. Some states made changes and/or improvements to their termination procedures. For example, in July 2011, Alabama passed the "Students First Act of 2011."³⁴² The Students First Act streamlines the teacher termination procedure and stops payment of a

³³⁸ Cohen & Walsh, *supra* note 23, at 33.

³³⁹ Schweizer, *supra* note 228.

³⁴⁰ John Michael Spinelli, *Is It Time to Terminate Teacher Tenure in Ohio?*, EXAMINER (Jan. 13, 2011). Eighth-grade science teacher John Freshwater was terminated for teaching creationism in violation of district policy. The costs associated with his termination represented approximately 3% of the Knox County school systems annual budget of \$32 million as of January 2011.

³⁴¹ Jennifer Medina, *Teachers Set Deal with City on Discipline Process*, NEW YORK TIMES (Apr. 10, 2010). See also, Ron Clairborne & Ben Forer, *Teacher Tenure Under Fire, as States Try to Cut Deficits*, ABC NEWS (Feb. 25, 2011), noting "It cost Los Angeles Unified School District \$3.5 million to fire six teachers."

³⁴² ALA. CODE §§ 16-24C-1 through 16-24C-14. The Students First Act replaced the "Teacher Tenure Act."

teacher's salary and benefits upon termination.³⁴³ In an effort to address their termination costs, New York City increased the number of hearing arbitrators from 23 to 39 and set a requirement that cases be heard more quickly.³⁴⁴

In order to address this issue, some states elected to put an end to automatically renewing contracts. As of the end of June 2012, three states (Florida³⁴⁵, Idaho³⁴⁶, and South Dakota³⁴⁷) passed legislation eliminating automatically renewing contracts. Three additional states (Arizona³⁴⁸, North Carolina³⁴⁹, and Virginia³⁵⁰) proposed legislation in process that would eliminate automatically renewing contracts.³⁵¹ Without the expectation of continued employment provided by an automatically renewing contract provision, teachers whose contracts are not renewed at the end of a contract are not entitled to due process of law.

Using a different tactic to make teacher termination less cumbersome, five states passed legislation stating that a teacher may lose tenure status if he or she receives unsatisfactory evaluations. An additional 2 states have similar proposed legislation pending. In Colorado³⁵², Louisiana³⁵³, Nevada³⁵⁴, New Jersey (proposed)³⁵⁵, and

³⁴³ *Id.*

³⁴⁴ Medina, *supra* note 341.

³⁴⁵ FLA STAT. ANN. §§ 1012.33, 1012.335, and 1012.22 (2012)

³⁴⁶ IDAHO CODE ANN. §§33-514 and 33-515 (2012). Idaho has a referendum on the November 2012 ballot that would repeal the 2011 legislative change. It would reinstate automatically renewing contracts and return issues like workload and class size to collective bargaining agreements.

³⁴⁷ S.D. CODIFIED LAWS §§13-43-6 through 13-43-6.6 (2012).

³⁴⁸ Arizona House Bill 2497, proposed January 2012.

³⁴⁹ North Carolina House Bill 950, proposed June 2012.

³⁵⁰ Virginia House Bill 576, proposed February 2012.

³⁵¹ Florida and South Dakota's laws both require that all teachers have one year contracts that must be renewed annually, regardless of probationary status. Idaho and Virginia's laws both allow for multi-year renewable contracts after completion of a probationary period. Comparatively, Arizona and North Carolina have left more up to the discretion of the school and/or local school district. They both offer contracts which range in length based on the individual.

³⁵² COLO. REV. STAT. ANN. §22-63-103 and §22-9-105.5 (2012).

³⁵³ LA. REV. STAT. ANN. §§ 17:441 through 17:446 (2012).

³⁵⁴ NEV. REV. STAT. ANN. §§ 391.311 through 391.3197 (2012)

³⁵⁵ New Jersey Senate Bill 1455, proposed February 2012.

Washington³⁵⁶, if a teacher receives a particular number of negative and/or unsatisfactory evaluations (annual), he or she may lose tenure status and be required to serve an additional probationary period. For example, in Louisiana, if a teacher receives a performance rating of "ineffective," he or she shall lose tenure status.³⁵⁷ In order to re-earn tenure status, a Louisiana teacher must again be rated "highly effective" for 5 years within a 6 year period. Under Colorado, Nevada, and Washington law, a teacher will lose tenure status after receiving 2 consecutive poor evaluations.

In Tennessee³⁵⁸, a teacher who receives 2 consecutive evaluation ratings of "below expectations" or "significantly below expectations" loses tenure status. In order to re-earn tenure status, the teacher does not have to serve a full five year probationary period but must receive 2 consecutive evaluation ratings of "above expectations" or "significantly above expectations." Alternatively, Connecticut's proposed legislation focuses more on keeping tenure status rather than losing it.³⁵⁹ It stipulates that teachers will have to continue to prove effectiveness to retain their tenure status.

Reduction in Force Decisions. Budget cuts also forced administrators to layoff large numbers of teachers. The cuts required administrators and lawmakers to take a closer look at their reduction in force policies.³⁶⁰ Prior to 2008, "last-hired, first-fired" policies were all too common. However, states were beginning to realize that effective

³⁵⁶ WASH. REV. CODE ANN. §§ 28A-405.100 through 28A-405.220 (2012).

³⁵⁷ LA. REV. STAT. ANN. §§ 17:441 through 17:446 (2012). This rule will be implemented beginning with the 2013-2014 school year.

³⁵⁸ TENN. CODE ANN. §§ 49-5-501 through 49-5-511 (2012).

³⁵⁹ Proposed plan introduced by Governor Malloy at the February 8, 2012 meeting of the Connecticut House of Representatives.

³⁶⁰ April Hunt & Nancy Badertscher, *Proposal Puts Performance Above Seniority in Teacher Layoffs*, ATLANTA JOURNAL-CONSTITUTION (Apr. 11, 2011).

educators were being let go only because they lacked seniority.³⁶¹ In response, many states begun addressing this problem in their legislatures, eliminating the "last-hired, first-fired" approach.

As of the end of June 2012, 7 states passed legislation addressing the use of teacher tenure status and/or seniority in making reduction in force decisions; similar legislation was proposed in an additional 5 states. Four states (Georgia³⁶², Iowa³⁶³, Maine³⁶⁴, and Nevada³⁶⁵) passed legislative changes that prohibited tenure status and/or seniority from being the sole factor considered in making reduction in force decisions. An additional four states (Maryland³⁶⁶, Massachusetts³⁶⁷, Rhode Island³⁶⁸, and Virginia³⁶⁹) have similar proposed legislation awaiting passage. Georgia's new law (as of May 2012) states that teacher seniority (including tenure status) is no longer the primary or sole factor used when implementing a reduction in force.³⁷⁰ Similarly, Nevada law now states that reduction in force decisions cannot be made based solely on teacher seniority.³⁷¹ Alternatively, Arizona³⁷², Indiana³⁷³, and Michigan³⁷⁴ have passed laws that prohibit using tenure status and/or seniority as a factor in making reduction in force

³⁶¹ *Id.* See also, Alex Bloom, *Arizona Law Changes Way Teachers Contract with Districts*, THE ARIZONA REPUBLIC (Nov. 23, 2009).

³⁶² GA. CODE ANN. §§ 20-2-940, 20-2-942, and 20-2-948 (2012).

³⁶³ IOWA CODE ANN. §§ 279-13 and 279-19 (2012).

³⁶⁴ ME. REV. STAT. ANN. tit. 20-A, § 13201 (2012).

³⁶⁵ NEV. REV. STAT. ANN. §§ 391.311 through 391.3197 (2012).

³⁶⁶ Maryland House Bill 1210, proposed February 2012.

³⁶⁷ Massachusetts Senate Bill 2197, proposed March 2012.

³⁶⁸ Rhode Island House Bill 7863, proposed February 2012.

³⁶⁹ Virginia House Bill 576, proposed February 2012.

³⁷⁰ GA. CODE ANN. §§ 20-2-940, 20-2-942, and 20-2-948 (2012).

³⁷¹ NEV. REV. STAT. ANN. §§ 391.311 through 391.3197 (2012).

³⁷² ARIZ. REV. STAT. ANN. §§ 15-538.01 through 15-548 (2012).

³⁷³ IND. CODE ANN. §§ 20-28-6-2 through 20-28-6-8 (2012).

³⁷⁴ MICH. COMP. LAWS ANN. §§ 38.71, 38.81 through 38.93 (2012).

decisions. Instead, reduction in force decisions will be made based exclusively on teacher effectiveness. Similar legislation has been proposed in Missouri.³⁷⁵

Politics Stream

Factors such as the national mood, the impact of organized political forces, and administrative turnover come together to create the politics stream. Specifically, teacher tenure reform advanced, in part, because of a change in perception about teachers and teacher tenure, a change in the impact of interest groups, and the agenda set by a new administration. Together with the problems and policy streams, these factors contributed to a policy window opening for the teacher tenure reform movement.

The National Mood

Kingdon notes that the national mood impacts what issues make it to government and decision agendas. He states:

People in and around government believe quite firmly that something like a national mood has important consequences. It has an impact on election results, on party fortunes, and on the receptivity of governmental decision making to interest group lobbying. A shift in climate, according to people who are actively involved in making or affecting public policy, makes some proposals viable that would not have been viable before, and renders other proposals simply dead in the water.³⁷⁶

Kingdon explains that lawmakers' perception of the national mood may push certain items onto the agenda or drive them into relative obscurity.³⁷⁷ However, the national mood is not necessarily a reflection of the sentiments of the mass public. It may be influenced by a few influential participants and/or media coverage. Kingdon observes

³⁷⁵ Missouri Senate Bill 806, proposed April 2012.

³⁷⁶ Kingdon, *supra* note 44, at 149.

³⁷⁷ *Id.* at 147.

that politicians and non-elected officials follow the media, "which is filled with commentary and impressions of the nature of the times."³⁷⁸

Public Perception of Teachers and Schools. Public opinion about teacher tenure relies in part on how the public perceives teachers and schools generally. The 2011 Gallup Poll results indicate that 71% of Americans have "trust and confidence" in public school teachers.³⁷⁹ When asked to grade the public schools in their community, 51% of participants gave the schools an A or a B.³⁸⁰ Sixty-nine percent of participants gave teachers in their community a grade of A or B, up 19% from 1984.³⁸¹ However, the *Education Next*-PEPG Survey³⁸² found only 46% of participants gave their local schools a grade of A or B. But in both the Gallup and the *Education Next*-PEPG Surveys, the percentage of participants awarding a grade of A or B dropped when participants were asked to focus on schools nationally (rather than just those in their community). In the Gallup Poll, only 17% of participants gave public schools nationally a grade of A or B, down 5% from 2008, while 51% awarded a grade of C.³⁸³ Similarly, the *Education Next*-PEPG Survey, the percentage of participants awarding a grade of A or B for schools nationally dropped to 22%, with 54% awarding a grade of C.

The inconsistency in public perception of schools locally and nationally begs the question, where is the public getting its information? The Gallup Poll response regarding media coverage may account for this inconsistency. Survey participants perceive the

³⁷⁸ *Id.* at 149.

³⁷⁹ William J. Bushaw & Shane J. Lopez, *Betting on Teachers: The 43rd Annual Phi Delta/Gallup Poll of the Public's Attitudes Toward the Public Schools*, 93 KAPPAN MAGAZINE 11, Table 8 (Sept. 2011).

³⁸⁰ *Id.* at 18, Table 2.

³⁸¹ *Id.* at 18, Table 29.

³⁸² William G. Howell, Martin R. West, & Paul E. Peterson, *The Public Weighs In on Public School Reform*, EDUCATION NEXT (Fall 2011). Surveyors interviewed a nationally representative sample of 2,600 American citizens during April and May 2011.

³⁸³ Bushaw & Lopez, *supra* note 379, at 19, Table 26. However, in 2007 only 16% of Survey participants awarded public schools nationally a grade of A or B.

schools in their community, that they may observe directly, much more positively than schools nationally. However, the public perception of how schools are performing nationally may be guided more by how they are portrayed in the media than by personal experience. When asked if they hear more good stories or bad stories about teachers in the news media, 68% of participants responses "bad stories," compared with 29% that responded "good stories."³⁸⁴

Perception of Tenure. The *Education Next*-PEPG Survey also questioned participants about their views on teacher tenure specifically. Between 2009 and 2011, opposition to tenure grew from 45% to 49%.³⁸⁵ Furthermore, support for tenure dropped from 25% to 20%.³⁸⁶ While the authors acknowledge that the numbers indicate a possible trend, they conclude that nothing can be made of the relatively small shifts alone. Future data is necessary to confirm if a trend exists.

One of the Survey questions asked participants how they felt about tying teacher tenure to performance; it asked, "If tenure is to be given at all...should [it] be based on demonstrated success in raising student performance on state tests."³⁸⁷ The percentage of participants who said that tenure should be based on student performance increased slightly from 49% to 50% between 2010 and 2011.³⁸⁸ It is evident from the Survey results that public sentiment is trending slowly away for support of teachers receiving tenure solely on the basis on amount of time served. It is unclear, however, whether

³⁸⁴ *Id.* at 11, Table 7.

³⁸⁵ Howell, West, & Peterson, *supra* note 382, at 13.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ The surveyors broke down the Survey results by isolating the responses of affluent participants and teachers. Affluent participants were defined as college graduates who were in the top income decile in their state. In those groups, 61% of affluent participants responded that they think tenure should be based on student achievement, while only 30% of teachers favored that approach.

public sentiment has influenced public policy in this area or whether public policy and the media have influenced public thought.

Perception of Unions and Collective Bargaining. Both the Gallup Poll and the *Education Next*-PEPG Survey addressed the public's perception of unions and collective bargaining. Given the unions' very public outcries against tenure reform, negative feelings about teachers' unions and/or collective bargaining for teacher could certainly impact how the public perceives the issue of teacher tenure.

In the 2011 Gallup Poll, when asked if unionization has helped, hurt, or made no difference in the quality of public school education in the United States, 47% of participants responded that it hurt, 26% responded "helped," and 25% responded "made no difference."³⁸⁹ In comparison, in 1976, only 38% of participants thought that the union hurt the quality of public education while 22% of participants thought it helped. It is interesting to note that the numbers in both camps have risen. From 1976 to 2011, the number of people who responded "don't know/refused" dropped from 13% to 2%, indicating that the public is becoming more aware of teachers' unions and is coming down on one side or the other.³⁹⁰

The *Education Next*-PEPG Survey notes that sentiment regarding teachers' unions has remained fairly steady over the last 3 years, with approximately 33% perceiving unions as having a negative impact on schools and 29% perceiving a positive impact.³⁹¹ They note that the plurality of participants, or 38%, continued to hold a neutral position

³⁸⁹ Bushaw & Lopez, *supra* note 379, at 13, Table 10.

³⁹⁰ *Id.* However, when asked if they sided with governors or the teacher's union in disputes over collective bargaining policies and the state budget, 52% said that they side with the teacher's union while only 44% said that they side with the governors. *Id.* at table 11.

³⁹¹ Howell, West, & Peterson, *supra* note 382, at 12.

on the issue.³⁹² There is clearly some inconsistency between the two polls. The Gallup Poll yields a far larger percentage of participants who believe that unions negatively impact public schools. It also provides a significantly smaller percentage of participants that claim to be undecided on the issue. Despite these inconsistencies, it is clear that the public is becoming increasingly aware of the impact of teachers' unions on public education. As more information becomes available on the subject, public sentiment may be swayed in either direction.

The Media. While the public is split on how it perceives teachers, public schools, unions, and teacher tenure, the media certainly seems to be more clear. Media attention on the teacher tenure debate has been rampant, coming from all varieties of media outlets and from all across the nation. The debate over teacher tenure has been covered heavily by the print media, including the New York Times,³⁹³ the Washington Post,³⁹⁴ and the Huffington Post,³⁹⁵ TIME,³⁹⁶ USA Today,³⁹⁷ the Associated Press,³⁹⁸ the Wall Street Journal,³⁹⁹ and state and local newspapers.⁴⁰⁰ Although there are articles

³⁹² *Id.* The authors also note that 56% of affluent participants responded that unions have a negative impact on schools, while only 17% of teachers took that position. *Id.* at 12-13.

³⁹³ See e.g., Medina, *supra* note 341; Steven Brill, *The Rubber Room: The Battle over New York City's Worst Teachers*, NEW YORK TIMES (Aug. 31, 2009); Tim Clifford, *Dear Reformers: Teachers Are Neither Heroes Nor Zeroes*, NEW YORK TIMES (Apr. 18, 2012); Andrew Harrer, *Michelle Rhee*, NEW YORK TIMES (Dec. 7, 2010); Sharon Otterman, *Once Nearly 100%, Teacher Tenure Rate Drops to 58% as Rules Tighten*, NEW YORK TIMES (July 27, 2011).

³⁹⁴ See e.g., Emma Brown, *Virginia Teacher Tenure Bill Dies in GOP-Led Senate*, WASHINGTON POST (Mar. 8, 2012); Valerie Strauss, *Is Teacher Tenure a Myth?*, WASHINGTON POST (June 5, 2012).

³⁹⁵ See e.g., Kimberly Hefling, *American Public School Teacher Tenure Rights Weakening as States Seek to Fire Underperforming Educators*, HUFFINGTON POST (Jan. 25, 2012); Myles Miller, *Fewer Teachers Get Tenure in New York City Schools*, HUFFINGTON POST (July 27, 2011); Joy Resmovits, *Teacher Tenure Under Fire from Statehouses*, HUFFINGTON POST (July 12, 2011).

³⁹⁶ See e.g., Andrew J. Rotherham, *Fixing Teacher Tenure Without a Pass-Fail Grade*, TIME (Jan. 27, 2011); Stephey, *supra* note 10.

³⁹⁷ See e.g., Greg Toppo, *Union Ties to Anti-Rhee Site Roil Schools Fight*, USA TODAY (Aug. 29, 2011).

³⁹⁸ See e.g., Kimberly Hefling, *Dire Warning on Education*, ASSOCIATED PRESS (Mar. 20, 2012); Michelle Rindels, *Nevada Teacher Tenure Bills Advance to Senate Vote*, ASSOCIATED PRESS (May 20, 2011).

³⁹⁹ See e.g., Stephanie Banchero, *Teacher-Evaluation Bill Approved in Colorado*, WALL STREET JOURNAL (May 14, 2010).

⁴⁰⁰ These are just a few examples of the hundreds of articles written on the subject.

defending tenure,⁴⁰¹ they are certainly few and far between. In large part, the coverage in newspapers and magazines has favored reform or abolition of teacher tenure. For example, in an article written in TIME Magazine, the author acknowledges that teacher tenure is a set of rules and regulations outlining due process for teachers fired for just cause and that most teachers are "not incompetent or dangerous."⁴⁰² However, he then goes on to note, "The elaborate rules often make it nearly impossible to fire a teacher. Joel Klein, who recently stepped down as New York City schools chancellor, has pointed out that death-penalty cases can be resolved faster than teacher-misconduct cases."⁴⁰³ In the article, he also states that "there is consensus among education reformers and some teachers'-union leaders that the rules need to be changed and the process streamlined."⁴⁰⁴ While the facts used in the article are for the most part accurate, the tone of the article reflects a need for reform and states that the majority of lawmakers (and even union leaders) are in support of legislative change. This article is just one of many articles that goes beyond reporting the facts and argues for reform of teacher tenure.

Tenure has not just been attacked in the print media. Broadcast news and even the movie industry have also entered the fray. In March 2011, Katie Couric interviewed Zeke Vanderhoek, Founder and Principal of The Equity Project Charter School (TEP) in New York City to discuss his strategies on how to run a successful school.⁴⁰⁵ Because TEP is a charter school, it is not required to employ union teachers like its public school counterparts.⁴⁰⁶ The administrative freedoms provided by TEP's charter have given

⁴⁰¹ See e.g., Clifford, *supra* note 393.

⁴⁰² Rotherham, *supra* note 396.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ 60 Minutes: Charter School's \$125K Experiment (CBS Broadcast Mar. 13, 2011). ABC News has also reported on the teacher tenure debate. See Clairborne & Forer, *supra* note 341.

⁴⁰⁶ 60 Minutes, *supra* note 405.

Vanderhoek a great deal of leeway in how to allocate resources and as a result he is able to pay the TEP teachers \$125,000 a year, well above the national average.⁴⁰⁷ When Couric and Vanderhoek addressed the issue of teacher tenure, Vanderhoek stated that his teachers are at-will employees and if they are not performing, they are dismissed.⁴⁰⁸ Regarding tenure, Vanderhoek stated, "The idea that someone could have a job for life no matter how they perform is not good for the people in that job, much less the students who have to suffer if that individual has gone downhill."⁴⁰⁹ After confirming that tenure is awarded to teacher just for "showing up," Couric reported that more teachers have died on the New York City School's payroll than have been removed for cause.⁴¹⁰ Again, like the print media, Couric's report was factually accurate.⁴¹¹ However, the way in which she framed the story was clearly biased against teacher tenure.

Finally, the teacher tenure debate made it to the big screen. Endorsed by Oprah Winfrey,⁴¹² the documentary *Waiting for 'Superman'* became a hit.⁴¹³ The film follows a handful of children through the charter school lottery system, all the while providing commentary on education policy, including teacher tenure. While praised by many,⁴¹⁴ some argued that the film provided a very one dimensional picture of the charter school movement. For example, in her critique of the film for *The Nation*, Dana Goldstein noted that the film only portrayed working- and middle-class parents attempting to get their

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ To the best of this author's knowledge. The author did not check all facts contained in the piece.

⁴¹² *The Oprah Winfrey Show* (Harpo Productions Sept. 20, 2010).

⁴¹³ *WAITING FOR 'SUPERMAN'* (Electric Kinny Films 2010).

⁴¹⁴ Including *NEW YORK MAGAZINE*, the *NEW YORK TIMES*, *TIME*, and Katie Couric of CBS Evening News.

"charming, healthy, well-behaved children into successful public charter schools."⁴¹⁵

However, she argues that there is a lot of information they left out, including:

[T]he four out of five charters that are no better, on average, than traditional neighborhood public schools (and are sometimes much worse); charter school teachers, like those at the Green Dot schools in Los Angeles, who are unionized and like it that way; and noncharter neighborhood public schools like PS 83 in East Harlem and the George Hall Elementary School in Mobile, Alabama, that are nationally recognized for successfully educating poor children. You don't see teen moms, households without an adult English speaker or headed by a drug addict, or any of the millions of children who never have a chance to enter a charter school lottery (or get help with their homework or a nice breakfast) because adults simply aren't engaged in education. These children, of course, are often the ones who are most difficult to educate, and the ones neighborhood public schools can't turn away. You also don't learn that in the Finnish education system, much cited in the film as the best in the world, teachers are—gasp!—unionized and granted tenure...⁴¹⁶

With a limited amount of time available, a documentary cannot present all of the facts on any one issue. But as Ms. Goldstein notes, the facts presented in *Waiting for 'Superman'* seemed to be one-sided and chosen to make a particular argument.

As is evidenced above, the media, in its many forms, seems to be overwhelmingly in favor of reform or abolition of teacher tenure. Whereas, the *Education Next*-PEPG Survey and Gallup Poll indicate that the mass public is still very split on issues involving teacher quality, unions and collective bargaining, and teacher tenure reform. Lack of public consensus has made room for the media to set the national mood on the teacher tenure debate. And the mood has been set in favor of tenure reform.

Organized Political Forces

Also contributing to the political stream are organized political forces. Kingdon explains that "interest group pressure does have a positive impact on the government's

⁴¹⁵ Dana Goldstein, *Grading 'Waiting for Superman'*, THE NATION (Sept. 23, 2010).

⁴¹⁶ *Id.*; See also, Gerald N. Tirozzi, *Is Superman the Conversation We Need?* 76 EDUCATION DIGEST 23 (2010).

agenda."⁴¹⁷ However, a great deal of interest group activity is in the form of negative blocking instead of positive policy promotion.⁴¹⁸ He notes, "[i]mportant interests with the requisite resources are often able to block not only passage of proposals inimical to their preferences but even serious consideration."⁴¹⁹ Policymakers seek to avoid crossing well-positioned interest groups to protect their own resources and reputations.⁴²⁰ Organized political forces that impact the education agenda include political advocacy groups, teachers' unions, and venture philanthropists.

Political Advocacy. With the passage of No Child Left Behind (NCLB) came a change in the political environment, both in terms of the groups influencing education policy and the strategies they used to influence change. This period saw both growth and diversification political advocacy groups focused on education policy.⁴²¹ Newer groups, such as the Center for American Progress, Democrats for Education Reform, and the New American Foundation, used new technology and collaboration to push their agendas in the post-NCLB era.⁴²² Their willingness to embrace new strategies helped these groups to remain "in-groups" in the debate over teacher tenure reform.⁴²³ They did this by challenging (or supporting) tenure directly and by challenging other traditional processes, such as the teacher credentialing and teacher evaluation systems, that are inextricably linked to teacher tenure. For example, Democrats for Education Reform focus their lobbying efforts expressly on teacher tenure, pushing specific legislation tying the acquisition and retention of tenure to demonstrated effectiveness in the classroom and

⁴¹⁷ Kingdon, *supra* note 44, at 49.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 151.

⁴²⁰ *Id.*

⁴²¹ DeBray-Pelot & McGuinn, *supra* note 302 at 33.

⁴²² *Id.*

⁴²³ *See id.* at 23.

for the placement of state officials who support tenure reform efforts.⁴²⁴ Alternatively, The New Teacher Projects report, "The Widget Effect," focuses on teacher evaluation systems and their accuracy in measuring teacher performance.⁴²⁵ The Widget Effect calls into question the utility of teacher tenure in a system that fails to accurately evaluate teachers and their performance. Without honest evaluation, tenure is granted to teachers for duration rather than quality of service and it becomes very difficult to terminate ineffective teachers.⁴²⁶ Both direct and indirect attacks on teacher tenure have worked to create a fertile climate for legislative change by linking all teacher performance issues together.

More recently, some policy advocacy groups brought in big names from the world of education policy to advocate for their particular position. For example, the Center for American Progress enlisted Stanford's Linda Darling-Hammond for its 2010 report on improving teacher evaluation.⁴²⁷ Darling-Hammond has a strong reputation in the education community, having served as an advisor on education to President Barack Obama in his first campaign, as president of the American Educational Research Association (1995-96), and as a member of the boards of directors for the Spencer Foundation, the Carnegie Foundation for the Advancement of Teaching, and the Alliance for Excellent Education.⁴²⁸ In her report, she argues that a stronger teacher assessment for initial teacher licensure, used in conjunction with other tools, such as subject matter

⁴²⁴ Kathleen Nugent, *In New Jersey, A Year Makes Quite a Difference (Take Two)*, DFER'S BLOG: TEACHER TENURE (January 7, 2013), (outlining the DFER's efforts to pass teacher tenure reform in New Jersey).

⁴²⁵ Daniel Weisberg, Susan Sexton, Jennifer Mulhern, & David Keeling, *The Widget Effect: Our National Failure to Acknowledge and Act on Differences in Teacher Effectiveness* (2nd. ed.), THE NEW TEACHER PROJECT (2009).

⁴²⁶ *Id.*

⁴²⁷ Linda Darling-Hammond, *Evaluating Teacher Effectiveness: How Teacher Performance Assessments Can Measure and Improve Teaching*, CENTER FOR AMERICAN PROGRESS (Oct. 2010).

⁴²⁸ Curriculum Vitae of Linda Darling-Hammond, Stanford University.

tests, can improve evaluation of teacher performance throughout a teacher's career and help to identify specific development needs.⁴²⁹ This is just one of many examples of think tanks and advocacy groups using well-known education experts to push their teacher performance agendas.⁴³⁰

In the debate over tenure reform, not all advocacy is coming from organized political groups or think tanks. Some well known scholars are speaking out as individuals for a particular position. For example, former U.S. Assistant Secretary of Education and *New York Times* bestselling author Diane Ravitch has been very vocal about efforts to reform teacher tenure legislation. In a speech given to the National Education Association, she stated:

Currently, there is a campaign underway to eliminate tenure and seniority. To remove job protections from senior teachers would destroy the profession. Supervisors will save money by firing the most expensive teachers. Imagine a hospital staffed by residents and interns with no doctors. Bad idea.⁴³¹

Instead, Ravitch argues for more diversity in curriculum, increased parent involvement, and allocation of resources that provides more equity in educational opportunity. In a more recent article for Education Week, Ravitch posits:

It cannot be accidental that the sharp drop in teacher morale coincides with the efforts of people such as Michelle Rhee and organizations such as Education Reform Now and Stand for Children to end teacher tenure and seniority. Millions have been spent to end what is called "LIFO" (last in, first out) and to make the case that teachers should not have job security. Many states led by very conservative governors have responded to this campaign by wiping out any job security for teachers.⁴³²

⁴²⁹ *Id.*

⁴³⁰ Some other examples include well known former Washington D.C. Chancellor Michelle Rhee advocates for her own organization, Students First, and the Teach for America Organization and Fareed Zakaria, a board member of the New America Foundation is also a weekly host on CNN, an Editor-at-Large for the Time Magazine, and a columnist for the Washington Post.

⁴³¹ Diane Ravitch, Address at the National Education Association 2010 Representative Assembly, NEA Friend of Education Award (June 6, 2010).

⁴³² Diane Ravitch, *Why Are Teachers So Upset?* EDUCATION WEEK (Mar. 13, 2012).

The policy groups and individual advocates that emerged or became much stronger in a post-NCLB era fall on both sides of the teacher tenure debate. The more conservative groups from both the Republican and Democrat parties argue for increasing the requirements for acquiring and retaining teacher tenure while advocates on the other side argue that tenure is a necessary job protection that should remain intact. With both sides using their powerful resources and more recognizable spokespeople, political advocacy groups and think tanks are making every effort to sway policy makers in their favor through both direct and indirect means.

Teachers' Unions. The teachers' unions have been one of the most politically powerful government unions, with membership in the millions.⁴³³ For years, teachers' unions have fought to stave off school reform efforts that would threaten the government's control over public schools (school choice and charter schools) and that would weaken teachers' rights.⁴³⁴ Their power, much as Kingdon described, was far greater in blocking legislation than in passing it. However, in the last two decades, and in particular in the last 4 years, the teachers' unions have seen their influence wane to some extent, making the cost of going against the union's wishes by voting for legislative change lower for policymakers. The union lost power in two different ways: first, there has been an internal split within the Democratic party regarding educational policy issues that has fractured its support of the union platform; second, union membership is dropping, lowering the union's resources and influence. The deterioration in union power

⁴³³ Ivan Osorio, *Democrats Diverging from Unions: Backing government Employees is Too Expensive*, WASHINGTON TIMES (Dec. 15, 2010). There are many teachers' unions, from the large national groups like the National Education Association (NEA) and the American Teachers' Federation (AFT), to smaller state or local unions (often affiliated with one of the two national groups). Because they have been working collectively to block teacher tenure reform, they are discussed collectively, as one body, in this paper.

⁴³⁴ *Id.*

has, in turn, weakened the union's ability to block legislation. Therefore, in the case of teacher tenure, the breakdown of organized political forces contributed to the political stream.

Relationship between the Democrats and the Unions. The teachers' union shares a longstanding relationship with Democrats. The union has been a loyal constituent, contributing generously to campaign funds. And Democrats reciprocated by voting in line with the union agenda of increased federal spending and limited interference with collective bargaining rights and school policy.⁴³⁵ However, over the last two decades the relationship between the Democrats and the teachers' unions has become strained at times when union interests conflict with other party values, such as serving poor and minority students.⁴³⁶ In such instances, some Democrats have voted in favor of legislative change, in direct opposition to the wishes of the teachers' unions.

Additionally, democratic mayors in cities across the country (Chicago, Cleveland, Denver, Newark, Boston, Los Angeles, etc.) challenged the teachers' union.⁴³⁷ For example, in Los Angeles, Democrat Mayor Antonio Villaraigosa recently joined the reform movement.⁴³⁸ Despite a close relationship in the past, in 2010, Villaraigosa denounced the United Teachers of Los Angeles (UTLA), stating, "At every step of the way, when Los Angeles was coming together to effect real change in our public schools, UTLA was there to fight against the change and slow the pace of reform."⁴³⁹

⁴³⁵ DeBray-Pelot & McGuinn, *supra* note 302 at 18.

⁴³⁶ Barone & DeBray, *supra* note 303 at 79-80. The split is discussed in greater detail in the preceding section.

⁴³⁷ Lyndsey Layton, *Democratic Mayors Challenge Teachers Unions in Urban Political Shift*, WASHINGTON POST (Mar. 30, 2012).

⁴³⁸ *Id.*; Osorio, *supra* note 433.

⁴³⁹ Osorio, *supra* note 433.

State representatives and local party officials are also standing up to union pressures. In Colorado, for example, Governor Bill Ritter signed SB 191 into law in 2010 despite violent protest by Colorado's union, the Colorado Education Association (CEA).⁴⁴⁰ Democrats in both chambers of the state legislature joined Republicans to send the groundbreaking proposal to Governor Ritter for his approval.⁴⁴¹ SB 191 provides sweeping reforms to the state's teacher evaluation and retention policies, changing the way teachers earn and retain tenure. The bill specifically states that teachers who receive unsatisfactory ratings twice in a row could lose their tenure status and possibly their job.⁴⁴² More recently, in Chicago, the director of the Illinois chapter of Democrats for Education Reform, Rebeca Nieves Huffman, publically accused the teachers' union of "not-so-secretly planning to hold our city - and our schoolchildren - hostage by calling a strike."⁴⁴³

It is clear that the teachers' unions and the Democrats share a more complicated relationship in the post-NCLB era. Since alignment with the Republican Party seems highly improbable given the two groups' political ideals, the unions' ability to impact the legislative process, particularly by blocking undesirable legislation, may be weaker than in previous periods.

Drop in union membership. A recent dramatic decrease in union membership is also threatening the influence of the teachers' union. Between 2010 and 2011, the nation's largest teachers' union, the National Education Association (NEA), lost more

⁴⁴⁰ Debi Brazzale, *Teachers Union Shaken, Allies Divided by Passage of Tenure Reform*, COLORADO NEWS AGENCY (May 12, 2010).

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ Rebeca Nieves Huffman, *CTU's Reckless Strike Talk is Bad for Chicago's Kids*, CHICAGO-SUN TIMES (May 3, 2012).

than 100,000 members.⁴⁴⁴ The NEA predicts that by 2014, that number may jump by an additional 300,000 members.⁴⁴⁵ The dues lost as a result of the sudden drop in membership is an estimated \$65 million, or 18%⁴⁴⁶ In response to the losses, the NEA states:

After a year of unprecedented membership losses driven by economic stresses and political attacks, the National Education Association stands at a crossroads. Unlike in the past, our shrinking membership is not the sole product of a down economy from which we could expect to eventually recover. The forces impacting us are so strong that they have indelibly changed our industry, the educational system, and society at large. Things will never go back to the way they were. Attacks on collective bargaining and the role of the union, the nation's changing demographics, education reform efforts, and an explosion in the use of education technology and online learning have radically changed the role of educators and the system of educating our nation's students.⁴⁴⁷

Regarding the impact of the unprecedented drop in membership, Rick Hess of the American Enterprise Institute stated, "Obviously in Democratic politics, if they have a half-million fewer members at some point and a lot fewer dollars, there's absolutely a point when they're going to matter less than they do today - and that's going to hurt them."⁴⁴⁸

Between its fractured relationship with the Democrats and the alarming drop in membership, the teachers' union has not fared well over the past four years. The passage of education reform in the area of teacher evaluation and tenure alone indicates that the union is losing its footing. From 2008 through June 2012, 23 states that permit collective

⁴⁴⁴ Greg Toppo, *USA's Top Teachers Union Losing Members*, USA TODAY (July 3, 2012). *See also*, S.D. Lawrence, *NEA Membership Decline Heralds Loss of Power and Influence*, EDUCATION NEWS (July 6, 2012).

⁴⁴⁵ Toppo, *supra* note 444. A reduction of an additional 300,000 members would constitute a 16% drop in membership from 2010.

⁴⁴⁶ *Id.*

⁴⁴⁷ Larry Sand, *The Nation's Biggest Union Finds Itself in a Big Hole and Keeps Digging*, NATIONAL INSTITUTE FOR LABOR RELATIONS RESEARCH (July 11, 2012)(quoting the NEA 2012-2014 Strategic Plan).

⁴⁴⁸ Toppo, *supra* note 444.

bargaining for teachers made substantive changes to their teacher tenure legislation, and an additional 8 states are considering similar changes.

Venture Philanthropy. Philanthropy has long been a part of America's public education system. For much of the twentieth century, well known charitable organizations such as the Carnegie Corporation, the Ford Foundation, and the Rockefeller Foundation made efforts to increase the visibility of educational inequalities throughout the country.⁴⁴⁹ The charitable organizations allowed their benefactor families to provide for the public good while benefiting from the tax shelters of their endowments.⁴⁵⁰ While these types of foundations proved effective tools for influencing public policy and social investment, their focus was viewed as primarily humanitarian.⁴⁵¹

In the latter part of the twentieth century, a new form of charitable giving emerged called "venture philanthropy." While venture philanthropy funding strategies are largely similar to those used by traditional conservative foundations, it is distinct in two key ways. First, venture philanthropy is premised on many of the same principles as venture capitalism, with a focus on return on investment.⁴⁵² As a result, accountability and measuring performance outcomes are vital components of venture philanthropy.⁴⁵³ It also uses benchmarking tools to "enhance mission-driven performance by comparing the social enterprise to the best in the chosen social arena."⁴⁵⁴ Second, venture

⁴⁴⁹ Kevin K. Kumashiro, *When billionaires Become Educational Experts: "Venture Philanthropists" Push for the Privatization of Public Education*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (May-June 2012).

⁴⁵⁰ Janelle Scott, *The Politics of Venture Philanthropy in Charter School Policy and Advocacy*, 23(1) EDUCATIONAL POLICY 106, 109 (2009).

⁴⁵¹ *Id.* at 110.

⁴⁵² Kumashiro, *supra* note 449.

⁴⁵³ Holona LeAnne Ochs, *Philanthropic Social Ventures: A Framework and Profile of the Emerging Field*, 18(1) J. OF PUB. MANAGEMENT & SOCIAL POL. 3, 6 (2012).

⁴⁵⁴ *Id.* However, this can be difficult in the nonprofit sector since it nonprofits can differ greatly even in the same social area.

philanthropists tend to be "highly engaged" with the goal setting, decision making, and evaluating progress and outcomes of the organizations they support.⁴⁵⁵ University of Illinois Professor Kevin Kumashiro notes that "[t]his hands-on role allows venture capitalists to affect public policy more directly and substantially, particularly in a climate where their financial aid is so desperately needed."⁴⁵⁶

Venture philanthropists have been engaging in growing advocacy activities resulting in their increased influence on K-12 educational policy.⁴⁵⁷ Janelle Scott from the University of California-Berkeley argues that "[i]n many ways, these new philanthropists have become among the most prominent and influential educational leaders and policy makers currently influencing state department of education and the leadership within many urban school systems."⁴⁵⁸

For example, Eli Broad (of The Broad Foundation) and Bill Gates (of The Bill and Melinda Gates Foundation) invested tens of millions of dollars into getting public education (particularly curriculum standards, longer school years and school days, and teacher quality) onto the agenda for the 2008 presidential election.⁴⁵⁹ More recently, The Bill and Melinda Gates Foundation has focused its attention on mechanisms for increasing teacher quality by looking at tools such as teacher evaluation and teacher tenure.⁴⁶⁰ In 2012 alone, it spent more than \$12.6 million on advocacy and education policy.⁴⁶¹

⁴⁵⁵ *Id.* at 5.

⁴⁵⁶ Kumashiro, *supra* note 449.

⁴⁵⁷ Scott, *supra* note 450 at 106.

⁴⁵⁸ *Id.* at 107.

⁴⁵⁹ *Id.* at 106. Despite their efforts, education policy was overshadowed in the campaign by the economic crisis.

⁴⁶⁰ Bill Gates & Melinda Gates, *Grading the Teachers*, THE WALL STREET JOURNAL (Oct. 22, 2011).

⁴⁶¹ Past Grants, The Bill and Melinda Gates Foundation website.

As with other influencing factors, it is difficult to measure the actual effect venture philanthropy has had on the teacher tenure reform movement specifically. However, with ever increasing foundation budgets, venture philanthropists certainly have a hand in the overall direction of education policy. Their overwhelming support of the charter schools, privatization, and school choice and their tendency to favor market-based principles such as competition and accountability may both sway policy makers in favor of reforming teacher tenure laws.

Administrative Turnover

Joining the national mood and organized political forces, administrative turnover rounds out the political stream.⁴⁶² Kingdon posits, "When it involves government actors, agenda change occurs in one of two ways. Either incumbents in positions of authority change their priorities and push new agenda items; or the personnel in those positions changes, bringing new priorities onto the agenda by virtue of turnover."⁴⁶³ Kingdon goes on to note, "Not only does turnover produce new agenda items, but it also makes it impossible to consider other items that might be thought deserving at another time."⁴⁶⁴ One of the most impactful personnel changes is a change in administration.⁴⁶⁵ At the top of the list of policy-making actors, an administration can heavily influence the national policy agenda through both indirect and direct means.

President Barack Obama was sworn in as the 44th President of the United States in January 2009, following 8 years under Republican George W. Bush. The Obama

⁴⁶² Kingdon, *supra* note 44, at 153.

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at 154.

⁴⁶⁵ *Id.*

Administration entered the office with a comprehensive and detailed policy agenda.⁴⁶⁶

Domestic agenda priorities included: revival of the economy; affordable, accessible health care; strengthening of public education and social security; and energy independence and climate change.⁴⁶⁷

In order to bolster his agenda, President Obama and his Secretary of Education, Arne Duncan, have used the "bully pulpit" to persuade the public and Congress of the need for education reform. The Obama Administration also used more direct measures by proposing two key programs: the Race to the Top Fund (as part of the American Recovery and Restoration Act of 2009)⁴⁶⁸ and the Recognizing Educational Success Professional Excellence and Collaborative Teaching Program.⁴⁶⁹ The "bully pulpit" and both programs are discussed below.

The Bully Pulpit. There are several modes of federal influence on state level education policy.⁴⁷⁰ While several modes that involve the allocation of funds or other resources, some argue that the President can influence education policy through his exertion of moral authority. Termed the "bully pulpit" by the press, the President can "develop vision and question assumptions through publications and speeches by top officials."⁴⁷¹ By influencing the public, the President may then have a greater influence on Congress.⁴⁷²

⁴⁶⁶ The Office of the President-Elect, *The Agenda* (Jan. 2009).

⁴⁶⁷ *Id.*

⁴⁶⁸ American Recovery and Reinvestment Act of 2009, §§ 14005, 14006, and 1413, Title XIV, P.L. 112-10 (2009).

⁴⁶⁹ U.S. Dept. of Educ., *Obama Administration Seeks to Elevate Teaching Profession, Duncan to Launch RESPECT Project: Teacher-Led National Conversation* (Feb. 15, 2012).

⁴⁷⁰ Michael W. Kirst & Frederick M. Wirt, *THE POLITICAL DYNAMICS OF AMERICAN EDUCATION* (4th Ed.)(2009) at 286.

⁴⁷¹ *Id.* at 287. However, Kirst and Wirt note that the use of the "bully pulpit" as an independent policy strategy has not been adequately examined.

⁴⁷² George C. Edwards, III, *ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT* (2003) at 8.

Both President Obama and his Secretary of State, Arne Duncan, have used the "bully pulpit" to push the administration's agenda, specifically with regards to innovation in education and the teaching profession. In each of his State of the Union addresses, President Obama has discussed the need for increased teaching standards and education policy reform. Below are examples from each of his State of the Union speeches:

- But we know that our schools don't just need more resources. They need more reform. That is why this budget creates new incentives for teacher performance; pathways for advancement, and rewards for success. We'll invest in innovative programs that are already helping schools meet high standards and close achievement gaps.⁴⁷³
- And the idea here is simple: Instead of rewarding failure, we only reward success. Instead of funding the status quo, we only invest in reform -- reform that raises student achievement; inspires students to excel in math and science; and turns around failing schools that steal the future of too many young Americans, from rural communities to the inner city.⁴⁷⁴
- When a child walks into a classroom, it should be a place of high expectations and high performance. But too many schools don't meet this test....We want to reward good teachers and stop making excuses for bad ones.⁴⁷⁵
- Teachers matter. So instead of bashing them, or defending the status quo, let's offer schools a deal. Give them the resources to keep good teachers on the job, and reward the best ones. And in return, grant schools flexibility: to teach with creativity and passion; to stop teaching to the test and to replace teachers who just aren't helping kids learn.⁴⁷⁶

In each speech, President Obama refers to the importance of teacher quality and high expectations. While he does not refer to teacher tenure directly in any of his State of the

⁴⁷³ President Barack Obama, State of the Union Address (February 24, 2009).

⁴⁷⁴ President Barack Obama, State of the Union Address (January 27, 2010).

⁴⁷⁵ President Barack Obama, State of the Union Address (January 25, 2011).

⁴⁷⁶ President Barack Obama, State of the Union Address (January 24, 2012). In a print document circulated in tandem with President Obama's 2012 State of the Union Address, the White House stated that it seeks to bolster teacher quality by revamping teacher preparation programs, "reshaping tenure," and updating teacher evaluations. Joy Resmovits, *State of the Union: Obama Touts College Affordability, Tough Love for Teachers*, HUFFINGTON POST (Jan. 25, 2012).

Union addresses, the implications are clear, especially when paired with the legislation released by his administration.

President Obama avoids directly attacking teacher tenure in his public appearances, opting for a more subtle push for quality teachers. Meanwhile, Secretary Duncan uses more direct rhetoric aimed at teachers and teachers unions, trying to convince them of the need for reform of tenure. For example, in an address given to the National Education Association in 2009, Duncan argued:

We created tenure rules to make sure that a struggling teacher gets a fair opportunity to improve, and that's a good goal. But when an ineffective teacher gets a chance to improve and doesn't—and when the tenure system keeps that teacher in the classroom anyway—then the system is protecting jobs rather than children. That's not a good thing. We need to work together to change that....And I'm telling you as well that, when inflexible seniority and rigid tenure rules that we designed put adults ahead of children, then we are not only putting kids at risk, we're also putting the entire education system at risk. We're inviting the attack of parents and the public, and that is not good for any of us.⁴⁷⁷

More recently, in prepared remarks to educators, Duncan said, "Instead of a lifetime guarantee, tenure needs to be a recognized honor that signifies professional accomplishment and success, and we need a system of due process to fairly deal with those who are not up to the challenge."⁴⁷⁸

The Obama administration is using the "bully pulpit" to convince the country of the need for change in the teaching profession. But the general public does not appear to be the administrations primary target. Its efforts of persuasion with regards to tenure reform are concentrated on teachers themselves. By lobbying teachers and teachers' unions directly, the administration could potentially sway its most outspoken objectors.

⁴⁷⁷ Secretary of Education, Arne Duncan, "Partners in Reform," Remarks made to the National Education Association (July 2, 2009).

⁴⁷⁸ John Hechinger, *Obama Pushes \$5 Billion in Grants to Revamp Teacher Tenure, Pay*, BLOOMBERG (February 15, 2012).

Race to the Top. In furtherance of several of his agenda items, particularly economic stimulation, on February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA).⁴⁷⁹ The ARRA laid "the foundation for education reform by supporting investments in innovative strategies that are most likely to lead to improved results for students, long-term gains in school and school system capacity, and increased productivity and effectiveness."⁴⁸⁰

The ARRA provided \$4.35 billion for the Race to the Top Fund (RTTT), a competitive grant program designed to encourage education innovation and reform, improvement in student achievement, and college and career readiness.⁴⁸¹ Out of its four core education reform areas, the third relates directly to teacher tenure; its focus being "recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most."⁴⁸² The Department of Education, with support of the Obama Administration, provided guidance for RTTT applicants in its Notice of Proposed Priorities, Requirements, Definitions, and Selection Criteria (Proposed Priorities), released in July 2009.⁴⁸³ The Proposed Priorities state:

(C)(2) Differentiating teacher and principal effectiveness based on performance: [FN12] The extent to which the State, in collaboration with its participating LEAs, has a high-quality plan and ambitious yet achievable annual targets to (a) Determine an approach to measuring student growth (as defined in this notice); (b) employ rigorous, transparent, and equitable processes for differentiating the effectiveness of teachers and principals using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor; (c) provide to each teacher and principal his or her own data and rating; and (d) use this information when making decisions regarding—

⁴⁷⁹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009). *See also*, U.S. Dept. of Educ., *Race to the Top Program: Executive Summary* (Nov. 2009).

⁴⁸⁰ U.S. Dept. of Educ., *supra* note 479, at 2.

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ 74 Fed. Reg. 37804-01 (July 29, 2009).

...

(iii) Granting tenure to and dismissing teachers and principals based on rigorous and transparent procedures for awarding tenure (where applicable) and for removing tenured and untenured teachers and principals after they have had ample opportunities to improve but have not done so.⁴⁸⁴

State RTTT applications were assessed by the Department of Education using a scoring rubric. Based on this rubric, states could earn a possible 28 out of 500 points for using performance evaluations to inform key decisions, such as tenure.⁴⁸⁵ Worth just over 5% of the total points available, linking employment and tenure decisions to teacher performance was a concrete way for states to increase their RTTT application score. Based on state response, it appears that linking employment decisions to performance was a popular option.

Forty-six states and the District of Columbia submitted applications for RTTT grants in the first round of applications.⁴⁸⁶ Many of those states made legislative changes or adopted new regulations in order to strengthen their Race to the Top applications. Two states won grants in the 1st round of consideration (spring 2010), an additional 9 states and the District of Columbia won grants in the 2nd round (fall 2010), and 7 states won grants in the 3rd round (spring 2011). A review of the relationship between grant applicants and/or awardees and changes in teacher tenure legislation may provide some

⁴⁸⁴ *Id.* at § (C)(2). The Department of Education invited interested parties to submit comments on the Proposed Priorities, of which they received 1,161. It made no substantive changes to (C)(2)(d)(iii), but did assign it a new section number and provided some clarification as to its application. For example, it specifies that decisions informed by teacher evaluations "should be made using rigorous standards and streamlined, transparent, and fair procedures." Final Priorities, Requirements, Definitions, and Selection Criteria: Race to the Top Fund, 74 Fed. Reg. 59688-01, §§(D)(2)(iv)(c) and (D)(2)(iv)(d) (Nov. 18, 2009).

⁴⁸⁵ U.S. Dept. of Educ., *Appendix B. Scoring Rubric* (2010).

⁴⁸⁶ The Department of Education accepted applications for three phases of Race to the Top grant awards. In order to be considered for an award, a state had to submit an application for each phases for which it wished to be considered. Therefore, states could submit applications for funding for phase 1, 2, or 3 or any combination thereof. U.S. Dept. of Educ., *States' Applications, Scores and Comments for Phase 1* (2010); U.S. Dept. of Educ., *States' Applications for Phase 2* (2010); U.S. Dept. of Educ., *States' Applications for Phase 3* (2011).

insight into how influential the RTTT Fund has been in the area of teacher tenure (See Table 2).

Table 2: Breakdown of Legislative Change by Race to the Top Application and Award Status

	Number of States that <i>Changed Tenure Legislation</i>	Percentage of States that <i>Changed Tenure Legislation</i>	Number of States with <i>Proposed Tenure Changes</i>	Percentage of States with <i>Proposed Changes</i>	Number of States with <i>No Change to Tenure Legislation</i>	Percentage of States with <i>No Change to Tenure Legislation</i>
No Application (AK, ND, TX, VT)	0	0%	0	0%	4	100%
Application but No Award (AL, AR, CA, ID, IN, IA, KS, ME, MI, MN, MS, MO, MT, NE, NV, NH, NM, OK, OR, SC, SD, UT, VA, WA, WV, WI, WY)	13	48%	6	22%	8	30%
Awarded Grant: Phase 1 (DE, TN)	2	100%	0	0%	0	0%
Awarded Grant: Phase 2 (DC, FL, GA, HI, MA, MD, NC, NY, OH, RI)	5	50%	3	30%	2	20%
Awarded Grant: Phase 3 (AZ, CO, IL, KY, LA, NJ, PA)	4	57%	2	29%	1	14%

As indicated on Table 2 above, four states have not submitted an application for a Race to the Top grant during phase 1, 2, or 3 of considerations: Alaska, North Dakota, Texas, and Vermont. None of these states have made changes to their teacher tenure

legislation.⁴⁸⁷ Comparatively, both of the states that received grants in the first phase of awards (Delaware⁴⁸⁸ and Tennessee⁴⁸⁹) have made changes to their tenure legislation.

The states that were awarded Race to the Top grants in the second⁴⁹⁰ and third phases of the program have also shown a strong commitment to legislative change. Over 80% of states receiving grants in phase 2 and 3 have either already made legislative change or are considering proposed change to their teacher tenure legislation. Only 3 states have been awarded a Race to the Top grant that have not changed or are not considering a proposed change to tenure law. Of these 3 states, two have made formal efforts to change the implementation of current legislation. The District of Columbia entered into a revised collective bargaining agreement with the teachers' union in 2010 that provided a new bonus structure in exchange for weakened teacher seniority protections.⁴⁹¹ New York has changed the application of its existing law which grants principals discretion in awarding tenure status. In 2005, nearly 99% of teachers received tenure whereas in 2011, approximately 58% of teachers eligible for tenure received it.⁴⁹²

⁴⁸⁷ Texas has changed the implementation to its existing tenure laws to decrease the number of new teachers awarded tenure status.

⁴⁸⁸ DEL. CODE ANN. tit. 14, §§ 1403, 1411-1414 (2012).

⁴⁸⁹ TENN. CODE ANN. §§ 49-5-501 through 49-5-511 (2012).

⁴⁹⁰ Note that Hawaii changed its teacher tenure law before RTTT was announced by lowering its probationary period from two years to one (to avoid any contradictions between state law and the teachers' collective bargaining agreement). Subsequently, as part of its Race to the Top application, Hawaii's Board of Education pledged to overhaul Hawaii's teacher tenure policies by increasing the probationary period to a minimum of three years and by requiring probationary teachers to receive positive evaluations in order to earn tenure protections. Bills addressing these issues were proposed in both houses of Hawaii's legislature. The house voted to recommit Senate Bill 2789 and the senate voted to recommit the companion measure, House Bill 2527, in April 2012, effectively killing the bill. The bill's demise came just two weeks after a federal education official visited Hawaii to check on its Race to the Top progress. There will likely be additional attempts to pass a performance management system with some component of student growth in order to fulfill their Race to the Top pledges. In the meantime, the Hawaii Department of Education is offering its principals and vice principals training on how to terminate ineffective teachers without violating due process rights.

⁴⁹¹ Harrer, *supra* note 393.

⁴⁹² Adam Lisberg & Meredith Kolodner, *Mayor Bloomberg Vows to Tenure Only Good Teachers and Boot Bad Ones*, NY DAILY NEWS (Sept. 27, 2010); Otterman, *supra* note 393.

Seventy-percent of the states that applied for but were not awarded a Race to the Top grant made a change or have proposed change to their tenure legislation. While the frequency is less than that of the states that received grants (70% as compared with over 80%), it is still significant. Nearly one-half (13) of these states have already made a change to their teacher tenure legislation and an additional 8 states (22%) are considering proposed changes. The directive language used in RTTT and its supporting documents concerning linking employment decisions to teacher performance and subsequent widespread legislative change indicate that the Obama Administration had at least some influence over the teacher tenure reform movement.

Recognizing Educational Success Professional Excellence and Collaborative Teaching (RESPECT). Using RTTT as a model, the Obama Administration proposed a new \$5 billion grant program to support states and districts working to reform the teaching profession as part of its 2013 budget.⁴⁹³ The Recognizing Educational Success Professional Excellence and Collaborative Teaching (RESPECT) Program will, in part, reward states and districts for revamping tenure practices in elementary and secondary schools to make it easier to extract underperforming teachers.⁴⁹⁴ In support of the program, Secretary of Education Arne Duncan said, "Instead of a lifetime guarantee, tenure needs to be a recognized honor that signifies professional accomplishment and success, and we need a system of due process to fairly deal with those who are not up to the challenge."⁴⁹⁵ While there are few specifics about the program available at this time, it appears that the President will continue to use money to exert his influence over state teacher tenure policies.

⁴⁹³ U.S. Dept. of Educ., *Secretary Duncan to Discuss Elevating the Teaching Profession and Preparing Students for College and Careers at the NAESP Leadership Conference* (July 20, 2012).

⁴⁹⁴ Herchinger, *supra* note 478; Winnie Hu, *\$5 Billion in Grants Offered to Revisit Teacher Policies*, NEW YORK TIMES (Feb. 15, 2012).

⁴⁹⁵ Herchinger, *supra* note 478.

Policy Window Opening

Kingdon argues that when streams converge, there exists an opportunity for active change or the opening of a policy window.⁴⁹⁶ In terms of agenda setting, Kingdon notes:

[T]he agenda is affected more by the problems and political streams, and the alternatives are affected more by the policy stream. Basically, a window opens because of change in the political stream (e.g., a change of administration, a shift in the partisan or ideological distribution of seats in Congress, or a shift in national mood); or it opens because a new problem captures the attention of governmental officials and those close to them.⁴⁹⁷

But, Kingdon warns, policy windows do not open frequently, and when they do open, they are only open for a short time.⁴⁹⁸ Policymakers must take advantage of the open policy window while it is open or be forced to wait until another opportunity comes along.⁴⁹⁹

With respect to teacher tenure legislation, a policy window opened in 2008 and remains open today. Converging with a continuously flowing policy stream, the problems stream was able to force the policy window open a crack, with the 2008 Financial Crisis. In order to address current and anticipated budget shortfalls, state lawmakers were forced to address state reduction in force policies. However, with the addition of the politics stream (with a turnover in the oval office; an increasingly negative, media-driven national mood; and waning union power), the policy window was forced the rest of the way open. With the path cleared for legislative change, the teacher tenure movement gained momentum quickly. In 2009, only Ohio changed its teacher tenure legislation. However, in 2010, 3 states passed changes and in 2011, an additional 13 states changed their teacher tenure laws. In the first 6 months of 2012, 7 states

⁴⁹⁶ Kingdon, *supra* note 44, at 166.

⁴⁹⁷ *Id.* at 168.

⁴⁹⁸ *Id.* at 166.

⁴⁹⁹ *Id.*

changed their tenure laws and additional 12⁵⁰⁰ states are considering proposed legislative change.

There is no telling how long the policy window will remain open for changes to teacher tenure legislation. The state of the economy has, at a minimum, stabilized. Similarly, school budgets are stabilizing, if not improving. Therefore, the influence of the problems stream is diminishing. Therefore, the politics stream will determine how long the policy window remains open.

⁵⁰⁰ Arizona revised its teacher tenure legislation in 2011 and is currently considering an additional change. For purposes of breaking down states that have made changes, Arizona is counted only once (in the "changed" category). However, for this discussion, their proposed legislation is also relevant.

CHAPTER 4

DISCUSSION OF RESULTS

Introduction

The purpose of this study is to document the changes made to teacher tenure legislation in the 50 states and the District of Columbia, to identify any trends in the change, and to identify the social, economic, and political factors making widespread legislative change possible in order to determine how these changes may impact teachers' employment rights. As described in Chapter One, the following research questions guide this study:

- (1) What is the relevant legal history of teacher tenure for elementary and secondary public school teachers?
- (2) What changes have been made to state teacher tenure laws from January 2008 through June 2012? Are there trends in the changes that have been made?
- (3) Why have these changes occurred? What political, economic, and/or social movements are driving changes in teacher tenure legislation?
- (4) How have changes in teacher tenure legislation impacted teacher employment rights? What are the other implications of practice associated with changes in teacher tenure laws?

Using the legal research methods discussed in Chapter One, this chapter is an analysis of the data presented in Chapter Two. The data are analyzed in two different

ways: it is organized based on the nature of legislative change in order to identify categories of change, and it is analyzed by comparing legislative changes with a number of state specific factors in order to identify trends in legislative change.

The first part of this chapter reveals six major categories of legislative change. By looking at the nuances of each legislative change, subcategories are then identified within each category. This breakdown not only allows for particular tendencies in legislation to be tracked, but also allows for a determination of what types of change are most popular.

The second section of this chapter looks at where legislative changes are taking place in comparison with certain state factors: geography, collective bargaining status, and Race to the Top application/award status. By looking at legislative change and particular state factors simultaneously, relationships are revealed and trends can be identified. Read in conjunction with the information presented in Chapter Three, a more complete picture of the tenure reform movement is revealed.

Categories of Change

Based upon a state-by-state review of changes made to teacher tenure legislation from January 2008 through June 2012, six main categories of change have been identified as follows:

- A. Elimination of automatically renewing contracts;
- B. Change in length of the probationary period;
- C. Teacher performance/evaluation considered in granting of tenure;
- D. Poor performance added as a grounds for "just cause" dismissal;
- E. Reduction in force decisions not based entirely on seniority; and

F. Loss of tenure protections after receipt of poor performance evaluations.

This section contains a discussion of each category of change.⁵⁰¹ Figure 2 provides an overview of the categorical changes.

⁵⁰¹ Table 1 notes that at least three states (Florida, Louisiana, and Maine) have tied teacher compensation to evaluation ("pay for performance"). It is possible that many more states have passed similar legislation in the same time period. However, since compensation issues are not at issue in this paper, it will not be discussed further. The information's inclusion in Table 1 was for interest only because the pay for performance provision was somehow tied in with the change in tenure legislation. There were a few other instances in which states made changes that were so different, they could not be categorized. For example, Alabama revised its teacher tenure legislation in 2011 to streamline its termination procedure. However, since this did not fit with the general trends in change, it is considered an outlier and is not discussed below.

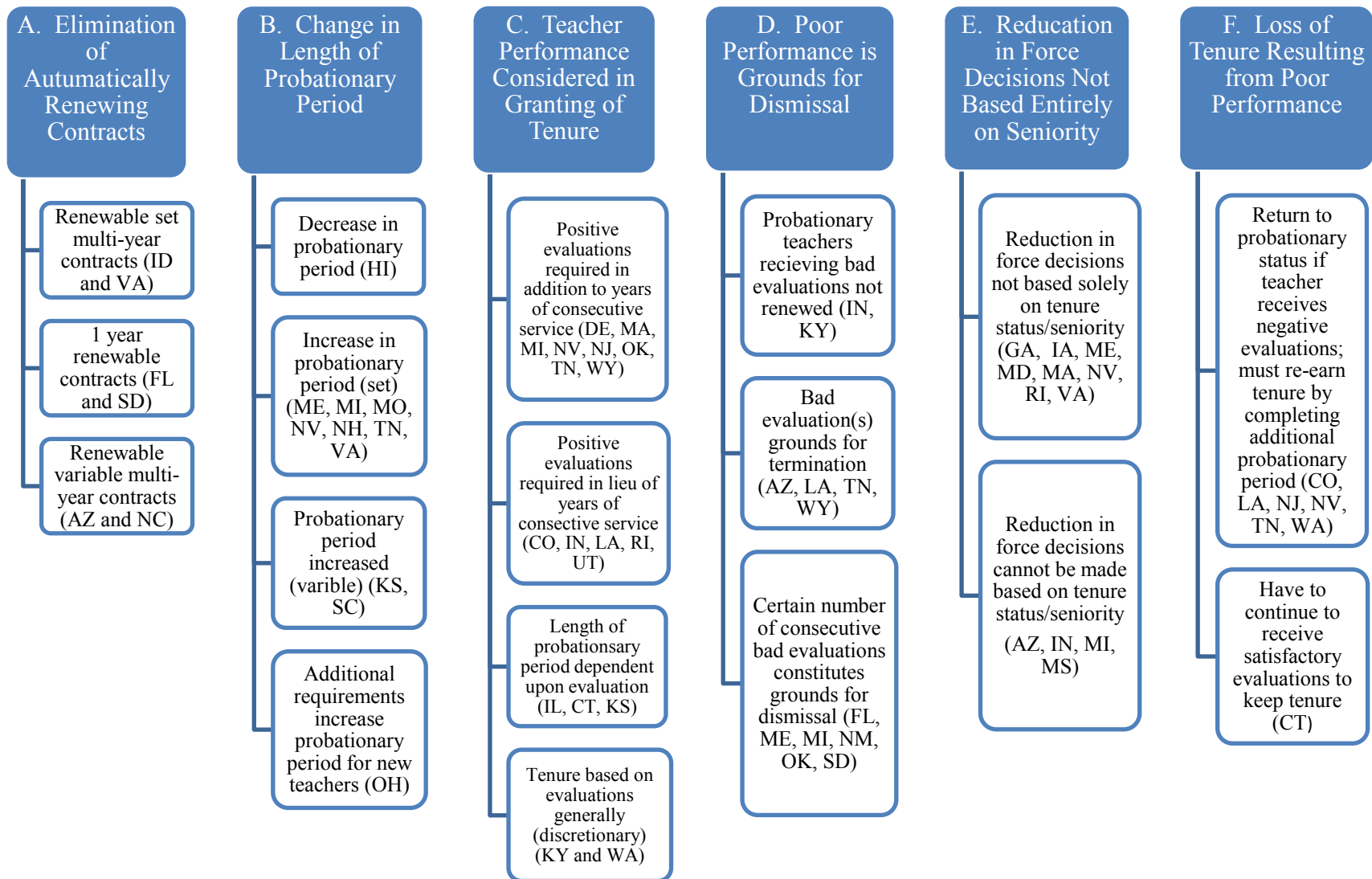


Figure 2: Categories of Legislative Change

A. Elimination of Automatically Renewing Contracts

As of the end of June 2012, three states (Florida, Idaho⁵⁰², and South Dakota) passed legislation eliminating automatically renewing contracts. Three additional states (Arizona, North Carolina, and Virginia) have proposed legislation in process that would eliminate automatically renewing contracts. While each state's legislation accomplishes the same goal, the states have taken slightly different approaches. Florida and South Dakota's laws both require that all teachers have one year contracts that must be renewed annually, regardless of probationary status. Idaho and Virginia's laws both allow for multi-year renewable contracts after completion of a probationary period. For example, after completion of a five year probationary period, the proposed Virginia legislation states that teachers will be entitled to 3 year renewable contracts. Comparatively, Arizona and North Carolina have left more up to the discretion of the school and/or local school district. They both offer contracts which range in length based on the individual. For example, under the proposed Arizona legislation, the local school board could offer a teacher a contract from 1-3 years. North Carolina's proposed legislation would allow for a 1-4 year contract following the completion of a 3 year probationary period.

B. Change in Length of Probationary Period

Eight states have made changes to the length of their probationary period and 3 more have proposed legislation pending. Most notably and clearly the exception, in 2008, Hawaii decreased its probationary period from 2 years to 1 so that the law would not conflict with what was agreed upon in the collective bargaining agreement with Hawaiian teachers. After applying and receiving a Race to the Top grant, the Hawaiian

⁵⁰² As previously noted, Idaho had a referendum on the November 2012 ballot that would repeal the 2011 legislative change. It would reinstate automatically renewing contracts and return issues like workload and class size to collective bargaining agreements.

state legislature considered legislation that would increase the probationary period from 1 year to 3; however, this legislation died in committee.

The majority of the states that increased their probationary periods did so from a set number of years to a greater set number of years. Maine and Nevada both increased their probationary period from 2 to 3 years to bring them in line with the national average. Michigan, New Hampshire, Tennessee, and Virginia (proposed) have all increased their probationary periods to 5 years.⁵⁰³ Notably, Missouri is considering a bill that increases the probationary period from 5 to 10 years. Attempts to pass such lengthy probationary periods in the past have been unsuccessful.⁵⁰⁴

Kansas and South Carolina also have both increased the length of their probationary periods as well, but the increase is variable depending upon the teacher. For example, in Kansas a teacher must serve a probationary period of at least 3 years, but it may be extended to 4 or 5 years at the agreement of the teacher and the board of education. Similarly, proposed legislation in South Carolina would increase its induction period from 1 year to 1-3 years, at the discretion of the school district.

Finally, Ohio has added requirements to its teacher tenure law that increase the time it takes new teachers to earn tenure to 7 years. In addition to an actual probationary period of 3 years, Ohio teachers must hold an educators license for at least 7 years to be eligible for tenure ("continuous contract").

⁵⁰³ Michigan's former probationary period was 4 years. New Hampshire, Tennessee, and Virginia had probationary periods of 3 years.

⁵⁰⁴ As originally written, Ohio's tenure reform legislation required teachers to be licensed for a minimum of 10 years before being eligible to receive tenure. This time period was later negotiated down to 7 years. See McGuinn, *supra* note 43.

C. Teacher Performance/Evaluation Considered in Granting of Tenure

Of the changes that have been made to teacher tenure legislation in the last four years, linking the award of tenure or continuing contract status to performance evaluations is the most prevalent. Thirteen states have already made legislative changes that fall under this category and 5 additional states have proposed legislation pending. Within this category, there are several different varieties of changes that have been made.

Many states are requiring a certain number of positive evaluations before a teacher is eligible for tenure status. Some states (DE, MA, MI, NV, NJ, OK, TN and WY) have added a positive evaluation requirement to an existing probationary period. For example, Delaware's probationary period is 3 years; a teacher must receive a rating of at least "satisfactory" on the "student improvement" component of the teacher appraisal for at least 2 of the 3 years of the probationary period (the "satisfactory" ratings do not have to be consecutive). The new Michigan law increases the probationary period to 5 years and requires that a teacher be rated as "effective" or "highly effective" on at least 3 of the last 5 year-end performance evaluations. Similarly, Tennessee increased its probationary period to 5 years (out of 7), and requires that a teacher receive a performance rating of "above expectations" or "significantly above expectations" during the last 2 years of the probationary period.

Other states (CO, IN, LA, RI, and UT) now require a teacher to receive a certain number of positive evaluations in lieu of a set probationary period. For example, prior to May 2010, Colorado required a probationary period of 3 years of consecutive service in order to earn tenure. The law has since been changed to require that teachers receive 3 years of positive evaluations ("demonstrated effectiveness") in order to receive tenure.

Likewise, Louisiana requires that a teacher be rated "highly effective" for at least 5 years within a 6 year period in order to be granted tenure.

Illinois, Connecticut (proposed bill), and Kansas are making the length of a probationary period dependent upon teacher performance evaluations. For example, in Illinois, a teacher can earn tenure status in 3 years if he or she earns 3 consecutive "excellent" evaluations. Otherwise, a teacher can earn tenure in 4 years with at least 4 "proficient" evaluations. Comparatively, Kansas requires that all of its teacher serve a probationary period of 3 years. That period can be extended to 4 or 5 years if appropriate based on the teacher's progress.

Kentucky (proposed legislation) and Washington include teacher evaluations in the award of tenure but do so at the discretion of local officials. For example, under Kentucky's proposed legislation, a tenure committee would be established in each school (made up of tenured teachers). The committee would grant tenure to eligible teachers based on effectiveness, using teacher evaluations and portfolios.

D. Poor Performance Added as a Grounds for "Just Cause" Dismissal

Including poor performance, as indicated by unsatisfactory teacher evaluations, as a grounds for termination has also been a common change. It is important to note that "incompetency" has been a grounds for dismissal in most states for decades. However, in many cases "incompetency" was not defined (or was ill defined) and its elements varied depending upon the trier of fact. This left principals with very little guidance as to what constituted incompetent behavior and how to prove it in a termination hearing. Therefore, "incompetency" was not used as grounds for termination as often as it could have been. In the last 5 years, many states are addressing this issue by legislatively tying

together competency and teacher evaluations. Eleven states have already passed legislative changes making receipt of unsatisfactory/bad evaluations grounds for dismissal and an additional two states have proposed legislation pending.

Two of the states (IN and KY) are using negative evaluations as grounds for non-renewal of its probationary teachers. While technically a state is not required to have "grounds" for dismissing a probationary teacher since they are at-will employees, states are certainly permitted to give guidelines for when non-renewal is most appropriate. For example, Indiana law states that a probationary teacher may not be renewed if he or she receives 1 rating of "ineffective" or 2 ratings of "improvement necessary." Kentucky's proposed law is unique. It states that if a teacher does not earn tenure by the end of the sixth year of employment (which relies on the teacher's evaluation), the teacher must be dismissed.

Arizona, Louisiana, Tennessee, and Wyoming have all added as grounds for dismissal "inefficiency" or "poor performance" in the classroom. While certainly relying on teacher evaluations to determine whether the teacher has performed poorly, these states generally focus more on the performance than the evaluation results. For example, Arizona has added "inadequacy of classroom performance" as grounds for dismissal. Also, Tennessee has recognized "inefficiency" as a grounds for termination, which includes receipt of an evaluation of "below expectation" or "significantly below expectation."

Several states (FL, ME, MI, NM, OK, SD, and VA (proposed)) have specified that a certain number of unsatisfactory or negative evaluations constitutes grounds for dismissal. For example, under Florida law, a teacher may be terminated for receiving

two consecutive annual performance ratings of "unsatisfactory" (either consecutively or 2 within a 3 year period), or 3 consecutive annual performance ratings of "needs improvement" or a combination of "needs improvement" and "unsatisfactory." In Maine and South Dakota, 2 consecutive unsatisfactory evaluations constitutes grounds for dismissal.

E. Reduction in Force Decisions Not Based Entirely on Seniority

As of the end of June 2012, 7 states have passed legislation addressing the use of teacher tenure status and/or seniority in making reduction in force decisions; similar legislation has been proposed in an additional 5 states. Four states (GA, IA, ME, and NV) had passed legislative changes that prohibited tenure status and/or seniority from being the sole factor considered in making reduction in force decisions. An additional four states (MD, MA, RI, and VA) have similar proposed legislation awaiting passage. Georgia's new law (as of May 2012) states that teacher seniority (including tenure status) is no longer the primary or sole factor used when implementing a reduction in force. Similarly, Nevada law now states that reduction in force decisions cannot be made based solely on teacher seniority.

Arizona, Indiana, and Michigan have passed laws that prohibit using tenure status and/or seniority as a factor in making reduction in force decisions. Instead, reduction in force decisions will be made based completely on teacher effectiveness. Similar legislation has been proposed in Missouri.

F. Loss of Tenure Protections after Receipt of Poor Performance Evaluation

In 6 states, a teacher may lose tenure status if he or she receives unsatisfactory performance evaluations. An additional 2 states have similar proposed legislation

pending. In Colorado, Louisiana, Nevada, New Jersey (proposed), Tennessee, and Washington, if a teacher receives a particular number of negative and/or unsatisfactory evaluations (annual), he or she may lose tenure status and be required to serve an additional probationary period. Under Colorado, Nevada, and Washington laws, a teacher loses tenure status after receiving 2 consecutive poor evaluations. Once tenure status is lost, a teacher must re-earn tenure status by completing an additional probationary period. For example, in Louisiana, if a teacher receives a performance rating of "ineffective," he or she shall lose tenure status.⁵⁰⁵ In order to re-earn tenure status, a Louisiana teacher must again be rated "highly effective" for 5 years within a 6 year period. Comparatively, in Tennessee, a teacher who receives 2 consecutive evaluation ratings of "below expectations" or "significantly below expectations" loses tenure status. In order to re-earn tenure status, the teacher does not have to serve a full 5 year probationary period but must receive 2 consecutive evaluation ratings of "above expectations" or "significantly above expectations."

Connecticut's proposed legislation focuses more on keeping tenure status rather than losing it. It stipulates that teachers will have to continue to prove effectiveness to retain their tenure status.

Trends in Change

This section explores the relationship between states' changes to teacher tenure legislation and other concurrent factors: geography, collective bargaining status, and Race to the Top application/award status. For each factor, color coded maps provide a visual representation of a particular relationship or breakdown. Since the maps alone do not fully reveal the relationships or correlations between legislative change and each

⁵⁰⁵ This rule will be implemented beginning with the 2013-2014 school year.

factor, statistical breakdowns are also provided. Read together, the maps and statistical breakdowns reveal particular trends in tenure reform.

Since January of 2008, 24 states have made some change to their teacher tenure legislation, and 11 additional states are considering proposed legislation. Figure 3 is a visual representation of where changes to teacher tenure legislation have taken place (or were proposed) from January 2008 through June 2012.

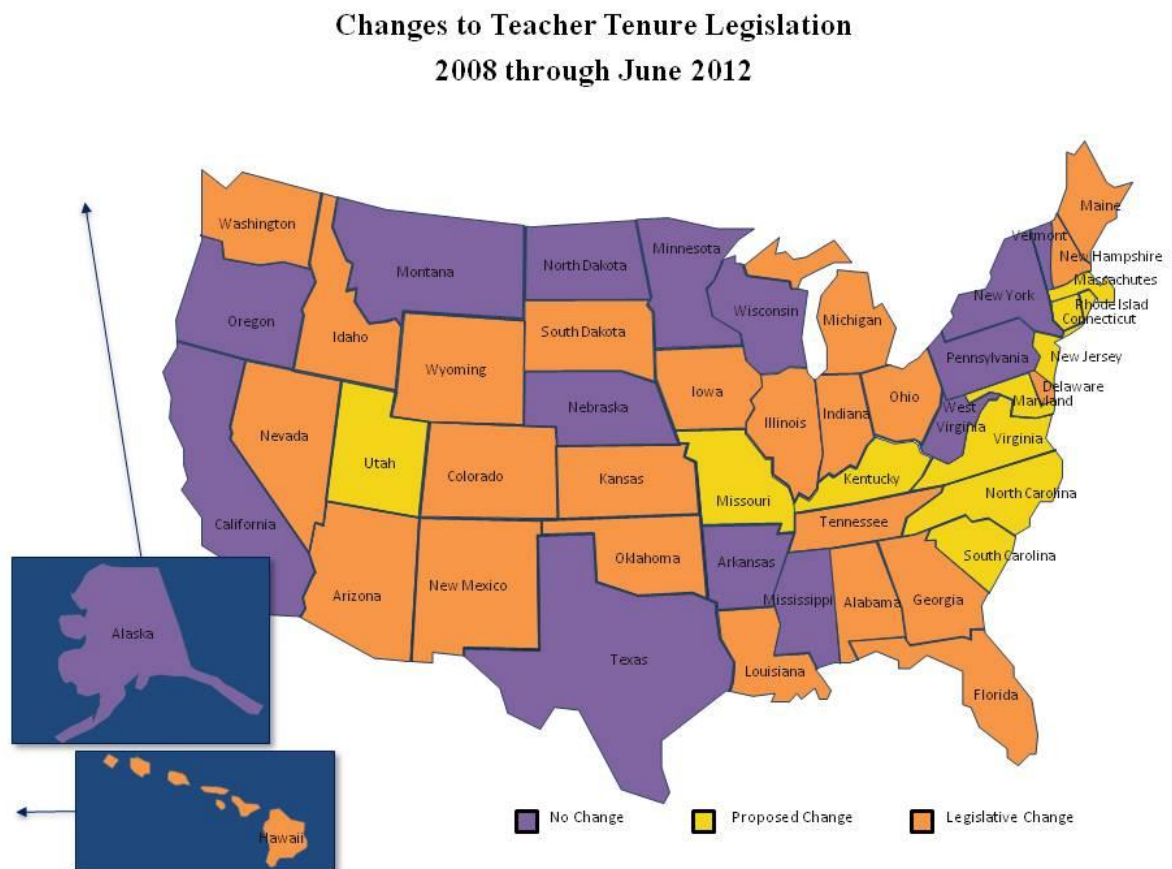


Figure 3: Changes to Teacher Tenure Legislation (Jan. 2008-June 2012)

Geography

A particular pattern of legislative change based on geography is not obvious based on visual assessment alone. Therefore, the states have been broken down into 4 regions⁵⁰⁶ in order to identify possible geographical patterns (See Table 3).

Table 3: Breakdown of Legislative Change by Region⁵⁰⁷

	Number of States that Changed Tenure Legislation	Percentage of States that Changed Tenure Legislation	Number of States with Proposed Tenure Changes	Percentage of States with Proposed Changes	Number of States with No Change to Tenure Legislation	Percentage of States with No Change to Tenure Legislation
North East (CT, MA, ME, NH, NJ, NY, PA, RI, VT)	2	22%	4	45%	3	33%
South (AL, AR, DC, DE, FL, GA, KY, LA, MD, MS, NC, OK, SC, TN, TX, VA, WV)	7	41%	5	30%	5	29%
Mid-West (IA, IL, IN, KS, MI, MN, MO, NE, ND, OH, SD, WI)	7	58%	1	8%	4	34%
West (AK, AZ, CA, CO, HI, ID, MT, NM, NV, OR, UT, WA, WY)	8	62%	1	8%	4	30%

By the end of June 2012, the North East Region made the least change to teacher tenure legislation with just 22% of its states. However, it is important to note that 4 states in the North East Region (which represents 45% of the region) were considering proposed legislation during this time period. The South Region has a change rate nearly

⁵⁰⁶ Regional breakdown was done using the U.S. Dept. of Commerce, Econ., and Statistics Admin. and U.S. Census Bureau's *Census Regions and Divisions of the United States Map* (2012). In order to condense the data, Alaska and Hawaii were added to the "West" region instead of listing them separately in the "Pacific" region.

⁵⁰⁷ See note 501

double that of the North East Region with 41%. However, because of its size, the number of states reflected in that 41% is more than triple that of the North East Region. Additionally, it had an additional 5 states, or 30% of its states, considering proposed legislation.

The Mid-West and West Regions have very similar breakdowns. Both had only 1 state considering proposed change to teacher tenure legislation and 4 states that made no change to the legislation. The percent change is slightly higher in the West Region as a result of its additional state.

Based on the last column of data in Table 3, it appears that approximately one-third of the states have made no change to their teacher tenure legislation in every region.⁵⁰⁸ The West and Mid-West Regions boast the highest percentage of change. In fact, approximately 63% of the total legislative change (15 out of the 24 states) has occurred in the Mid-West and West Regions. However, with 9 out of the 11 states with proposed change (82%) in the North East and the South Regions, the eastern half of the country could soon match the western half.⁵⁰⁹ Therefore, it appears that tenure reform is on state legislative agendas at similar rates across the country, but states in the West and Mid-West regions successfully passed legislative reform at a higher rate as of June 2012.

Collective Bargaining (Unions)

Teachers unions at the state and national levels have been very involved with the debate over changes to teacher tenure legislation. For the most part, union efforts have

⁵⁰⁸ The percents of states that have not made any change to teacher tenure legislation in the South and West Regions are slightly below one-third.

⁵⁰⁹ If all currently proposed legislative changes pass, the Mid-West and West Regions will have 17 states with legislative change and the North East and South Regions will have 18 states. This should not be construed as any assessment regarding the strength of any of the proposed legislative changes, it is merely a hypothetical scenario for comparison purposes.

focused on blocking changes to teacher tenure legislation. However, it is unclear as to whether their efforts have had an impact. A review of state collective bargaining laws and changes in teacher tenure legislation may provide some insight. Figure 4 provides a visual breakdown of the states in which collective bargaining is prohibited, permitted, or required for teachers.

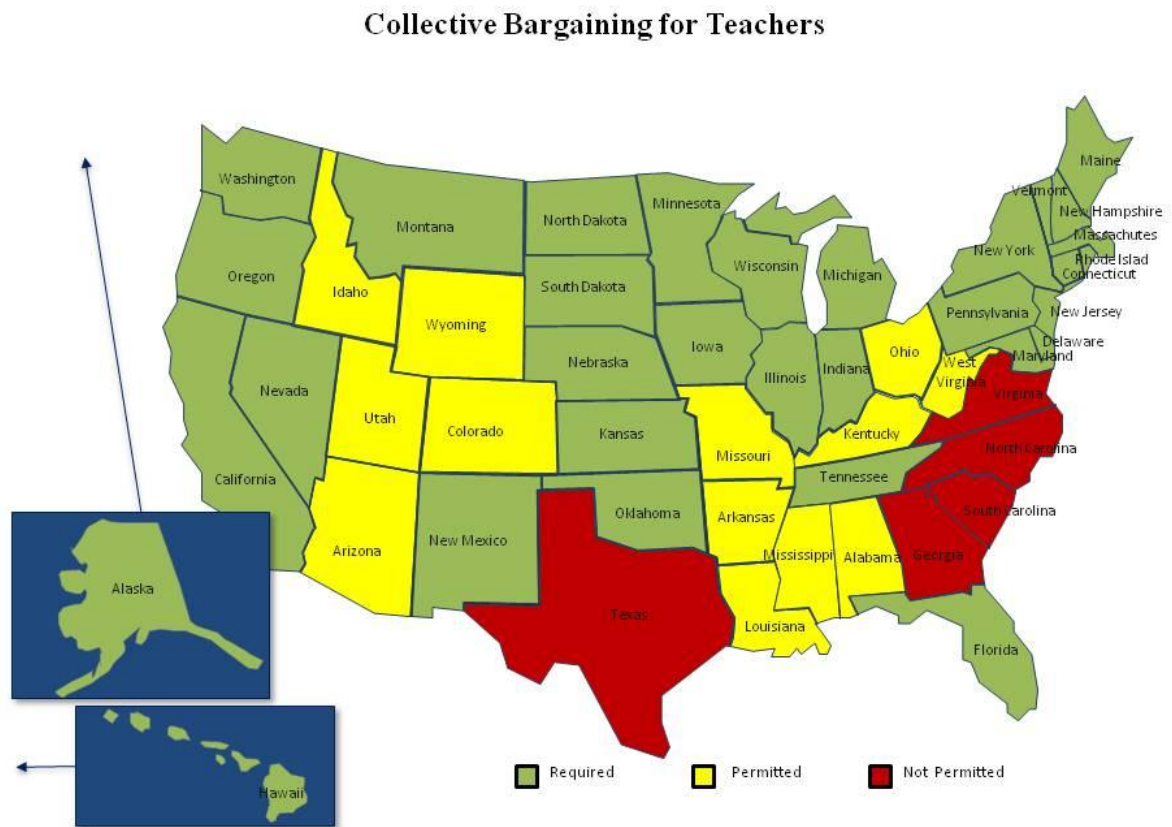


Figure 4. Collective Bargaining for K-12 Teachers

In order to better understand the relationship between collective bargaining and changes to teacher tenure legislation, see Table 4. Exactly 50% of the states⁵¹⁰ that either

⁵¹⁰ This includes the District of Columbia.

require or permit⁵¹¹ collective bargaining for K-12 public school teachers have reformed their teacher tenure legislation. An additional 17% are considering proposed changes to tenure legislation. One-third of the collective bargaining states have made no attempt to change teacher tenure legislation.⁵¹²

Out of the states that prohibit collective bargaining, only Georgia has actually changed its tenure legislation. Three additional states, North Carolina, South Carolina, and Virginia, are considering proposed legislation. While Texas has made no change to its teacher tenure legislation, it is of note that it has changed the application of its law so that fewer teachers are receiving tenure.⁵¹³ Therefore, it appears that all of the states in which collective bargaining is prohibited are considering ways to change tenure policy. While only one has made a legislative change to date, all 5 appear to be moving in the same direction. Although this seems significant, there are only 5 states that prohibit collective bargaining, just 10% of the total states. Of the states that allow or require collective bargaining, half have also passed legislative changes, and more may be on the way. Therefore, it is not clear as to whether a state's collective bargaining status is correlated to whether it has or will pass teacher tenure legislation.

⁵¹¹ Teachers' unions have at least some influence over education policies in all of the states where collective bargaining is either permitted or required. The degree of influence varies from state to state.

⁵¹² While the following states/districts have not made legislative changes, they have made some move toward change: California (there is litigation pending in California challenging the constitutionality of tenure legislation); the District of Columbia (it renegotiated the teachers' collective bargaining agreement in 2010, increasing teacher bonuses in exchange for fewer seniority rights); New York (it changed the implementation of its tenure law by granting tenure less often (tenure is granted at the discretion of the school principal in New York)).

⁵¹³ See note 265.

Table 4. Breakdown of Legislative Change by Collective Bargaining Status

	Number of States that <i>Changed Tenure Legislation</i>	Percentage of States that <i>Changed Tenure Legislation</i>	Number of States with <i>Proposed Tenure Changes</i>	Percentage of States with <i>Proposed Changes</i>	Number of States with <i>No Change to Tenure Legislation</i>	Percentage of States with <i>No Change to Tenure Legislation</i>
Collective Bargaining Prohibited	1	20%	3	60%	1	20%
Collective Bargaining Permitted	7	54%	3	23%	3	23%
Collective Bargaining Required⁵¹⁴	16	49%	5	15%	12	36%

Race to the Top Status

The Race to the Top (RTTT) is a competitive grant program, awarding money to states who submit applications supporting the White House's reform agenda: allowing school districts to take over failing schools, improving curriculum standards, encouraging school innovation (directed in part at charter schools), and making teacher employment decisions based on merit in lieu of seniority or tenure status.⁵¹⁵ The use of teacher evaluations to inform key employment decisions, including tenure, is specifically discussed in the Notice of Proposed Priorities, Requirements, Definitions, and Selection Criteria which was released by the U.S. Department of Education to provide guidance for states applying for Race to the Top funding.⁵¹⁶

Forty-six states and the District of Columbia submitted applications in the first round of RTTT applications (See Figure 5).⁵¹⁷ Many of those states made legislative

⁵¹⁴ Includes the District of Columbia.

⁵¹⁵ U.S. Dept. of Educ., *Race to the Top Program Guidance and Frequently Asked Questions* (May 2010).

⁵¹⁶ 74 FR 37804-01 (2009); amended by 74 FR.59688 (2009).

⁵¹⁷ The Department of Education accepted applications for three phases of Race to the Top grant awards. In order to be considered for an award, a state had to submit an application for each phases for which it wished to be considered. Therefore, states could submit applications for funding for phase 1, 2, or 3 or any

changes or adopted new regulations in order to strengthen their Race to the Top applications. Two states won grants in the 1st round of consideration (spring 2010), an additional 9 states and the District of Columbia won grants in the 2nd round (fall 2010), and 7 states won grants in the 3rd round (See Figure 6). This sub-section investigates whether states who applied for and/or were awarded Race to the Top grants passed changes to teacher tenure laws or were considering proposed changes in greater numbers than states who did not.

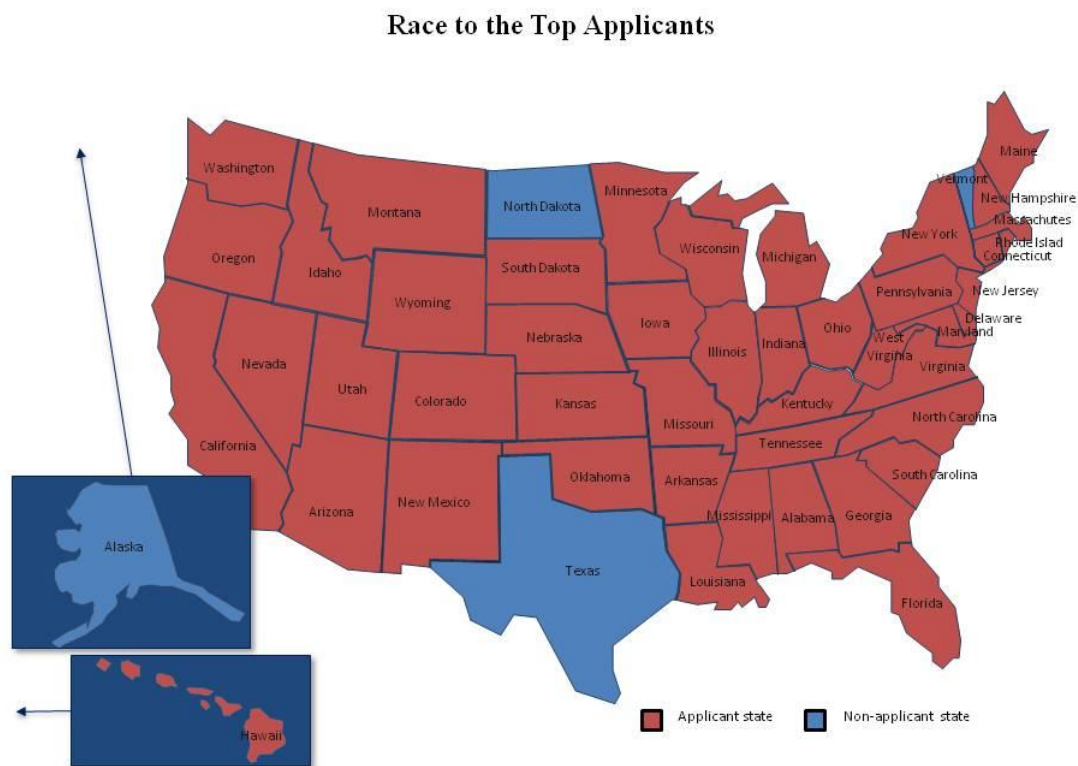


Figure 5: Race to the Top Applicants

combination thereof. U.S. Dept. of Educ., *States' Applications, Scores and Comments for Phase 1*, *supra* note 486; U.S. Dept. of Educ., *States' Applications for Phase 2*, *supra* note 486; U.S. Dept. of Educ., *States' Applications for Phase 3*, *supra* note 486.

Four states have not submitted an application for a RTTT grant during phase 1, 2, or 3 of considerations: Alaska, North Dakota, Texas, and Vermont. None of these states have made changes to their teacher tenure legislation. As previously noted, Texas has changed the implementation of its existing tenure laws to decrease the number of new teachers awarded tenure status. While it is interesting that 100% of the states that did not apply for a RTTT grant also have not made changes to their tenure legislation, it is difficult to draw any conclusions from this information alone since it is such a small number of states (less than 10%). A review of the states that did apply for RTTT grants may be more telling.



Figure 6: Race to the Top Grant Winners

Figure 6 represents an overview of the states who applied for and were awarded RTTT grants during the 3 phases awards to date. As noted above, none of the states that chose not to apply for a grant made changes to their teacher tenure legislation.

Comparatively, both of the states that received grants in the first phase of awards (Delaware and Tennessee) made changes to their tenure legislation. Neither was able to pass legislation before the grants were awarded; Delaware passed its reform in July 2010 and Tennessee followed in April 2011 (See Table 2).

The states that were awarded RTTT grants in the second and third phases of the program have also shown a strong commitment to legislative change. At least 80% of states receiving grants in phase 2 and 3 (80% and 86% respectively) have either already made legislative change or were considering proposed change to their teacher tenure legislation in June 2012. Only 3 states/jurisdictions have been awarded a RTTT grant that did not changed or were not considering a proposed change to tenure law as of June 2012. Of these 3 states/jurisdictions, two have made formal efforts to change the implementation of current legislation. The District of Columbia entered into a revised collective bargaining agreement with the teachers' union in 2010 that provided a new bonus structure in exchange for weakened teacher seniority protections.⁵¹⁸ New York changed the application of its existing law which grants principals discretion in awarding tenure status. In 2005, nearly 99% of teachers received tenure whereas in 2011, approximately 58% of teachers eligible for tenure received it.⁵¹⁹

Seventy-percent of the states that applied for but were not awarded a RTTT grant made a change or had proposed change to their tenure legislation. While the frequency is

⁵¹⁸ Harrer, *supra* note 393.

⁵¹⁹ Lisberg & Kolodner, *supra* note 492; Otterman, *supra* note 393.

less than that of the states that received grants (70% as compared with 80% and 86%), it is still significant. Nearly one-half (13) of these states have already made a change to their teacher tenure legislation and an additional 8 states (22%) were considering proposed changes. As discussed in Chapter Three, there are multiple factors that may influence a state's decision to change its teacher tenure legislation. However, based on the information provided in Table 2, it does appear that there is a positive correlation between states seeking a RTTT grant and states that have changed their teacher tenure legislation or were considering proposed change.

CHAPTER 5

FINDINGS, IMPLICATIONS, AND CONCLUSIONS

Introduction

This chapter includes a review of the study, reports key findings as a result of analyses presented in Chapters Three and Four, and suggests implications for practice and future research.

Review of the Study

The purpose of this study is to document the changes made to teacher tenure legislation in the 50 states and the District of Columbia, to identify any trends in the change, and to identify the national social, economic, and political factors making widespread legislative change possible in order to determine how these changes may impact the teaching profession, teachers' employment rights, and education policy. The majority of the study (Chapters 1, 2, and 4) uses a legal scholarship framework.⁵²⁰ However, to fully appreciate the information contained in Chapter 3 addressing the economic, social, and political context of the legislative change, a policy focused framework is for organization and analysis purposes. Specifically, Chapter 3 uses a modified version of Kingdon's Multiple Streams framework.⁵²¹

In conceptualizing this study, several factors informed the identification of this topic. Generally, there appears to be a growing dissatisfaction with the nation's public

⁵²⁰ See Rubin, *supra* note 46; Kissam, *supra* note 50.

⁵²¹ Kingdon, *supra* note 44 .

education system.⁵²² In an attempt to repair what is perceived by some as a broken system, federal and state policy makers have tried various legislative approaches to address declining student test scores and poor student achievement. As a result, legislators at the state and federal levels have passed a flood of education related policies in the areas of standards, testing, school choice, teacher licensure, pay for performance, and teacher evaluation, all designed to increase student achievement.⁵²³ Acknowledging that teacher quality does positively impact student achievement, recent reform efforts specifically have focused on ensuring that the most effective teachers are in the classroom.

Some argue that part of getting the right teachers in the classroom is getting rid of the wrong ones, which has increased the focus on teacher tenure. While many perceive teacher tenure to be a lifetime guarantee of employment for teachers, it is actually a guarantee of due process when a teacher faces a negative employment action, such as demotion or termination. It is a product of state law. Generally, state tenure statutes include some sort of mechanism for continued employment, such as an automatically renewing contract, and procedural protections against arbitrary dismissal. Teachers are granted tenure after a probationary period of one (Hawaii)⁵²⁴ to seven (Ohio)⁵²⁵ years

⁵²² Based on policy and media reports. Perceived dissatisfaction with the American public education system is not necessarily a reflection of its success in educating students.

⁵²³ There are too many examples at the state level to reasonably include here. For recent examples of federal legislation targeting student achievement, *see* The Goals 2000: Educate America Act, P.L. 103-277 (1994) and No Child Left Behind Act, P.L. 107-110, 115 Stat. 1425 (2002).

⁵²⁴ H.R.S. § 302A-608 (read in conjunction with the 2008 Senate Bill No. 2449, which reduced the probationary period from four semesters to two semesters).

⁵²⁵ O.C.R. 3319.08. Teachers employed after January 1, 2011 are eligible for a "continuing contract" after working as a teacher for at least 7 years and some graduate education. It is important to note that the 7 year requirement is for licensure and is not a probationary period. Ohio also requires employment in a district for at least 3 years out of a five year period for receipt of tenure rights. This time period is more consistent with probationary periods in other states. O.C.R. 3319.08 (D)(3). Teachers who were licensed to teach in Ohio prior to January 1, 2011 can earn a continuing contract with just graduate coursework. O.C.R. 3319.08 (D)(2).

teaching, with a majority of states granting tenure after only three years.⁵²⁶ While some states require a record of satisfactory evaluations for teachers to be eligible for tenure, historically tenure has been a right that has been automatically granted after the expiration of the probationary period.

Teacher tenure regulations have been a part of the American elementary and secondary education system for over 100 years.⁵²⁷ By the late 1960s, nearly all states offered some sort of employment protection to their teachers, either in the form of formal tenure laws or automatically renewing contract policies.⁵²⁸ While there have been isolated challenges to tenure for K-12 public school teachers in the past, recent events have made it possible for the theoretical debate over tenure to turn into a large scale reform movement. For example, between 2008 and the end of June, 2012, 24 states made substantive changes to their teacher tenure laws and an additional 11 states had proposed legislation pending.

Chapter 3 uses media reports, census and polling data, economic reports, and scholarly analyses to provide an overview of the national economic, social, and political context of the legislative changes in the area of teacher tenure and to examine how teacher tenure moved from the policy agenda to the decision agenda. By utilizing the legislative data from the 50 states and the District of Columbia (*see* Chapter 2, Table 1), Chapter 4 of this study identifies the six major areas of legislative change. The six main areas of change are further broken down into sub-categories of change to provide a more detailed overview of what types of legislative changes are being adopted and the

⁵²⁶ While the average probationary period remains three years, six states now have probationary periods that can run as long as five years. Additionally, many states with three year probationary periods now also require a certain level of performance (as evidenced by teacher evaluations) during that time period.

⁵²⁷ Coleman, et al., *supra* note 9; Marshall, *supra* note 9.

⁵²⁸ Marshall, *supra* note 9.

popularity of each legislative option. Chapter 4 also looks at legislative change in relation to certain state characteristics (geography, collective bargaining status, and Race to the Top application/award status) to identify trends in teacher tenure reform. This chapter concludes the study with major findings, implications for practitioners (in both the law and education), and recommendations for further research.

Major Findings

This study identifies the national economic, social, and political factors that allowed the teacher tenure reform movement to move from the policy agenda to the decision agenda. It also identifies categories and trends in legislative change. These findings are presented below.

Contextual Factors Contributing to the Teacher Tenure Reform Movement

By reviewing the relevant media reports, census and polling data, economic reports, and scholarly analyses, this study found that the following national economic, social, and political factors contributed to teacher tenure's transition from the policy agenda to the decision agenda. The 2008 Financial Crisis resulted in the collapse of large financial institutions, downturns in the housing and stock markets, increased unemployment, and decreased federal and state revenue. Despite federal aid targeted at education,⁵²⁹ the Crisis took a toll on public education funding, resulting in a loss of nearly 300,000 public education jobs nationally⁵³⁰ and a drop in per-pupil spending.⁵³¹

The decrease in funding led to state, district, and school level budget cuts, and in many circumstances, teacher and staff layoffs. Consequently, teacher tenure policy

⁵²⁹ American Recovery and Reinvestment Act (ARRA), P.L. 111-5 (2009); Education Jobs Fund, P.L. 111-226 (2010).

⁵³⁰ Oliff & Leachman, *supra* note 324.

⁵³¹ *Id.* at 1.

became a particular concern for two reasons. First, the cost of terminating a tenured teacher is expensive both in terms of money and time. In response, some states made changes to their teacher tenure laws to improve the efficiency of their termination procedures for tenured teachers⁵³² or changed the procedure for acquisition and/or retention of tenure.⁵³³ Other states modified the enforcement of already existing policies to make the acquisition of tenure more difficult.⁵³⁴ Second, when faced with the prospect of having to lay off large numbers of teachers, administrators want to ensure that they retain the most effective, not just the most senior teachers. In response, many states made changes to their reduction in force policies, moving away from the "last-hired, first-fired approach" to systems that took teacher performance into account.⁵³⁵

Social factors, particularly changes in the "national mood," also contributed to widespread changes in teacher tenure legislation. The national mood is a reflection of the political climate more than public sentiment. It can be influenced by a few influential participants and/or the media.⁵³⁶ Public sentiment regarding public education, teachers, and teacher tenure has not changed dramatically over the last four years and remains relatively positive. However, media (both print and broadcast) coverage of public education, and teacher tenure specifically, has been generally negative, favoring reform

⁵³² See e.g., ALA. CODE §§ 16-24C-1 through 16-24C-14. The Students First Act replaced the "Teacher Tenure Act."

⁵³³ See e.g., COLO. REV. STAT. ANN. §22-63-103 and §22-9-105.5 (2012); FLA STAT. ANN. §§ 1012.33, 1012.335, and 1012.22 (2012); IDAHO CODE ANN. §§33-514 and 33-515 (2012); S.D. CODIFIED LAWS §§13-43-6 through 13-43-6.6 (2012); TENN. CODE ANN. §§ 49-5-501 through 49-5-511 (2012).

⁵³⁴ New York and Texas changed the enforcement of existing teacher tenure policies.

⁵³⁵ See e.g., GA. CODE ANN. §§ 20-2-940, 20-2-942, and 20-2-948 (2012); IOWA CODE ANN. §§ 279-13 and 279-19 (2012); ARIZ. REV. STAT. ANN. §§ 15-538.01 through 15-548 (2012); IND. CODE. ANN. §§ 20-28-6-2 through 20-28-6-8 (2012).

⁵³⁶ Kingdon, *supra* note 44 at 147-149.

and/or the abolition of teacher tenure.⁵³⁷ The negative media coverage created a climate in which policy makers could justify legislative changes to teacher tenure policy.

In addition, organized political forces contributed to teacher tenure rising to the decision agenda. With the passage of NCLB came a change in the political environment, both in terms of the groups influencing education policy and the strategies they used to influence change. This period saw both growth and diversification political advocacy groups focused on education policy.⁵³⁸ Their willingness to embrace new strategies⁵³⁹ helped these groups to remain "in-groups" (or earn "in-group" status) in the debate over teacher tenure reform.⁵⁴⁰ In the post-NCLB era, policy advocacy groups expanded to include influential individuals, such as Diane Ravitch, and venture philanthropists, such as the Bill and Melinda Gates Foundation.

Similarly, the influence of teachers' unions as a political force also has changed. In the last two decades, and in particular in the last 4 years, the teachers' unions saw their influence wane in part, lowering the cost to policymakers of going against the union's wishes by voting for reform. The union lost power in two different ways: first, there was an internal split within the Democratic party regarding educational policy issues that resulted in fractured support for the union platform⁵⁴¹; second, union membership dropped, lowering the union's resources and influence.⁵⁴²

⁵³⁷ The issues has been covered by countless national media outlets, such as the New York Times, the Washington Post, the Huffington Post, TIME Magazine, USA Today, the Associated Press, the Wall Street Journal, and CBS (60 Minutes).

⁵³⁸ DeBray-Pelot & McGuinn, *supra* note 302 at 33.

⁵³⁹ Some new strategies include the incorporation of technology, collaboration, and using well-known spokespeople.

⁵⁴⁰ *See id.* at 23.

⁵⁴¹ DeBray-Pelot & McGuinn, *supra* note 302; Barone & DeBray, *supra* note 303.

⁵⁴² Toppo, *supra* note 444. *See also*, Lawrence, *supra* note 444.

Finally, the change in the presidential administration contributed to teacher tenure's rise to the decision agenda. President Barack Obama came into office in January 2009 with a domestic agenda that included a revival of the economy and a strengthening of public education.⁵⁴³ In order to bolster his agenda, President Obama and his Secretary of Education, Arne Duncan, used the "bully pulpit" to persuade the public and Congress of the need for education reform. The Obama Administration also used more direct measures by proposing two key programs: the Race to the Top Fund (RTTT) (as part of the American Recovery and Restoration Act of 2009)⁵⁴⁴ and the Recognizing Educational Success Professional Excellence and Collaborative Teaching Program.⁵⁴⁵ RTTT, a competitive grant program, was designed to encourage education innovation and reform, improvement in student achievement, and college and career readiness.⁵⁴⁶ Out of its four core education reform areas, the third relates directly to teacher tenure; its focus being "recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most."⁵⁴⁷ Based on the Department of Education scoring rubric, states could earn a possible 28 out of 500 points for using performance evaluations to inform key employment decisions, such as tenure.⁵⁴⁸ Worth just over 5% of the total points available, linking employment and tenure decisions to teacher performance was a concrete way for states to increase their RTTT application score. Based on state response, it appears that this was a popular option. Of the 19 states that applied for and received a RTTT grant, nearly 85% passed or were considering proposed

⁵⁴³ The Office of the President-Elect, *The Agenda*, *supra* note 466.

⁵⁴⁴ American Recovery and Reinvestment Act of 2009, §§ 14005, 14006, and 1413, Title XIV, P.L. 112-10 (2009).

⁵⁴⁵ U.S. Dept. of Educ., *Secretary Duncan to Discuss Elevating the Teaching Profession and Preparing Students for College and Careers at the NAESP Leadership Conference*, *supra* note 493.

⁵⁴⁶ U.S. Dept. of Educ., *Race to the Top Program: Executive Summary*, *supra* note 479.

⁵⁴⁷ *Id.*

⁵⁴⁸ U.S. Dept. of Educ., *Appendix B. Scoring Rubric*, *supra* note 485.

changes to their teacher tenure laws (as compared with 70% of states that applied for but did not receive a RTTT grant).⁵⁴⁹

Beginning in 2008, the above mentioned economic, social, and political factors converged, creating a political climate that allowed teacher tenure to rise from the policy agenda to the decision agenda. With the path cleared for legislative change, the teacher tenure movement gained momentum quickly. In 2009, only Ohio changed its teacher tenure legislation. However, in 2010, 3 states passed changes and in 2011, an additional 13 states changed their teacher tenure laws. In the first 6 months of 2012, 7 states changed their tenure laws and additional 12⁵⁵⁰ states considered proposed legislative change. There is no way of predicting how long the political climate will remain fertile for widespread change to teacher tenure legislation, but the factors discussed above will certainly play a big role.

Categories of Legislative Change

Based upon a state-by-state review of changes made to teacher tenure legislation from January 2008 through June 2012, the following six categories and corresponding sub-categories of legislative change were identified:

A. Elimination of automatically renewing contracts:

- Move to one- year renewable contracts (Florida and South Dakota);
- Move to renewable set multi-year contracts (Indiana and Virginia);

⁵⁴⁹ See Table 2. Forty-six states applied for a RTTT grant during the three phases of awards. A total of 19 states received grants in phases 1, 2, and 3. Twenty-seven states applied for but did not receive a RTTT grant.

⁵⁵⁰ Arizona revised its teacher tenure legislation in 2011 and is currently considering an additional change. For purposes of breaking down states that have made changes, Arizona is counted only once (in the "changed" category). However, for this discussion, their proposed legislation is also relevant.

- Move to renewable variable multi-year contracts (Arizona and North Carolina).

B. Change in length of the probationary period:

- Decrease in probationary period (Hawaii);
- Set increase in probationary period (Maine, Michigan, Missouri, Nevada, New Hampshire, Tennessee, Virginia);
- Variable increase in probationary period (Kansas and South Carolina);
- Additional requirements increase probationary period for new teachers (Ohio).

C. Teacher performance/evaluation considered in granting of tenure:

- Set number of positive evaluations required in addition to years of consecutive service (Delaware, Massachusetts, Michigan, Nevada, New Jersey, Oklahoma, Tennessee, Wyoming);
- Set number of positive evaluations required in lieu of years of consecutive service (Colorado, Indiana, Louisiana, Rhode Island, and Utah);
- Length of probationary period dependent upon evaluations (Illinois, Connecticut, and Kansas);
- Tenure based on evaluations generally (discretionary) (Kentucky and Washington).

D. Poor performance added as a grounds for "just cause" dismissal:⁵⁵¹

- Probationary teachers receiving poor evaluations not renewed (Indiana and Kentucky);
- Bad evaluation(s) grounds for dismissal (Arizona, Louisiana, Tennessee, Wyoming);
- Certain number of consecutive bad evaluations constitutes grounds for dismissal (Florida, Maine, Michigan, New Mexico, Oklahoma, South Dakota).

E. Reduction in force decisions not based entirely on seniority:

- Reduction in force decisions not based SOLELY on tenure status/seniority (Georgia, Iowa, Maine, Maryland, Massachusetts, Nevada, Rhode Island, and Virginia);
- Reduction in force decisions CANNOT be made based on tenure status or seniority (Arizona, Indiana, Michigan, Mississippi).

F. Loss of tenure protections after receipt of poor performance evaluations.

- Return to probationary status if teacher receives negative evaluations (Colorado, Louisiana, Nevada, New Jersey, Washington);
- Loss of tenure status after negative evaluations, must re-earn status by receipt of positive evaluations (Tennessee);
- Have to continue to receive satisfactory evaluations to keep tenure (Connecticut).

⁵⁵¹ Note that incompetence has been listed as grounds for dismissal in many states for decades. However, incompetence was not defined or was poorly defined in the law. Therefore, dismissals for incompetence were considered on a case by case basis and often varied based on the trier of fact. This left supervisors without much guidance on how to identify and eliminate incompetence.

Trends in Legislative Change

This study also explores the relationship between states' changes to teacher tenure legislation and other concurrent factors: geography, collective bargaining status, and Race to the Top application/award status. Both visual and statistical relationships are explored in order to reveal trends in teacher tenure reform.

Geography. A review of state legislation broken down by region⁵⁵² reveals that approximately one-third of the states legislation in every region have made no change to their teacher tenure.⁵⁵³ The West and Mid-West Regions boast the highest percentage of change. In fact, approximately 63% of the total legislative change (15 out of the 24 states) occurred in the Mid-West and West Regions. However, with 9 out of the 11 states with proposed change (82%) in the North East and the South Regions, the eastern half of the country could soon match the western half.⁵⁵⁴ Therefore, it appears that tenure reform is on state legislative agendas at similar rates across the country, but states in the West and Mid-West regions successfully passed legislative reform at a higher rate as of June 2012.

Collective Bargaining Status. Teachers unions at the state and national levels have been very involved in the debate over changes to teacher tenure legislation. For the most part, union efforts have focused on blocking changes to teacher tenure legislation. A review of states legislative changes and collective bargaining status reveals that of the

⁵⁵² Regional breakdown was done using the U.S. Department of Commerce, Economics, and Statistics Administration and U.S. Census Bureau's *Census Regions and Divisions of the United States* Map (2012), *supra* note 506. In order to condense the data, Alaska and Hawaii were added to the "West" region instead of listing them separately in the "Pacific" region.

⁵⁵³ The percents of states that have not made any change to teacher tenure legislation in the South and West Regions are slightly below one-third.

⁵⁵⁴ If all currently proposed legislative changes pass, the Mid-West and West Regions will have 17 states with legislative change and the North East and South Regions will have 18 states. This should not be construed as any assessment regarding the strength of any of the proposed legislative changes, it is merely a hypothetical scenario for comparison purposes.

states that prohibit collective bargaining, only Georgia has actually changed its tenure legislation. However, three additional states (North Carolina, South Carolina, and Virginia) were considering proposed legislation. While Texas made no change to its teacher tenure legislation, it did change the application of its law so that fewer teachers were receiving tenure.⁵⁵⁵ Therefore, it appears that all of the states in which collective bargaining is prohibited considered ways to change tenure policy. Of the states that allow or require collective bargaining, half have also passed legislative changes, and more may be on the way. Therefore, it is not clear at this time as to whether a state's collective bargaining status is correlated to whether it has or will pass teacher tenure legislation.

Race to the Top Application/Award Status. The use of teacher evaluations to inform key employment decisions, including tenure, is one of many factors considered in the Department of Education scoring rubric for RTTT applications.⁵⁵⁶ Forty-six states and the District of Columbia submitted applications for a RTTT grant.⁵⁵⁷ Of the states that applied, both of the states that received grants in the first phase of awards (Delaware and Tennessee) made changes to their tenure legislation.⁵⁵⁸ At least 80% of states receiving grants in phase 2 and 3 (80% and 86% respectively) either made legislative changes or were considering proposed changes to their teacher tenure legislation in June

⁵⁵⁵ See note 265.

⁵⁵⁶ U.S. Dept. of Educ., *Race to the Top Program Guidance and Frequently Asked Questions*, *supra* note 515.

⁵⁵⁷ The Department of Education accepted applications for three phases of Race to the Top grant awards. In order to be considered for an award, a state had to submit an application for each phases for which it wished to be considered. Therefore, states could submit applications for funding for phase 1, 2, or 3 or any combination thereof. U.S. Dept. of Educ., *States' Applications, Scores and Comments for Phase 1*, *supra* note 486; U.S. Dept. of Educ., *States' Applications for Phase 2*, *supra* note 486; U.S. Dept. of Educ., *States' Applications for Phase 3*, *supra* note 486.

⁵⁵⁸ Neither state was able to pass legislation before the grants were awarded; Delaware passed its reform in July 2010 and Tennessee followed in April 2011.

2012. Four states did not submitted an application for a RTTT grant during phase 1, 2, or 3 of considerations: Alaska, North Dakota, Texas, and Vermont. None of these states have made changes to their teacher tenure legislation.⁵⁵⁹ As previously discussed, there are multiple factors that may influence a state's decision to change its teacher tenure legislation. However, it does appear that there is a positive correlation between states seeking a RTTT grant and states that changed their teacher tenure legislation or considered proposed change.

Implications

The teacher tenure reform movement could have lasting effects for both education in general and education policy specifically, even after the policy window closes. In the education arena, teacher tenure may be over as we know it. Consequently, the role it plays in recruiting and retaining teachers may change. Additionally, the teacher tenure reform movement has been widely publicized. It may have a lasting impact on how the public perceives teachers and teacher tenure. Similarly, widespread legislative changes will affect teachers' employment rights and the practice of law with regards to personnel issues. Finally, the reform movement may also impact education policy. The growing influence of the executive branch may impact state and local control over public schools. However it manifests itself in the future, the teacher tenure reform movement is certainly going to have lasting effects on education.

Impact on Education. Teacher tenure, as it was known in 2007, may be over. Approximately half of the states have already passed some variety of teacher tenure reform, and more are considering changes. Instead of using tenure as a general

⁵⁵⁹ Note that Texas has changed the implementation of its teacher tenure policy to make earning tenure more difficult.

employment protection, many states now are looking at it as a merit based reward. This begs the question, how will changes in teacher tenure impact teacher recruitment and retention? The job security tenure offers is a benefit that cannot be discounted. Little research has been conducted on the impact of teacher tenure on recruitment and retention;⁵⁶⁰ however, Brunner and Imazeki attempt to address this issue by "using cross-state variation in tenure policies to identify the effects, if any, of the length of the probationary period on entry-level teacher salaries."⁵⁶¹ The authors investigate whether states off-set longer probationary periods with higher wages.⁵⁶² The results indicate that states do offer higher wages for teachers that must undergo longer probationary periods, demonstrating that tenure is valued as an employment benefit.⁵⁶³ If teacher tenure becomes more difficult to earn and less frequently awarded, presumably, its value as an employment benefit also will decrease. In order to keep up with teacher recruitment, schools will have to create new benefits or increase existing benefits (such as wages) to make up for the diminished value of teacher tenure.

In addition to teacher recruitment and retention, the teacher tenure reform movement may also have a negative effect on the public perception of teachers and schools. As discussed above, currently the mass public has a fairly positive view of teachers and schools, particularly those in their own community.⁵⁶⁴ However, their opinion of teachers' unions, collective bargaining and teacher tenure is not as positive.⁵⁶⁵

⁵⁶⁰ Susanna Loeb & Jeannie Myung, *Economic Approaches to Teacher Recruitment and Retention*, in INTERNATIONAL ENCYCLOPEDIA OF EDUCATION, 473, 478 (Penelope Peterson, Eva Baker, & Barry McGaw eds., 3rd ed., 2010).

⁵⁶¹ Eric J. Brunner & Jennifer Imazeki, *Probation Length and Teacher Salaries: Does Waiting Pay Off?* 64 INDUSTRIAL & LABOR RELATIONS REV. 164, 164 (2010).

⁵⁶² *Id.* The thought is that higher wages is a way to compensate for the extended evaluative period.

⁵⁶³ *Id.* at 178-179.

⁵⁶⁴ Bushaw & Lopez, *supra* note 379, at 11, 18; Howell, West, & Peterson, *supra* note 382, at 12-13.

⁵⁶⁵ *Id.*

With an inundation of negative media coverage of teacher tenure and related issues, public sentiment regarding not only tenure, but the teaching profession in general, may suffer. Negative perceptions of teachers and schools have the potential to impact education funding, strengthen the school choice movement, increase private school enrollment, and decrease teacher recruitment.

Impact on Employment Rights and Legal Practice. Changes to teacher tenure laws across the county will certainly affect teachers' employment rights and the practice of personnel law in education. Teachers' employment rights will change most dramatically in the states that eliminate automatically renewing contracts. At the conclusion of each contract cycle, before contract renewal, teachers will be treated as at-will employees. Unless otherwise prescribed by state law, teachers may be non-renewed at the discretion of the school district for any reason. Grounds for termination, including incompetency and insubordination, do not apply to non-renewal decisions. This in and of itself is a dramatic change in employment protections for teachers. It also opens the door to increased litigation for alleged constitutional violations. Without access to the hearing and appeals process set up for tenured teachers (as a result of their due process rights), non-renewed teachers who feel that they have been wronged will be forced to go straight to the state court system in order to be heard. Additionally, since their legal options for challenging a non-renewal are more limited, they are likely to rely more heavily on constitutional (both state and federal) violations, particularly with regards to issues concerning academic freedom and discrimination of protected classes (age, race, gender,

etc.).⁵⁶⁶ However, it is important to note that teachers who are terminated, laid off, or non-renewed through no fault of their own may be eligible to collect unemployment benefits.⁵⁶⁷ If an employer challenges the award of unemployment benefits on the grounds of employee misconduct, the employee will then be entitled to an administrative hearing.

In addition to tying acquisition and retention of tenure rights to teacher evaluations, many states have overhauled their teacher evaluation systems. A popular new trend in teacher evaluation is using students' standardized test scores as some percentage (up to 60%) of a teacher's evaluation.⁵⁶⁸ The result is that teacher tenure is directly tied to students' standardized test scores. For a number of reasons, using student test scores to make such high-stakes decisions will likely lead to an increase in legal challenges.⁵⁶⁹ Some object to the standardized tests themselves, claiming that they are biased and fail to accurately capture student achievement over time, instead focusing only on how the student performs on one particular test on one particular day. As such, such examinations would be an invalid basis for making employment decisions. Additionally, it may be argued that student test scores are an inaccurate measure of a teacher's instructional skill because there are so many other factors that may impact the student's score, from the student's socio-economic status and parental support to whether the

⁵⁶⁶ See, Neal H. Hutchens, *Using a Legal Lens to Better Understand and Frame Issues Shaping the Employment Environment of Non-Tenure Track Faculty Members*, 55(11) AMER. BEHAVIORAL SCIENTIST 1443, 1453-1454 (2011).

⁵⁶⁷ Generally, unemployment benefits are not paid to teachers and other education workers for school breaks (including summer) if they will be employed in any capacity the following school year, even if it is in a reduced capacity. Also note that resigning from a position generally disqualifies a teacher from later collecting unemployment benefits.

⁵⁶⁸ These kinds of teacher evaluations are not just used tenure decisions. They are also used for calculating teacher salaries and/or bonuses in pay-for-performance and value-added systems.

⁵⁶⁹ Mark Paige, *Using VAM in High-Stakes Employment Decisions*, 94(3) KAPPAN MAGAZINE 29, 30 (2012).

student had breakfast the morning of the test. Therefore, using student standardized test scores to make high-stakes employment decisions, including decisions concerning teacher tenure, will certainly result in increased legal challenges.⁵⁷⁰

Impact on Education Policy. While the U.S. Constitution makes no provision for education, the federal government has increasingly played a role in the creation and implementation of K-12 education policy.⁵⁷¹ From the time public schools began operating in the mid-nineteenth century, education has been the responsibility of the state and local governments.⁵⁷² However, the federal government, particularly the legislative branch, was pushed into the public education ring with the Supreme Court's decision in *Brown v. Board of Education*.⁵⁷³ Since the Court's 1954 decision, the federal government's power over public schools has expanded, usurping state and local control.⁵⁷⁴

With the RTTT Fund, the executive branch exerted its own influence over education policy, separate from that of Congress. RTTT enabled President Obama to bring state policy in line with his own policy agenda. RTTT was particularly effective because it used high-dollar incentive grants during a time of economic crisis. It successfully encouraged legislative change in targeted areas. Data indicate that RTTT was one factor, if not the leading factor, in encouraging states to reform their teacher tenure legislation.

⁵⁷⁰ *Id.*

⁵⁷¹ *See, San Antonio v. Rodriguez*, 411 U.S. 1 (1973). Under the Tenth Amendment of the U.S. Constitution, the power to control education is reserved for the states.

⁵⁷² Barone & DeBray, *supra* note 303.

⁵⁷³ 347 U.S. 483 (1954).

⁵⁷⁴ Sarah G. Boyce, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal Government's Quest to Leave No Child Behind*, 61 DUKE L. J. 1025, 1037 (2012); Barone & DeBray, *supra* note 303.

Based on the success of RTTT, the President already expressed interest in pursuing additional high-dollar incentive programs, such as RESPECT.⁵⁷⁵ With schools still facing budget shortfalls, opportunities for additional funding remain attractive, regardless of the policy cost. Therefore, in addition to the influence that Congress already wields over states,⁵⁷⁶ the executive branch's increased leverage may serve to further diminish state and local control over public schools.⁵⁷⁷

Suggested Future Research

This study focused primarily on cataloging changes in teacher tenure laws and identifying categories and trends in change. In order to fully appreciate the changes taking place, it was necessary to look at the context in which the change was occurring. Therefore, Chapter 3 examined the external, national factors contributing to a state level reform movement. Because this study was limited in scope, it did not look at the internal factors at play in each state's decision making process. A more in depth understanding of the tenure reform movement could be gained by exploring each state's internal determinants.

Additionally, teacher tenure is inextricably linked to both teacher evaluation and teacher collective bargaining rights. The relationships between these employment issues should be further examined, particularly in terms of how legislative change in one area drives legislative change in another. In some states, such as Wisconsin, legislative change in one area, such as teacher evaluation, helped to drive forward legislative reform

⁵⁷⁵ U.S. Dept. of Educ., *Obama Administration Seeks to Elevate Teaching Profession, Duncan to Launch RESPECT Project: Teacher-Led National Conversation*, *supra* note 469.

⁵⁷⁶ Particularly as a result of the Elementary and Secondary Education Act of 1965, *supra* note 27, as drafted and as amended by reauthorization.

⁵⁷⁷ The executive branch's influence would not necessarily be limited to education policy; the use of incentive grants could increase the President's influence over state and/or local policy in any area.

efforts in another area (collective bargaining rights). However, in other states, changes to tenure laws were made without change to either the teacher evaluation system or collective bargaining rights.

Furthermore, the impact that these legislative changes have on the teaching profession should be more thoroughly considered, particularly in terms of teacher recruitment and retention. In order to sustain the number of teachers needed to service all public school students and to increase the quality of instruction, the issue of employment benefits will need to be addressed. A decrease in job security will require an increase in other benefits. Given the current economic climate, this may prove challenging and certainly warrants further examination.

Finally, the teacher tenure reform movement is an interesting example of the federal government's use of incentive grants to influence change at the state level. While linking teacher tenure decisions to teacher evaluations was worth approximately 5% of the total points available on the RTTT application, a large number of states changed their tenure and/or teacher evaluation laws. The disproportionate response merits further inquiry.

Conclusion

Teacher tenure legislation remained generally stable for nearly 50 years, despite tenure reform having been on the political agenda for decades. However, since January 2008, teacher tenure legislation has come under particular scrutiny. Recent events have made it possible for the theoretical debate over tenure to turn into a large scale reform movement. Between 2008 and the end of June, 2012, 24 states have made substantive changes to their teacher tenure laws and an additional 11 states have proposed legislation

pending. A modified version of Kingdon's⁵⁷⁸ Multiple Streams framework helps explain how teacher tenure transitioned from the political agenda to the decision agenda. Surges in the problems and politics streams opened the policy window for tenure reform. In the problems stream, the 2008 Financial Crisis and subsequent budget cuts for schools and school districts, pushed the policy window open a crack. However, with the convergence of the politics stream, the policy window was forced the rest of the way open. Specifically, an increasingly negative, media-driven national mood, the changing influence of political advocacy groups, and a turnover in the oval office contributed to widespread teacher tenure reform. While future events will determine how long the policy window will remain open, the reform movement is certain to have long term effects on education and education policy.

⁵⁷⁸ Kingdon, *supra* note 44.

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